

INCREMENTALIST VS. MAXIMALIST REFORM: SOLITARY CONFINEMENT CASE STUDIES

Margo Schlanger

ABSTRACT—Among criminal justice reformers, it has long been hotly contested whether moderate reform helps or harms more efforts to achieve more thoroughgoing change. With respect to solitary confinement, do partial and ameliorative measures undermine the goal of solitary confinement abolition? Or do reformist campaigns advance—albeit incrementally—that ultimate goal? Call this a debate between “incrementalists” and “maximalists.” I offer this Essay as an appeal for empirical rather than aesthetic inquiry into the question. After summarizing nationwide reform litigation efforts that began in the 1970s, I try to shed some factual light by examining solitary reform efforts in two states, Massachusetts and Indiana. In Massachusetts, early incremental reforms may be providing a blueprint for deeper depopulation of solitary confinement—though the matter is still highly contested. In Indiana, incremental reforms seem to be less effective at achieving deeper depopulation. I offer some hypotheses about the sources of the difference.

The evidence suggests that for litigation to trigger broad reform, or significant steps towards solitary abolition, allies are required. In Massachusetts, the political ecosystem has many more reform-minded participants—activists, lawyers, judges, legislators—than does the much redder Indiana. Each such participant can build on the others. In Massachusetts, litigation’s strengths—information generation, thoughtful policy development (codified in settlement documents), publicity, and storytelling—can emerge. Weaknesses—the detachment of litigation from mobilization, hyper-empowerment of lawyers, undue affection for process—are ameliorated by other actors and other actions. The Indiana ecosystem is far less hospitable to solitary confinement change.

There is no sign that the limited reformist measures in Massachusetts and Indiana have been perverse, as maximalists might predict. Neither state has seen an increase in the use of solitary confinement or reported worsening of conditions in solitary. In neither state is there any sign that the litigated amelioration of solitary confinement has entrenched or legitimated solitary confinement more broadly.

AUTHOR—Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan. Thanks to the individuals I interviewed for this Essay: Tom Crishon, Philip Desgranges, Ken Falk, Jamie Fellner, Amy Fettig, Maggie Filler, Robert Fleischner, Dan Kelley, Melissa Keyes, Rachel Meeropol, Karen Murtagh, Jim Pingeon, Alex Reinert, and Kelly Tautges. I also received helpful feedback (via Crimfest) from Jonathan Whitmer-Rich and Renagh O’Leary. And thanks (as always) to Sam Bagenstos. All remaining errors are my own responsibility. I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan. This Essay may be copied and distributed for free or at cost to students or prisoners.

INTRODUCTION	274
I. NATIONWIDE WAVES OF LITIGATED REFORM	280
A. <i>Early Challenges to Solitary Confinement</i>	280
B. <i>Limited Supermax Challenges</i>	283
C. <i>The Return to Wholesale Challenges</i>	287
II. TWO STATE CASE STUDIES	290
A. <i>Massachusetts</i>	290
B. <i>Indiana</i>	298
ANALYSIS AND CONCLUSION	306

INTRODUCTION

Solitary confinement and efforts to reform it are as old as American imprisonment.¹ And when modern long-term solitary confinement emerged in the early 1980s with the rise of the “supermax,”² a reform movement followed essentially immediately. Many or even most of the modern movement’s advocates have made it their goal to abolish solitary, not merely reduce it: the American Friends Service Committee, for example, named its campaign STOPMAX,³ and the ACLU calls its successor campaign Stop Solitary.⁴ But, as described below, much of the advocacy, and particularly

¹ See, e.g., David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 116–24 (Norval Morris & David J. Rothman eds., 1995).

² See CHASE RIVELAND, NAT’L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1, 5 (1999).

³ See *Healing Justice*, AM. FRIENDS SERV. COMMITTEE, <https://www.afsc.org/stopmax> [<https://perma.cc/4KJW-PLK3>].

⁴ See *We Can Stop Solitary*, ACLU, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary> [<https://perma.cc/DZD6-XKKC>].

the litigation, has been more modest—seeking to tighten up the procedure used to assign prisoners to solitary, improve the conditions within solitary, and bar particularly vulnerable populations (prisoners with serious mental illness, pregnant women, and so on) from solitary.

With respect to criminal justice more generally—and, indeed, left-leaning campaigns altogether—it has long been hotly contested whether moderate reform helps or harms more thoroughgoing advocacy efforts (consider the current prison abolition and “defund the police” movements). Do partial and ameliorative measures undermine the goal of solitary confinement abolition? Or do they advance—albeit incrementally—that ultimate goal?⁵

Call adherents to the incrementalism-skeptical position “maximalists.” There are two chief maximalist arguments. First, a normalization argument⁶ suggests that modest reforms tend to normalize the use of solitary confinement—to imply that solitary confinement is acceptable if it is hedged by the right procedures, softened by the right environmental conditions, and imposed on the right populations.⁷ For example, arguing that solitary is particularly inappropriate for certain populations of prisoners can be

⁵ To try to shed light on this question, I lean on the written sources cited throughout and on telephone interviews I conducted with over a dozen experienced prisoners’ rights advocates: Tom Crishon, Managing Att’y, Ind. Disability Rights (Mar. 11, 2020); Philip Desgranges, Senior Staff Att’y, NYCLU, & Alex Reinert, Max Freund Professor of Litig. & Advocacy & Dir., Ctr. for Rights & Justice, Cardozo Law Sch. (Oct. 15, 2019); Kenneth Falk, Legal Dir. ACLU of Ind. (Feb. 6 & 11, 2020); Jamie Fellner, former Senior Counsel for the U.S. Program of Human Rights Watch (Feb. 13, 2020); Amy Fettig, then-Deputy Dir., ACLU Nat’l Prison Project & Dir., ACLU Stop Solitary Campaign (Oct. 23, 2019); Maggie Filler, Att’y, MacArthur Justice Ctr. (Feb. 13, 2020); Robert Fleischner, former Att’y, Ctr. for Pub. Representation & member, Mass. Restrictive Hous. Oversight Comm. (Oct. 15, 2019); Melissa Keyes, Exec. Dir., Ind. Disability Rights (Feb. 13, 2020); Rachel Meeropol, Senior Staff Att’y, Ctr. for Constitutional Rights (Oct. 16, 2019); Karen Murtagh, Exec. Dir., Prisoners’ Legal Servs. of N.Y. (Nov. 15, 2019); James Pingeon, Litig. Dir., Prisoners’ Legal Servs. of Mass. (Oct. 21, 2019); Kelly Tautges, Pro Bono Counsel & Dir., Faegre Drinker Biddle & Reath LLP & Dan Kelley, Assoc., Faegre Drinker Biddle & Reath LLP (Mar. 12, 2020). I also come to the topic with substantial advocacy experience of my own, which obviously influences my analysis.

⁶ For an analysis in the context of death penalty abolitionist work that separates normalization into “entrenchment” and “legitimation,” see Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 748–54 (2014) [hereinafter Steiker & Steiker, *Lessons for Law Reform*]; Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421–24 (2002) [hereinafter Steiker & Steiker, *Legislative “Reform”*]. On these accounts, entrenchment “occurs when incremental reform unequivocally offers improvements along some key dimension or dimensions of the problem and thus makes the case for larger-scale change less urgent,” and legitimation “occurs when incremental reforms promote an exaggerated or false confidence (in the reliability, fairness, wisdom, etc.) of the system or practice subject to reform.” Steiker & Steiker, *Lessons for Law Reform*, *supra*, at 749. When I refer to “normalization,” I intend to encompass both.

⁷ See Keramet Reiter, *The International Persistence and Resilience of Solitary Confinement*, 8 OÑATI SOCIO-LEGAL SERIES 247, 255 (2018).

understood to accede to its appropriateness for others. Thus, maximalists argue, vulnerable-populations reforms may entrench the practice of solitary confinement for some prisoners, even as those reforms rule out solitary for others. Professor Keramet Reiter writes, along these lines:

[R]eform efforts targeting protected categories like the young, or the mentally ill, or more recently, pregnant women, leave behind a core of people who are not young, not (yet) mentally ill, not pregnant, and therefore not deserving of protection. This durable core of punishable subjects becomes an ongoing justification for the need for solitary confinement In sum, many attempts to improve conditions of confinement in solitary, or to limit its imposition on some vulnerable groups, have been positive, reformist efforts, ultimately bolstering the legitimacy of the existing system, rather than negative, non-reformist or abolitionist, efforts, with the potential to challenge the legitimacy of systems of solitary confinement.⁸

The second chief maximalist argument is about bandwidth and is conceptually distinct. It points to the hard-to-escape reality that reform attention is scarce.⁹ If that limited resource is used up on, for example, barring pregnant women from solitary, that leaves the vast majority of prisoners with less advocacy energy devoted to their situations.

In contrast to maximalists, “incrementalists” believe that a modest approach is often best suited to bring about the shared abolitionist (or close-to-abolitionist) goal. Incrementalists argue that shrinking the number of prisoners in solitary will help not just those who are rehoused in less brutal conditions, but also those who remain in solitary. The normalization problem can be avoided, they say, by careful framing and empathetic language. This is how prisoners’ rights lawyer Jim Pingeon describes his anti-solitary litigation efforts, which have been decidedly incremental:

The whole debate . . . was framed It wasn’t just, “Solitary is a terrible place, but some people can tolerate it,” it [was,] “Solitary is terrible and it’s really, really terrible for some people and we should absolutely make sure that they don’t go there, but we should also start making it harder for anybody to go there. And I think that that message was a fairly effective one and certainly more effective than if you just said, “Well, [solitary is] bad for everyone.”¹⁰

And Amy Fettig, then-head of the ACLU’s Stop Solitary campaign, puts it this way:

⁸ *Id.* (citation omitted).

⁹ See *Proceedings of a Colloquium to Further a National Consensus on Ending the Over-Use of Extreme Isolation in Prisons*, JOHN JAY C. OF JUST. (2015).

¹⁰ Telephone Interview with James Pingeon, *supra* note 5.

[I]f you raise up the worst case first, [the cases] that people can identify with—kids, folks with mental illness, pregnant women—you actually normalize change within corrections so that they are examples of other things that work [E]specially when we’re dealing with these closed institutions, we can’t actually create change on the ground unless there is some willingness on the part of those institutions to change. And so [incremental reform is] actually softening up the ground. It’s building the skill base and, frankly, the moral framework, for change to happen. Then social forces on the outside actually effectuate real change on the inside.¹¹

As Fetting makes clear, incrementalists offer arguments about increasing technocratic capacity, suggesting that in moving a particular group of prisoners out of solitary, prison and jail officials develop alternative housing and custody strategies and facilities, which can then be extended. Solving a slice of a problem may enable officials to see how they can address the remainder—as long as the remainder continues to be perceived as a problem. It is the role of advocates to ensure that solitary confinement continues to be seen as a problem. Incrementalists often argue, too, that bandwidth limitations actually cut in favor of incrementalism because once the most egregious suffering from solitary is solved—the most vulnerable prisoners taken out of solitary confinement, for example—reform can move on to focus on slightly less urgent but more widespread issues. In addition, economies of scale may mean that when supermax solitary units are sufficiently depopulated, their elevated per-prisoner cost may become unsustainable politically.

The incrementalist versus maximalist debate is a cousin of the standard liberal versus left debate opposing ameliorationist reform to deeper, more structural, more radical action. In the particular setting of solitary confinement, where maximalists and incrementalists largely share a maximalist goal and disagree only about strategy, the anti-incrementalist argument sounds in perversity—it claims that reformers’ attempts to improve or minimize solitary confinement will not only fail, but are counterproductive, entrenching and worsening the existing cruel system.¹²

Professor Albert Hirschman, in *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, analyzes the appeal of the perversity argument as a *reactionary* trope: “What better way to show [a reformer] up as half foolish

¹¹ Telephone Interview with Amy Fetting, *supra* note 5.

