

HOW DO WE REACH A NATIONAL TIPPING POINT IN THE CAMPAIGN TO STOP SOLITARY?

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ABSTRACT—The use and abuse of solitary confinement in American prisons, jails, and juvenile detention centers is at epidemic levels. On any given day 80,000 to 100,000 people in prisons are subjected to a practice considered inhumane and degrading treatment—even torture under international human rights standards. Despite widespread international condemnation, decades of research demonstrating the harm it inflicts on human beings, and a growing chorus from the medical community raising alarms about its impact on the brain, solitary confinement remains a routine prison-management strategy in correctional institutions nationwide. In the past decade, however, a growing movement has emerged to challenge the use of solitary confinement. This movement is variously driven by civil society campaigns, the emergence of strong international human rights standards, allies in government, civil rights litigation, corrections leadership, and increasing levels of public information and media attention. The question remains whether the current reform movement will be sufficient to create a tipping point whereby solitary confinement is rejected as an acceptable practice in the American sociocultural context and legal landscape. This Essay examines the current factors driving the movement against solitary and posits that a national tipping point is possible with more concerted effort to shift public opinion; increased documentation, research and promotion of alternatives that allow for the safe, humane, and effective management of carceral institutions; and implementation of greater oversight and accountability in corrections institutions in the United States more broadly.

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“A social movement that only moves people is merely a revolt. A movement that changes both people and institutions is a revolution.”

—Martin Luther King, Jr.[†]

INTRODUCTION

I am a human rights attorney and many of my clients are serial self-mutilators. They find, or fashion, small, sharp edges to slice and dice their arms and legs, their hands and feet, and sometimes their stomachs. A few have pushed straws, sticks, or forks into their penises or sliced up their scrotums. Some have swallowed small, sharp objects that rip them up inside. When we meet, I notice the raw, red crisscrosses on their arms and wrists. They often wear long-sleeved shirts and tug self-consciously at the cuffs in a vain attempt to cover the ongoing carnage wreaked on their bodies. But I know the real carnage is in their minds. I know that they cut just to feel something. They cut to drive back the hours, weeks, months, and years of isolation in tiny cells. They cut to feel human.

You might think my clients are in a mental hospital in a developing country with few resources and little treatment, or even that they are prisoners of war held in some terrible failed state with no human rights protections or basic rule of law. They are not. All of my clients are right here, being held in solitary confinement in U.S. prisons, jails, and juvenile detention centers.

[†] MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 117 (1964).

Solitary confinement harms the lives of tens of thousands of men, women, and children. On any given day, the best research suggests there are approximately 80,000 to 100,000 people held in solitary confinement in prisons in the United States.¹ That figure does not include the thousands of men, women, and children subject to solitary confinement in local jails, juvenile detention centers,² and immigration detention facilities.³ This estimate is also likely to be an underreported number as these figures are based on self-reports and voluntary disclosures by departments of corrections, many of which are not required by any law or policy to gather such information or make it public. Nonetheless, even the self-reported data makes clear that our custodial institutions rely heavily, and sometimes almost exclusively, on isolation as a means of punishment and control. Indeed, from 2011 to 2012, approximately 20% of all U.S. prisoners and 18% of jail detainees spent some time in solitary confinement for punishment, protection, or institutional convenience.⁴ By any measure, solitary confinement is endemic in the United States, where more than two million people are held in overwhelmed, underresourced institutions⁵ with poorly trained staff subject to little—if any—meaningful oversight.⁶

¹ See, e.g., THE LIMAN PROGRAM, YALE LAW SCH. & ASS'N OF STATE CORR. ADM'RS., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON, at ii (2015) [hereinafter 2014 ASCA-LIMAN SURVEY]; Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46, 46–49 (2011).

² For a description of solitary confinement in juvenile detention centers, see generally ACLU, ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 2 (2014), <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf> [<https://perma.cc/G3RN-67WW>] [hereinafter ALONE & AFRAID].

³ For an explanation of solitary confinement in immigration detention facilities, see generally Spencer Woodman & Ben Hallman, *Solitary Confinement in US Immigration Facilities, Explained*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 21, 2019), <https://www.icj.org/investigations/solitary-voices/solitary-confinement-in-us-immigration-facilities-explained/> [<https://perma.cc/CDD5-9P4H>]; Spencer Woodman, Maryam Saleh, Hannah Rappleye & Karrie Kehoe, *Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention*, INTERCEPT (May 20, 2019, 11:01 PM), <https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention/> [<https://perma.cc/6A4G-K3BH>].

⁴ ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 1–2 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> [<https://perma.cc/W45B-2E3W>].

