

**Reassessing Solitary Confinement:
The Human Rights, Fiscal, and Public Safety Consequences**

**Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights**

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Statement submitted by

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In keeping with Arthur Liman's commitment to a just and humane criminal justice system, much of the work of the Arthur Liman Public Interest Program at Yale Law School focuses on understanding the uses and implications of incarceration in the United States.¹ During the past few years, a special concern has been the use of prolonged solitary confinement—*i.e.*, placing individuals in physical and social isolation in their cells for 22 to 24 hours per day and often for indefinite periods of time. At the Fourteenth Annual Liman Colloquium—*Imprisoned*—held in 2010, more than 400 participants addressed the unprecedented numbers of individuals held in U.S. prisons.² In the fall of 2011, we taught a weekly seminar, *Abolition: Slavery, Supermax, and Social Movements*, which posed the question whether “Supermax” – prisons organized to keep individuals in confinement indefinitely in conditions of extreme sensory and social deprivation – should be the subject of an “abolition” movement, as was slavery.

In the spring of 2012, the Liman Program, working with the ABA Subcommittee on Solitary Confinement and Columbia Law School, co-sponsored a roundtable, *Incarceration and Isolation*. The day-long meeting brought together leaders in corrections, experts in law, criminology, sociology, and psychology, and lawyers and others in the field. In advance, we worked with a group of law students who reviewed public information so as to provide a picture of what solitary confinement looks like inside of America's prisons.³ A summary of preliminary findings follows.

¹ The Arthur Liman Public Interest Program and Fund at Yale Law School was created in 1997 to forward the commitments of Arthur Liman (YLS '57) to public service in the furtherance of justice. Arthur Liman was chief counsel to the New York State Special Commission on Attica Prison, which in 1972 issued a major report on prison conditions. Thereafter, Arthur Liman served as President of the Legal Aid Society of New York and of the Neighborhood Defender Services of Harlem; Chair of the Legal Action Center in New York City; Chair of the New York State Capital Defender's Office; and Special Counsel to the United States Senate Committee Investigating Secret Military Assistance to Iran and the Nicaraguan Opposition.

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School and the Founding Director of the Liman Public Interest Program and Fund. Her article, *Detention, The War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010), focused in part on solitary confinement. Hope Metcalf is Director of the Liman Program. She also supervises the Detention and Human Rights Clinic, and is a co-chair of the ABA Subcommittee on Solitary Confinement. These comments reflect the authors' personal views. For additional details of the Liman Program, see <http://www.law.yale.edu/intellectuallife/ArthurLimanPIFellowship&fund.htm>.

² Liman Newsletter, *Imprisoned* (Fall 2010), http://www.law.yale.edu/documents/pdf/Liman/Liman_NL_2010_web.pdf.

³ The Liman Survey of Prolonged Solitary Confinement was done by Yale Law students Brian Holbrook, Danielle Lang, Albert Monroe, Ester Murdukhayeva, Katherine Oberembt, Yaman Salahi, and by Columbia Law student Joanna Wright. In addition to supervision from us and Brett Dignam, Clinical Professor of Law at Columbia Law School, the Senior Liman Fellow in Residence, Sia Sanneh, oversaw the data collection and analysis. For each of the fifty states, the student-researchers examined statutes, administrative regulations, correctional rules and procedures, policies and classification instruments. In some instances, they turned to prisoner handbooks and to state public record and FOIA requests. Our statement is also informed by the collective efforts of Isra Bhatti, Katherine D'Ambrosio, Emily Gerrick, David Lebowitz, Matthew Lee, Kate Mollison, Jamelia Morgan, Sophia

We submit this statement based on our study of the law, policy, and practices of solitary confinement. We are concerned that prolonged solitary confinement is used too often, for too long, and with too little oversight. Given the immense fiscal, societal, and human costs, we hope that this Hearing will be the first of many to address the harms of prolonged solitary confinement so as to develop new laws to limit its uses.

I. A Survey of State and Federal Policies on the Isolation of Prisoners in the United States: The Limited Public Information about the Process, Duration, and Practices of Confinement

Our specific concern is the development in the 1970s in the United States of a new form of incarceration – an institution organized to keep people in isolation indefinitely. To provide a window into the nature of the isolation, we borrow a description from the 2005 decision, *Wilkinson v. Austin*, of the United States Supreme Court, which detailed one state’s Supermax facility – the institution that opened in Ohio in 1998 to confine more than five hundred prisoners.⁴ Conditions there were:

more restrictive than any other form of incarceration in Ohio, including conditions on its death row [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, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

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

Aside from the severity of the conditions, placement at [the Supermax] is for an indefinite period of time, limited only by an inmate’s sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated . . . once assigned there.⁵

Shin, Helen Vera, and Rachel Wiener, who were members of the Detention and Human Rights Clinic at Yale Law School.

⁴ 545 U.S. 209 (2005).

⁵ *Id.* at 214-15.

Given this description, we sought to learn more about the use of prolonged isolation around the United States. As noted, we relied on publicly available data, some of which is summarized below. We learned that very limited information is available to enable a concrete and specific understanding of the numbers of persons in prolonged solitary confinement, the characteristics of those persons, the processes that were provided before they were placed in isolation, and the rules that permit them to exit from that isolation.⁶ For several states, student-researchers were unable to find any policies or regulations available to the public about the use of segregation. Of the policies that were available, many were written in vague and general terms. Another caveat is that, in many states, the Department of Corrections is exempt from ordinary Administrative Procedure Act requirements for policy-making, and therefore policies can change without either notice or comment.⁷ In short, the Spring 2012 Liman Survey of Prolonged Solitary Confinement is a preliminary review that will be augmented when additional materials become available.

Yet another challenge in providing a national picture is that various terms are used to describe the placement of individuals in long-term solitary confinement.⁸ One common formulation refers to “punitive segregation” or “disciplinary segregation,”⁹ which is the

⁶ In terms of national data collection, other researchers have reviewed statistics compiled by the Bureau of Justice Statistics (BJS) and have concluded that as of 2005, 81,622 individuals were in forms of “restrictive housing.” Angela Browne & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 21 Federal Sentencing Reporter 1, 1 (October 2011) (citing James J. Stephan, *Census of State and Federal Adult Correctional Facilities*, 2005 (Bureau of Justice Statistics, U.S. Department of Justice, October 2008)).

⁷ See, e.g., N.D. CENT. CODE § 28-32-01(1)(f) (1991) (“A rule concerning only inmates of a correctional or detention facility” is exempted from the North Dakota Administrative Agencies Practice Act). For a list of states that exempt prison rulemaking from their APAs, see Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 app. at 376 (2009).

