

No. 18-3505

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNEST PORTER,

Plaintiff-Appellant,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Pennsylvania
Civil Action No. 2:17-cv-00763-MPK
The Honorable Maureen P. Kelly, *Magistrate Judge*

**BRIEF OF CORRECTIONS DIRECTORS AND EXPERTS AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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INTEREST OF *AMICI CURIAE*

Amici curiae are former corrections directors and experts with experience reducing the use of solitary confinement. *Amici* submit that prolonged isolation has proven dangerous and ineffective, whereas alternative prison management methods have successfully eliminated prolonged solitary confinement while decreasing prison violence. *Amici* provide this Court information demonstrating evidence-based alternatives to solitary confinement that have increased prison safety.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Corrections and Probation for seven years. Horn has also served as Executive Director of the New York State Sentencing Commission.

Justin Jones spent thirty-six years with the Oklahoma Department of Corrections, where he served as Director from 2005 through 2013. As Director, he established programs to reduce solitary confinement. He also served as Commission Chair for the Accreditation and Standards Committee for the American Correctional Association, where he worked to decrease the use of solitary confinement on a national level.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for offenders with mental impairments. He

coauthored *Texas Prisons, The Walls Came Tumbling Down*, and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. He has served as Director of Correctional Institutions, Regional Administrator, Probation Officer, and Youth Correctional Officer. He is currently a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented a wide array of evidence-based programs, including an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary.

Amici have obtained the consent of all parties to the filing of this brief.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no party's counsel authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

In the growing awareness of isolation’s harmful effects, many state correctional systems have demonstrated that eliminating prolonged solitary confinement—while simultaneously improving prison security and reducing operating costs—is possible through three interrelated types of reforms: 1) reducing the number of prisoners sent to solitary confinement, 2) providing rehabilitation that instills prosocial behaviors benefitting the prison as a whole, and 3) reducing the length of time prisoners spend in solitary. In light of the availability and success of these reforms, prison administrators can no longer assert a compelling interest for keeping prisoners in “near-total isolation from the living world in what comes perilously close to a penal tomb.”¹

ARGUMENT

I. Solitary Confinement Did Not Reduce Violence Within Prison Systems.

In the 1880s and for nearly a century after, America abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.² But in the 1980s, solitary confinement returned to America’s prisons, partly in reaction to exploding prison populations.³ The dismantling of state-run

¹ *Apodaca v. Raemisch*, 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation omitted).

² Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 747-49 (2015).

³ *Id.*

mental health hospitals, the “War on Drugs,” and the shift to mandatory minimum sentencing flooded prison systems with more people than cells could hold.⁴ The resulting overcrowded prisons were ill-equipped to address the epidemic of prisoners with mental illness, the growth of prison gangs, or the overall increase in violence.⁵

Correctional officials believed they could pinpoint the “troublemakers” and the “worst of the worst” who most frequently engaged in prison violence and then isolate them to restore order.⁶ Many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.⁷ Officials expected that removing difficult prisoners from the general population would reduce prison violence.⁸ They were wrong.

The increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”⁹ Unfortunately, with so many solitary confinement cells already built, isolation became an overused part of the

⁴ See, e.g., Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment* (2014).

⁵ Bennion, *supra* note 2, at 748-49.

⁶ Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

⁷ Bennion, *supra* note 2, at 751-52.

⁸ Briggs, *supra* note 6, at 1342.

⁹ B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* 165, 179 (2016); see also R.M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (Aug. 2015) (unpublished Ph.D. dissertation, Univ. of Cin.).

correctional toolkit.¹⁰ Punitive isolation became common for even minor offenses including disrespect, praying, and swearing.¹¹ Inevitably, as the practice continued, studies showed that “[p]risons with higher rates of restrictive housing had higher levels of facility disorder.”¹² Psychologists demonstrated that the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system and the people that surround, provoke, deny, thwart, and oppress them.”¹³ Texas experienced a 104 percent increase in prisoner assaults between 2008 and 2015, which correctional staff attributed directly to the overuse of solitary confinement.¹⁴

More recently, attitudes about solitary confinement began to shift. Additional research into the impact of long periods of isolation on prisoners’ mental health confirmed that prolonged solitary confinement caused extensive harm to prisoners.¹⁵

¹⁰ Erica Goode, *Rethinking Solitary Confinement*, N.Y. Times, March 11, 2012, at A1.

¹¹ Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* 15 (2018).

¹² Allen Beck, U.S. Department of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

¹³ Craig Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003).