⁵ See Lorna Collier, *Incarceration Nation*, AM. PSYCHOL. ASS'N (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/TE53-4YYY>] (“Over the past four decades, the nation’s get-tough-on-crime policies have packed prisons and jails to the bursting point . . .”).

⁶ See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010) (“[C]omprehensive external oversight [of prisons] . . . is truly rare in this country. Even more elusive are forms of oversight that seek to promote

This Essay will explore the different factors influencing the push to reform solitary confinement. It posits that the evolution of policy, practice, litigation, and public knowledge regarding solitary confinement is pushing towards a change in social norms. Part I explains why the United States' practice of solitary confinement represents a human rights crisis. Part II presents the diverse set of actors who have contributed to the push to reform solitary and analyzes their contributions. Further, it acknowledges that the United States may be reaching a tipping point where increasingly more sophisticated and sustained advocacy and public engagement can influence more rapid and permanent change to solitary confinement. Part III sets forth the three additional initiatives that need to be addressed to achieve solitary reform in America, and may even lead to abolition: (1) mobilizing to generate a sufficiently strong shift in public opinion supportive of ending solitary confinement; (2) documenting, researching, and promoting alternatives to solitary confinement that allow for the safe, humane, and effective management of carceral institutions; and (3) implementing greater oversight and accountability in corrections institutions.

I. THE NEED FOR REFORM

In the United States, almost nobody survives solitary confinement unscathed, and many do not survive at all. Consider Kalief Browder. Kalief was arrested at age sixteen for allegedly stealing a backpack in New York City. He was put into solitary for two of the three years he spent in jail before charges were dropped and he was released into the community. The pain and suffering of those years in jail overwhelmed him, and he took his own life soon after being released.⁷ Or consider Mariam Abdullah, who was also placed in solitary as a child. We found her in an isolation cell during a prison inspection in Arizona—a confused and scared seventeen-year-old. She seemed to be unraveling in isolation. We tried to get her out of isolation immediately, before it was too late, but the state refused. Instead, she was

both public transparency of correctional institutions and accountability for the protection of human rights.”); *Lack of Prison Oversight = Sexual Abuse and Impunity*, ACTION UPDATE (Just Detention Int’l, L.A., Cal.), June 2009, at 1, <https://justdetention.org/wp-content/uploads/2015/10/au0609.pdf> [<https://perma.cc/3SU6-HWRU>]; Azadeh N. Shahshahani, *Private Prisons for Immigrants Lack Accountability, Oversight*, ACLU (June 11, 2009, 3:45 PM), <https://www.aclu.org/blog/speakeasy/private-prisons-immigrants-lack-accountability-oversight> [<https://perma.cc/DKH7-9AQR>].

⁷ Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), www.newyorker.com/magazine/2014/10/06/before-the-law [<https://perma.cc/JT6H-S68D>]; Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [<https://perma.cc/K9G9-MEB9>].

sent to an adult solitary confinement unit after her eighteenth birthday. The pain and desperation she must have felt in that small, lonely cell haunts me. She was dead within weeks of being placed in solitary confinement at the adult facility at Estrella Jail.⁸

We know about the tragedies of Kalief’s and Mariam’s deaths, but thousands of other men, women, and children are silent casualties of a practice too little acknowledged, challenged, or changed. Thousands of people frequently end up shattered by the social isolation and environmental deprivation inflicted by the extreme conditions of solitary confinement. Yet solitary confinement is a routine—even mundane—practice in U.S. correctional facilities. Its use is pervasive across every state and jurisdiction in the country and commonplace in federal facilities as well.⁹ For correctional professionals, it is the primary “tool” in the “toolbox” of prison management.¹⁰ Too often, it is used as a one-size-fits-all approach to deal with everything from minor rule violations, like cursing or talking back to an officer, to more serious infractions, like assaults, to facilitating official malfeasance, like attempting to silence prisoners who speak out against rape or other maltreatment.¹¹

Despite its routine use, solitary confinement is widely recognized as painful and difficult to endure. In fact, there is a long, well-documented cultural history of its horrors, starting with a nineteenth-century report on U.S. prison conditions by Alexis de Tocqueville¹² condemning the practice, and followed by Charles Dickens’s stunning nineteenth-century critique of solitary confinement in Pennsylvania’s Eastern Penitentiary in his travelogue *American Notes for General Circulation*.¹³ In his writings on the subject, Dickens states, “I hold this slow and daily tampering with the mysteries of

⁸ Lisa Armstrong, *When Solitary Confinement Is a Death Sentence*, HUFFPOST (Aug. 29, 2019, 6:03 AM), https://www.huffpost.com/entry/solitary-confinement-suicide-prison-teens_n_5d63f4d3e4b01d7b529317aa [<https://perma.cc/BU5L-5D9T>].

⁹ See *supra* note 1.