⁸ Jurisdictions also are not consistent in how they designate individuals for the highest classification levels. For example, some states use the terms “maximum security” or “maximum custody,” but others use the designation “close custody.” Compare Ky. DOC Policy 18.5, at 2 (May 14, 2008), <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH18/18-5%20Custody%20and%20Security%20Guidelines.pdf>, with Miss. DOC Inmate Handbook Ch. 1, at 1-2 (Jul. 11, 2011), http://www.mdoc.state.ms.us/Inmate_Handbook/CHAPTER%20I.pdf, and Idaho DOC Control Number 303.02.01.001, at 7 (Aug. 19, 2010), http://www.idoc.idaho.gov/sites/default/files/webfm/documents/about_us/policies_and_forms/policypublic/3030201001.pdf. Some states have small units at one or more specific facilities designated as long-term housing for inmates with a prolonged pattern of disciplinary sanctions, referred to as “Intensive Management Units” or “Special Management Units.” See Wash. DOC Policy 320.255 (July 9, 2009) (“Intensive Management Units”), <http://www.doc.wa.gov/policies/showFile.aspx?name=320255>; Pa. DOC Policy DC-ADM 802 (June 7, 2011) (“Special Management Units”), http://www.portal.state.pa.us/portal/server.pt/document/919463/802_administrative_custody_procedures_pdf.

⁹ E.g., Ala. DOC Policy 804.02, at 1 (July 9, 1995) (“punitive segregation”), <http://www.correct.state.ak.us/pnp/pdf/804.02.pdf>; Ark. DOC Policy 10-20, at 1 (July 23, 2010) (“punitive segregation”); Conn. DOC Directive 9.5, at 4 (Jan. 1, 2008) (“punitive segregation”), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0905.pdf>; Neb. DOC Regulation 210.01, at 2 (June 29, 2010) (“disciplinary segregation”), <http://www.corrections.nebraska.gov/pdf/ar/classification/AR%20210.01.pdf>; Wyo.

placement in solitary confinement as punishment for *past conduct*. This form of segregation is typically for a set duration and consecutive terms may be served. Placement in solitary confinement for the possibility of *future wrongdoing* is frequently referred to as “administrative segregation,”¹⁰ which often is not limited its duration and which is an umbrella for a range of rationales for the placement of an individual in isolation.¹¹

Despite these limits, our preliminary review of public information offers a few lessons. First, the profound isolation that Ohio imposed, as the Supreme Court described in *Wilkinson* is not, we regret to report, unusual. Indeed, the common feature of the custody settings that our research identified is that prisoners spend a minimum of twenty-three hours per day in a cell.¹² Other common conditions include very limited access to phone and visitation privileges. Likewise, access to outside recreation areas is generally limited to three to five hours per week.

Second, all states provided written notice of the reasons for placement in advance of or contemporaneous with confinement, but corrections officials generally have a great deal of discretion in the initial and continuing placement of prisoners in administrative segregation. In determining whether someone should be assigned to administrative segregation, many correctional systems use a list of factors¹³ that specify particular justifications but also typically include broad, catch-all provisions.¹⁴ Further, in the public data reviewed thus far, no system placed a definite time limit on the use of administrative segregation.

DOC Policy 3.101, at 17 (Oct. 15, 2009) (“disciplinary segregation”), <http://doc.state.wy.us/Media.aspx?mediaId=340>.

¹⁰ E.g., Haw. Corrections Administration Policy 11.01, at 1 (Dec. 12, 2009); Minn. DOC Directive 301.085 (June 3, 2008), http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=301.085.htm; Nev. DOC Administrative Regulation 507 (May 20, 2010), <http://www.doc.nv.gov/sites/doc/files/pdf/AR507.pdf>; Ohio Department of Rehabilitation & Corrections Administrative Rule 1-10-15 (Jan. 1, 2003), http://www.drc.ohio.gov/web/administrative_rules/documents/1-10-15.pdf.

¹¹ A third common category is protective segregation, or protective custody, which is used when prison officials believe that a given prisoner is at risk from others in the general population.

¹² E.g., 20 ILL. ADM. CODE 504.620 (2012); Pa. DOC Policy DC-ADM 801, at 6-1 (June 13, 2008), http://www.portal.state.pa.us/portal/server.pt/document/916568/801_inmate_discipline_pdf; Vt. DOC Policy 410.06, Attach. 1 (Dec. 18, 2006), <http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/401-500-programs-security-and-supervision/410.06%20Restrictive%20Housing.pdf>; Wash. DOC Policy 320.255, at 3 (Aug. 9, 2009), <http://www.doc.wa.gov/policies/showFile.aspx?name=320255>.

¹³ In some states, prisoners may be put in long-term isolation based on classification determinations. See, e.g., Cal. Dep’t of Corrections and Rehabilitation, Expert Panel Study of the Inmate Classification Score System 2 (Dec. 2011), <http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf>.

¹⁴ For example, Nebraska considers the following factors in placing a prisoner in administrative segregation:

1. The threat potential to staff and/or inmates posed by the inmate.
2. The behaviors leading to the inmate’s referral or placement on Administrative Segregation status.
3. The inmate’s history of or lack of predatory behavior.
4. The inmate’s history of or lack of assaultive behavior.

A third lesson is that, while a few states delineate ways in which prisoners can be moved out of prolonged confinement, most of the policies reviewed lacked specificity. Some jurisdictions have “step-down” or transitional programming available for prisoners prior to transfer to general population or release.¹⁵ Data are not publicly available about either the rates of exit or the other effects of these programs.¹⁶ While many states appear to allow individuals in long-term administrative segregation to have some access to programs such as life skill classes and other educational programs available to other inmates, such access is generally limited to offering inmates written materials to use in their isolation cells.¹⁷

Fourth, a diversity of rules govern placement. As noted, all states provide written notice in advance of or contemporaneous with placement in administrative segregation. Some states permit hearings, which may include the opportunity for written or oral testimony, prior to placement. Several states appear to provide written notice but no hearing.¹⁸

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5. The inmate's history of or lack of escape/attempted escapes.
 6. The inmate's history of or lack of membership in a criminal threat group.
 7. The injuries the inmate may have caused to others.
 8. The inmate's use of weapon(s) in this or prior incidents.
 9. The inmate's documented mental health issues.
 10. The inmate's prior criminal history.
 11. The inmate's prior disciplinary record (misconduct reports, etc.).
 12. The inmate's history of or lack of illicit drug use within the [correctional system].
 13. The programming that the inmate has or has not completed.
 14. The prior classification decisions involving the inmate's status.
 15. The inmate's documented behavior (incident reports, etc.) and interactions with staff and other inmates.
 16. The professional judgment and recommendations of Nebraska Department of Correctional Services staff regarding the classification of the inmate.
 17. The real or perceived threat of harm to the inmate from other inmates.
 18. The inmate's statements regarding admission of prior actions, a commitment to changing behavior, and accountability for prior acts.
 19. Any other information regarding the inmate that the classification authority deems appropriate.