¹² The three paragraphs that follow are adapted from my own prior work. See Margo Schlanger, *No Reason to Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)*, NEW RAMBLER (June 15, 2015) (reviewing NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014)), <https://newramblerreview.com/book-reviews/law/no-reason-to-blame-liberals-or-the-unbearable-lightness-of-perversity-arguments> [<https://perma.cc/QD7Q-PT5W>].

and half criminal than to prove that he is achieving the exact opposite of what he is proclaiming as his objective?”¹³ Professor Hirschman argues that conservatives are particularly drawn to perversity arguments because they are a way to deride purportedly public-spirited reform.¹⁴ This nicely supplements the conservative commitment to self-interest that (via the invisible hand doctrine of Adam Smith¹⁵) serves the public good. But as Professor Hirschman says, perversity arguments are not “the exclusive property of ‘reactionaries.’”¹⁶ And actually, perversity arguments are just as much a hallmark of left/radical attacks on liberalism/reformism. A classic radical argument, founded in Marxist dialectical thought, is to promote drastic but salutary change (that is, revolution) by making the current state of affairs more intolerable. The idea, often tagged with the imperative “heighten the contradictions,” is that if things get worse for the oppressed, that will spur much needed radical solutions. The concomitant claim is that moderate reform, by dulling “contradictions,” perversely makes things worse for its purported beneficiaries.¹⁷

Indeed, perversity arguments are appealing not only to reactionaries and the left-of-liberal left but to academics, regardless of ideology. As Professor Hirschman said, a perversity argument “is, at first blush, a daring intellectual maneuver. The structure of the argument is admirably simple, whereas the claim being made is rather extreme.”¹⁸ Perversity arguments are counterintuitive, attention-grabbing. These are attractive characteristics if the goal is to stand out in a crowd of monographs. And sure enough, the attack on liberalism as perversely harming the disempowered has become quite fashionable in criminal justice scholarship in particular. Professor Bill Stuntz was its most well-known (and perhaps least radical) author, but structurally similar claims have sprouted up all over, usually from the left. These are arguments that prison-conditions litigation causes an increase in

¹³ ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 19 (1991).

¹⁴ *See id.* at 12.

¹⁵ *See* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 456 (R. H. Campbell, A. S. Skinner & W. B. Todd eds., Liberty Classics 1976) (1776).

¹⁶ HIRSCHMAN, *supra* note 13, at 7.

¹⁷ *See, e.g.,* VLADIMIR ILYICH LENIN, *The Heritage We Renounce, reprinted in 2 LENIN'S COLLECTED WORKS* (George Hanna ed., Yuri Sdobnikov & George Hanna trans., Progress Publishers 1972) (1898), <https://www.marxists.org/archive/lenin/works/1897/dec/31c.htm> [<https://perma.cc/WD9E-9RKR>]; ROSA LUXEMBURG, *REFORM OR REVOLUTION* (1900), <https://www.marxists.org/archive/luxemburg/1900/reform-revolution/> [<https://perma.cc/7VDN-AZ8Q>].

¹⁸ HIRSCHMAN, *supra* note 13, at 11.

incarceration,¹⁹ *Miranda* rights cause increased arrests,²⁰ and so on. The claims are empirical—A caused B—but the arguments are usually a combination of ideological and hypothetical.

Professor Hirschman warned us, however, that notwithstanding the aesthetic appeal of perversity arguments, we should be on our guard against them: “[T]he perverse effect is widely appealed to . . . [but] unlikely to exist ‘out there’ to anything like the extent that is claimed.”²¹ So, with respect to solitary confinement, I offer this Essay as an appeal for empirical rather than aesthetic inquiry. Empirically, who has the better of the argument—the maximalists or the incrementalists? To try to shed some light on how these issues play out in fact rather than in theory, I examine solitary reform efforts in two states, Massachusetts and Indiana. In Massachusetts, early incremental reforms may be providing a blueprint for deeper depopulation of solitary confinement—though the matter is still highly contested. In Indiana, incremental reforms seem to be less effective at achieving deeper depopulation. I explain and offer some hypotheses about the sources of the difference. In neither state, however, is there any sign of a perverse effect, where reform actually increases the problem it purports to oppose.

For contextualization of the state-by-state stories, in Part I, I summarize the nationwide reform litigation efforts in which they have been situated. In Part II, I provide the case studies of Massachusetts and Indiana. In Part III, I offer analysis of those case studies.

¹⁹ Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 *LAW & SOC’Y REV.* 731, 733 (2010).

²⁰ William J. Stuntz, *Miranda’s Mistake*, 99 *MICH. L. REV.* 975, 976 (2001) (“*Miranda* imposes only the slightest of costs on the police, and its existence may well forestall more serious, and more successful, regulation of police questioning. . . . Its effects are probably small, perhaps vanishingly so. But what effects it has are probably perverse—a conclusion that holds, oddly enough, no matter which side of the left-right divide one is on.”).

²¹ HIRSCHMAN, *supra* note 13, at 35.

I. NATIONWIDE WAVES OF LITIGATED REFORM

A. *Early Challenges to Solitary Confinement*

Prisoners' federal civil rights lawsuits began in earnest²² in the mid-1960s,²³ and grew quickly in both volume and scope in the 1970s. Federal judges began by ratifying complaints about in-prison violations of generally applicable constitutional guarantees (such as the Equal Protection Clause or the First Amendment)²⁴ but soon started to entertain seriously claims that the Eighth Amendment's prescription against "cruel and unusual punishments" provided a judicially enforceable right to at least minimally adequate prison conditions. The first such cases involved prison discipline—corporal punishment and conditions in disciplinary isolation—presumably because these were easiest to conceptualize as "punishment" separable from the sentence of incarceration.²⁵

In 1966, for example, after what may have been the first civil rights prison conditions trial, the U.S. District Court for the Northern District of

²² There were cases prior to the 1960s, but rarely. And among the earliest U.S. prisoners' rights litigation were cases attacking torturous solitary conditions—for example, stress-position restraints. See *In re Birdsong*, in which Federal District Judge Emory Speer held that a federal prisoner's Eighth Amendment rights had been violated by a county jailer who fed him just bread and water for a maximum period of three days and chained him "in solitude" by the neck to a grate in his cell at night "so that he could not put his heels to the ground." 39 F. 599, 601–03 (S.D. Ga. 1889).

²³ I have previously described the erosion of barriers to such litigation from the 1940s through the 1960s. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 368 (2018); see also *Ex parte Hull*, 312 U.S. 546, 548–49 (1941) (barring official censorship practices that prevented prisoners' petitions from even arriving at federal courthouses); *Monroe v. Pape*, 365 U.S. 167, 171–87 (1961) (reviving 42 U.S.C. § 1983, providing prisoner plaintiffs a jurisdictional path into federal court); *Robinson v. California*, 370 U.S. 660, 667–68 (1962) (holding the Eighth Amendment's prohibition on "cruel and unusual punishments" applicable to states and local governments); *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (reversing categorical exclusion of prisoners from enforcement of Bill of Rights protection).

²⁴ See, e.g., *Pierce v. La Vallee*, 293 F.2d 233, 235 (2d Cir. 1961) ("[W]e feel constrained to hold . . . that the present complaints, with their charges of religious persecution, state a claim under the Civil Rights Act which the district court should entertain."); *Cooper*, 378 U.S. at 546; *Sostre v. McGinnis*, 334 F.2d 906, 908 (2d Cir. 1964) ("To the extent that it is a religion those who profess to follow its teaching have some measure of constitutional protection, even though they are confined to prison and are subject to prison discipline."), *cert. denied*, 379 U.S. 892 (1964).

²⁵ See, e.g., *Jordan v. Fitzharris*, 257 F. Supp. 674, 684 (N.D. Cal. 1966) (finding that conditions in isolation constituted cruel and unusual punishment); *Wright v. McMann*, 387 F.2d 519, 521–26 (2d Cir. 1967) (finding the harsh conditions to which the prisoner was subjected constituted cruel and unusual punishment); *Jackson v. Bishop*, 404 F.2d 571, 579–81 (8th Cir. 1968) (holding whipping of prisoners unconstitutional); see also *Fulwood v. Clemmer*, 206 F. Supp. 370, 378–79 (D.D.C. 1962) (holding confinement in "control cell" for prison rule violations unconstitutional because disproportionate to offense); cf. *Johnson v. Glick*, 481 F.2d 1028, 1031–34 (2d Cir. 1973) (Friendly, J.) (discussing scope of the application of the Eighth Amendment's prohibition on cruel and unusual punishments to prison conditions).

California issued an order regulating solitary confinement cells—an important instrument of control in that state’s prison system. The court enjoined the State to provide “the basic requirements which are essential to life, and . . . such essential requirements as may be necessary to maintain a degree of cleanliness compatible with elemental decency in accord with the standards of a civilized community.”²⁶ In a suit about the isolation unit of New York’s Clinton State Prison at Dannemora, the Second Circuit quoted the plaintiff’s description of the strip-cell in which he had been placed:

[T]he said solitary confinement cell wherein plaintiff was placed was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days [elsewhere said to be 11 days] until he was given a thin pair of underwear to put on; plaintiff was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils therefore; plaintiff was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore; the windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself or to escape the detrimental effects thereof; and the said solitary confinement cell was used as a means of subjecting plaintiff to oppression, excessively harsh, cruel and inhuman treatment specifically forbidden by the Eighth Amendment to the United States Constitution.²⁷

The court held that such conditions would violate the Eighth Amendment.²⁸

While many other contemporaneous court decisions rejected similar lawsuits,²⁹ among the most influential of the early cases was *Gates v.*

²⁶ *Jordan*, 257 F. Supp. at 683; Petition for Writ of Habeas Corpus, *Jordan v. Fitzharris*, No. 44786 (N.D. Cal. Oct. 14, 1965), available at <https://www.clearinghouse.net/chDocs/public/PC-CA-0008-0005.pdf> [<https://perma.cc/6Y6D-ZARE>]; Resubmission for Petition for a Writ of Habeas Corpus, *Jordan v. Fitzharris*, No. 43983 (N.D. Cal. Sept. 30, 1965), available at <https://www.clearinghouse.net/chDocs/public/PC-CA-0008-0004.pdf> [<https://perma.cc/RX3Z-9MLZ>]. Plaintiff’s counsel, Charles Cohler, had been appointed by the court and pursued a legal theory that had been pleaded by his client, Robert Charles Jordan, Jr., a prolific and accomplished writ-writer. Telephone Interview with Charles B. Cohler (Mar. 16, 1999).

²⁷ *Wright*, 387 F.2d at 521 (alterations in original).

²⁸ *Id.* at 525.

²⁹ See, for example, *Sostre*, 442 F.2d at 191–94, and cases cited therein.

Collier,³⁰ a broad-gauge reform litigation that successfully challenged race segregation and conditions at the Mississippi State Penitentiary, known as Parchman Farm.³¹ In *Gates*, the district court enjoined all forms of corporal punishment, including “[b]eating,” “[s]hooting,” “[a]dministering milk of magnesia” (a laxative), “[t]urning fans on inmates while they are naked and wet,” and “[u]sing a cattle prod.”³² The court also regulated solitary confinement:

Defendants, and persons in privity with them, are further enjoined from confining any inmate in disciplinary segregation or isolation at MSU or elsewhere, including “dark hole” cells, except under the following conditions:

- (a) The inmates so confined shall receive the same daily ration of food which is provided to the general prison population, and in no event shall such inmates receive less than 2000 calories per day;
- (b) The inmates shall be permitted to wear normal institutional clothing unless the prison physician orders otherwise for a particular inmate;
- (c) The inmates so confined shall be supplied with soap, towels, toothbrush and shaving utensils;
- (d) All disciplinary cells shall be equipped with adequate bedding, including mattresses, clean sheets and blankets. Adequate bedding may be withheld only if an inmate misuses or destroys such supplies;
- (e) All disciplinary cells shall be adequately heated, ventilated and maintained in a sanitary condition at all times;
- (f) No inmate shall be confined in any isolation cell referred to as a dark hole for a period in excess of 24 hours.³³

As prison conditions cases multiplied, this type of order became fairly typical. Professor Keramet Reiter summarizes the case law as of the 1980s:

[I]mprovements to isolation conditions . . . were ordered again and again by courts across the country . . . [and included]: (1) requirements that prisoners have access to some basic routines of daily life, like showers and regular outdoor exercise; (2) requirements that prisoners have minimum physical comforts, largely geared toward avoiding health problems, such as provisions for adequate lighting as well as adequate hygiene, and limitations on noise; (3) requirements that prisoners be physically safe from attacks by other prisoners,

³⁰ 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d. 1291 (5th Cir. 1974).