¹⁰ See, e.g., BECK, *supra* note 4, at 1 (finding that nearly 20% of prison inmates and 18% of jail inmates had spent time in some form of a solitary confinement setting in the past twelve months).

¹¹ See, e.g., ALISON SHAMES, JESSA WILCOX & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 12–14 (2015), https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf [<https://perma.cc/EM44-BK34>].

¹² ALEXIS DE TOCQUEVILLE & GUSTAVE DE BEAUMONT, DU SYSTÈME PÉNITENTIAIRE AUX ÉTATS-UNIS ET DE SON APPLICATION EN FRANCE [ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE] (Francis Lieber, trans., Philadelphia, Carey, Lea & Blanchard 1833).

¹³ CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION (London, Chapman & Hall 1842).

the brain, to be immeasurably worse than any torture of the body”¹⁴ By 1890, the U.S. Supreme Court described how even short stints in solitary left people “violently insane.”¹⁵

Tragically, solitary confinement is also often used to house the most vulnerable prisoners: the very old and the very young; people with physical disabilities; those who suffer from hearing and visual impairments; individuals with serious mental illness; pregnant women; and people who identify as LGBTQ+.¹⁶ Decades of research in the twentieth and twenty-first centuries has established that solitary is psychologically difficult for even relatively healthy individuals and shattering for these vulnerable populations, especially those with mental illness.¹⁷ As a result, rates of suicide and self-harm are shockingly high for prisoners held in solitary confinement.¹⁸ Unfortunately, the fates of Kalief and Mariam are all too common for those in solitary—even those who manage to survive. Recent research demonstrates that exposure to solitary confinement leads to early death even after a few days in isolation, increased rates of death by opioid overdose upon release, and substantially higher rates of cardiovascular disease.¹⁹ Neuroscientists and medical experts are increasingly raising alarms

¹⁴ *Id.* at 239.

¹⁵ *In re Medley*, 134 U.S. 160, 168 (1890).

¹⁶ For the latter group, placing women who are transgender in solitary is extremely commonplace as corrections officials often claim or believe that they cannot keep transwomen safe in a general population prison unit. And due to policy, practice, and discriminatory attitudes, many transwomen are still housed in male prisons where they are frequently housed in solitary confinement, justified by their vulnerability to physical and sexual abuse. ACLU, *STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES* 13–14 (2019).

¹⁷ *See, e.g.*, HANS TOCH, *MOSAIC OF DESPAIR: HUMAN BREAKDOWNS IN PRISON*, at xi–xiv (rev. ed. 1992); Stanley L. Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 *FORENSIC REP.* 267, 279 (1988); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *AM. J. PSYCHIATRY* 1450, 1453–54 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *CRIME & DELINQ.* 124, 132–37 (2003); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 *SOC. JUST.* 8, 14–16 (1988); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 *CRIM. BEHAV. & MENTAL HEALTH* 85, 91 (1997).

¹⁸ Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *AM. J. PUB. HEALTH* 442, 445 (2014) (“Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm . . .”).

¹⁹ Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan E. Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, 2 *JAMA NETWORK OPEN*, Oct. 2019, at 8; Christopher Wildeman & Lars H. Andersen, *Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals: A Population-Based Study*, 5 *LANCET PUB. HEALTH* 107, 107–13 (2020), available at <https://www.thelancet.com/journals/lanpub/article/PIIS2468->

over the long-term impacts of solitary confinement on human health and functioning.²⁰ Some experts are even questioning whether the extreme social isolation and environmental deprivation of “solitary confinement can fundamentally alter the human brain.”²¹ Decades of research and advances in brain science now confirm what common sense and basic humanity made plain centuries earlier: solitary confinement is torture.

The use of solitary confinement in U.S. correctional institutions is a human rights crisis. And yet, up until very recently, few Americans paid any attention to this horrific practice taking place in their own communities and government institutions. Fortunately, the times are changing. Over the past several years, momentum to reform and even abolish the practice of solitary confinement has grown at an enormous rate.²² In many ways, the reform movement’s success at capturing the attention of the media, the public, and state and national leaders is unprecedented for any campaign seeking to end inhumane prison conditions. Not only has a sitting President of the United States labeled the practice “an affront to our common humanity,”²³ but several Supreme Court Justices have publicly condemned the practice as a possible violation of constitutional rights. The Supreme Court’s decision in *Davis v. Ayala*, a capital case addressing the exclusion of a defense attorney from part of a hearing on jury selection, issued on June 18, 2015, is one such example.²⁴ The defendant had spent much of the past twenty years in solitary confinement.²⁵ Justice Anthony Kennedy took the occasion to pen a separate concurring opinion to address the practice.²⁶ He noted that long-standing

2667(19)30271-3/fulltext [https://perma.cc/VUV2-S4D5]; Brie A. Williams, Amanda Li, Cyrus Ahalt, Pamela Coxson, James G. Kahn & Kirsten Bibbins-Domingo, *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. GEN. INTERNAL MED. 1977, 1978 (2019).