¹⁴ ACLU of Texas & Texas Civil Rights Project, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 9 (2015).

¹⁵ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 *Ann. Rev. Criminology* 285, 286 (2018).

International condemnation of prolonged solitary confinement as torture placed a spotlight on its use in state and federal prison systems.¹⁶ Litigation highlighted the risks to prisoners in isolation and sought to limit its use, particularly for juveniles and people with mental illness.¹⁷ The United States Senate and several states commissioned studies of the impact of solitary confinement on prisoners and its effectiveness in managing violence.¹⁸

Mindful of isolation's harm to prisoners and its failure to reduce prison violence, twenty-one states and the federal government have undertaken solitary confinement reforms.¹⁹ Sixteen states passed legislation intended to limit the use of

¹⁶ Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), ¶¶ 79-89, U.N. Doc. A/63/175 (28 July 2008), <http://www.refworld.org/docid/48db99e82.html>; G.A. Res. 70/175, Rule 44, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* (Dec. 17, 2015).

¹⁷ See, e.g., *Presley v. Epps*, 4:05cv148 (N.D. Miss. 2006); *Jones'El v. Berge*, No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002); *Joslyn v. Armstrong*, No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

¹⁸ Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014) <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell* 87-88 (2018) (*ASCA-Liman 2018*).

¹⁹ Hager & Rich, *supra* note 18; *ASCA-Liman 2018*, *supra* note 18, at 87-88.

solitary confinement, and many more have reformed correctional practices.²⁰ The American Correctional Association (ACA), the largest accrediting body in the United States for correctional institutions, proposed standards and guidelines recommending limits on the use of solitary confinement.²¹ In 2016, a growing tendency toward reform was captured in a report published by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School (Liman Center): “Instead of being cast as the solution to a problem, restricted housing has come to be understood by many as a problem in need of a solution.”²²

II. Limiting the Use of Solitary Confinement Reduced Violence Within Prison Systems and Improved Safety for Corrections Officers.

Over one-third of state correctional systems have initiated restrictions on solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report substantial, system-wide reforms, reducing the nationwide estimated population of prisoners in

²⁰ National Conference of State Legislatures, *Administrative Segregation: State Enactments: January 2018*, <https://www.leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Mar-2018/Exhibits/sj25-state-enactments-2018-ncsl.pdf>.

²¹ The American Correctional Association, *Restrictive Housing Performance Based Standards* (Aug. 2016), <https://www.asca.net/pdfdocs/8.pdf> (*ACA Standards*).

²² The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* 15 (2016) (*ASCA-Liman 2016*).

isolation from nearly 100,000 to approximately 60,000 in just four years.²³ Colorado reports reducing the population of prisoners in long-term solitary confinement from seven percent of the prison population to one percent.²⁴ In reforming states, prisoners who remain in solitary confinement now reportedly stay for days, not years, in compliance with ACA-recommended standards.²⁵ An overlapping—but not identical—list of states report safely reducing or abolishing solitary confinement for prisoners on death row.²⁶ Colorado, Missouri, and North Carolina all report experimenting extensively—and successfully—with “mainstreaming” death row prisoners, while Arizona and California have changed policies mandating solitary confinement for death-sentenced prisoners in response to lawsuits.²⁷ These states transformed their prisons by 1) reducing the number of prisoners sent to solitary confinement, 2) initiating prosocial training for prisoners in temporary isolation, and 3) reducing the length of time prisoners spend in solitary conditions.

Putting prisoners into isolation did not reduce violence, and the corollary also proved true: letting prisoners out of solitary confinement did not increase violence. Instead, reforms limiting the use of solitary resulted in a dramatic *decrease* in prison

²³ *ASCA-Liman 2018*, *supra* note 18, at 7, 10.

²⁴ Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 *Yale L.J. Forum* 253, 263 (Jan. 15, 2016) <https://www.yalelawjournal.org/forum/reforming-solitary-confinement-in-us-prisons-and-jails>.

²⁵ *ACA Standards*, *supra* note 21, at 3.

²⁶ *ASCA-Liman 2018*, *supra* note 18, at 92.