Nebraska Department of Correctional Services, Admin. Reg. 201.05 (July 28, 2010).

¹⁵ See, e.g., Bureau of Prisons, Institution Supplement, General Population and Step-Down Unit Operations (Oct. 13, 2006) (describing “step-down” program at Florence ADX); Connecticut Department of Corrections, “Northern Correctional Institution Administrative Segregation Program,” (undated), www.ct.gov/doc/lib/doc/pdf/northernascc.pdf.

¹⁶ Litigation has generated some information about these programs' operations. See Submission of Laura Rovner, at 9-10, filed in *Ahmad et al. v. United Kingdom*, Application Nos 24027/07, 11949/08 and 36742/08, Euro. Ct. Hum. Rts (Apr. 20, 2009) (citing testimony of Florence ADX warden and describing how federal step-down program at Florence ADX is designed, in theory, to be completed in 36 months, but in practice, five percent of prisoners completed the program in that period).

¹⁷ Florida's program, for example, is a general transitional program mandated by statute for all inmates in the six months prior to their release from prison. FLA. ADMIN. CODE 33-601.504 (2012).

¹⁸ These are Wisconsin and Michigan.

Processes regarding the review of continued placement are yet more variable and provide fewer procedural protections. For most states, it appears that review could occur on an informal level by staff members or a classification committee. The content of such reviews is unclear. Public information did not often explain whether inmates receive notice, can present new evidence, or obtain a staff advocate for the informal reviews.¹⁹ Further, for states that use static factors for confinement—such as the severity of offense, or membership/affiliation with a security threat group—it is extremely difficult to show a change in circumstances, meaning that an individual is likely to be left in segregation for long periods.²⁰

Fifth, a great deal of variation exists in the treatment of the mentally ill. Ten states provide some restriction on placing mentally ill inmates in solitary confinement.²¹ In a few states, there appear to be absolute bars on such placements.²² Several other states' regulations

¹⁹ See, e.g., 15 Cal. Code Reg. 3341.5 (8)(c)(2)(A)(1); Arizona Department of Corrections, Department Order Manual, Order 801.04..

²⁰ A recent report by California's Department of Corrections shows that reliance on static factors can extend periods of isolation. The March 2012 report analyzed California's classification system, which uses points-based instruments; an inmate receives more points for meeting enumerated criteria. Beyond a certain threshold, that inmate is classified as "close custody," and placed in isolation. The report concluded that the use of "Mandatory Minimum" scores, which applies additional points to inmates incarcerated for certain violent or sex crimes, crimes of public notoriety or crimes carrying life sentences, "appear[s] to 'trap' many well-behaving inmates into higher housing levels." CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, EXPERT PANEL STUDY OF THE INMATE CLASSIFICATION SCORE SYSTEM 2 (Dec. 2011). The report further cautioned against overinclusive classification. It concluded that placing inmates whose scores are just above the threshold for close custody has "a criminogenic effect" on those individuals and does not predict institutional misbehavior. *Id.* The report also identified mental illness, which can manifest in behavior that in turn results in an increased classification score, as one of the critical factors behind overclassification. *Id.* at 140.

²¹ Conn. Admin. Directive 9.5.10.I (Jan. 1, 2008) (providing that prisoners' mental health will be considered before disciplinary measures are imposed that could result in transfer to administrative segregation), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0905.pdf>; Brian Mast v. J. David Donahue, No.2:05-cv-00037 LJM/WGH, Private Settlement Agreement Between Defendants and Plaintiffs 2 (Jan. 23, 2007) (Indiana will not place mentally ill offenders in isolation); Me. DOC Policy Number 15.1, Administrative Segregation Status, at 8 (Sept. 1, 2011); Mich. DOC Policy Directive 04.06.182, Mentally Disabled Prisoners in Segregation, at 1 (Dec. 29, 2010), http://www.michigan.gov/documents/corrections/0406182_342182_7.pdf; Mont. DOC Policy Directive 4.5.21, at 1 (Oct. 27, 2009), <http://www.cor.mt.gov/content/Resources/Policy/Chapter4/4-5-21.pdf>; N.H. ADMIN. CODE R. COR 404.07 (2012) (punitive segregation); N.M. DOC Level V/VI Table of Procedures, Forms, and Attachments, at 7 (Aug. 25, 2010), <http://www.corrections.state.nm.us/policies/current/CD-143000.pdf>; N.C. DOC, Division of Prisons Policy & Procedures C.1700 High Security Maximum Control, at 1 (Nov. 1, 2011), http://www.doc.state.nc.us/dop/policy_procedure_manual/C1700.pdf; Vt. DOC Rule 05-049, Classification, Treatment and the Use of Administrative and Disciplinary Segregation for Inmates with a Serious Mental Illness (Dec. 2005), <http://doc.vermont.gov/about/policies/rpd/correctional-services-301-550/361-370-programs-treatment-programs/370%20Classification,%20Treatment%20and%20Use%20of%20Admin%20and%20Discip%20Seg%20for%20Inmates%20with%20a%20SMI.pdf>.

²² Some rules come from policies, and others from court orders or settlement decrees. See, e.g., *Mast v. Donahue*, No.2:05-cv-00037 LJM/WGH, Private Settlement Agreement Between Defendants and Plaintiffs, 2 (Jan. 23, 2007) (Indiana will not place mentally ill offenders in isolation); N.M. DOC Level V/VI Table of Procedures, Forms, and Attachments, at 7 (Aug. 25, 2010), <http://www.corrections.state.nm.us/policies/current/CD-143000.pdf>.

appear effectively to exclude severely mentally ill prisoners from solitary confinement.²³ The definition of what constitutes “serious mental illness” is a distinct question to which some states provide written answers.²⁴

A final lesson is that demographic information as to the use of long-term isolation is largely unavailable. In 1999, Roy D. King published a chart identifying some 25,000 inmates in solitary confinement in American prisons.²⁵ See Appendix A. Updated specifics and sources are difficult to obtain, except in a few instances. In Pennsylvania, for example, correctional authorities provide a breakdown, in monthly population reports, of the number of inmates in segregation.²⁶ In Idaho, one can work backward by determining which facilities are classified as “Supermax” to learn the number of beds in those facilities.²⁷

Going beyond population numbers, ascertaining demographic characteristics about the solitary population and the frequency of isolation is even more difficult. Basic data as to the functioning of systems for isolation—the reasons for admission, the duration of stays, the prevalence of mental illness and recidivism rates—are unavailable. Racial, gender, ethnic, and age breakdowns for inmates in solitary are also generally unpublished.²⁸

