

INCARCERATION AND THE LAW

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Excerpts (p. 225-26 and 246-49)

American advocacy organizations devoted considerable attention to the international process, as ACLU Stop Solitary director Amy Fettig explains:

AMY FETTIG, WHY I WORKED ON THE MANDELA RULES

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U.S.-based advocates are often frustrated by how little traction international human rights standards receive in the U.S. But in recent years that has begun to change. Surprisingly, one of the best examples of the shift is in prisoner rights advocacy. Theorists write about interactions between domestic and international law as “dialogic,” and that has certainly been the case in the campaign against solitary confinement.

The ACLU launched its national Stop Solitary campaign in 2010, building on domestic work by (among others) the American Friends Service Committee and on not-yet-terribly-successful litigation. We had the inspiration of global efforts, but those had not yet much influenced the American conversation. That changed that same year, with the report on solitary confinement issued by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. A former political prisoner from Argentina, Méndez is also a law professor in the United States. His report set forth a specific time limit for solitary beyond which the practice may be considered torture—fifteen days.

In the United States, people in prison are routinely subject to solitary confinement for weeks, months, years, even decades. A now-famous solitary survivor, Albert Woodfox, spent forty-four years in isolation in Louisiana, and his decades in solitary are hardly unusual in many correctional systems. The stark juxtaposition between the proposed human rights limit of fifteen days and our own unregulated and extreme practices drew the attention of the media, advocates, and political leaders alike.

Using the international human rights standard proposed by the Special Rapporteur, we started to push for more definite limits in U.S. law and practice. At the same time, there was an opening to establish the 15-day limit more firmly in international standards due to the ongoing revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners, or SMRs. Originally drafted in 1955, the SMRs were not updated until a 2010 U.N. General Assembly resolution requested revision. The four-year revision process involved dozens of U.N. member states and relentless advocacy on the part of non-governmental organizations from around the world, including the ACLU, Human Rights Watch, Penal Reform International, Amnesty International, and many others.

Unlike a treaty, the SMRs are not binding, but they represent a powerful global consensus on minimum standards for prisoners. The original SMRs had undeniable weaknesses—for example, they contained no standards related to solitary confinement, no protections for people with disabilities or LGBT prisoners. They also failed to account for advances in technology over the last sixty years and used archaic and offensive terminology such as “insane” and “mentally abnormal.” The global prison population of nine million—and the horrors of mass incarceration

in the U.S.—made the case for strong, updated SMRs. Revision to ensure that they were not only stronger but met the needs of a new age was an enormous task.

At an early meeting, the U.S. government actually opposed any meaningful limits on solitary confinement, such as a maximum duration or the exclusion of vulnerable populations, like children and people with mental illness. Fortunately, this dynamic changed after U.S. advocates were able to bring to the negotiating table two state corrections directors from Colorado and Washington who pioneered reforms of solitary confinement in their own jurisdictions. These directors soon joined the U.S. delegation; during the last expert meeting to revise the SMRs in Cape Town, South Africa, they described their work on a panel sponsored by the United States and participated in the negotiations leading to the final adoption of solitary confinement protections into the SMRs.

The revised SMRs, now known as the Mandela Rules in honor of late South African President Nelson Mandela, who was imprisoned for 27 years by the country's apartheid regime, provide that solitary confinement "shall be used only in exceptional cases as a last resort for as short a time as possible and subject to independent review." Indefinite solitary confinement and prolonged solitary confinement—defined as more than 15 consecutive days—are prohibited. Solitary confinement is also prohibited in the case of persons with mental or physical disabilities when their condition would be exacerbated.

The new Mandela Rules constitute a major victory for prison reformers across the globe. In the United States, we are now able to point to a clear international human rights standard that was approved by our own government. As a result, the Mandela Rules' fifteen-day limit on solitary is being adopted by corrections systems, like Colorado, and being included in draft state legislation around the country. For the first time in decades, Americans are looking outside their border and parochial practice to reach for a better standard by which we judge our treatment of incarcerated people. It's about time.

AMY FETTIG, ARE WE REACHING A TIPPING POINT IN THE CAMPAIGN TO END SOLITARY CONFINEMENT?

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Over the past decade, momentum to reform and even abolish the practice of solitary confinement has grown at an enormous rate. In many ways, the reform movement's success at capturing the attention of the media, the public, and state and national leaders is unprecedented for any campaign seeking to end inhumane prison conditions. Not only has a sitting President of the United States labeled the practice "an affront to our common humanity," Barack Obama, Op-Ed., *Why We Must Rethink Solitary Confinement*, Wash. Post. A15 (Jan. 26, 2016), but several Justices of the Supreme Court have condemned the practice as a possible violation of constitutional rights.