²⁷ *Id.*

violence.²⁸ As solitary confinement populations plunged in Washington, Colorado, and Mississippi, assaults against staff declined by forty to fifty percent, and assaults against other prisoners declined by fifty to seventy percent.²⁹

In Mississippi “the number of incidents requiring use of force plummeted (for example, spraying a prisoner with immobilizing gas or taking down a recalcitrant prisoner). Monthly statistics showed an almost seventy percent drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”³⁰ Similar broad measures of violence in the Colorado prison system, including the number of forced cell entries, decreased by approximately eighty percent post-reforms, and prisoner-on-staff assaults decreased by nearly fifty percent.³¹ In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three or more times

²⁸ See, e.g., Marc A. Levin, Esq., *Testimony Before the U.S Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (February 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>; Rick Raemisch, remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What’s Worked in Colorado?* (Sept. 17, 2018), <https://www.safealternativestosegregation.org/webinar/rethinking-restrictive-housing-whats-worked-in-colorado/> (*Raemisch Remarks*); *Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author) (*Deterrence*).

²⁹ *Deterrence*, *supra* note 28, at 38; Levin, *supra* note 28; *Raemisch Remarks*, *supra* note 28.

³⁰ Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1039 (2009) (*Beyond Supermax*).

³¹ *Raemisch Remarks*, *supra* note 28.

every week in solitary; after dramatic reductions in the use of isolation, they now occur only a few times each year.³²

Barely a year after launching solitary confinement reforms in 2013, Maine prisons reported

substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up — which was an event that happened every week or at least every other week . . . The cutting [has] almost been totally eliminated as a result of these changes.³³

In Washington a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.³⁴ “In the model’s first year of implementation at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50%.”³⁵ Between 2014 and 2017, violent incidents in the two high-security prisons utilizing the model decreased by nearly sixty percent and inmate-on-staff assaults decreased by nearly ninety

³² Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 a.m.), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme>.

³³ Levin, *supra* note 28.

³⁴ Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 1, 5 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>; *see generally*, Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017) (*Solitary*).

³⁵ Pacholke & Mullins, *supra* note 34, at 6.

percent.³⁶ Of particular relevance here, Missouri determined that integrating death row prisoners into the general population was a viable strategy over twenty years ago, and recent studies continue to show that Missouri's approach has not increased violence in its prisons.³⁷ Indeed, reduced numbers of isolated prisoners and reduced time in solitary confinement *improved* the security of prisons in these states.

III. Limiting the Use of Solitary Confinement Also Reduces Costs.

Limiting solitary confinement not only reduces violence, it also provides long-term cost savings. The Government Accountability Office calculated that solitary housing costs three times as much as general population housing.³⁸ The cost of constructing supermax prisons, built specifically to house prisoners in solitary confinement, can be as high as three times the cost to build a conventional prison.³⁹ The facilities must be staffed more robustly because prisoners cannot do many of the jobs they would do in general population housing.⁴⁰ Isolation units need a higher

³⁶ *Deterrence*, *supra* note 28.

³⁷ *ASCA-Liman 2018*, *supra* note 18, at 92.

³⁸ The United States Government Accountability Office, *Bureau of Prisons: Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing* 31 (2013), <http://www.gao.gov/assets/660/654349.pdf> (GAO Report).

³⁹ ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the US* 2 (2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf (*Dangerous Overuse*).

⁴⁰ *Id.* at 11.

ratio of correctional officers to prisoners because policies require at least two officers be present to move prisoners between their cells, exercise areas, and showers.⁴¹

Colorado estimated it costs over \$15,000 more per year to house a prisoner in isolation than in the general population, and spent \$20 million housing prisoners in solitary confinement in 2010 alone.⁴² In 2009 the California Office of the Inspector General investigated the costs per prisoner in California's administrative segregation units and "estimated that the annual correctional staff cost of a standard [segregation] bed [was] at least \$14,600 more than the equivalent general population bed," amounting to "nearly \$130 million a year."⁴³

In 2013, Illinois closed its supermax prison, Tamms, which cost \$64,000 per prisoner per year, contrasted with \$21,000 per year for general population prisoners.⁴⁴ The governor's office projected that closing Tamms would save the state

⁴¹ *Id.*

⁴² Rick Raemisch, *Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights* 4 (February 25, 2014), [https://www.judiciary.senate.gov/imo/media/doc/02-25-14Raemisch Testimony.pdf](https://www.judiciary.senate.gov/imo/media/doc/02-25-14Raemisch%20Testimony.pdf); Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

⁴³ David Shaw, Office of the Inspector General, *Special Review: Management of the California Department of Corrections and Rehabilitation's Administrative Segregation Unit Population 1* (2009), <https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf>.