³¹ *Id.* at 885, 895; *see also* DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 241–48 (1996).

³² 349 F. Supp. at 900.

³³ *Id.*

and relatedly, not be isolated in overcrowded cells; (4) requirements that prisoners have some minimal due process protections.³⁴

B. Limited Supermax Challenges

The current U.S. solitary confinement regime was inaugurated in the early 1980s by the Marion lockdown, a response by the Federal Bureau of Prisons to the murder of two correctional officers on the same day in 1983 at the U.S. Penitentiary in Marion, Illinois.³⁵ Modern solitary confinement converted the example set by the lockdown into long-term, high-security “supermaxes,”³⁶ which became very fashionable, proliferating rapidly. Litigation followed almost immediately. It necessarily looked somewhat different than prior litigation had. As Professor Reiter generalizes (perhaps a bit overgeneralizes):

In a sense, supermax prisons represent the opposite of the many abuses courts documented in the 1970s and 1980s prison reform cases. The supermax prison keeps people in absolute isolation; no overcrowding. The supermax prison is brand new—made of clean steel and smooth concrete, with technologically advanced central control rooms, from which officers can open and close cell doors at the push of a button without even the necessity of human sound, let alone contact; no dilapidation, no filth. Heavy doors with perfect seals muffle the sounds; no intolerable din. Supermax prisons keep individual prisoners contained, each in his own concrete box, for 23–24 h[ours] every day; no violence.³⁷

That is, the supermax prisons built in the 1980s often complied with the case law of the 1970s and were thus somewhat litigation resistant. And the lower federal courts—pushed to the right by President Reagan’s, and eventually President George H. W. Bush’s, nominees³⁸ and by the new Rehnquist Court—were growing more reluctant to recognize new rights, even in response to new institutional practices.

³⁴ Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 *STUD. L. POL. & SOC’Y* 71, 103 (2012) [hereinafter Reiter, *The Most Restrictive Alternative*].

³⁵ See AM. FRIENDS SERV. COMM., *THE LESSONS OF MARION: THE FAILURE OF A MAXIMUM SECURITY PRISON: A HISTORY AND ANALYSIS, WITH VOICES OF PRISONERS* 1 (1985), <https://www.afsc.org/document/lessons-marion> [<https://perma.cc/ZPV5-3P38>].

³⁶ RIVELAND, *supra* note 2, at 1, 5–6.

³⁷ Reiter, *The Most Restrictive Alternative*, *supra* note 34, at 106.

³⁸ For a discussion of the existence and magnitude of the rightward shift, and supporting sources, see Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 *N.Y.U. L. REV.* 550, 595–96 (2006) [hereinafter Schlanger, *Injunctions over Time*].

Less than a year after the Marion lockdown, a class action challenged Marion's resultant harsh conditions of confinement under the Eighth Amendment. In 1988, the Seventh Circuit rejected that challenge. The opinion in *Bruscino v. Carlson*, by Judge Richard Posner, described conditions as "sordid and horrible," but found them necessitated by security.³⁹ The court noted, "If order could be maintained in Marion without resort to the harsh methods attacked in this lawsuit, the plaintiffs would have a stronger argument that the methods were indeed cruel and unusual punishments. But the plaintiffs' able counsel have no suggestions as to how this might be done."⁴⁰

The most significant attack on supermax-type confinement that followed was *Madrid v. Gomez*, a class action challenging conditions of confinement at Pelican Bay, a supermax in the far northwest corner of California, in rural Del Norte County.⁴¹ Filed in 1990 and litigated in front of one of the most progressive members of the federal bench, Judge Thelton Henderson,⁴² the eventual ruling in *Madrid* rejected the plaintiffs' attempt at wholesale reform. In a tremendously detailed and influential 139-page opinion issued in 1995, Judge Henderson found that prison staff habitually used excessive force against inmates in a variety of situations; that the medical and mental health care at Pelican Bay were constitutionally inadequate; and that conditions in the Secure Housing Unit (SHU) constituted cruel and unusual punishment for prisoners with mental illness, brain damage, intellectual disabilities, or borderline personality disorders.⁴³ But for prisoners not in those "specific population subgroups," he ruled, "[c]onditions in the SHU may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time. They do not, however, violate exacting Eighth Amendment standards."⁴⁴

³⁹ 854 F.2d 162, 164–165 (7th Cir. 1988).

⁴⁰ *Id.* at 165–66; *see also* *Adams v. Carlson*, 488 F.2d 619, 621–22 (7th Cir. 1973) (describing the origin of the Marion control unit as a response to prison work stoppages); Jules Lobel, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America's Prisons*, 115 NW. U. L. REV. 159 (2020).

⁴¹ 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

⁴² SOUL OF JUSTICE: THELTON HENDERSON'S AMERICAN JOURNEY (California Newsreel 2005), <http://newsreel.org/video/SOUL-OF-JUSTICE-THELTON-HENDERSON> [<https://perma.cc/6KK8-QSSK>].

⁴³ *Madrid*, 889 F. Supp at 1236, 1251, 1258, 1280.

⁴⁴ *Id.* at 1280.

Madrid set the terms of the next two decades of litigated solitary confinement advocacy.⁴⁵ It had well-resourced and expert plaintiffs' counsel in front of the most favorable judge they could hope for. Their target, Pelican Bay, had the starkest conditions of any supermax prison in the country.⁴⁶ If they could not win a ruling that such conditions were categorically unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause, it seemed implausible that anyone else could win a similar ruling. And so the prisoners' rights bar moved on, falling back to two more limited types of challenges. First, in cases brought under the Due Process Clause, plaintiffs argued that more procedure was required to consign a prisoner to solitary confinement. And second, Eighth Amendment cases followed the path Judge Henderson had laid out, focusing on special populations—groups of prisoners particularly prone to grievous suffering in solitary.

Supreme Court case law closely constrained the first strategy. In 1995, *Sandin v. Conner* held that the Due Process Clause did not even apply to most assignments of prisoners to solitary confinement because “segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.”⁴⁷ Solitary confinement challenges under the Due Process Clause thus had to demonstrate first that the regime they challenged was materially different from the conditions presented in *Sandin* based on the term or the conditions of confinement. A number of cases pursued this approach.

The doctrinal results were not, however, terribly impressive. In 2005, in *Wilkinson v. Austin*, the Supreme Court agreed with the prisoner-plaintiffs that prisoners did indeed have a constitutionally protected liberty interest in avoiding long-term supermax.⁴⁸ That said, *Austin* shrank the litigation benefit of such a finding, ratifying bare-bones notice and meager hearing rights. In an opinion by Justice Anthony Kennedy, the Court unanimously rejected the lower court's insistence that: a prisoner under consideration for supermax classification be provided with “an exhaustive list of grounds believed to justify [the] placement” and a summary of the evidence against him; prisoners be allowed to present documentary evidence and call witnesses to challenge the placement; the state's classification authority summarize the

⁴⁵ For analysis of *Madrid*'s impact on prison litigation norms more generally, see Schlanger, *Injunctions over Time*, *supra* note 38, at 618–21.

⁴⁶ See KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 19–29 (2016).

⁴⁷ 515 U.S. 472, 486 (1995).

⁴⁸ 545 U.S. 209, 224 (2005).

evidence supporting its recommendation; and the state “advise the inmate what specific conduct is necessary for that prisoner to be reduced from Level 5 and the amount of time it will take before [Ohio] reduce[s] the inmate’s security level classification.”⁴⁹ *Austin*’s holding meant that procedural obstacles would pose little challenge to any state committed to solitary confinement for even a large fraction of its prisoners. This low impact was not inherent in the procedural strategy: prior to the Supreme Court’s intervention, the *Austin* litigation itself led to the release of over 80% of the prisoners in Ohio supermax confinement.⁵⁰ But the Court’s weak version of procedural due process would not have compelled this result.

The second post-*Madrid* strategy, the special-populations approach, made more difference than the first. Some prisoners, Judge Henderson had written, are especially vulnerable to severe damage from solitary confinement. For them,

the record demonstrates . . . a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief.⁵¹

And so, cases were filed on behalf of—especially—prisoners with mental illness. In several states, the result was a settlement barring at least prisoners with serious mental illness, especially psychosis, from solitary confinement.⁵² Such settlements could reach a significant portion of solitary prisoners. (As with all settlements, the details and monitoring mattered. Without close implementation oversight, these kinds of settlements

⁴⁹ *Id.* at 219–20 (alterations in original) (quoting *Wilkinson v. Austin*, 204 F. Supp. 2d 1024, 1028 (N.D. Ohio 2012)).

⁵⁰ E-mail from Jules Lobel, Supreme Court counsel of record, *Wilkinson v. Austin*, to author (Feb. 16, 2020, 22:49 EST) (on file with journal).

⁵¹ *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995).

⁵² *See, e.g.*, Private Settlement Agreement at 2–3, *Disability Advocates Inc. v. N.Y. State Office of Mental Health*, No. 02-cv-4002 (S.D.N.Y. Apr. 25, 2007), available at <https://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf> [<https://perma.cc/5NX5-S5NQ>]; Settlement Agreement at 6, *Disability Law Ctr. v. Mass. Dep’t of Corr.*, No. 07-10463 (D. Mass. Dec. 12, 2011), available at <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf> [<https://perma.cc/8DFE-99GT>].

promoted miraculous cures of long-diagnosed psychosis; with the diagnosis withdrawn, the prisoner remained eligible for solitary confinement.) And as scientific evidence of other particular vulnerabilities mounted—for pregnant women, youthful prisoners, and individuals with particular physical disabilities, among others—new litigation began to expand exclusions to these populations as well.⁵³

In the sustained attack on solitary confinement that followed *Madrid*, prisoners and prisoners' rights advocates partnered with sympathetic corrections administrators and state legislators, who undertook reviews and reforms that could later be assessed. Their efforts included development of the scientific record on the harms of solitary and of penological alternatives. This followed up on Judge Posner's point in *Bruscino* that the Eighth Amendment challenge lost plausibility in the absence of some alternative to solitary confinement that could solve the grave security threats cited by correctional authorities.⁵⁴

C. The Return to Wholesale Challenges

It was more than twenty years after *Madrid* that prisoner self-advocacy finally jolted litigation back to a more general set of challenges in two high-profile cases: *Ashker v. Brown* and *Peoples v. Fischer*. In *Ashker*, two prisoners in California who had been confined in Pelican Bay's SHU for decades, Todd Ashker and Danny Troxel, filed several pro se lawsuits complaining that solitary confinement conditions constituted cruel and unusual punishment.⁵⁵ In 2011, they began what became a widespread hunger strike, attracting thousands of California prisoner participants.⁵⁶ This drew the Center for Constitutional Rights (CCR), a radical advocacy organization, to join and litigate their case. After *Ashker* survived a motion

⁵³ See, e.g., Settlement Agreement at 30, *Peoples v. Fischer*, No. 11-cv-2964 (S.D.N.Y. Apr. 1, 2016), available at <https://www.clearinghouse.net/chDocs/public/PC-NY-0062-0015.pdf> [<https://perma.cc/ZA2D-8GFW>] (presumption against placing pregnant prisoners in solitary, absent exceptional circumstances); Settlement Agreement at 5–9, *H.C. v. Bradshaw*, No. 9:18-cv-80810 (S.D. Fla. Nov. 15, 2018), available at <https://clearinghouse.net/chDocs/public/JC-FL-0023-0005.pdf> [<https://perma.cc/JE62-JQZP>] (limiting the time and use of segregated housing for prisoners under age eighteen); *Harvard v. Inch*, 411 F. Supp. 3d 1220, 1231 (N.D. Fla. 2019) (denying defendant's motion to dismiss plaintiff's claim that the prison's use of isolation units against people with physical disabilities was in violation of the Eighth Amendment).

⁵⁴ See *Bruscino v. Carlson*, 854 F.2d 162, 165–66 (7th Cir. 1988). For a collection of amicus briefs summarizing the results, see Margo Schlanger, Sheila Bedi, David Shapiro & Lynn Branham, *Featured, Cited, and Supplemental Litigation Documents*, INCARCERATION & L., <http://incarcerationlaw.com/resources/case-documents/> [<https://perma.cc/RH3W-JATD>].