²³ North Carolina’s regulations require that the Director of the Division of Mental Health (or designee) personally approve the placement of every inmate placed into solitary confinement with a diagnosis of serious mental illness. N.C. DOC, Division of Prisons Policy & Procedures C.1700 High Security Maximum Control, at 1 (Nov. 1, 2011), http://www.doc.state.nc.us/dop/policy_procedure_manual/C1700.pdf. Montana’s regulations state that “unstable psychiatric illness” and other mental and medical illnesses contraindicate solitary confinement. Mont. DOC Policy Directive 4.5.21, at 1 (Oct. 27, 2009), <http://www.cor.mt.gov/content/Resources/Policy/Chapter4/4-5-21.pdf>. Maine’s regulations state that no inmate will be placed into solitary confinement if the inmate’s physical or mental condition contraindicates the placement. Me. DOC, Policy Number 15.1, Administrative Segregation Status, at 8 (Sept. 1, 2011). In practice, this excludes all severely mentally ill from solitary confinement. See Lance Tapley, *Reducing Solitary Confinement*, PORTLAND PHOENIX, Nov. 2, 2011.

²⁴ For example, Vermont defines “serious mental illness” as the “[s]ubstantial disorder of thought, mood, perception, orientation or memory, any of which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life. This includes, but is not necessarily limited to, diagnoses of schizophrenia, schizoaffective disorder, psychotic conditions not otherwise specified, bipolar disorder, and severe depressive disorders.” Vermont DOC Rule 05-049, Classification, Treatment and the Use of Administrative and Disciplinary Segregation for Inmates with a Serious Mental Illness (Dec. 2005).

²⁵ Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC’Y 163, 175 tbl.1 (1999).

²⁶ Pa. DOC Monthly Population Report, as of Feb. 29, 2012, at 2, http://www.portal.state.pa.us/portal/server.pt/document/1227704/mtpop1202_pdf.

²⁷ Idaho DOC Standard Reports for September 2011, at 7 (396 inmates incarcerated at Idaho Maximum Security Institution), http://www.idoc.idaho.gov/content/document/standard_monthly_rept_sept_2011; Idaho DOC, “Idaho Maximum Security Institution”, http://www.idoc.idaho.gov/content/locations/prisons/idaho_maximum_security_institution (describing custody levels for offenders at IMSI).

²⁸ Our students found two states, Colorado and Washington, that have participated in or authored studies examining rates of mental illness among subsets of their solitary confinement inmate populations. See Maureen

In sum, while we had hoped to be able to sketch a clear national picture of solitary confinement in the United States circa 2012, we cannot do so. Individual correctional departments may well have detailed data on how many inmates are held in solitary settings, the causes for their placement, and the length of confinements, but such information is not reported systematically to permit interjurisdictional comparisons and a national overview.

II. The Law of Solitary Confinement

The 2005 Supreme Court description in *Wilkinson* of the extreme sensory deprivation is chilling. One might think that such a description would lead to a prohibition—that individuals could not be subjected to isolation and sensory deprivation indefinitely. Indeed, in 1890, the Supreme Court, objecting to the solitary confinement of an individual convicted of murder, observed when solitary confinement had been used in the 1820s, “after even a short confinement,” such detention put a prisoner “into a semi-fatuous condition,” making him unable to “recover sufficient mental activity to be of any subsequent service to the community.”²⁹ About a century later, in the 1970s, the Court approved district court findings that Arkansas’s use of indefinite punitive isolation (in that instance, an “average of 4 . . . prisoners were crowded into windowless 8’x10’ cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell”) violated the Eighth Amendment.³⁰

A number of lower courts echoed those concerns in describing the effects of long-term solitary confinement.³¹ The Southern District of Texas in 1999 quoted the following expert description:

O’Keefe, Administrative Segregation for Mentally Ill Inmates, 45 J. OFFENDER REHABILITATION 149-65 (2007) (indicating 37% of the inmates in administrative segregation in Colorado had developmental disabilities or mental health needs); David Lovell & Clark Johnson, *Felony and Violent Recidivism Among Supermax Prison Inmates in Washington State: A Pilot Study* 6 (2004) (indicating 21% “probable mental illness rate” among prisoners in Washington’s Intensive Management Unit), <http://www.son.washington.edu/faculty/fac-page-files/Lovell-SupermaxRecidivism-4-19-04.pdf>.

²⁹ *In re Medley*, 134 U.S. 160, 168 (1890).

³⁰ *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

³¹ See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1230-31 (N.D. Cal. 1995) (observing that “[s]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances [including] perceptual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control,” and that “[t]here is also an ample and growing body of evidence that this phenomenon may occur among persons in solitary or segregated confinement—persons who are, by definition, subject to a significant degree of social isolation and reduced environmental stimulation.”); see also *Miller ex. rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000) (“[I]t is well accepted that conditions such as those present in [solitary confinement] . . . can cause psychological decompensation to the point that individuals may become incompetent.”); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (noting that “isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total”); *McClary v. Kelly*, 4 F.

In a number of instances, there were people who had smeared themselves with feces. . . . There were many people who were incoherent when I attempted to talk to them, babbling, sometimes shrieking, other people who appeared to be full of fury and anger and rage and were, in some instances, banging their hands on the side of the wall and yelling and screaming, other people who appeared to be simply disheveled, withdrawn and out of contact with the circumstances or surroundings. . . . These were people who appeared to be in profound states of distress and pain.³²

Those observations find support in an array of studies.³³

However, in 2005 in *Wilkinson*, the Court's description of the harms of Supermax sustained only its conclusions that such conditions were "dramatic departure from the basic conditions of [the inmate's] sentence" so as to constitute an "atypical and significant hardship,"³⁴ sufficient to require a modicum of process under the Fourteenth Amendment.

In contrast, the trial court in the *Wilkinson* litigation had mandated that certain kinds of minor infractions in prison could not result in such a severe sanction as confinement in

Supp. 2d 195, 208 (W.D.N.Y. 1998) ("A conclusion . . . that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this court as rocket science.").

³² *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 909-10 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001).

³³ Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, CORR. MENTAL HEALTH REP., at 1, 9 (May-June 2011) ("Just about everyone who has taken a serious look . . . has concluded there is serious harm from long-term isolated confinement."); Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L., 104, 104 (2010) (solitary confinement "can be as clinically distressing as physical torture."); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 331 (2006); A. Vrca, V. Bozikov, Z. Brzovic, R. Fuchs & M. Malinar, *Visual Evoked Potentials in Relation to Factors of Imprisonment in Detention Camps*, 109 INT. J. LEGAL MED. 114, 114-16 (1996) (study of prisoners of war from former Yugoslavia, finding that the two factors that had the most significant effect on brain waves were solitary confinement and physical trauma to the head resulting in loss of consciousness; less significant factors included torture by electrocution and extreme cold).