⁴⁴ Steve Mills, *Quinn's Prison Plan Causes Stir*, Chicago Tribune, Feb. 23, 2012, <http://www.chicagotribune.com/news/ct-xpm-2012-02-23-ct-met-illinois-state-budget-prisons-20120223-story.html#>.

over \$48 million in 2013 alone.⁴⁵ Mississippi saved nearly \$6 million a year by closing its supermax facility; Colorado estimated it saved over \$5 million after closing just one of its supermax prisons.⁴⁶ Louisiana and Washington have also closed supermax prisons.⁴⁷ In each state, reducing the use of solitary confinement also reduced ballooning corrections costs.

IV. States Reduced Their Use of Solitary Confinement by Limiting the Reasons and Managing the Behaviors that Result in Prisoners Being Sent to Solitary.

Recognizing that solitary confinement did not reduce prison violence, prison officials developed strategies to reduce the influx of prisoners into solitary, including deterring the violent acts that resulted in solitary placement, eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who needed mental health treatment or protective custody.⁴⁸

A. States Reduced Solitary Confinement Populations by Limiting the Reasons and Managing the Behaviors that Resulted in Solitary Confinement.

Prison officials began reform efforts by evaluating who was put in solitary confinement. They discovered that rather than housing “the worst of the worst,” isolation cells often were filled with people who were simply disruptive, suffered

⁴⁵ *Id.*

⁴⁶ *GAO Report, supra* note 38, at 34-35.

⁴⁷ Haney, *supra* note 15, at 303; *ASCA-Liman 2018, supra* note 18, at 107.

⁴⁸ Digard, *supra* note 11, at 28.

from mental illness, or sought protective custody.⁴⁹ The first ASCA-Liman report revealed that “the criteria for entry [into solitary confinement] were broad, as was the discretion accorded correctional officials when making individual decisions about placement.”⁵⁰ Prison officials originally intended solitary confinement “to be a last resort for those who were too violent to be in a prison’s general population. But then we gradually included inmates who disrupted the efficient running of an institution . . . Inmates could be placed in solitary for almost any reason, and they were.”⁵¹ In a 2014 ASCA survey, “several correctional experts discussed the risk of overuse based on . . . being ‘mad’ at a prisoner, as contrasted with being ‘scared’ of that individual.”⁵²

Self-reports from correctional departments indicated “[l]ow-level nonviolent offenses were among the most common infractions to result in disciplinary segregation sanctions,” and in some states, up to eighty percent of prisoners in solitary confinement had been diagnosed with a mental illness.⁵³ Prior to initiating

⁴⁹ Hans Toch & Terry Kupers, *Violence in Prisons, Revisited* 45.3 J. of Offender Rehabilitation 1, 18 (2007); Digard, *supra* note 11, at 15.

⁵⁰ The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* i (2015), https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf (*ASCA-Liman 2014*).

⁵¹ Rick Raemisich, *Putting an End to Long-Term Solitary*, N.Y. Times, Oct. 12, 2017, at A25.

⁵² *ASCA-Liman 2014*, *supra* note 50, at 8.

⁵³ Digard, *supra* note 11, at 16; *ASCA-Liman 2016*, *supra* note 22, at 50.

reforms, Nebraska reported twenty-eight percent of prisoners in punitive isolation were there for “disobeying an order,” and another thirty-eight percent for “threatening language or gestures,” “swearing,” or “disruption.”⁵⁴ North Carolina reported fifty percent of its punitive isolation population was there for “disobeying an order,” “profane language,” or “unauthorized tobacco use.”⁵⁵ Five prison systems seeking to reform their isolation policies confirmed that between forty to sixty percent of prisoners in solitary confinement had an identified serious mental health diagnosis.⁵⁶ Reforming states determined that assignment to solitary confinement was inappropriate for these prisoners in the first place, and continued isolation was likely to cause long-term harm.⁵⁷ Mississippi screened its solitary confinement population based on these criteria and transitioned eighty percent of the prisoners at the state’s supermax facility into less restrictive housing.⁵⁸ Reforming states decided to withhold privileges from prisoners who committed less serious infractions instead of sending them to solitary.⁵⁹ Officials could then reserve solitary confinement for prisoners who “pose a serious threat to the safety of others,” and “only when a less-restrictive setting is not sufficient.”⁶⁰

⁵⁴ Digard, *supra* note 11, at 15.

⁵⁵ *Id.*

⁵⁶ *Id.* at 21-23.

⁵⁷ *Id.* at 30-35.

⁵⁸ *Beyond Supermax*, *supra* note 30, at 1039.

⁵⁹ Digard, *supra* note 11, at 31-32.

⁶⁰ *Id.* at 32.