⁵⁵ *Ashker v. Brown*, No. 09-cv-5796, 2013 WL 1435148, at *1–2 (N.D. Cal. Apr. 9, 2013).

⁵⁶ For Ashker's account of the events, see *Summary: Todd's Short Bio*, TODD ASHKER, <https://toddashker.org/tag/2016/> [<https://perma.cc/RL7N-SHAD>].

to dismiss,⁵⁷ CCR was able to bring the now-developed expert views against solitary confinement into the record—reports similar to those in *Madrid* but now informed by two decades of factual development.⁵⁸ In addition, the plaintiffs presented new evidence supporting the claim that social isolation and deprivation of touch inflict significant harm.⁵⁹ In 2015, the case settled, with terms requiring hundreds of prisoners who had been housed in solitary to be moved to general population—though still high-security—housing.⁶⁰ And in New York, after several incrementalist lawsuits, a handful of pro se prisoner complaints were consolidated to become *Peoples v. Fischer*, a class action that began what became a path to general reform.⁶¹ State-specific nonlitigation reform efforts have also moved from the incremental to more general, achieving something close to solitary confinement abolition in several states.⁶²

Table 1 presents some relevant data on the number of prisoners in solitary confinement for the full United States, and for Massachusetts and Indiana, since those are the states discussed in detail below.⁶³

⁵⁷ *Ashker*, 2013 WL 1435148, at *1.

⁵⁸ For many of the documents filed in *Ashker*, see *Ashker v. Governor of California*, CTR. FOR CONST. RTS. (May 4, 2020), <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown> [<https://perma.cc/UUD2-VBNH>]. For a summary of the litigation, see *Ashker v. Brown*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=12103> [<https://perma.cc/DWS2-Z528>].

⁵⁹ See Expert Report of Dr. Dacher Keltner, Ph.D. at 3, *Ashker v. Brown*, No. 09-cv-5796 (N.D. Cal. Mar. 11, 2015), available at <https://ccrjustice.org/sites/default/files/attach/2015/07/Keltner%20Expert%20Report.pdf> [<https://perma.cc/YW7B-QCEG>] (“Human relations, health, and well-being depend critically upon the quality of touch an individual experiences in everyday social interactions.”); Expert Report of Matthew D. Lieberman at 4, *Ashker v. Brown*, No. 09-cv-5796 (N.D. Cal. Mar. 11, 2015), available at <https://ccrjustice.org/sites/default/files/attach/2015/07/Lieberman%20Expert%20Report.pdf> [<https://perma.cc/24E5-SY7B>] (“[A] lack of social connection and social support have been examined as risk factors for morbidity (i.e. death) . . . [and] has also been repeatedly associated with various deleterious mental and physical health consequences” (citation omitted)).

⁶⁰ Settlement Agreement, *Ashker v. Brown*, No. 09-cv-5796 (N.D. Cal. Sept. 1, 2015), available at <https://www.clearinghouse.net/chDocs/public/PC-CA-0054-0024.pdf> [<https://perma.cc/6P2F-HFYV>].

⁶¹ See *Peoples v. Fischer*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=12210> [<https://perma.cc/G3LY-VNCB>]; Interview with Phillip Desgranges & Alex Reiter, *supra* note 5.

⁶² For essays by heads of corrections about their reform efforts in Colorado, Idaho, North Dakota, and Ohio, see THE ASS’N OF STATE CORR. ADM’RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_efforts_in_four_jurisdictions_to_make_changes.pdf [<https://perma.cc/6AGR-ZWDD>].

⁶³ For a full panel of state-by-state data, see this Essay’s online appendix, available at <http://www.law.umich.edu/facultyhome/margoschlanger/Pages/Publications.aspx> [<https://perma.cc/FN3J-UNEP>].

TABLE 1: PRISON SOLITARY CONFINEMENT BY STATE⁶⁴

Source	Year	Total Prison Population	Solitary Confinement	
			Prisoners	% Population
Indiana				
Bureau of Justice Statistics	1990	12,338	602	4.9%
	1995	14,044	697	5.0%
	2000	18,195	1,348	7.4%
	2005	23,205	1,014	4.4%
ASCA–Liman Report	2014	28,318	1,789	6.3%
	2015	27,508	1,621	5.9%
	2017	26,317	1,741	6.6%
Massachusetts				
Bureau of Justice Statistics	1990	7,870	417	5.3%
	1995	10,579	515	4.9%
	2000	10,500	542	5.2%
	2005	10,262	313	3.1%
ASCA–Liman Report	2014	10,475	518	5.5%
	2015	10,004	235	2.3%
	2017	9,047	443	4.9%
MDOC	2020	7,941	299	3.8%
United States				
Bureau of Justice Statistics	1990	690,771	36,254	5.2%
	1995	990,617	47,945	4.8%
	2000	1,305,253	70,085	5.4%
	2005	1,427,316	63,885	4.5%
ASCA–Liman Report	2014*	1,049,984	66,495	6.3%
	2015*	1,124,695	56,337	5.0%
	2017*	1,055,196	46,893	4.4%
	2017 (est.)	1,490,000	61,000	4.1%

*Survey responders only.⁶⁵

⁶⁴ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ICPSR 24642, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2005 (2017) <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/24642> [<https://perma.cc/V6ZH-AGMQ>]; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ICPSR 4021, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000 (2004), <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4021> [<https://perma.cc/G837-JYEA>]; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ICPSR 6953, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995 (1998), <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6953> [<https://perma.cc/J4TS-87DX>]; THE ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 12–13 (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_released_oct_2018.pdf [<https://perma.cc/2U7L-HTWN>] [hereinafter ASCA & LIMAN, 2018]; ASS'N OF STATE CORR. ADM'RS & THE LIMAN PROGRAM, YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 15 (2015), https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_combined_web_august_2015.pdf [<https://perma.cc/JY3G-YPG9>] [hereinafter ASCA & LIMAN, 2015]; MASS. DEP'T OF CORR., MONTHLY RESTRICTIVE HOUSING REPORT (2020), <https://www.mass.gov/doc/restrictive-housing-report-march-2020/download> [<https://perma.cc/9RJK-KPC7>]; MASS. DEP'T OF CORR., WEEKLY COUNT SHEET 1 (Mar. 2, 2020), <https://www.mass.gov/doc/weekly-inmate-count-322020/download> [<https://perma.cc/C5PC-77XN>]. Note that Table 1 should be read as suggestive only—in particular, there is reason to think that the Bureau of Justice Statistics results from 1995 to 2005 do not measure precisely the same thing as the ASCA–Liman results from 2014 to 2017. Total U.S. prison population in 2017 is from JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, NCJ 252156, PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/55E2-ZUTJ>].

⁶⁵ For the 2014 results, survey responders include thirty-four jurisdictions, housing about 73% of the

Table 1 presents data from two different series of publications (labeled by source in its first column). Data should be compared only within source type; the apparent increase in solitary from 2005 to 2014 may be a function of methodological differences, rather than reflecting a true increase. Even conservatively interpreted, however, it demonstrates that a long path remains to solitary confinement abolition. On any given day, U.S. prisons house over 60,000 people in solitary confinement.⁶⁶ And so the question remains: are incrementalist strategies helpful or harmful to the abolitionist goal?

II. TWO STATE CASE STUDIES

I have picked two states, Massachusetts and Indiana, as sites for a deeper dive into the pathways of solitary reform. This is a compare-and-contrast exercise: the two states are similar in some ways and different in others. In both, incrementalist strategies dominated for several decades. But more recently, Massachusetts seems to be heading towards more general and deeper reductions in solitary populations, while Indiana does not. Between the two, it is possible to examine most of the current reform approaches.

A. Massachusetts

Solitary reform came early to Massachusetts in 1985, when prisoners at the Massachusetts Correctional Institution at Cedar Junction mailed a letter to the Massachusetts Supreme Judicial Court describing dangerous conditions in the Disciplinary Segregation Unit (DSU).⁶⁷ Justice Paul Liacos treated the letter as a court complaint, asked Massachusetts Correctional Legal Services to represent the prisoners, and took original jurisdiction over the matter.⁶⁸ The resulting litigation, *Hoffer v. Fair*,⁶⁹ challenged the procedures by which prisoners were placed and held in administrative segregation under Massachusetts's constitution, state statutes, and regulations, as well as privileges and programming. The plaintiffs won and

American prison population. ASCA & LIMAN, 2015, *supra* note 64, at 2. The 2015 and 2017 results are for forty jurisdictions. ASCA & LIMAN, 2018, *supra* note 64, at 96 tbl.21.

⁶⁶ *See id.* at 4. There are no reliable estimates for jails, but if the solitary rate is similar in jail and prison, that would add another 33,000 to the count.

⁶⁷ The Supreme Judicial Court had rejected a challenge to conditions at the unit just a few years prior in *Libby v. Commissioner of Correction*, 432 N.E.2d 486 (Mass. 1982).

⁶⁸ *See Hoffer v. Comm'r of Corr.*, 490 N.E.2d 417, 418–19 (Mass. 1986); E-mail from James Pigeon, Litig. Dir., Prisoners' Legal Servs. of Mass., to author (Oct. 28, 2019, 13:55 EST) (on file with journal).

⁶⁹ For a description of the litigation, see *Hoffer v. Fair*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=10038> [<https://perma.cc/J4EQ-2LJQ>].

Justice Liacos ordered significant changes to the regulations that governed the unit.⁷⁰

For prisoners who ended up in the DSU, the intervention was limited; even after the reforms, DSU prisoners spent twenty-three hours per day in their cells (though the regulations did improve their access to reading material and visitation and required individualized justification for programming restrictions). The more important limit was on who could be sent to the unit and for how long. The regulatory changes were primarily intended “to ensure that residents will not be unnecessarily or arbitrarily retained in the DSU.”⁷¹ The regulations, currently still in effect, have provided for a hearing before an impartial board, which can impose solitary confinement only based on “substantial evidence” that the prisoner poses a “substantial threat” to the safety of himself, others, or the operation of the facility.⁷² Perhaps more significantly, in practice, the regulations have required solitary confinement to be conditional. That is, the state has had to set conditions with which compliance would lead to release from solitary in six months. These conditions could include, for example, “successful participation in specified counseling or evaluation programs, [the] completion of work assignments, remaining free of disciplinary reports, cooperation with correctional personnel, and maintenance of cell and sanitation standards.”⁷³

Decades of litigation flowed from these regulations. In 1995, the state attempted to repeal the regulations, but that effort was enjoined.⁷⁴ Then, in the early 2000s, as procedural due process challenges made only limited headway under federal law,⁷⁵ Massachusetts prisoners’ rights advocates sought—eventually successfully—to have the regulations applied more broadly to other prisons and to similar, though not identical, solitary

⁷⁰ *Hoffer v. Fair*, No. 85-71, slip op. at 39–51 (Mass. Mar. 3, 1988), available at <https://www.clearinghouse.net/chDocs/public/PC-MA-0029-0003.pdf> [<https://perma.cc/67F8-JV5X>]. The modified DSU regulations issued in response to that decision were codified at 103 MASS. CODE REGS. 421.00, 421.20(2)(c), 421.20(7) (since modified).

⁷¹ *Hoffer v. Comm’r of Corr.*, 589 N.E.2d 1231, 1234 (Mass. 1992).

⁷² 103 MASS. CODE REGS. 421.09, 421.12 (2020).

⁷³ 103 MASS. CODE REGS. 421.15 (2020).

⁷⁴ See Post Final Judgment Order, *Hoffer v. Fair*, No. SJ-1985-0071 (Mass. Sept. 26, 1995), available at <https://www.clearinghouse.net/chDocs/public/PC-MA-0029-9000.pdf> [<https://perma.cc/S8M6-SKST>].