Solitary confinement has been shown to induce symptoms of serious mental illness. Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 268 (1977) (noting that isolation induces "depersonalization, hallucination and delusions"); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8, 14-15 (1988) (same, as to claustrophobia, rage, severe depression, hallucination, withdrawal, blunting of affect, and apathy); Grassian & Kupers, *Colorado Study*, *supra* note 28, at 333, 335-36 (same, as to hyperresponsivity, panic attacks, or paranoia). In another study, "almost ninety percent of . . . prisoners had difficulties with 'irrational anger,' compared with just three per cent of the general population," attributable to "the extreme restriction, the totality of control, and the extended absence of any opportunity for happiness or joy." *Id.*

³⁴ *Wilkinson*, 545 U.S. at 222-23 (citing *Sandin v. Conner*, 515 U.S. 472, 483-85 (1995)).

Supermax.³⁵ Further, the lower courts had concluded that the procedural protections provided by Ohio were insufficient and that additional procedures were required.³⁶

The Supreme Court, however, cut back on the lower courts' imposition of more procedural requirements and accepted Ohio's minimal process. All that was required was notice of "a brief summary of the factual basis for the classification," and "a rebuttal opportunity" at the two levels of internal review.³⁷ Detained prisoners could not present adverse witnesses.³⁸ The obligation for a short statement of reasons for confinement was, according to the Court, enough to buffer against "arbitrary decision-making."³⁹

Further, while the question posed for the Supreme Court was not the constitutionality of Supermax under the Eighth Amendment but rather the processes used to place prisoners there, the Court appeared to endorse at least some forms of Supermax confinement. The opinion advised that the "harsh conditions [of Supermax] may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners."⁴⁰ Thus, "[p]rolonged confinement in Supermax may be the State's only option for the control of some inmates."⁴¹

Since *Wilkinson*, courts have rejected a variety of claims seeking remedies for prisoners' prolonged isolation.⁴² Only a few forms of solitary confinement have been found actionable, such as "28 to 35 year confinements" in lockdown in the Louisiana State Penitentiary in Angola.⁴³ In addition, courts have found that such confinement is impermissible for the mentally ill.⁴⁴

³⁵ *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1028 (N.D. Ohio 2002).

³⁶ *Austin v. Wilkinson*, 372 F.3d 346, 360-61 (6th Cir. 2004); *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 743-46 (N.D. Ohio 2002).

³⁷ *Wilkinson*, 545 U.S. at 226.

³⁸ *Id.* at 228.

³⁹ *Id.* at 226.

⁴⁰ *Id.* at 224.

⁴¹ *Id.* at 229.

⁴² See, e.g., *Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1336 (10th Cir. 2007); *Al-Amin v. Donald*, 165 Fed.Appx. 733, 738 (11th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 485 (1st Cir. 2005); *Hill v. Pugh*, 75 Fed. Appx. 715, 721 (10th Cir. 2003).

⁴³ *Wilkerson v. Stalder*, No. 00-304-C, 2007 WL 2693852, at *1 (M.D. La. Sept. 11, 2007); see also *Scarver v. Litscher*, 434 F.3d 972, 974 (7th Cir. 2006); *Bailey v. Fansler*, No. 04-1175-PHX-MHM, 2009 WL 151204, at *1 (D. Ariz. Jan. 21, 2009); *Farmer v. Kavanagh*, 494 F. Supp. 2d 345, 347 (D. Md. 2007). Further, in *Westefor v. Snyder*, 422 F.3d 570 (7th Cir. 2005), the court noted that placement in Supermax resulted in the almost complete deprivation of "human contact," attorneys included. *Id.* at 589. Given that at least some prisoners confined to the facility were not given the reasons for their placement, the case survived a motion for summary judgment. *Id.* at 590.

⁴⁴ See, e.g., *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001) ("Most inmates have a difficult time handling these conditions of extreme social isolation and sensory deprivation, but for seriously mentally ill inmates, the conditions can be devastating."); *Ruiz*, 37 F. Supp. 2d at 915 ("Conditions in [the prison's]

We hope that the Supreme Court will revisit the constitutionality of long-term isolation in light of its more recent law on conditions of confinement. In 2011, *Brown v. Plata* upheld a three-judge district court’s conclusion that it had the authority to remedy the unconstitutional conditions in California’s prisons.⁴⁵ The Court explained that all “[p]risoners retain the essence of human dignity inherent in all persons” and that “[r]espect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”⁴⁶

The research cited underscores the harms that long-term isolation imposes on individual personhood and its assault on human dignity. Our hope is that *Plata* indicates that, when a full record of the effects of Supermax is before it, the Supreme Court will recognize that long-term solitary confinement is at odds with the prohibition on cruel and unusual punishment as well as the values of individual dignity and liberty protected by the U.S. Constitution.

III. A Growing Commitment to End Extreme Isolation

A. Reforms in the States

Many directors of state correction systems are at the forefront of reforms limiting prolonged solitary confinement. Recognizing the serious impact of long-term social and sensory deprivation on prisoners, families, communities, and state budgets, these states—Maine, Mississippi, New York, Colorado, Illinois, New Mexico, and Texas—have all changed their policies.

In 2010, the Maine Legislature required the Department of Corrections to review its use of solitary confinement and report its findings back to the Legislature. The report, issued in March 2011, called for improvements in mental health care and alternatives aimed at “behavioral intervention” in the general prison population.⁴⁷ Since then, Commissioner Joseph Ponte instituted a series of reforms in the Maine State Prison’s Supermax unit.

- The unit’s population was cut by more than half;
- “Cell extractions”—or the forcible removal of prisoners from cells—were discontinued;
- A prisoner could not be placed in the Supermax unit for longer than 72 hours without personal approval by the Commissioner;

administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs’ class made up of mentally-ill prisoners.”).

⁴⁵ 131 S. Ct. 1910 (2011).

⁴⁶ *Id.* at 1928.

⁴⁷ Final Report of Review of Due Process Procedures in Special Management Units at the Maine State Prison and the Maine Correctional Center (Mar. 2011), http://www.aclu.org/files/assets/maine_-_final_doc_report_on_smus.pdf.