If prisoners could no longer be sent to isolation for “disruption,” officials needed to address conditions within their prison systems that led to disruptive behaviors in the first place.⁶¹ Prison leadership sought to end the “cycle of hostility” between prisoners and correctional staff by providing training in respectful interactions, ending prisoner idleness, and facilitating social connections.⁶² Officials in reforming states developed alternative deterrence strategies and training to reduce “the violent acts posing the greatest risk to staff and offender safety,” such as violent assaults on corrections officers, use of weapons, and multi-party assaults.⁶³ “By looking at the pathways that lead inmates to be placed in segregation, an agency can begin to deter the behavior that leads to segregation placement and identify more effective responses.”⁶⁴ Correctional staff were trained to de-escalate potentially violent incidents and prevent infractions that could result in solitary confinement placement.⁶⁵

Washington State instituted a group violence deterrence strategy that limited group-motivated violence by “target[ing] specific violent acts with swift, certain,

⁶¹ Digard, *supra* note 11, at 6; Bernie Warner, Dan Pacholke & Carly Kujath, Washington State Department of Corrections, *Operation Place Safety: First Year in Review* 1, 10 (2014), <http://doc.wa.gov/docs/publications/reports/200-SR002.pdf> (*Place Safety*).

⁶² Toch & Kupers, *supra* note 49, at 24-25; *Place Safety*, *supra* note 61, at 88.

⁶³ *Place Safety*, *supra* note 61, at 13; *see also* Steiner & Cain, *supra* note 9.

⁶⁴ *Place Safety*, *supra* note 61, at 5.

⁶⁵ Pacholke & Mullins, *supra* note 34, at 8; *see also*, Kupers, *Solitary*, *supra* note 34, at 171-211.

and meaningful consequences.”⁶⁶ These consequences included privilege restrictions, but also included help from trained staff to learn “pro-social alternatives to violence.”⁶⁷ Staff offered incentives for good behavior, including increased access to the commissary, recreation, and education opportunities.⁶⁸ Some prisons designated “calm rooms” where agitated prisoners could choose to soothe themselves before they became too distressed or acted out.⁶⁹ With more effective methods for addressing disruptive prisoners, fewer disruptions occurred.⁷⁰

Officials in reforming states, particularly Washington, also began to rethink old modalities of prison management, such as long-term lockdowns that kept general population prisoners sealed in their cells for days at a time.⁷¹ “Lockdowns prevented staff from being able to run programs . . . The violent acts committed by a few offenders were depriving the majority of offenders opportunities to serve their sentence in a productive way.”⁷² In the same way prison officials had curtailed the list of infractions for which an individual could be sent to solitary, officials limited the use of lockdowns to the most serious violent incidents.⁷³ Officials in Washington

⁶⁶ *Place Safety*, *supra* note 61, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.* at 14.

⁶⁹ *Raemisch Remarks*, *supra* note 28.

⁷⁰ *Toch & Kupers*, *supra* note 49, at 187-88; *Place Safety*, *supra* note 61, at 20-21; *Digard*, *supra* note 11, at 31.

⁷¹ *Place Safety*, *supra* note 61, at 14.

⁷² *Id.* at 12.

⁷³ *Id.* at 13.

limited the amount of time a unit could be on lockdown to thirty-six hours while a team determined who was responsible for an assault.⁷⁴ Corrections staff instituted restrictions on certain privileges for the primary actors rather than maintain unit lockdowns.⁷⁵ Clear expectations and swift discipline further reduced the need to rely on deprivation and isolation to maintain security.⁷⁶

Additionally, when staff did refer prisoners for placement in solitary, correctional officials provided prisoners prompt due process hearings to ensure placement was appropriate. Prior to reforms, despite the Supreme Court's holding that placement in prolonged solitary confinement can create a liberty interest, due process protections for placement and retention in solitary were non-existent in many jurisdictions.⁷⁷ The 2014 ASCA-Liman Report states that

Some but not all jurisdictions provided notice to the prisoner of the grounds for the placement and an opportunity for a hearing. The kind of notice and what constituted a "hearing" varied substantially. In short . . . getting into segregation was relatively easy, and few policies focused on how people got out.⁷⁸

Lack of meaningful hearings enabled mass isolation of prisoners, such as in Nebraska where "44 percent of all incarcerated people had been placed in restrictive

⁷⁴ *Id.* at 14.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See, Wilkinson v. Austin*, 545 U.S. 209, 220 (2005).