⁷⁵ See *Wilkinson v. Austin*, 545 U.S. 209, 230 (2005); *Sandin v. Connor*, 515 U.S. 472, 487 (1995); *supra* notes 47–50 and accompanying text.

confinement settings.⁷⁶ This led to the shutdown of several such units.⁷⁷ However, in the meantime, the Department of Correction (DOC) has managed to reduce the regulations' impact by reconfiguring its solitary system, substituting long-term disciplinary segregation for much of the confinement previously accomplished by administrative segregation.⁷⁸ That change wiped out the impact of the 1980s reforms; Massachusetts disciplinary rules imposed solitary confinement as a sanction for in-prison misconduct for up to ten years per offense.⁷⁹ And a litigated challenge to solitary imposed as a disciplinary sanction failed completely.⁸⁰

A different incrementalist lawsuit was filed in 2007 by a consortium of Massachusetts lawyers: Massachusetts Correctional Legal Services (renamed Prisoners Legal Services of Massachusetts during the lawsuit's pendency); the Center for Public Representation, a disability rights organization; the Disability Law Center (DLC), which served as both lawyer and organizational plaintiff; and a large white-shoe law firm, Bingham McCutchen. The case, *Disability Law Center v. Massachusetts Department of Correction*,⁸¹ focused on prisoners with mental illnesses, alleging violations of the Constitution and the Americans with Disabilities Act:

By placing prisoners with mental illnesses in segregated confinement, the Massachusetts Department of Correction subjects these vulnerable individuals to conditions they are physically and psychologically incapable of tolerating for any sustained period of time. The extreme social isolation and sensory deprivation conditions of segregated confinement are difficult for all prisoners;

⁷⁶ See *Cantell v. Comm'r of Corr.*, 60 N.E.3d 1149, 1151 (Mass. 2016) (described at *Cantell v. Commissioner of Correction et al.*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=17279> [<https://perma.cc/QPD9-PJKT>]) (applying DSU regulations to other units in which conditions “are also at least as restrictive as those applied to [DSUs]”); *LaChance v. Comm'r of Corr.*, 978 N.E.2d 1199, 1205 (Mass. 2012) (described at *LaChance v. Commissioner*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=17282> [<https://perma.cc/T4VX-RSND>]) (finding that “under DOC regulations, indefinite confinement in any unit where conditions are substantially similar to those of a DSU entitles an inmate to the protections afforded by the DSU regulations”); *Haverty v. Comm'r of Corr.*, 776 N.E.2d 973, 991 (Mass. 2002) (described at *Haverty v. Commissioner of Correction*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=10037> [<https://perma.cc/Q9AX-PEP7>]) (finding non-DSU segregation units to be so similar to those of the DSU that state regulations apply).

⁷⁷ E-mail from James R. Pingeon, Litig. Dir., Prisoners' Legal Servs. of Mass., to author (Mar. 31, 2020, 13:32 EST) (on file with journal).

⁷⁸ *Id.*; see also E-mail from James R. Pingeon, *supra* note 68.

⁷⁹ 103 MASS. CODE REGS. 430.25(1)(f) (2020); see also E-mail from James R. Pingeon, *supra* note 68.

⁸⁰ *Torres v. Comm'r of Corr.*, 695 N.E.2d 200, 206 (Mass. 1998).

⁸¹ No. 1:07-cv-10463-MLW (D. Mass.). For a case description, see *Disability Law Center v. Massachusetts Department of Correction*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=9481> [<https://perma.cc/42Y9-3R9K>].

for prisoners with mental illnesses, they exceed the limit of human endurance. Indeed, it is only too common for prisoners with mental illnesses to suffer further psychological deterioration, inflict serious harm to themselves, and even commit suicide as a result of placement in segregation.⁸²

Five years of litigation resulted in a settlement agreement largely excluding prisoners with serious mental illness from both disciplinary and administrative segregation. Instead, such prisoners were to be housed, if possible, in a “Secure Treatment Unit,” designed to be more therapeutic. There were two types of such units: “Secure Treatment Program” units for prisoners with Axis I (that is, psychosis and mood disorder) diagnoses and “Behavioral Management Units” for those with Axis II (personality disorder) diagnoses.⁸³ While waiting for this assignment, covered prisoners were to be provided more out-of-cell time and slightly more privileges.⁸⁴ The settlement implementation period was three years, and the case was dismissed in 2015.⁸⁵ Observers report that the Secure Treatment Program (STP) units are notably different from pre-reform solitary confinement, with a much more therapeutic environment, but that the Behavioral Management Units (BMUs) remain highly punitive. A DOC presentation slide⁸⁶ from early in the new regime confirms the point. Titled “Different Issues = Different Interventions,” it contrasts the two types of units:

<u>Mentally Ill</u>	<u>Antisocial/Psychopathic</u>
○ Medication	○ Behavior Management
○ Supportive Therapy	○ Clearly defined incentives and consequences
○ Insight into mental illness	○ Strict adherence to rules
○ Relationships with staff and other offenders are important	○ All staff must be consistent

⁸² Complaint at 1, Disability Law Ctr. v. Mass. Dep’t of Corr., No. 1:07-cv-10463-MLW (D. Mass. Mar. 8, 2017), *available at* <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0001.pdf> [<https://perma.cc/BM9X-269T>].

⁸³ Presentation, Katherine L. O’Neill, Dir. of Behavioral Health, Specialized Mental Health Units: Massachusetts Department of Correction (no date but covers period through 2011) (on file with journal).

⁸⁴ Settlement Agreement at 3–7, Disability Law Ctr. v. Mass. Dep’t of Corr., No. 1:07-cv-10463-MLW (D. Mass. Dec. 12, 2011), *available at* <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf> [<https://perma.cc/GS5E-Z99P>].

⁸⁵ Stipulation of Dismissal at 1, Disability Law Ctr. v. Mass. Dep’t of Corr., No. 1:07-cv-10463-MLW (D. Mass. May 20, 2015), *available at* <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0009.pdf> [<https://perma.cc/8QTL-SGBA>].

⁸⁶ O’Neill, *supra* note 83.

A 2012 report by plaintiffs' expert Dr. Kathryn Burns demonstrates that the BMUs were experienced by prisoners to be no less punitive than presettlement solitary. Dr. Burns reported a high "degree of anger, hostility and frustration expressed by the inmates," who complained that BMU programming was "punitive rather than therapeutic," and reported overuse of "accountability cells"—a cell assignment attached to "loss of level/privileges and property; removal of clothing and undergarments with issue of safety smock; no soap or toothpaste; no access to shower; and all meals are finger foods."⁸⁷ Bob Fleischner, plaintiffs' counsel in *Disability Law Center* and also a member of a current oversight committee, reports more recently that prisoners with serious mental illness describe the STP units as "life saving." Fleischner says he has observed a sharp shift in attitude, as staff have come around to the view that prisoners with serious mental illness do not belong in solitary. By contrast, he sees the Behavioral Management Units as highly punitive, and reports that the prisoners housed there are extremely unhappy.⁸⁸

In addition, prisoners' rights lawyer Jim Pingeon reports that the *DLC* case improved the environment for those prisoners left in solitary. The disciplinary units, he says,

became notably calmer and less chaotic with the removal of prisoners with SMI. Before, when I'd go onto the unit there were almost always people screaming; it was often filled with smoke from prisoners lighting fires, and the smell of feces from prisoners throwing it out of their cells or smearing it in the showers was often in the air. The difference post *DLC*-suit was palpable and even guards expressed appreciation.⁸⁹

Thus, as of 2015, incremental solitary confinement reform in Massachusetts had produced moderate payoffs: hard-won procedural requirements for administrative segregation covered only a portion of the prisoners facing solitary confinement and had even provoked the backlash of long-term disciplinary segregation. And true alternatives to solitary were being implemented for just a small portion of the affected population. Conditions in solitary were a bit improved.

But in the years since, it has seemed that both the procedural and substantive steps just described are providing a crucial blueprint for much more thoroughgoing reforms. First, as the *Disability Law Center* case drew

⁸⁷ First Report of Designated Expert Kathryn A. Burns, MD, MPH at 4, *Disability Law Ctr. v. Mass. Dep't of Corr.*, No. 1:07-cv-10463-MLW (Oct. 22, 2012), available at <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0016.pdf> [<https://perma.cc/7UKS-EC3U>].

⁸⁸ Telephone Interview with Robert Fleischner, *supra* note 5.

⁸⁹ E-mail from James R. Pingeon, *supra* note 68.

to its close in 2015, the legislature passed a statute largely codifying the settlement, rendering it permanent.⁹⁰ The statute provided:

Except in exigent circumstances that would create an unacceptable risk to the safety of any person or where no secure treatment unit bed is available, a segregated inmate diagnosed with a serious mental illness in accordance with clinical standards adopted by the department of correction shall not be housed in a segregated unit for more than 30 days and shall be placed in a secure treatment unit. Any such segregated inmate awaiting transfer to a secure treatment unit shall be offered additional mental health services in accordance with clinical standards adopted by the department.⁹¹

Next, in 2018, much more thorough reform began. Solitary confinement reform was made a small part of a comprehensive criminal justice reform effort, signed by the Governor in April and effective December 31, 2018.⁹² The new statute's reach is far broader than any of the prior interventions, though it used them as a model. Massachusetts criminal justice reform had a broad constituency—activists of many stripes exerted political pressure, and legislative leaders and their allies worked on the issue in state government, pressuring a reluctant governor.⁹³

First, building on the *Disability Law Center* reforms, the new statute expanded the definition of “serious mental illness” to include:

(i) schizophrenia and other psychotic disorders; (ii) major depressive disorders; (iii) all types of bipolar disorders; (iv) a neurodevelopmental disorder, dementia or other cognitive disorder; (v) any disorder commonly characterized by breaks with reality or perceptions of reality; (vi) all types of anxiety disorders; (vii) trauma and stressor related disorders; or (viii) severe personality disorders; or a finding by a qualified mental health professional that the prisoner is at serious risk of substantially deteriorating mentally or emotionally while confined in restrictive housing, or already has so deteriorated while confined in restrictive housing, such that diversion or removal is deemed to be clinically appropriate by a qualified mental health professional.⁹⁴

⁹⁰ MASS. GEN. LAWS ch. 127, §§ 1, 39, 39A (2015) (all now amended).

⁹¹ *Id.* § 39A(b) (effective Apr. 5, 2015 to Dec. 30, 2018).

⁹² S. 2371, 189th Gen. Court. §§ 85–86 (Mass. 2018) (amending MASS. GEN. LAWS ch. 127, § 1 by adding a new definition of restrictive housing and expanding the definition of SMI); *id.* § 93 (amending MASS. GEN. LAWS ch. 127, § 39 by striking § 39 and § 39A and adding new sections).

⁹³ See Matt Murphy, *Negotiators File Compromise Criminal Justice Reform Bill*, METROWEST DAILY NEWS (Mar. 26, 2018, 2:24 PM), <https://www.metrowestdailynews.com/news/20180323/negotiators-file-compromise-criminal-justice-reform-bill> [perma.cc/8LGV-YAA4].

⁹⁴ MASS. GEN. LAWS ch. 127, § 1 (2020).

This definition covers many more people than the lawsuit settlement. And the new statute imposes a more muscular ban on solitary confinement of this larger group. It bars prisoners with serious mental illness, so defined, from restrictive housing absent certification provided to the prisoner explaining

- (i) the reason why the prisoner may not be safely held in the general population;
- (ii) that there is no available placement in a secure treatment unit; (iii) that efforts are being undertaken to find appropriate housing and the status of the efforts; and (iv) the anticipated time frame for resolution.⁹⁵

In addition, the new statute goes further in the special-populations direction in several ways. It applies to jails as well as prisons.⁹⁶ The results have been mixed. As James Pingeon reports, “Some [jails] have responded by increasing out-of-cell time to a bit more than two hours so the[] law won’t apply, but others have made pretty significant strides in reducing the solitary population and creating alternative treatment units.”⁹⁷ It imposes a flat ban on housing pregnant prisoners in restrictive housing.⁹⁸ And it requires that “[t]he fact that a prisoner is lesbian, gay, bisexual, transgender, queer or intersex or has a gender identity or expression or sexual orientation uncommon in general population shall not be grounds for placement in restrictive housing.”⁹⁹

The rest of the new statute covers everyone in solitary confinement, not just special populations. Besides softening the conditions in solitary in a variety of ways, it allows isolation of prisoners only if they “pose[] an unacceptable risk: (i) to the safety of others; (ii) of damage or destruction of property; or (iii) to the operation of a correctional facility,”¹⁰⁰ and it enforces that requirement via “placement reviews.”¹⁰¹ The effect is to eliminate long-fixed-term solitary confinement as a disciplinary sanction. It also sets up oversight mechanisms, including a “restrictive housing oversight committee,” which includes DOC personnel, other law enforcement, and outsiders connected to the two litigation efforts described above or otherwise likely to have a more prisoner-friendly orientation (“the executive director of Disability Law Center, Inc. or a designee, . . . the executive director of Prisoners’ Legal Services or a designee, . . . the executive director of the

⁹⁵ *Id.* § 39A(a).