²⁰ Carol Schaeffer, “Isolation Devastates the Brain”: *The Neuroscience of Solitary Confinement*, SOLITARY WATCH (May 11, 2016), <http://solitarywatch.com/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/> [https://perma.cc/S42G-UDWL].

²¹ ACLU, BRIEFING PAPER: THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES 6 (2014), https://www.aclu.org/sites/default/files/field_document/stop_solitary_briefing_paper_updated_august_2014.pdf [https://perma.cc/8BKN-YGGT] [hereinafter BRIEFING PAPER].

²² See Amy Fetting, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), <https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement/> [https://perma.cc/DX2W-TDAZ] (“Twenty-eight states introduced legislation to ban or restrict solitary confinement, and twelve states passed reform legislation . . .”).

²³ Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html [https://perma.cc/MQJ2-NH52].

²⁴ 135 S. Ct. 2187, 2193 (2015).

²⁵ *Id.* at 2208 (Kennedy, J., concurring).

²⁶ *Id.*

knowledge of the danger of solitary confinement was “[t]oo often” and “[t]oo easily ignored,” but described a “new and growing awareness” about solitary confinement.²⁷ He concluded that years in solitary “exact a terrible price” and can drive prisoners “to the edge of madness, perhaps to madness itself.”²⁸ He concluded by inviting lawyers to bring a case that addressed these concerns directly, stating that “[i]n 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.”²⁹

While many might expect backpedaling from the Trump Administration, the trajectory for reform at the state level has thus far been unaffected by the regressive nature of the federal regime.³⁰ This is likely because the national reform movement and local campaigns are simultaneously driving systems reform, exposing the harms solitary inflicts on incarcerated people, and focusing on broadscale culture change—reforms that can proceed regardless of federal policy.

II. FACTORS DRIVING SOLITARY CONFINEMENT REFORM NOW

The current momentum against solitary confinement is no accident. It is the result of several groups’ long-term investment, savvy organizing, multipronged strategies, innovative corrections management, and intensive and simultaneous engagement with leaders at the local, state, national, and international level. The result is that both the public and corrections officials in state after state, and in the federal system, are embracing more humane

²⁷ *Id.* at 2209–10.

²⁸ *Id.*

²⁹ *Id.* at 2210; *see also* *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). In concluding that the death penalty violates the Eighth Amendment, Justice Stephen Breyer argued, in part, that almost all death-penalty states hold death-sentenced prisoners in solitary confinement for more than twenty-two hours per day. In addition to its inherently “dehumanizing” nature, Justice Breyer noted that solitary confinement is especially agonizing when a prisoner does not know whether he will actually be put to death. In these circumstances, Justice Breyer concluded that such prolonged confinement gives rise to an independent “special constitutional difficult[y].” *Id.* at 2765.

³⁰ For an example of regressive detention policies promulgated by the Trump Administration, *see generally* U.S. IMMIGRATIONS & CUSTOMS ENF’T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019), <https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf> [<https://perma.cc/9UV4-9Y8J>]. The new standards “[weaken] critical protections and [lower] oversight requirements” for immigration detention facilities and “further [weaken] protections for immigrant detainees against the use of force and solitary confinement.” Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, ACLU (Jan. 14, 2020), <https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/> [<https://perma.cc/WW4E-X6WJ>].

and effective alternatives to isolation.³¹ Some reforms have been halting and piecemeal, others more thoroughgoing. Some are driven by legislation or litigation, others by policy or budget.

This new momentum for reforming solitary confinement builds on six discernible forces of change: (1) civil society campaigns, including the leadership of solitary survivors, their families, and their communities; (2) the interplay of international human rights standards with domestic practices; (3) allies in government and leading professional groups; (4) civil rights litigation; (5) corrections leadership; and (6) media coverage and education efforts that increase public awareness and discourse. Any of these factors alone would likely be insufficient to generate the current momentum for change, but together they may be creating a sufficient groundswell to permanently alter the institutions and culture that supported the proliferation and “normalization” of this inhumane practice in the first place. The following Sections explain each of these agents of change in detail.

A. Civil Society Campaigns

The forces for change in the advocacy community have been building for years. A first effort was made in the late 2000s by the American Friends Service Committee (AFSC)—a group that boasts a long history of advocating for prisoner rights in the United States—with the *Stopmax* campaign, which advocated against “supermax” prisons.³² Supermax prisons are institutions that were built largely in the 1980s and 1990s, during the rise of mass incarceration in the United States, to hold all prisoners in extreme solitary confinement.³³ The next pivotal moment came in 2011, when the ACLU launched its Stop Solitary campaign, which has accelerated legislative and policy reform, public education, and litigation nationwide.³⁴ At the same time, the National Religious Campaign Against Torture (NRCAT) expanded its work against U.S.-sponsored torture to organize diverse faith communities to advocate against the practice of solitary confinement. The combination of the civil rights community and the faith community is one of the great strengths of the movement as it speaks to both legal and moral principles.