⁷⁸ *ASCA-Liman 2014*, *supra* note 50, at i.

housing as punishment for an infraction or pending an investigation.”⁷⁹ Meaningful hearings ensured less-restrictive placements were considered whenever possible and returned isolated prisoners to general population within days or weeks rather than months or years.⁸⁰ Maine required senior leadership to review referrals to solitary within three days.⁸¹ Washington required a multidisciplinary team to review placement in solitary within forty-eight hours.⁸² Twenty-one states mandated similar meaningful panel reviews for each prisoner sent to isolation.⁸³

Limits on the length of time a person could be held in isolation further improved prison management. Prisoners were told exactly why they were being confined, and for how long.⁸⁴ People who have spent extensive time in segregation “require intensive work to re-integrate,” because isolation degrades mental health.⁸⁵ Colorado reports limiting solitary confinement to fifteen days, which meets the international standard set by *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*.⁸⁶ Washington “start[s] with the

⁷⁹ Digard, *supra* note 11 at 17.

⁸⁰ *Id.* at 9.

⁸¹ Zachary Heiden, ACLU, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine* 15 (2013).

⁸² Pacholke & Mullins, *supra* note 34, at 6-7.

⁸³ *ASCA-Liman 2018*, *supra* note 18, at 125 fn.171.

⁸⁴ Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado*, 3 (2015) (*Open the Door*).

⁸⁵ Terry Kupers, *Alternatives to Long-Term Solitary Confinement*, 38.3 Correctional L. Rep. 33, 45 (2016)

⁸⁶ *The Nelson Mandela Rules*, *supra* note 16, at Rule 44; *ASCA-Liman 2018*, *supra* note 18, at 67.

assumption that disciplinary segregation should continue for no longer than [thirty] days.”⁸⁷

B. States Created Alternative Housing for Prisoners with Mental Illness and Vulnerable Populations.

Self-reports from jurisdictions throughout the United States established that isolation cells were filled with prisoners who needed mental health treatment or protective custody.⁸⁸ Several states—including Colorado, Massachusetts, Nebraska, and New York—passed legislation preventing the isolation of prisoners with mental illness.⁸⁹ These four states—along with Arizona, Mississippi, North Carolina, North Dakota, Pennsylvania, and Virginia, and Washington—created policies for housing prisoners with mental illness in ways that do not exacerbate their illnesses.⁹⁰ Mississippi both excluded prisoners with mental illness from solitary confinement and designed high security mental health treatment centers.⁹¹ Colorado reports that it now diverts prisoners with severe mental illness to a secure treatment facility where they spend at least twenty hours per week outside their cells for medical treatment, therapy, and recreation.⁹²

⁸⁷ Pacholke & Mullins, *supra* note 34, at 7.

⁸⁸ *ASCA-Liman 2016*, *supra* note 22, at 48-49; *ASCA-Liman 2018*, *supra* note 18, at 47-49.

⁸⁹ Hager & Rich, *supra* note 18.

⁹⁰ *Dangerous Overuse*, *supra* note 39, at 12-13.

⁹¹ *Id.*

⁹² *Open the Door*, *supra* note 84, at 4-5.

Prison officials in reforming states provided people with mental health treatment rather than referring them to solitary confinement if infractions were linked to their illness.⁹³ Prisoners with severe mental illnesses (SMI) who went through such treatment programs and then went back to the general population had a “sharp decrease” in violent incidents, “which strongly supports a conclusion that prisoners with SMI tend to suffer psychiatric deterioration and get into disciplinary trouble in supermax administrative segregation.”⁹⁴ At New York’s Rikers Island, officials established the Clinical Alternatives to Segregation (CAPS) program, which provided prisoners “individual and group psychotherapy, art therapy, medication management, and community meetings.”⁹⁵ The program was successful enough to export to other mental health units.⁹⁶

States also reduced their solitary confinement populations by designating less-restrictive housing for vulnerable populations needing protective custody.⁹⁷ Reforming states report implementing screening policies to ensure vulnerable people are not placed with known aggressive offenders.⁹⁸ “Innovations in an increasing number of jurisdictions now demonstrate that agencies can safely reduce their use

⁹³ *Id.* at 5.

⁹⁴ *Beyond Supermax*, *supra* note 30, at 1047.

⁹⁵ Toch & Kupers, *supra* note 49, at 233.

⁹⁶ *Id.*

⁹⁷ Digard, *supra* note 11, at 34-35.