⁹⁶ *Id.* § 39(a) (governing “the superintendent of a state correctional facility or the administrator of a county correctional facility”).

⁹⁷ E-mail from James R. Pingeon, *supra* note 68.

⁹⁸ MASS. GEN. LAWS ch. 127, § 39A(d) (2020).

⁹⁹ *Id.* § 39A(c).

¹⁰⁰ *Id.* § 39(a).

¹⁰¹ *Id.* § 39B(a).

Massachusetts Association for Mental Health, Inc. or a designee and . . . a licensed social worker designated by the Massachusetts chapter of the National Association of Social Workers, Inc.”).¹⁰² Thus, to quote James Pingeon, incrementalist litigation has “to some extent . . . work[ed] in harmony” with closer-to-abolitionist legislation.¹⁰³ The litigation put “pressure . . . on the governor,” leading to progress via political rather than court-centered routes.¹⁰⁴

Implementation of this set of reforms is, however, hotly contested. Even though he had signed the new statute, Governor Charlie Baker soon proposed to dial back the definition of serious mental illness.¹⁰⁵ Although his proposal died with the legislative session in which it was introduced, it was revived the following session and is currently pending.¹⁰⁶ Meanwhile, the state first delayed the designation of the oversight committee,¹⁰⁷ then promulgated a temporary regulation that banned committee members’ communication to the public or the press (absent approval of the chair); limited information-gathering to existing documents and data; and barred unannounced visits to prisons and all access to nonpublic data (such as prisoner files) without a signed prisoner release.¹⁰⁸ In August 2019, the final regulation backed off on what the press had labeled a “gag rule” but maintained the other limits.¹⁰⁹ The Department of Correction also implemented new “Secure Adjustment Units” that, while locking prisoners down in single cells for nearly all of each day, allow them sufficient out-of-cell hours per day to escape classification

¹⁰² *Id.* § 39G(a).

¹⁰³ Telephone Interview with James Pingeon, *supra* note 5.

¹⁰⁴ *Id.*

¹⁰⁵ Letter from Charles D. Baker, Governor of Mass., to the Mass. Senate & House of Representatives (Apr. 13, 2018), <https://www.mass.gov/files/documents/2018/04/13/CJ%20Supplement%20Filing%20Letter.pdf> [<https://perma.cc/4CGP-LK3Q>] (“[T]he Act’s definition of serious mental illness is so broad that it includes any inmate with an anxiety disorder, no matter how well managed with medication, and trauma and stressor related disorders. The enclosed bill includes a more narrow definition of ‘serious mental illness’ that, when appropriate, incorporates the concept of significant functional impairment.”).

¹⁰⁶ See An Act Clarifying the Definition of Serious Mental Illness on Criminal Justice Reform, H. 1571, 191st Gen. Court (Mass. 2019) (pending); An Act Building on Criminal Justice Reform, H. 4426, 190th Gen. Court (Mass. 2018).

¹⁰⁷ See Telephone Interview with Robert Fleischner, *supra* note 5.

¹⁰⁸ See 103 MASS. CODE REGS. 179.00 (2019).

¹⁰⁹ Compare *id.*, with PRISONERS’ LEGAL SERVS. OF MASS., TESTIMONY OF DESIGNEES TO THE RESTRICTIVE HOUSING OVERSIGHT COMMITTEE ON THE DEPARTMENT OF CORRECTIONS’ PROPOSED REGULATIONS 103 CMR 179 REGARDING THE RESTRICTIVE HOUSING OVERSIGHT COMMITTEE (2019), <https://www.mamh.org/assets/files/RHOC-Testimony-re-Regs.docx> [<https://perma.cc/W72P-JQ8U>] (testimony of Marlene Sallo, on behalf of the Disability Law Center; Robert Fleischner, on behalf of the Massachusetts Association for Mental Health; and Bonita Tenneriello, on behalf of Prisoners’ Legal Services of Massachusetts; National Association of Social Workers, Massachusetts Chapter).

as solitary confinement under the new statute.¹¹⁰ In response, reformers have introduced tighter statutory language, which is under consideration in the state legislature.¹¹¹

There is no way to know where all this will land—it is clear that the Governor and Department of Correction are resisting reform, but unclear who will finally win the tug-of-war. Currently (prior to COVID-19 issues), the monthly population in solitary confinement in Massachusetts prisons has declined, but certainly not to zero. In the first month for which data were collected under the new statute, the solitary confinement population was 392—5.1% of total population. In no month since then has it exceeded 343 people, and it has averaged 316 people and 4.2% of total population.¹¹²

B. Indiana

In Indiana, as in Massachusetts and other states, solitary confinement has been used for many decades, and prisoners have consistently objected to both their assignment to solitary and its conditions. For example, a class action injunction that regulated conditions of confinement at the Indiana Reformatory from the 1980s through 2002 included both procedural and substantive constraints on the use of solitary.¹¹³ As other states and the federal government embraced supermax confinement, so too did Indiana, opening its first supermax in 1991 and its second in 1993.¹¹⁴ Prisoners immediately protested harsh conditions; of the thirty-five prisoners housed in the supermax in late 1991, at least sixteen conducted a long hunger strike, which ended only when the state obtained a force-feeding court order. Several

¹¹⁰ See 103 MASS. CODE REGS. 430.05 (2019); Katie Rose Quandt, *Massachusetts Department of Correction Gives a Lesson in How to Get Around Solitary Confinement Reforms*, SOLITARY WATCH (Nov. 20, 2019), <https://solitarywatch.org/2019/11/20/massachusetts-department-of-correction-gives-a-lesson-in-how-to-get-around-solitary-confinement-reforms/> [<https://perma.cc/EV58-9JP3>].

¹¹¹ An Act to Provide Criminal Justice Reform Protections to All Prisoners in Segregated Confinement, S. 2413, 91st Gen. Court (Mass. 2019) (introduced Aug. 12, 2019).

¹¹² For the weekly overall population, see *Weekly Inmate Count 2020*, MASS.GOV, <https://www.mass.gov/lists/weekly-inmate-count-2020> [<https://perma.cc/NAM8-XJN8>]; *Weekly Inmate Count 2019*, MASS.GOV, <https://www.mass.gov/lists/weekly-inmate-count-2019> [<https://perma.cc/YG3W-3EMD>]. For the monthly solitary confinement population, see *Weekly Restrictive Housing Counts*, MASS.GOV, <https://www.mass.gov/lists/monthly-restrictive-housing-counts> [<https://perma.cc/YFY7-VB4Q>]. I post a longitudinal spreadsheet with month-by-month data at this Essay's technical appendix, available at <http://www.law.umich.edu/facultyhome/margoschlanger/Pages/Publications.aspx> [<https://perma.cc/FN3J-UNEP>].

¹¹³ *French v. Miller*, C.R. LITIG. CLEARINGHOUSE, <https://clearinghouse.net/detail.php?id=703> [<https://perma.cc/5TR5-LWAG>].

¹¹⁴ HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA (1997), <https://www.hrw.org/legacy/reports/1997/usind/> [<https://perma.cc/N7DS-EWZZ>] [hereinafter COLD STORAGE].

months later, seeking to enlist outside support, a prisoner in the supermax cut off one of his fingertips to send to the ACLU as a cry for help.¹¹⁵ The prisoners were unable to gain much political traction, although there was one well-attended protest of solitary confinement conditions.¹¹⁶ Prisoners also filed over a dozen lawsuits, pro se, in federal district court. The class action litigation that followed, *Taifa v. Bayh*,¹¹⁷ began in 1992 (first in state court, then quickly removed to federal court). With the ACLU of Indiana serving as class counsel, *Taifa* consolidated many of the pro se cases before Chief Judge Allen Sharp, a Nixon appointee. The case was limited to just one supermax—the “Maximum Control Complex” (MCC), part of Indiana’s Westville prison. Its attack was comprehensive—as summarized upon settlement by the magistrate judge, it alleged that long-term solitary confinement at the MCC “subjects [the plaintiff class to] sensory deprivation and arbitrary and irrational rules, physically abuses them, denies them visitation and medical and psychiatric care, and deprives them of educational, vocational, recreational, and other rehabilitative programs,” in violation of the Due Process Clause and the Eighth Amendment.¹¹⁸ Among the allegedly unconstitutional conditions of confinement were

denial of telephone privileges and use of radios and televisions; arbitrary discipline; the removal of bedding as punishment for minor infractions; extremely cold temperatures within the facility; restrictions on visitation; limited out-of-cell time; constantly illuminated cells; prohibiting the display of personal items; denial of vocational, educational and rehabilitative opportunities; denial of meaningful recreation and exercise time; contaminated drinking water; restricted access to the courts and inadequate law library; tampering with prisoner mail; confiscation of religious materials; restrictions on taking Bible study correspondence courses; unavailability of commissary items; verbal harassment; physical abuse; and denial of adequate medical and mental health care.¹¹⁹

The settlement was equally comprehensive. Again, as summarized by the magistrate judge:

In general, the Agreed Entry would provide for: the assignment of prisoners to the MCC only under specified conditions; the transfer of prisoners out of the

¹¹⁵ *Id.*; see also Aaron Isby-Israel, *Indiana Prisoners Must Unite & Struggle to Change Conditions!*, IDOC WATCH (Sept. 30, 2019), <https://www.idocwatch.org/blog-1/israel-indiana-prisoners-must-unite-and-struggle> [https://perma.cc/X85A-ERMT].

¹¹⁶ See NANCY KURSHAN, *OUT OF CONTROL: A FIFTEEN YEAR BATTLE AGAINST CONTROL UNIT PRISONS* 151–53 (2013).

¹¹⁷ See *Taifa v. Bayh*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=706> [https://perma.cc/2LEM-FE9V].

¹¹⁸ *Taifa v. Bayh*, 846 F. Supp. 723, 724 (N.D. Ind. 1994).

¹¹⁹ *Id.* at 725.

MCC after a specified period of time, provided that certain conditions are met; a commissary at the MCC, with a list of particular items to be made available; inmate access to radios and televisions under specified conditions and at inmate expense; expanded visitation and telephone privileges; the availability of additional reading materials for prisoners; increased opportunities for prisoner recreation; increased privileges with respect to keeping of personal property in cells and in the storage room; improvements in the condition of bedding; a decrease in the intensity of the 24-hour lights in the cells; additional access by prisoners to personal hygienic items; the establishment of a policy concerning the use of force by DOC personnel; expanded provisions for medical care, including mandatory psychiatric evaluations for all prisoners upon their admittance to the MCC; an expanded law library containing specified reference materials, and provisions for greater access to legal materials by prisoners; increased educational opportunities for prisoners; a substance abuse program; and improvements in inmate grievance procedures.¹²⁰

As the quotation makes clear, *Taifa* was mostly a conditions case. But its settlement did have significant terms governing who could be assigned to the MCC—only prisoners with a documented history, during the current term of incarceration, of “[e]scapes with attempts to cause physical harm to staff, other prisoners, and/or the public at large, or to cause serious destruction to the physical plant”; “[a]ssaultive behavior against staff and/or prisoners causing serious bodily injury and/or death”; “[r]ioting or inciting to riot or violence causing the serious disruption of the orderly management of a facility or unit”; “[i]ntensive involvement in violent gang activities”; or “[a]ggressive sexual conduct and/or rape.”¹²¹ Moreover, the settlement provided that “[p]risoners diagnosed as mentally ill shall not be incarcerated in MCC.”¹²² Nonetheless, the State’s settlement-mandated retrospective review of all the MCC prisoners yielded few, if any, releases.¹²³ And the settlement did not control assignments to Indiana’s other supermax or to solitary confinement in any other state prison. In addition, in late 1996, the settlement was modified to allow use of the facility for long-term

¹²⁰ *Id.* at 726.