- A committee composed of corrections officials and members of the public was appointed to continue review and reforms.⁴⁸

According to Commissioner Ponte, these reforms did not require substantial new funds.⁴⁹

Mississippi has also changed the manner in which it uses long-term isolation. Between 2007 and 2009, the Mississippi Department of Corrections (MDOC) reduced the population in its Supermax facility (known as “Unit 32”) from approximately 1000 to less than 100.⁵⁰ The MDOC revised classification criteria so that prisoners eligible for confinement at Unit 32 were those who had committed serious violent acts while incarcerated or had attempted escape.⁵¹ Individual management plans were mandated for each prisoner, so that they had concrete goals on how to earn their way out of Unit 32.⁵² In addition, the MDOC created a “step-down” unit for prisoners with serious mental illness who had been previously isolated; these prisoners are housed in a small unit with supervised group and other activities to encourage their transition to general population.⁵³ In Unit 32, violence by prisoners and the use of force by staff declined.⁵⁴ In 2010, the MDOC closed Unit 32.⁵⁵

In 2011 and 2012, other states instituted measures to stem the over-use of solitary confinement. New York enacted a law making it more difficult to put seriously mentally ill prisoners in solitary confinement.⁵⁶ Colorado enacted a law in August 2011 requiring the Department to provide a report regarding the use of administrative segregation⁵⁷ and directed

⁴⁸ Lance Tapley, *Maine’s Dramatic Reduction of Solitary Confinement*, CRIME REPORT (July 21, 2011), <http://www.thecrimereport.org/archive/2011-07-maines-dramatic-reduction-of-solitary-confinement>.

⁴⁹ Lance Tapley, *Reform Comes to the Supermax*, PORTLAND PHX. (May 25, 2011), <http://portland.thephoenix.com/news/121171-reform-comes-to-the-supermax/>.

⁵⁰ Terry A. Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST & BEHAV. 1037, 1046 (2009).

⁵¹ Kupers, *supra* note 45, at 1046.

⁵² *Id.* at 1047.

⁵³ *Id.* at 1043.

⁵⁴ *Id.* at 6-7.

⁵⁵ John Buntin, *Exodus: How America’s Reddest State – And Its Most Notorious Prison – Became a Model of Corrections Reform*, 23 GOVERNING 20, 27 (2010).

⁵⁶ 2008 N.Y. Sess. Laws 1 (McKinney) (codified as amended primarily at N.Y. CORRECT. LAW § 1, 137, 401, & 401-a and at N.Y. MENTAL HYG. LAW § 45.07 (McKinney 2011) (excluding prisoners who are actively suicidal or who have Axis I diagnoses, except under “exceptional circumstances,” and mandating at least two hours of mental health treatment for such prisoners).

⁵⁷ Colorado Laws 2011, Ch. 289, § 1, eff. July 1, 2011 (codified at C.R.S.A. § 17-1-113.9(1) (requiring report from CDOC “concerning the status of administrative segregation; reclassification efforts for offenders with mental illnesses or developmental disabilities, including duration of stay, reason for placement, and number and percentage discharged”).

that funds be directed to support mental health treatment and alternatives to segregation.⁵⁸ Colorado's Department of Corrections thereafter undertook an audit of its use of solitary confinement and announced in March 2012 that it would close a 312-bed Supermax facility by early 2013.⁵⁹ In May 2012, concerned about the economic costs of its Supermax prison, the Illinois governor announced a proposal to close the facility.⁶⁰ The New Mexico Legislature directed a committee to study solitary confinement's impact on inmates, its effectiveness in "reducing problems," and its cost.⁶¹ Likewise, the Texas Lieutenant Governor commissioned a study on the use of administrative segregation and its impact on mental health and recidivism, as well as options for alternative methods of confinement and reentry programming.⁶²

B. American Bar Association Standards on the Treatment of Prisoners

In 2005, the American Bar Association began a project to develop contemporary standards for prison administration. Participants included a range of institutional actors.⁶³ In 2010, the ABA House of Delegates approved a revised set of Standards on the Treatment of Prisoners.⁶⁴

The standards regarding solitary confinement center around a core ideal: "Segregated housing should be for the briefest term and under the least restrictive conditions practicable and

⁵⁸ Colorado Laws 2011, Ch. 289, § 1, eff. July 1, 2011 (codified at C.R.S.A. § 17-1-113.9(2)) (directing funds made available from savings due to new earned time law be used "to support behavior-modification programs, incentive programs, mental health services or programs, or similar efforts designed as viable alternatives to administrative segregation additional funding for treatment and alternative placements for mentally ill prisoners in solitary confinement.").

⁵⁹ Kristen Wyatt, *Colorado Closing Canon City Prison*, Colorado Springs Gazette (Mar. 19, 2012), <http://www.gazette.com/news/colorado-135471-denver-prison.html>.

⁶⁰ Steve Mills, *Quinn's Prison Plan Causes Stir*, CHI. TRIBUNE (Feb. 23, 2012), <http://www.chicagotribune.com/news/local/ct-met-illinois-state-budget-prisons-20120223,0,3394133.story>.

⁶¹ New Mexico House of Representatives, "A memorial requesting the appropriate legislative interim committee to convene a working group to gather information regarding the use of solitary confinement in New Mexico public and private correctional facilities, to determine the impact of solitary confinement on inmates and to assess the effectiveness of solitary confinement in reducing problems and costs." www.nmlegis.gov/sessions/11%20regular/final/HM062.pdf (2001).

⁶² Press Release, Office of the Lieutenant Governor, Lt. Governor Dewhurst Issues Select Interim Charges Relating to Transportation, Homeland Security and Criminal Justice (Jan. 13, 2012), <http://www.ltgov.state.tx.us/prview.php?id=337>.

⁶³ "Based on constitutional and statutory law, a variety of relevant correctional policies and professional standards, the deep expertise of the many people who assisted with the drafting, and the extensive contributions and comments of dozens of additional experts and groups, they set out principles and functional parameters to guide the operation of American jails and prisons, in order to help the nation's criminal justice policy-makers, correctional administrators, legislators, judges, and advocates protect prisoner's rights while promoting the safety, humaneness, and effectiveness of our correctional facilities." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS intro. (3d ed. 2011) [hereinafter ABA STANDARDS].

⁶⁴ ABA Adopts Host of Criminal Justice Measures, ABA JOURNAL (Feb. 8, 2010), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html.

consistent with the rationale for placement and with the progress achieved by the prisoner.”⁶⁵ Appendix B sets forth ABA Standards on solitary confinement.

C. International Legal Norms

The reforms in several states and the ABA Standards reflect a growing consensus on the treatment of prisoners that is shared internationally. The United States is a signatory to a number of international human rights agreements that govern the treatment of prisoners and “mandate that prisoners be treated with humanity and respect for the inherent dignity of the human person.”⁶⁶ Those principles have been interpreted to limit the use of solitary confinement.⁶⁷ In 2011, the United Nations’ Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment exhorted all countries to “re-evaluate and minimize” and to abolish completely its use for juveniles and prisoners with mental illness.⁶⁸ Based on existing research, the Special Rapporteur concluded that fifteen days is the maximum period prisoners can spend in solitary confinement without suffering permanent mental harm.⁶⁹ The Special Rapporteur

⁶⁵ ABA STANDARDS 23-2.6(a).