³¹ For example, the Mandela Rules’ fifteen-day limit on solitary is being adopted by corrections systems and included in draft state legislation around the country. *See infra* notes 56–57.

³² *See Healing Justice*, AM. FRIENDS SERV. COMMITTEE, <https://www.afsc.org/stopmax> [<https://perma.cc/28YT-ALAF>].

³³ Jesenia Pizarro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates*, 84 PRISON J. 248, 248–49 (2004).

³⁴ *See We Can Stop Solitary*, ACLU, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary> [<https://perma.cc/T9KL-FGRD>].

The movement also benefits from national coordination, goal-driven leadership, and recognition of the need for a relatively extended time horizon. This is best exemplified by the formation of the umbrella campaign, Unlock the Box (ULB), in October 2018.³⁵ ULB provides funding and technical assistance to strategically targeted state and local campaigns.³⁶ ULB was created by leaders in the movement to end solitary confinement, including the ACLU, NRCAT, the Center for Children’s Law & Policy, California Families Against Solitary Confinement, and a few others.³⁷ This joint and coordinated effort deliberately focuses on elevating the voices, experiences, and leadership of directly impacted individuals and communities in the movement to end solitary as a deliberate strategy to create and sustain a social movement empowered to change the larger culture.³⁸ The campaign has a stated ten-year time horizon and focuses on implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the “Nelson Mandela Rules,” as they relate to solitary confinement.³⁹

Finally, the movement benefits from strong, single-state campaigns with remarkable organization and leadership, such as in New Jersey, where a campaign just secured passage of the most protective legislation in the country in 2019.⁴⁰ Indeed, in 2019, a record twenty-eight states introduced solitary-reform legislation and twelve states passed reform laws.⁴¹

In the next ten years, the reform movement expects to work state by state and at the federal and international levels to enforce limits and outright bans on the use of solitary. Given the varied patchwork of culture and institutions in each state, this will require somewhat different strategies in each jurisdiction. Litigation will be required in some places, while legislation and policy reform will work better in others. At the same time, the national-level coordination of the movement led by ULB supports the exchange of ideas and strategies between geographically diverse campaigns and advocates in order to build on and strengthen the movement as a whole.

³⁵ Jean Casella & James Ridgeway, *Advocates Join Forces to End Long-Term Solitary Confinement in U.S. Prisons in the Next 10 Years*, SOLITARY WATCH (Oct. 19, 2018), <https://solitarywatch.org/2018/10/19/advocates-join-forces-to-end-long-term-solitary-confinement-in-u-s-prisons-in-the-next-10-years/> [<https://perma.cc/3HJN-TMSP>].

³⁶ See *Who We Are*, UNLOCK THE BOX, <https://www.unlocktheboxcampaign.org/> [<https://perma.cc/8LCM-3244>].

³⁷ *Id.*

³⁸ *See id.*

³⁹ See *infra* Section II.B for further discussion of these rules.

⁴⁰ Assemb. B. 314, 218th Leg., Reg. Sess. (N.J. 2019).

⁴¹ Fettig, *supra* note 22.

B. International Human Rights Standards

The same year the ACLU launched its Stop Solitary campaign, the first-ever global report on solitary confinement was issued by the United Nations Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Juan E. Méndez.⁴² A former political prisoner from Argentina, Méndez is also a law professor in the United States.⁴³ His report looked at the global practice of solitary confinement, which included the United States. Importantly, the report also set forth a specific time limit for solitary beyond which the practice may be considered torture: fifteen days.⁴⁴ A now-famous solitary survivor, Albert Woodfox, spent more than forty-three years in isolation in Louisiana,⁴⁵ but his decades in solitary are hardly unusual in many U.S. correctional systems. In the United States, people in prison are routinely subject to solitary confinement for weeks, months, years, or even decades.⁴⁶ The stark juxtaposition between the proposed human rights limit of fifteen days and our own unregulated and extreme practices has drawn the attention of international media, human rights advocates, and political leaders alike.⁴⁷

⁴² Juan E. Méndez (Special Rapporteur of the Human Rights Council), *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 19–22, U.N. Doc. A/66/268 (Aug. 5, 2011) [hereinafter Méndez Interim Report].

⁴³ Juan Méndez, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/torture/srtorture/pages/juanmendez.aspx> [https://perma.cc/PCP9-BRQ3].