¹²¹ Agreed Entry at 2, *Taifa v. Bayh*, 846 F. Supp. 723 (N.D. Ind. Mar. 31, 1994) (No. S-92-00429-M), available at <https://clearinghouse.net/chDocs/public/PC-IN-0006-0002.pdf> [<https://perma.cc/UJ2W-DXM2>].

¹²² *Id.*

¹²³ *Taifa v. Bayh*, No. 3:92cv429AS, 1995 WL 803816, at *4 (N.D. Ind. Sept. 26, 1995) (describing a review in which line-level staff flagged about twenty-six prisoners for further consideration, but a “classification analyst” concluded that there were “maybe two offenders that didn’t meet particular criteria,” of whom at least one was then deemed appropriately assigned). The district court disposition of this issue was reversed on appeal, but the ultimate outcome is unclear. See *Komyatti v. Bayh*, 96 F.3d 955, 964 (7th Cir. 1996).

disciplinary segregation, even if the classification criteria listed above were not met.¹²⁴

The *Taifa* settlement induced the State to allow Human Rights Watch full investigative access to Indiana’s two supermaxes. The resulting report, *Cold Storage*,¹²⁵ became an important document in nationwide advocacy. The *Taifa* settlement lasted nearly a decade before it was terminated in 2003,¹²⁶ but it did not reduce the use of solitary confinement. Indeed, as settlement implementation began, the number of Indiana prisoners in solitary confinement rose.¹²⁷

Just two years after the termination of the *Taifa* settlement, in 2005, the ACLU of Indiana filed another anti-solitary federal court class action. *Mast v. Donohue*¹²⁸ focused on Indiana’s second supermax facility, the Secured Housing Unit at Wabash Valley Correctional Facility. The resulting settlement required that prisoners with serious mental illness (defined as Axis I disorders—that is, psychosis and mood disorders—or a “mental disorder that is worsened by confinement in the SHU”) not be housed at Wabash Valley.¹²⁹ Instead, such prisoners were to receive necessary psychiatric services at other, less anti-therapeutic institutions or in general population units.¹³⁰ In implementation, however, plaintiffs’ counsel, ACLU lawyer Kenneth Falk, observed that the result was simply shifting those same prisoners to less regulated facilities, where they continued to violate prison rules as a result of their mental illness and to receive decades of disciplinary solitary confinement as a result.¹³¹

Indiana’s third large solitary confinement litigation, filed in 2008, attempted to address this issue. In *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Correction (IPAS)*,¹³²

¹²⁴ COLD STORAGE, *supra* note 114, at 18.

¹²⁵ *Id.*

¹²⁶ *Taifa v. Bayh*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=706> [<https://perma.cc/TAG3-LV58>].

¹²⁷ *See supra* Table 1.

¹²⁸ *See Mast v. Indiana Department of Corrections*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=5554> [<https://perma.cc/JAZ6-G5S5>] (describing factual background).

¹²⁹ Private Settlement Agreement at 3, *Mast v. Donahue*, No. 2:05-cv-00037 LJM/WGH (S.D. Ind. Jan. 1, 2007), *available at* <https://www.clearinghouse.net/chDocs/public/PC-IN-0013-0002.pdf> [<https://perma.cc/4GYX-VZFG>].

¹³⁰ *Id.*

¹³¹ Telephone Interview with Kenneth Falk, *supra* note 5.

¹³² No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *1–2 (S.D. Ind. Dec. 31, 2012). For a case description, see *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Correction*, C.R. LITIG. CLEARINGHOUSE,

the ACLU of Indiana represented Indiana's Protection and Advocacy agency and the class of prisoners with mental illness housed in "settings . . . that feature extended periods of time in cells, including, but not limited to, prisoners in disciplinary segregation, administrative segregation, or in the New Castle Psychiatric Unit."¹³³ This time, the State declined to settle; plaintiffs won a five-day bench trial in 2011, and the district court entered a finding that prisoners with mental illness in solitary confinement were receiving constitutionally inadequate mental health care.¹³⁴

The parties entered into remedial negotiations and, in 2016, jointly submitted a proposed agreement that generally prohibited solitary confinement of seriously mentally ill prisoners.¹³⁵ The definition of seriously mentally ill prisoners was more precise than in *Mast*:

- a. Prisoners determined to have a current diagnosis or recent significant history of schizophrenia, delusional disorder, schizophreniform disorder, schizoaffective disorder, brief psychotic disorder, substance-induced psychotic disorder (excluding intoxication and withdrawal), undifferentiated psychotic disorder, bipolar I or II disorders;
- b. Prisoners diagnosed with any other validated mental illness that is clinically severe, based on evidence-based standards, and that results in significant functional impairment; and
- c. Prisoners diagnosed with an intellectual or developmental disability or other cognitive disorder that results in a significant functional impairment.¹³⁶

The settlement went into effect in March 2016 for what was initially set as a three-year term. This was later extended (in exchange for finally terminating the *Mast* litigation). So *IPAS* remains in implementation.¹³⁷ This time, plaintiffs' counsel reports significant success. Ken Falk, the ACLU lawyer who led this litigation, said,

It has removed almost all seriously mentally ill prisoners from seg[regation]. There's an exception for those who are deemed too dangerous to move and at any time there are 10 to 15 [prisoners in that category], but hundreds have been

<http://www.clearinghouse.net/detail.php?id=11187> [<https://perma.cc/J5MA-S6AL>] [hereinafter *IPAS* Summary].

¹³³ No. 1:08-cv-01317-RLY-JMS, 2010 WL 1737821, at *1 (S.D. Ind. Apr. 27, 2010).

¹³⁴ *IPAS*, 2012 WL 6738517, at *25.

¹³⁵ See *IPAS* Summary, *supra* note 132.

¹³⁶ Stipulation to Enter into Private Settlement Agreement at 15, Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317-TWP-MJD (S.D. Ind. Jan. 27, 2016), available at <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf> [<https://perma.cc/FCH4-L96E>]. The agreement further defined "[re]cent significant history" and "[s]ignificant functional impairment." *Id.*

¹³⁷ See *IPAS* Summary, *supra* note 132.

removed. And many of them end up going through step down units and getting back into general population. So that has worked. But I do not think it has reduced markedly the number of other persons who are in segregation.¹³⁸

Court-filed status reports likewise document the general exclusion of prisoners who meet the class definition from ordinary solitary confinement; they are housed, instead, in units in which they receive increased out-of-cell time and therapeutic programming.¹³⁹ A September 2018 site visit by a jointly chosen forensic psychologist concluded that, moreover, the mental health units “are no longer best understood as a way to get inmates out of restrictive housing. Basically they have become very appropriate ways to meet the mental health needs of inmates. I congratulate the parties for this achievement.”¹⁴⁰

But even assuming that the State reaches full compliance with the *IPAS* agreement (once the COVID-19 pandemic passes), what about prisoners who do *not* have serious mental illness? For them, as Falk reports above, *Mast* and *IPAS* have not accomplished much. There is no indication that use of solitary confinement is decreasing in Indiana.¹⁴¹ And length of stay is unusually high in Indiana as well.¹⁴² For prisoners who are not mentally ill, the incrementalist approach seems to fall far short.

¹³⁸ Telephone Interview with Kenneth Falk, *supra* note 5.

¹³⁹ See First Joint Status Report Following Effective Date of Private Settlement Agreement at 2, Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Oct. 18, 2016), *available at* <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0016.pdf> [<https://perma.cc/J4RJ-T944>]; Second Joint Status Report Following Effective Date of Private Settlement Agreement at 1–2, Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. July. 5, 2017), *available at* <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0017.pdf> [<https://perma.cc/LYZ9-CBBG>]; Third Joint Status Report Following Effective Date of Private Settlement Agreement at 1, Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Mar. 6, 2018), *available at* <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0018.pdf> [<https://perma.cc/PZG3-B899>].

¹⁴⁰ Fourth Joint Status Report Following Effective Date of Private Settlement Agreement at 14, Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Sept. 4, 2018), *available at* <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0019.pdf> [<https://perma.cc/4VAK-T4PG>]. However, shortly after the September 2018 site visit, implementation hit an unexpected obstacle; the new unit was destroyed by a fire. Substitute space has made compliance impossible, leading the plaintiffs to seek another extension of the agreement. See Parties’ Further Status Report at 1, 4, Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Mar. 8, 2020), *available at* <https://www.clearinghouse.net/chDocs/public/MH-IN-0002-0020.pdf> [<https://perma.cc/SD3W-CT5W>].

¹⁴¹ See *supra* Table 1.

¹⁴² Expert Report of Dan Pacholke at 15, *Vermillion v. Levenhagen*, No. 1:15-cv-605-RLY-TAB (S.D. Ind. Mar. 31, 2019), *available at* <https://www.clearinghouse.net/chDocs/public/PC-IN-0025-0001.pdf> [<https://perma.cc/JK3U-6RXY>] (“IDOC has double the inmates serving 6 months to three years

Two more recent due process cases, both initiated by prisoners pro se, may make some limited headway for a broader population. In both, initial losses in district court were reversed by the Seventh Circuit, leading to large money damages on remand. *Isby-Israel v. Wynn*¹⁴³ was brought by Aaron Isby-Israel—a very frequent litigant and one of the hunger strikers and named plaintiffs in the *Taifa* litigation.¹⁴⁴ Isby-Israel had been in solitary confinement for over twenty-five years.¹⁴⁵ He filed his case pro se but eventually attracted volunteer counsel. Although he lost an Eighth Amendment challenge to conditions, in 2017, he managed to reverse the State’s due process summary judgment on appeal.¹⁴⁶ On remand, represented by “biglaw” litigator Daniel Kelley, Isby-Israel’s discovery uncovered that the periodic classification reviews promised by regulation were a sham:

[P]eriodic reviews must be meaningful and cannot be a sham or pretext for indefinite segregation. They cannot rely only on past events, nor can they only include uninformative boilerplate language. In this case, periodic reviews must consider Mr. Isby’s current circumstances and future prospects, in addition to the reasons for his placement in solitary confinement when determining whether his continued solitary confinement is warranted.

It is plain from the record that the 30-day reviews at Wabash Valley were perfunctory, meaningless, and not even rubber stamped. The identical forms with the same language were printed out each month by a single reviewer, a caseworker or casework manager. No factual basis or rationale is provided in the 30-day reviews, leaving the basis for “no changes” in status entirely unknown.¹⁴⁷

The *IPAS* litigation provided some of the evidence base for the case; the *IPAS* settlement required periodic mental health reviews of individuals in solitary, and those reviews helped substantiate Isby-Israel’s argument that he could safely be released from solitary.¹⁴⁸ In December 2018, Isby-Israel

in restrictive housing than the national average and it uses shorter 15 day to 3 months sanctions far less than the national average.”).

¹⁴³ No. 2:12-cv-116-JMS-MJD, 2014 WL 2866197 (S.D. Ind. June 24, 2014). For additional resources and documents, see *Isby-Israel v. Wynn*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=17397> [<https://perma.cc/86PR-UC2L>].

¹⁴⁴ Isby-Israel was, in fact, one of the named plaintiffs who objected to that litigation’s 1994 settlement, arguing that it was insufficiently advantageous to plaintiffs. See *Isby v. Bayh*, 75 F.3d 1191, 1194 (7th Cir. 1996).

¹⁴⁵ See *Isby-Israel*, *supra* note 115.

¹⁴⁶ *Isby v. Brown*, 856 F.3d 508, 530 (7th Cir. 2017).

¹⁴⁷ *Isby-Israel v. Wynn*, No. 2:12-cv-00116-JMS-MJD, slip op. at 23–24 (S.D. Ind. Dec. 19, 2018), available at <https://www.clearinghouse.net/chDocs/public/PC-IN-0026-0001.pdf> [<https://perma.cc/9H4W-LVYL>].