⁶⁶ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (ratified in 1992) (prohibiting “cruel, inhuman, or degrading treatment or punishment” and requiring that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 108 Stat. 382, 463-64, 1465 U.N.T.S. 85 (ratified in 1992) (prohibiting torture, defined as “[a]n act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he . . . committed or is suspected of having committed or intimidating or coercing him . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁶⁷ *See, e.g.*, UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary-General, 28 July 2008, A/63/175 pp. 18-20, available at: <http://www.unhcr.org/refworld/docid/48db99e82.html> (interim report of U.N. Special Rapporteur Manfred Nowak criticizing use of solitary confinement); Comm. Against Torture, Report of the Committee Against Torture, 73, U.N. Doc. A/61/44 (Nov. 14–15, 2005; May 1–19, 2006) (questioning the United States about its supermax practice and its effects on prisoners’ mental health); Comm. Against Torture, Report of the Committee Against Torture, 32, U.N. Doc. A/55/44 (Nov. 8-19, 1999; May 1–19, 2000) (expressing concern about the United States’ “excessively harsh regime of the ‘supermaximum’ prisons”); *see also* Standard Minimum Rules for the Treatment of Prisoners, R. 57, E.S.C. Res. 663C, U.N. Doc. E/3048 (Aug. 30, 1955) amended by E.S.C. Res. 2076, U.N. Doc. E/5988 (May 13, 1977) (“Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.”); ISTANBUL STATEMENT ON THE USE AND EFFECTS OF SOLITARY CONFINEMENT, *reproduced in* 18 Torture 56 (2008) (statement by international group of experts in law, medicine, and criminology).

⁶⁸ U.N. Special Rapporteur on Torture, Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2, ¶ 31, ¶ 81, U.N. Doc. A/66/268 (Aug. 5, 2011) (citations omitted).

⁶⁹ *Id.*

observed that “[c]onsidering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment.”⁷⁰

Conclusion

We applaud this Committee for putting on the agenda the need to rethink the role of extreme isolation in American criminal justice system. Detention in democratic orders requires respect for the individual dignity and for the worth of all persons.

This understanding of American obligations is longstanding. As Arthur Liman explained in 1971:

[N]o excuse can justify the failure of the American public to demand a better system of criminal justice, from arrest, trial and sentencing to ultimate release from confinement. . . .

The larger obligation to continue the search for a better and a more humane system of criminal justice, from arrest to release after imprisonment, requires the alert attention of every thinking citizen. . . .

Change should not be lightly undertaken, but the *status quo* can no longer be defended. The only way to salvage meaning out of the otherwise senseless killings at Attica is to learn from this experience that our Atticas are failures. The crucial issues remain unresolved; and they will continue unresolved until an aroused public demands something better.⁷¹

More than forty years later, the human suffering described in *Wilkinson*, documented by social scientists, and experienced by tens of thousands of incarcerated Americans, “demands something better.”

Respectfully submitted,

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⁷⁰ *Id.*

⁷¹ ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xi (Bantam Books, 1972).

Appendix A

States with Supermax Facilities, 1997–1998

	Supermax Beds	Sentenced Prison Pop.	Incarceration Rate per 100,000	Percent of Total Beds
Northeast	3,214	163,836		2.0
Connecticut	586	13,005	397	4.5
Maine	100	1,542	123	6.5
Massachusetts	124	10,847	278	1.1
New Jersey	96	28,361	351	0.3
New York	2,000	70,026	386	2.9
Pennsylvania	200	34,963	291	0.6
Rhode Island	108	2,100	213	5.1
Midwest	2,290	216,391		1.1
Illinois	500	40,788	342	1.2
Indiana	85	17,730	301	0.5
Michigan	421	44,771	457	0.9
Minnesota	120	5,306	113	2.3
Nebraska	164	3,329	200	4.9
Ohio	500	48,002	429	1.0
Wisconsin	500	14,682	283	3.4
South	7,584	480,061		1.6
Florida	1,000	64,540	437	1.5
Georgia	10	35,722	472	0.3
Louisiana	1,048	29,265	672	3.6
Maryland	286	21,088	413	1.4
Mississippi	1,756	14,548	531	12.0
North Carolina	300	27,726	370	1.1
Oklahoma	392	20,542	617	1.9
South Carolina	200	20,264	536	1.0
Texas	1,229	140,729	717	0.9
Virginia	1,267	27,524	407	4.6
West Virginia	96	3,160	174	3.0
West	6,542	242,315		2.7
Arizona	1,728	22,353	484	7.7
California	2,942	154,368	475	1.9
Colorado	750	13,461	342	5.6
Idaho	96	3,946	323	2.4
Montana	64	2,242	25	2.9
Nevada	430	8,884	518	4.8
Oregon	196	7,589	232	2.6
Washington	300	13,198	233	2.3
Wyoming	36	1,566	326	2.3
All states	19,630	1,102,603	—	1.8

Sources: King 1999, updating figures from Riveland 1999b.

Table 1 from Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons* 74 app. tbl.1 (2006), originally published as Table 1 in Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *Punishment & Soc'y* 163, 175 tbl.1 (1999), reproduced with the permission of Professors Mears and King. Reproduced in Judith Resnik, *Detention, The War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 643 (2010).

APPENDIX B

ABA Standards for Criminal Justice (Third Edition), Treatment of Prisoners (2010)⁷²

Standard 23-2.6 Rationales for segregated housing

(a) Correctional authorities should not place prisoners in segregated housing except for reasons relating to: discipline, security, ongoing investigation of misconduct or crime, protection from harm, medical care, or mental health care. Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner. Segregation for health care needs should be in a location separate from disciplinary and long-term segregated housing. Policies relating to segregation for whatever reason should take account of the special developmental needs of prisoners under the age of eighteen.

(b) If necessary for an investigation or the reasonable needs of law enforcement or prosecuting authorities, correctional authorities should be permitted to confine a prisoner under investigation for possible criminal violations in segregated housing for a period no more than [30 days].

Standard 23-2.7 Rationales for long-term segregated housing

(a) Correctional authorities should use long-term segregated housing sparingly and should not place or retain prisoners in such housing except for reasons relating to:

- (i) discipline after a finding that the prisoner has committed a very severe disciplinary infraction, in which safety or security was seriously threatened;
- (ii) a credible continuing and serious threat to the security of others or to the prisoner's own safety; or
- (iii) prevention of airborne contagion.