⁹⁸ Allison Hastings et al., National PREA Resource Center, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails* 8 (2015).

of segregation . . . by removing vulnerable, nonviolent individuals from segregation and considering alternative strategies as an initial response for those screened at risk of sexual victimization or abusiveness.”⁹⁹ Washington created “safe harbors” for specific populations, such as veterans, people with mental illness, and the elderly.¹⁰⁰ New York “remove[d] youth, pregnant women, and the developmentally disabled and intellectually challenged prisoners from extreme isolation.”¹⁰¹ Washington found “at least [twelve] percent of the prison population had significant cognitive impairments,” and instead of placing them in protective isolation, created a “Skill Building Unit” to meet the needs of people with developmental and intellectual disabilities or traumatic brain injuries.¹⁰²

Washington also began screening for gang affiliation, and rival gang members were housed in separate facilities to prevent potentially violent encounters.¹⁰³ “These units/facilities reduced the potential for victimization of inmates while lowering the violence levels within the system.”¹⁰⁴ Wisconsin uses this model for prisoners who have renounced gang affiliations, or who were former police officers—people whose safety could not be guaranteed in the general population.¹⁰⁵ The Texas Department

⁹⁹ *Id.* at 18-19.

¹⁰⁰ Pacholke & Mullins, *supra* note 34, at 6.

¹⁰¹ *Dangerous Overuse*, *supra* note 39, at 13.

¹⁰² Hastings, *supra* note 98, at 12.

¹⁰³ *Place Safety*, *supra* note 61, at 5.

¹⁰⁴ Pacholke & Mullins, *supra* note 34, at 6.

¹⁰⁵ Levin, *supra* note 28, at 6.

of Criminal Justice developed the Gang Renunciation and Disassociation Program in 2007, and in 2014 reported that none of the graduates of the program had returned to solitary confinement.¹⁰⁶

Improvements to prison discipline strategies and development of alternative housing prevented “difficult” prisoners from being sent to solitary confinement, and quickly shrunk the population of prisoners in supermax facilities and isolation units in these states.¹⁰⁷

V. States Provide Programming to Prepare Prisoners in Solitary Confinement to Return to General Population Housing.

Once correctional staff reduced the number of prisoners entering solitary confinement, they prepared prisoners already in isolation to get out and stay out. Research demonstrated even short periods in solitary confinement created negative psychological effects, and states began to question the efficacy of penal isolation.¹⁰⁸ Early attempts at reform moved prisoners through “step-down” programs in which they would be moved from isolation into less-restrictive conditions, only to commit a small infraction and be returned to solitary confinement, making them feel there was no way to end the cycle.¹⁰⁹ “In segregation, [the prisoner is] mad and responds with more vulgarity. He gets another rule violation and we tack on [thirty] days.

¹⁰⁶ *Id.*

¹⁰⁷ *Open the Door*, *supra* note 84, at 3.

¹⁰⁸ Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 *Crime & Just.* 365, 384 (2018).

¹⁰⁹ *Open the Door*, *supra* note 84, at 2.

Soon you have a guy who has never used violence doing three to four years in segregation. He probably needs some anger management.”¹¹⁰ This cycle of isolation leading to further infractions and additional time in segregation prevented prisoners from re-establishing the prosocial behaviors necessary for them to successfully transition out of solitary.¹¹¹ Without an opportunity to regain social skills after isolation, prisoners could not escape solitary confinement for long.¹¹²

Providing rehabilitation and therapy opportunities for prisoners in solitary confinement enabled the swift return of many to general population housing.¹¹³ Mississippi provided segregated prisoners with education, mental health services, and therapy, profoundly reducing the “rates of violence, disciplinary infractions, and use of force.”¹¹⁴ Mississippi’s administrators also allowed formerly isolated prisoners to spend several unrestrained hours out of their cells each day, including eating meals together.¹¹⁵ Colorado instituted “Thinking for a Change,” a “program with a track record of significantly reducing recidivism rates.”¹¹⁶ “Staff began to witness successful, permanent transitions [out of segregation]. Even offenders

¹¹⁰ Emmitt Sparkman, *Mississippi DOC's Emmitt Sparkman on Reducing the Use of Segregation in Prisons*, Think Justice Blog (Oct. 31, 2011), <https://www.vera.org/blog/mississippi-docs-emmitt-sparkman-on-reducing-the-use-of-segregation-in-prisons>.

¹¹¹ Toch & Kupers, *supra* note 49, at 17-18.

¹¹² *Open the Door*, *supra* note 84, at 2.

¹¹³ Haney, *supra* note 108, at 384; Kupers, *Solitary*, *supra* note 34, at 224-33.