⁴⁴ Méndez Interim Report, *supra* note 42, ¶¶ 79–81.

⁴⁵ See generally ALFRED WOODFOX WITH LESLIE GEORGE, *SOLITARY* (2019) (discussing his time in solitary).

⁴⁶ In Louisiana, for example, Woodfox “served nearly 44 years in solitary confinement.” KK Ottesen, *He Served Nearly 44 Years in Solitary Confinement. He Was Innocent of the Crime.*, WASH. POST (Mar. 31, 2020, 8:00 AM), https://www.washingtonpost.com/lifestyle/magazine/he-served-nearly-44-years-in-solitary-confinement-he-was-innocent-of-the-crime/2020/03/31/714b5506-621c-11ea-b3fc-7841686c5c57_story.html [https://perma.cc/8K2M-3Z3X]. An ACLU survey sent to every solitary confinement inmate across Louisiana found that more than 77% of inmates had been in solitary confinement for over a year and 30% for more than five years. Meghan Holmes, *Advocates Fight to Eliminate Long-Term Solitary Confinement*, LA. WEEKLY (July 1, 2019), <http://www.louisianaweekly.com/advocates-fight-to-eliminate-long-term-solitary-confinement/> [https://perma.cc/26R5-C3CX].

⁴⁷ See, e.g., Editorial, *Solitary Confinement Is an Affront to Human Decency*, WASH. POST (Oct. 13, 2018, 3:53 PM), www.washingtonpost.com/opinions/easing-the-torture-of-solitary-confinement/2018/10/13/68c50238-cd80-11e8-920f-dd52e1ae4570_story.html [https://perma.cc/3PUW-DQTC]; Ian M. Kysel, *Solitary Confinement Makes Teenagers Depressed and Suicidal. We Need to Ban the Practice.*, WASH. POST (June 17, 2015, 7:34 AM), www.washingtonpost.com/posteverything/wp/2015/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/ [https://perma.cc/9JNZ-ELXQ]; Richard Wener, Letter to the Editor, *Alabama Prison’s Cruelty*, N.Y. TIMES (Apr. 12, 2017), www.nytimes.com/2017/04/12/opinion/alabama-prisons-cruelty.html [https://perma.cc/X757-UQDF]; Christopher Zoukis, *What ‘The Mandela Rules’ Mean for American Prisons*, HUFFPOST (June 24, 2015,

This attention is in contrast to the experience of many U.S.-based advocates, including myself, who are often frustrated by how little traction international human rights standards receive in the United States. But that has begun to change in recent years, especially in the context of the campaign against solitary confinement.

Another fortuitous factor in the use of international human rights standards in the solitary confinement context arose due to the simultaneous revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs). The SMRs were originally drafted in 1955⁴⁸ but were not updated until the U.N. General Assembly issued a resolution requesting revision in 2010.⁴⁹ The revision process took over four years until the final rules were adopted in 2015.⁵⁰

The revised SMRs, now known as the Mandela Rules—named in honor of late South African President Nelson Mandela,⁵¹ who was imprisoned for twenty-seven years and held in solitary confinement by the country’s apartheid regime—provide that solitary confinement “shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review.”⁵² Indefinite solitary confinement and prolonged solitary confinement—defined as more than fifteen consecutive days—are now prohibited.⁵³ Solitary confinement is also prohibited in the case of persons with mental or physical disabilities when their condition would be exacerbated by such isolation.⁵⁴

The new Mandela Rules and the standards proposed by the Special Rapporteur constitute a major victory for prison reformers across the globe. Although they are nonbinding on nation-states and do not have the force of

4:07 PM), www.huffpost.com/entry/what-the-mandela-rules-mean-for-american-prisons_b_7649928 [<https://perma.cc/9266-YJAL>].

⁴⁸ *Standard Minimum Rules for the Treatment of Prisoners*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx> [<https://perma.cc/H8FL-GLNJ>] (noting that the rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).

⁴⁹ G.A. Res. 65/230, annex, ¶ 4 (Dec. 21, 2010).

⁵⁰ G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015).

⁵¹ *Id.* at 5.

⁵² *Id.* at 17.

⁵³ *Id.* at 16–17.

⁵⁴ *Id.* at 17.

a treaty,⁵⁵ they do provide a natural starting point for U.S.-based and nongovernmental organizations from around the world who are pushing for stronger protections from solitary confinement, including the ACLU, Human Rights Watch, Amnesty International, Penal Reform International, and a host of others. The impact is already being felt in the United States. Advocates are now able to point to clear international human rights standards that were approved by our own government. As a result, the Mandela Rules' fifteen-day limit on solitary is being adopted by corrections systems, like Colorado,⁵⁶ and being included as a reference or standard in draft state and federal legislation around the country.⁵⁷ For the first time in decades, or perhaps ever, Americans are looking outside their borders and parochial practices to reach for a better standard by which we judge our treatment of incarcerated people.