(b) Correctional authorities should not place a prisoner in long-term segregated housing based on the security risk the prisoner poses to others unless less restrictive alternatives are unsuitable in light of a continuing and serious threat to the security of the facility, staff, other prisoners, or the public as a result of the prisoner's:

- (i) history of serious violent behavior in correctional facilities;
- (ii) acts such as escapes or attempted escapes from secure correctional settings;
- (iii) acts or threats of violence likely to destabilize the institutional environment to such a degree that the order and security of the facility is threatened;
- (iv) membership in a security threat group accompanied by a finding based on specific and reliable information that the prisoner either has engaged in dangerous or threatening

⁷²The full text of the ABA Standards is published at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf

- behavior directed by the group or directs the dangerous or threatening behavior of others;
or
(v) incitement or threats to incite group disturbances in a correctional facility.

Standard 23-2.8 Segregated housing and mental health

- (a) No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.
- (b) No prisoner should be placed in segregated housing for more than [1 day] without a mental health screening, conducted in person by a qualified mental health professional, and a prompt comprehensive mental health assessment if clinically indicated. If the assessment indicates the presence of a serious mental illness, or a history of serious mental illness and decompensation in segregated settings, the prisoner should be placed in an environment where appropriate treatment can occur. Any prisoner in segregated housing who develops serious mental illness should be placed in an environment where appropriate treatment can occur.
- (c) The mental health of prisoners in long-term segregated housing should be monitored as follows:
- (i) Daily, correctional staff should maintain a log documenting prisoners' behavior.
 - (ii) Several times each week, a qualified mental health professional should observe each segregated housing unit, speaking to unit staff, reviewing the prisoner log, and observing and talking with prisoners who are receiving mental health treatment.
 - (iii) Weekly, a qualified mental health professional should observe and seek to talk with each prisoner.
 - (iv) Monthly, and more frequently if clinically indicated, a qualified mental health professional should see and treat each prisoner who is receiving mental health treatment. Absent an individualized finding that security would be compromised, such treatment should take place out of cell, in a setting in which security staff cannot overhear the conversation.
 - (v) At least every [90 days], a qualified mental health professional should perform a comprehensive mental health assessment of each prisoner in segregated housing unless a qualified mental health professional deems such assessment unnecessary in light of observations made pursuant to subdivisions (ii)-(iv).

Standard 23-2.9 Procedures for placement and retention in long-term segregated housing

- (a) A prisoner should be placed or retained in long-term segregated housing only after an individualized determination, by a preponderance of the evidence, that the substantive prerequisites set out in Standards 23-2.7 and 23-5.5 for such placement are met. In addition, if long-term segregation is being considered either because the prisoner poses a credible continuing

and serious threat to the security of others or to the prisoner's own safety, the prisoner should be afforded, at a minimum, the following procedural protections:

- (i) timely, written, and effective notice that such a placement is being considered, the facts upon which consideration is based, and the prisoner's rights under this Standard;
- (ii) decision-making by a specialized classification committee that includes a qualified mental health care professional;
- (iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, has a reasonable opportunity to present available witnesses and information;
- (iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine any witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;
- (v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;
- (vi) if the classification committee determines that a prisoner is unable to prepare and present evidence and arguments effectively on his or her own behalf, counsel or some other appropriate advocate for the prisoner;
- (vii) an independent determination by the classification committee of the reliability and credibility of confidential informants if material allowing such determination is available to the correctional agency;
- (viii) a written statement setting forth the evidence relied on and the reasons for placement; and
- (ix) prompt review of the classification committee's decision by correctional administrators.

(b) Within [30 days] of a prisoner's placement in long-term segregated housing based on a finding that the prisoner presents a continuing and serious threat to the security of others, correctional authorities should develop an individualized plan for the prisoner. The plan should include an assessment of the prisoner's needs, a strategy for correctional authorities to assist the prisoner in meeting those needs, and a statement of the expectations for the prisoner to progress toward fewer restrictions and lower levels of custody based on the prisoner's behavior. Correctional authorities should provide the plan or a summary of it to the prisoner, and explain it, so that the prisoner can understand such expectations.

(c) At intervals not to exceed [30 days], correctional authorities should conduct and document an evaluation of each prisoner's progress under the individualized plan required by subdivision (b) of this Standard. The evaluation should also consider the state of the prisoner's mental health;

address the extent to which the individual's behavior, measured against the plan, justifies the need to maintain, increase, or decrease the level of controls and restrictions in place at the time of the evaluation; and recommend a full classification review as described in subdivision (d) of this Standard when appropriate.

(d) At intervals not to exceed [90 days], a full classification review involving a meeting of the prisoner and the specialized classification committee should occur to determine whether the prisoner's progress toward compliance with the individual plan required by subdivision (b) of this Standard or other circumstances warrant a reduction of restrictions, increased programming, or a return to a lower level of custody. If a prisoner has met the terms of the individual plan, there should be a presumption in favor of releasing the prisoner from segregated housing. A decision to retain a prisoner in segregated housing following consideration by the classification review committee should be reviewed by a correctional administrator, and approved, rejected, or modified as appropriate.

(e) Consistent with such confidentiality as is required to prevent a significant risk of harm to other persons, a prisoner being evaluated for placement in long-term segregated housing for any reason should be permitted reasonable access to materials considered at both the initial and the periodic reviews, and should be allowed to meet with and submit written statements to persons reviewing the prisoner's classification.

(f) Correctional officials should implement a system to facilitate the return to lower levels of custody of prisoners housed in long-term segregated housing. Except in compelling circumstances, a prisoner serving a sentence who would otherwise be released directly to the community from long-term segregated housing should be placed in a less restrictive setting for the final months of confinement.

Standard 23-3.8 Segregated housing

(a) Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.

(b) Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.

(c) All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation should include:

(i) in-cell programming, which should be developed for prisoners who are not permitted to leave their cells;

- (ii) additional out-of-cell time, taking into account the size of the prisoner's cell and the length of time the prisoner has been housed in this setting;
- (iii) opportunities to exercise in the presence of other prisoners, although, if necessary, separated by security barriers;
- (iv) daily face-to-face interaction with both uniformed and civilian staff; and
- (v) access to radio or television for programming or mental stimulation, although such access should not substitute for human contact described in subdivisions (i) to (iv).

(d) Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.

(e) No cell used to house prisoners in segregated housing should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Physical features that facilitate suicide attempts should be eliminated in all segregation cells. Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).

(f) Correctional staff should monitor and assess any health or safety concerns related to the refusal of a prisoner in segregated housing to eat or drink, or to participate in programming, recreation, or out-of-cell activity.