¹⁴⁸ Telephone Interview with Dan Kelley, *supra* note 5.

won over \$336,500 in compensatory and punitive damages, plus attorneys' fees and an injunction directing his return to a general population (though "restricted movement") unit.¹⁴⁹ Appeal is pending.¹⁵⁰ Soon thereafter, in *Vermillion v. Plank*,¹⁵¹ with the assistance of counsel recruited from the MacArthur Justice Center at Northwestern Pritzker School of Law, intense district court litigation in a similar case ended with a November 2019 settlement of \$425,000 in damages for long-term solitary prisoner Jay Vermillion.¹⁵²

These two damage actions could have several effects on solitary reform. They seem likely to encourage additional litigation including, perhaps, a class action. They may induce the actual implementation of the regulatory procedural protections. And they have generated substantial information on the state's (non)compliance with solitary regulations. In addition to information that the state was not, in fact, conducting the required periodic reviews, an expert report in *Vermillion* offered Indiana access to developing best practices elsewhere. The expert, former Washington Department of Corrections head Dan Pacholke, rebuked Indiana's practices. He noted that appropriate classification limits (those stemming from the *Taiifa* litigation) were in place for "Department-Wide Administrative Segregation."¹⁵³ But, he wrote, "Facility Administrative Segregation" was far looser—allowed whenever "a documented history of behavior that causes staff to believe that that the offender's continued presence in general population would be detrimental to the security of the facility, among others."¹⁵⁴ The report criticized this provision as far too general to induce appropriate classification, and documented abusive practices in the particular case in court—when vague suspicions relating to an attempted escape never led to a

¹⁴⁹ *Isby-Israel*, No. 2:12-cv-00116-JMS-MJD, slip. op. at 36; Entry Approving Proposed Plan for Injunctive Relief & Retaining Jurisdiction over Action at 2, *Isby-Israel v. Wynn*, No. 2:12-cv-00116-JMS-MJD (S.D. Ind. Mar. 4, 2019), available at <https://www.clearinghouse.net/chDocs/public/PC-IN-0026-0003.pdf> [<https://perma.cc/5UQ3-C2W4>].

¹⁵⁰ *Isby-Israel v. Brown*, No. 19-01590 (7th Cir. filed Apr. 2, 2019).

¹⁵¹ 1:15-cv-00605-RLY-TAB (S.D. Ind.). For additional resources and documents, see *Vermillion v. Levenhagen*, C.R. LITIG. CLEARINGHOUSE, <https://clearinghouse.net/detail.php?id=17396> [<https://perma.cc/SVV9-AL5M>]. Notwithstanding its docket number, *Vermillion* filed this case in 2011 in the Northern District of Indiana. For the 2015 Seventh Circuit remand opinion, see *Vermillion v. Levenhagen*, 604 F. App'x 508 (7th Cir. 2015).

¹⁵² See Release & Settlement Agreement at 1, *Vermillion v. Levenhagen*, 1:15-cv-00605-RLY-TAB (S.D. Ind., Oct. 11, 2019), available at <https://clearinghouse.net/chDocs/public/PC-IN-0025-0005.pdf> [<https://perma.cc/6GDM-JBLL>].

¹⁵³ Expert Report of Dan Pacholke at 17, *Vermillion v. Levenhagen*, No. 1:15-cv-605-RLY-TAB (S.D. Ind. Mar. 31, 2019), available at <https://www.clearinghouse.net/chDocs/public/PC-IN-0025-0001.pdf> [<https://perma.cc/UYJ3-XWG7>].

¹⁵⁴ *Id.*

disciplinary charge but were instead the undisclosed motivation for long-term administrative segregation.¹⁵⁵ Moreover, he described conditions in solitary confinement as poor, writing of his 2018 site visit: “I find it surprising that given [the Indiana Department of Correction’s (IDOC)] history of being litigated against over super max conditions of confinement and the Human Rights Watch report issued more than two decades ago, that IDOC does not demonstrate more acuity around the condition and management of these units.”¹⁵⁶

ANALYSIS AND CONCLUSION

It may help to summarize the accounts just presented in a timeline:

TABLE 2: SOLITARY CONFINEMENT AND REFORM TIMELINE

Nationwide	Massachusetts	Indiana
1960s and 1970s: Litigated regulation of solitary confinement conditions		
1983: Marion lockdown, rise of modern supermax	1988: <i>Hoffer v. Fair</i> regulates administrative solitary	1991 and 1993: Supermaxes opened
1995: <i>Madrid v. Gomez</i> (N.D. Cal.) decision holding solitary confinement not per se unconstitutional, though it may be for prisoners with mental illness	1990s: MDOC revamps disciplinary solitary to escape <i>Hoffer</i> -related constraints	1992: <i>Taifa v. Bayh</i> (N.D. Ind.) challenges supermax conditions; settlement reached in 1994, lasts until 2003
1995: <i>Sandin v. Conner</i> (U.S.) holding short-term solitary confinement not a liberty deprivation triggering due process protections	1998: Legal challenge in <i>Torres v. Commissioner</i> to long-term disciplinary solitary fails	
2005: <i>Wilkinson v. Austin</i> (U.S.) holding long-term supermax confinement does trigger due process protections		
~2000–present: Special-populations litigation	2007: <i>DLC v. MDOC</i> filed, addressing solitary confinement of prisoners with serious mental illness; settled in 2012; settlement lasts until 2015, when it is codified	2005: <i>Mast v. Donahue</i> (S.D. Ind.) bars solitary confinement of prisoners with serious mental illness, but fails because it applies to only one prison 2008: <i>IPAS v. Commissioner</i> (S.D. Ind.) seeks to extend bar to all prisoners with serious mental illness; settlement reached in 2016

¹⁵⁵ *Id.* at 19–24.

¹⁵⁶ *Id.* at 30.

Nationwide	Massachusetts	Indiana
~2011–present: Return to wholesale litigation in some states	2018: Criminal justice reform includes significant and broad limits on solitary confinement	2012: <i>Isby-Israel v. Wynn</i> (S.D. Ind.) filed; concluded in 2018; granting damages and injunctive relief for long-term solitary prisoner because reclassifications were a sham 2015: <i>Vermillion v. Plank</i> (S.D. Ind.) filed; settled in 2019; similar to <i>Isby-Israel</i>

Neither of the case studies just presented offers any sign that the litigated amelioration of solitary confinement in Massachusetts and Indiana has been perverse. That is, there is no indication in either state that the special-populations approach has entrenched or legitimated solitary confinement more broadly. Neither state has seen a recent increase in the use of solitary confinement or reported worsening of conditions in solitary.

But Massachusetts seems poised on the verge of broad solitary confinement reform, and Indiana does not. Why? It seems to me (and to my—highly informed—interview subjects¹⁵⁷) that the primary reason is that in Indiana, the litigators are on their own. To quote Amy Fettig, the former director of the ACLU’s Stop Solitary campaign, Indiana “had successful litigation, but there was no ground game.” It is all but impossible to achieve real change without “a social movement to support you,” she says.¹⁵⁸ Indiana’s political culture lacks such movement actors. That lack is far from random: generally, Indiana is far more politically conservative than Massachusetts.¹⁵⁹ As Dan Kelley, who won over \$300,000 for Aaron Isby-Israel, said, “I have a hard time thinking how political [solitary confinement reform] would be feasible in this state. Reform has to happen through the courts.”¹⁶⁰ And more specifically, there is simply no effective out-of-court prisoners’ rights activism. Maggie Filler, who won over \$400,000 for her client Jay Vermillion, explained, “I do think that there’s a lack of grassroots groups making noise.”¹⁶¹ Without out-of-court backup, Indiana’s state

¹⁵⁷ See list of interviewees, *supra* note 5.

¹⁵⁸ Amy Fettig, *How Do We Reach a National Tipping Point in the Campaign to Stop Solitary?*, 115 NW. U. L. REV. 311 (2020); Telephone Interview with Amy Fettig, *supra* note 5.

¹⁵⁹ In Massachusetts, in 2018, self-described liberals outnumbered self-described conservatives 35% to 21%; in Indiana, the proportions were more than reversed: liberals were outnumbered by conservatives 17% to 39%. Jeffrey M. Jones, *Conservatives Greatly Outnumber Liberals in 19 U.S. States*, GALLUP (Feb. 22, 2019), <https://news.gallup.com/poll/247016/conservatives-greatly-outnumber-liberals-states.aspx> [<https://perma.cc/M6N7-72V5>].

¹⁶⁰ Telephone Interview with Dan Kelley, *supra* note 5.

¹⁶¹ Telephone Interview with Maggie Filler, *supra* note 5.

government is not pressured to learn from its litigation losses. No allies in the legislature pick up settlement terms and run with them. No large-scale protests force the state to justify its practices.

The point is not that litigation fails in these circumstances. It may well be that litigation has greatly improved the lives of Indiana prisoners with serious mental illness who are avoiding solitary confinement. And future litigation may actually induce the substitution of real process for the current “perfunctory, meaningless, and not even rubber stamped” reviews of prisoners in solitary.¹⁶² There may even be some small additional benefits caused by litigation’s role in bringing new kinds of officials into the system. To quote Kenneth Falk, “There are mental health positions now within the DOC that never existed before. [There’s a] guy . . . who sort of rides herd on all of this; that wasn’t a position that they had [before]. I think that makes a difference.”¹⁶³

But for litigation to trigger something much bigger—broad reform or significant steps towards solitary abolition—requires more. In Massachusetts, the political ecosystem has many more reform-minded participants—activists, lawyers, judges, legislators—than does the much redder Indiana. Each such participant can build on the others. In Massachusetts, litigation’s strengths can emerge, among them information generation, thoughtful policy development (in settlement terms), publicity, and storytelling. Weaknesses—the detachment of litigation from mobilization, hyper-empowerment of lawyers, undue affection for process—are ameliorated by other actors and other actions. The Indiana ecosystem is far sparser.

In my view, the most likely path to abolition or near-abolition of solitary confinement will create and then build on incremental change. The point is both technocratic and also jurisprudential. Jurisprudentially, consider a 2015 concurring opinion inviting broad Eighth Amendment challenges to solitary confinement, in which Justice Kennedy wrote:

[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.¹⁶⁴

¹⁶² *Isby-Israel v. Wynn*, No. 2:12-cv-00116-JMS-MJD, slip op. at 23–24 (S.D. Ind. Dec. 19, 2018), available at <https://www.clearinghouse.net/chDocs/public/PC-IN-0026-0001.pdf> [<https://perma.cc/9H4W-LVYL>].

¹⁶³ Telephone Interview with Kenneth Falk, *supra* note 5.

¹⁶⁴ *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citation omitted).

That is, abolishing solitary is more feasible—and may even be found to be constitutionally compelled—if “workable alternative systems for long-term confinement exist.”

More technocratically, solitary confinement’s persistence in American corrections policy is attributable in part to officials believing in its efficacy as an antidote to in-prison violence. I think that belief is incorrect, but to address it will take persuasion as well as politics. And incremental reforms can be persuasive for all the reasons touched on throughout this Essay; they can demonstrate the possibilities, building both reform capacity and credibility. They introduce, as well, some much needed humility: the asserted “need” for solitary confinement is undermined by every day that passes without incident for a person who was previously said to need solitary confinement.

To use the language of left theory, it seems to me that the kinds of incremental reforms undertaken in Massachusetts and Indiana have the potential to be “nonreformist reforms”: reforms that avoid the reformist trap of legitimizing an unjust system, instead “reduc[ing] the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”¹⁶⁵ How do nonreformist reforms work? To quote Professor Mark Tushnet, who was writing more generally, if reforms truly are to be “nonreformist,” they must either “set in train a larger transformation of the political system,” or “the effort to secure such reforms might mobilize people to seek additional reforms, even if the particular effort fails or if it produces legislation that is itself not really a reform.”¹⁶⁶ Reforms fail to be “nonreformist” if they are too tame—but if they are too aggressive, they simply fail. Again, quoting Professor Tushnet, they must be “not far out of line with the ordinary legislative product of an unreformed political system, so political activists can realistically place them on the political agenda.”¹⁶⁷ In Massachusetts, there is, right now, the possibility that a nonreformist reform of solitary confinement is underway. In Indiana, not so much. But in neither state do the limits of reform appear counterproductive rather than merely limited.

¹⁶⁵ Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/T9FB-7VHN>]; see also ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7–9 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (coining the phrase “non-reformist reform”). For the definition, see Berger et al., *supra*.

¹⁶⁶ MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 312 (1988).

¹⁶⁷ *Id.*