C. Allies in National Government and Leading Professional Groups

National reform efforts have also attracted strong allies in the U.S. Congress. In June 2012, Illinois Senator Dick Durbin held the first-ever congressional hearing on solitary confinement, and in February 2014 he held a follow-up hearing on the subject.⁵⁸ As a result of these hearings, the Federal Bureau of Prisons (BOP) faced greater scrutiny of its solitary confinement and isolation policies and practices, and efforts for reform were galvanized nationwide. Senator Durbin also reintroduced the Solitary Confinement Reform Act⁵⁹ in 2019, and representatives in the U.S. House of Representatives introduced a bipartisan bill, the Solitary Confinement Study and Reform Act of 2019.⁶⁰ Importantly, the First Step Act, which passed with bipartisan support in 2018 and was signed into law by President Donald Trump, included strong provisions to protect youth held under federal

⁵⁵ David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015, 4:30 PM), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/victory-un-crime-commission-approves-mandela-rules> [https://perma.cc/J27P-RYB3].

⁵⁶ See Rick Raemisch, Opinion, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html> [https://perma.cc/8EWG-2G8J].

⁵⁷ See, e.g., Solitary Confinement Study and Reform Act, H.R. 4488, 116th Cong. (2019); H.B. 1284, 2020 Sess. (Va. 2020); Humane Alternatives to Long-Term Solitary Confinement Act, S. 1623, 238th Leg., Reg. Sess. (N.Y. 2019) (HALT Solitary Confinement Act); Assemb. B. 314, 218th Leg., Reg. Sess. (N.J. 2018).

⁵⁸ Press Release, U.S. Sen. Dick Durbin, Durbin, Democratic Senators Introduce Bill to Limit Use of Solitary Confinement (Apr. 20, 2018), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-democratic-senators-introduce-bill-to-limit-use-of-solitary-confinement> [https://perma.cc/2MVV-VBLB] (describing the 2012 and 2014 hearings).

⁵⁹ Solitary Confinement Reform Act, S. 719, 116th Cong. (2019).

⁶⁰ Solitary Confinement Study and Reform Act, H.R. 4488, 116th Cong. (2019).

jurisdiction from the use of isolation and solitary confinement, including provisions limiting any “room confinement” of juveniles to three hours.⁶¹ This legislation has established a new national reference point for protecting detained and incarcerated youth from the damaging impacts of isolation.

Increasing leadership by prominent national organizations is also playing an important role in shaping political leadership, public opinion, and the field of corrections on the issue of solitary reform. Groups such as the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, and the National Commission on Correctional Health Care have all promulgated policy and standards to limit the use of solitary confinement, and other medical, professional, and religious organizations have followed suit.⁶²

D. Civil Rights Litigation

After years of fairly weak opinions and limited protections coming out of the courts, litigation momentum is growing. The recent combination of civil society organizing and jurisprudential development promises substantial new protections for prisoners. Importantly, this new momentum against solitary includes civil rights litigators coordinating cases, strategies, and experience in order to build jurisprudence as the national reform movement simultaneously focuses on broadscale culture change geared toward the ultimate abolition of solitary confinement. Litigation plays a key role in this regard by exposing the harms solitary wreaks on incarcerated

⁶¹ First Step Act, 18 U.S.C § 5043(b)(2)(B)(ii) (2018).

⁶² AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011); AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS (2012), <https://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder?g=667e5186-df26-4170-8c10-c8967acc5e27&Page=2> [<https://perma.cc/Y8AE-3WZ3>]; *Commissioners’ Resolution 11-22 on Prolonged Solitary Confinement in U.S. Prisons*, PRESBYTERIAN CHURCH (USA) (2012), [https://pcbiz.org/MeetingPapers/\(S\(em2ohnl5h5sdehz2rjteqtn\)\)/Explorer.aspx?id=4389](https://pcbiz.org/MeetingPapers/(S(em2ohnl5h5sdehz2rjteqtn))/Explorer.aspx?id=4389) [<https://perma.cc/ANK2-EQYT>] (urging all members of the faith to participate in work to “significantly limit the use of solitary confinement”); *Resolution on Prison Conditions and Prisoner Isolation*, RABBINICAL ASSEMBLY (May 21, 2012), www.rabbinicalassembly.org/story/resolution-prison-conditions-and-prisoner-isolation?tp=377 [<https://perma.cc/N2FF-5MWN>] (calling on prison authorities to end prolonged solitary confinement and the solitary confinement of juveniles and of people with mental illness); *Resolution Opposing the Use of Prolonged Solitary Confinement in the Correctional Facilities of New York State and New York City*, N.Y. ST. COUNCIL CHURCHES (Sept. 2012), <https://sites.google.com/site/nyscouncilofchurches/priorities/on-solitary-confinement> [<https://perma.cc/V79K-59RM>]; *Solitary Confinement (Isolation)*, NAT’L COMMISSION ON CORRECTIONAL HEALTH CARE (2016), <http://www.ncchc.org/solitary-confinement> [<https://perma.cc/LC2R-5K8D>]; *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (2012), https://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx [<https://perma.cc/V98C-UGBV>].