¹¹⁴ *Beyond Supermax*, *supra* note 30, at 1039.

¹¹⁵ *Id.*

¹¹⁶ *Open the Door*, *supra* note 84, at 5.

serving death sentences were able to interact with other offenders and land prison jobs.”¹¹⁷ Louisiana also used Thinking for a Change and other therapeutic programs to completely eliminate the use of restrictive housing.¹¹⁸ The 416 restrictive housing beds that this saved the state were, as of early 2018, being re-purposed into space for assisted living and medical housing.¹¹⁹ Washington’s “Ceasefire” program increased staff and prisoner training on violence prevention and prosocial skill-building.¹²⁰ Both Colorado and Washington used desks with built-in restraints so potentially violent prisoners could safely engage in group activities and non-contact social interactions that eventually led to unrestrained group programming.¹²¹

States employed individualized incentives to promote participation and develop prisoners’ agency, leading them to value the training itself.¹²²

You have to give a guy an incentive to do be better—and what works with one person might not work with another. One guy may have been locked up for years and for the first time he’s able to hug his mother. Another gets to play basketball with a group of offenders. Another gets to take his GED.¹²³

¹¹⁷ *Id.* at 7.

¹¹⁸ *ASCA-Liman 2018*, *supra* note 18, at 107 fn.34.

¹¹⁹ *Id.*

¹²⁰ *Place Safety*, *supra* note 61, at 9-11.

¹²¹ *Place Safety*, *supra* note 61, at 5-6; *Open the Door*, *supra* note 84, at 5.

¹²² Toch & Kupers, *supra* note 49, at 171-192.

¹²³ Sparkman, *supra* note 110, at 1.

Colorado also used therapy dogs to encourage prisoners to engage with therapy opportunities.¹²⁴ Prisoners in Mississippi’s supermax were allowed to participate in out-of-cell programming: “[W]e gave them more freedoms, and we saw a huge decrease in violence in that unit.”¹²⁵ Multiple state correctional systems reported that together, the incentives, socialization, and therapy helped prisoners develop prosocial strategies, enabling them to return to general population without threatening prison security.

This socialization and training prepared prisoners who committed even the most serious violent offenses to return to general population housing.¹²⁶ Training that emphasized mutual respect “decrease[s] negative behavior on the unit and reinforce[s] the concept that how inmates are treated has an impact on how they treat staff.”¹²⁷ New prison management strategies created an environment where prisoners knew how to succeed and were more equipped to do so.¹²⁸ Prisoners left solitary confinement to enter units supervised by staff trained in de-escalation strategies and supported by discipline policies that prisoners perceived as fair, enabling formerly violent prisoners to re-integrate into general populations successfully.¹²⁹ Through

¹²⁴ *Open the Door*, *supra* note 84, at 5.

¹²⁵ *Id.*

¹²⁶ Pacholke & Mullins, *supra* note 34, at 7-8.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Toch & Kupers, *supra* note 49, at 212-13, 231-33.

these reforms, corrections officials have found that rehabilitation works far better than solitary confinement ever did at reducing violence.

CONCLUSION

“Clearly, viable alternatives to supermax do exist.”¹³⁰ Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation and former President of ASCA, explained the logic behind North Dakota’s approach to reducing the use of prolonged solitary confinement, pointing out that “[r]estricted housing places substantial stress on both the staff working in those settings as well as the prisoners housed in those units. Our highest priority is to operate institutions that are safe for staff and inmates and to keep communities to which prisoners will return safe.”¹³¹ Reforming states have demonstrated that less harmful and more effective alternatives can prevail over long-term isolation. “Moreover, many of these alternative approaches to social control in prison systems do not have the dubious moral qualities, legal uncertainties, and costs that are associated with supermax prisons.”¹³²

The alternatives to solitary confinement employed by a large and growing number of states have enhanced prison security, prisoner welfare, and societal safety, demonstrating there is no longer a penological interest in maintaining prisoners in

¹³⁰ Briggs, *supra* note 6, at 1371.

¹³¹ ASCA-Liman 2016, *supra* note 22, at 2.

¹³² Briggs, *supra* note 6, at 1371.

prolonged solitary confinement. Minimizing the harm of solitary confinement is not only a moral imperative, but a practical imperative as well.

Respectfully submitted,

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I hereby certify that I am a member of the bar of this Court, in compliance with 3d Cir. L.A.R. 46.1(e). I was admitted on February 11, 2019.

Dated: March 20, 2019

s/ Laura Rovner
Laura Rovner

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on March 20, 2019.

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