Both the public and corrections officials in state after state, and the federal system, are embracing more humane and effective alternatives to isolation. This apparently sudden success is no accident. It is the product of long-term investment by a number of groups, savvy organizing, multi-pronged strategies, innovative corrections management, and intensive and simultaneous engagement with local, state, national, and international leaders. And we're not done. We are hoping and working towards a tipping point—where sophisticated and sustained advocacy and targeted funding/technical assistance can induce more rapid and permanent change to solitary confinement practices in America, and perhaps even lead to abolition.

I have worked against solitary confinement for nearly 10 years. I have seen this new momentum for reforming solitary confinement emerging from five agents of change: (1) civil society campaigns; (2) allies in government and leading professional groups; (3) civil rights litigation; (4) corrections leadership; and (5) media coverage that increases public awareness and discourse. Each of these builds on the others; all are necessary.

Civil Society Campaigns: The forces for change in the advocacy community have been building for a number of years. A pivotal moment came in 2010 when the ACLU launched its “Stop Solitary Campaign” that has accelerated legislative and policy reform, public education, and litigation nationwide. At the same time, the National Religious Campaign Against Torture (NRCAT) expanded its work on U.S.-sponsored torture to organize diverse faith communities to advocate against the practice of solitary confinement. The combination of the faith community and the civil rights community working in tandem nationally is one of the great strengths of the movement. The movement also benefits from strong, single-state campaigns with remarkable organization and leadership. In 2019, a record 28 states introduced solitary reform legislation and eight states passed laws.

Allies in Government and Leading Professional Groups: National reform efforts have attracted strong allies in the U.S. Congress. In June 2012, Senator Dick Durbin of Illinois held the first ever congressional hearing on solitary confinement, and in February 2014 he held a follow-up hearing on the subject. As a result of these hearings, the federal Bureau of Prisons (“BOP”) faced greater scrutiny of its solitary confinement and isolation policies and practices and efforts for reform were galvanized nationwide. Senator Durbin also reintroduced the Solitary Confinement Reform Act (S.719) in 2019 and a bipartisan House bill, The Solitary Confinement Study and Reform Act of 2019 (H.R. 4488) has also been introduced.

Increasing leadership by prominent national organizations is also playing an important role in shaping political leadership, public opinion, and the field of corrections on the issue of solitary reform. Groups such as the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, and the National Commission on Correctional Health Care have all promulgated policy and standards to limit the use of solitary confinement, and other medical, professional, and religious organizations have followed suit. Even the American Legislative Exchange Council (ALEC) has passed a resolution on “limiting the use of prolonged solitary confinement.” [These policies and standards are listed/linked on this casebook’s website, <http://incarceration.com>.]

Civil Rights Litigation: Litigation is simultaneously driving systems reform and exposing the harms solitary wreaks on incarcerated people. Key recent victories in states like Alabama, Massachusetts, Montana, Virginia, Pennsylvania, New York, California, Arizona, and Indiana are leading to the further development of alternative approaches to the management of both vulnerable populations, like people with serious mental illness, and corrections management more generally. At the same time, significant damage judgments and settlements, such as the \$15.5 million settlement accepted by a man with mental illness who spent two years in solitary confinement in a New Mexico jail, have put pressure on corrections leaders to support change.

Corrections Leadership: Recognition within the criminal justice community and corrections that the use of solitary confinement in the U.S. has gone too far and is not creating positive results is also fueling reform efforts. Indeed, in a joint report by the Association of State Correctional Administrators (ASCA) and Yale Law School recognized that “[p]rolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern.” These concerns are reflected in the actions of some of the field’s most outspoken leaders, such as former Executive Director of Colorado’s Department of Corrections, Rick Raemisch, who adopted the fifteen-day limit on solitary confinement set forth in the United Nations’ Mandela Rules.

Media Coverage: Prior to 2010 there was almost no reporting on solitary confinement in the United States, despite its pervasive use and corrosive impacts. This began to change with the formation of *Solitary Watch*, a web-based, single issue journalism site that creates and collates print and online reporting on solitary confinement and efforts to reform the practice. At the same time, advocacy campaigns nationwide have worked diligently to engage media attention through local op-eds by community leaders, editorial board engagement, human rights reports, arts collaborations, and utilization of social media. Whether solitary confinement costs too much, is inhumane, and does nothing to rehabilitate prisoners have emerged as topics in the mainstream media and public discourse.

The question remains whether all these pieces of the campaign against solitary will be enough to actually shift culture, both inside and outside prison walls—to fundamentally alter how we manage and operate incarcerative institutions and how we treat our fellow human beings.