people while also demanding that correctional systems undergo reform and ultimately seeking to change cultural norms both inside and outside correctional institutions.

Key victories in states like Alabama, Massachusetts, Montana, Virginia, Pennsylvania, New York, California, and Indiana help to develop alternative approaches to the management of vulnerable populations, like people with serious mental illness, and corrections management more generally.⁶³ At the same time, significant damage judgments and settlements, such as the \$15.5 million settlement accepted by a man with mental illness who spent two years in solitary confinement in a New Mexico jail, have put pressure on corrections leaders to support change.⁶⁴ Prior to the Trump Administration, the leadership of the Civil Rights Division (CRD) of the U.S. Department of Justice (DOJ) was also providing critical impetus for reform. Federal investigations into the use of solitary confinement at the state and local levels and Statements of Interest by the DOJ in support of ongoing litigation pushed the development of policy, practice, and law at the state and national levels.⁶⁵ Currently, that momentum has stalled due to inactivity

⁶³ Disability Rights Mont., Inc. v. Batista, 930 F.3d 1090, 1093 (9th Cir. 2019); Porter v. Clarke, 290 F. Supp. 3d 518, 521 (E.D. Va. 2018), *aff'd*, 923 F.3d 348, 353 (4th Cir. 2019); Braggs v. Dunn, 257 F. Supp. 3d 1171, 1247 (M.D. Ala. 2017); Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *1 (S.D. Ind. Dec. 31, 2012); Settlement Agreement, Peoples v. Fischer, No. 11-cv-2694-SAS (S.D.N.Y. Dec. 16, 2015); Settlement Agreement, Ashker v. Brown, No. 09-cv-05796-CW (N.D. Cal. Sept. 1, 2015), *available at* http://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf [<https://perma.cc/V4MN-HSZR>]; Settlement Agreement, Disability Rights Network of Pa. v. Wetzel, No. 1:13-CV-00635 (M.D. Pa. Jan. 5, 2015), *available at* <https://www.aclupa.org/our-work/legal/legaldocket/disability-rights-network-v-wetzel> [<https://perma.cc/BNJ5-2VWH>]; Settlement Agreement, Disability Law Ctr., Inc. v. Mass. Dep't of Corr., No. 07-10463 (D. Mass. Oct. 21, 2011), *available at* <http://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf> [<https://perma.cc/RKF3-H5EE>].

⁶⁴ Alan Duke, *'Forgotten' Inmate Gets \$15.5 Million Settlement from N.M. County*, CNN (Mar. 8, 2013, 10:56 AM), <https://www.cnn.com/2013/03/07/justice/new-mexico-inmate-settlement/index.html> [<https://perma.cc/W9UJ-KRLD>].

⁶⁵ *See, e.g.*, Statement of Interest of the United States of America, G.F. v. Contra Costa County, No. 3:13-cv-03667-MEJ (N.D. Cal. Feb. 13, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf [<https://perma.cc/G6CF-KTBK>]; Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y., to Mayor Bill de Blasio, Mayor of N.Y.C., Comm'r Joseph Ponte, N.Y.C. Dep't of Corr., & Zachary Carter, Corp. Counsel of N.Y.C. 3, 46, 62 (Aug. 4, 2014), *available at* <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf> [<https://perma.cc/F3JR-VDGY>] (regarding the CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Tom Corbett, Governor of Pa. (May 31, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf [<https://perma.cc/8VUG-4PQU>] (regarding the Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation).

within CRD, but allies in DOJ remain and will no doubt resurface under a new administration.

E. Corrections Leadership

Recognition among corrections leadership that the use of solitary confinement in the United States has gone too far and does not create positive results also fuels reform efforts. Indeed, in a joint report, the Association of State Correctional Administrators (ASCA) and the Liman Program at Yale Law School recognized that “[p]rolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern.”⁶⁶ These concerns are reflected in the actions of some of the field’s most outspoken leaders, such as former Executive Director of Colorado’s Department of Corrections, Rick Raemisch, who adopted the fifteen-day limit on solitary confinement set forth in the Mandela Rules.⁶⁷

Director Raemisch and other U.S. corrections officials were also part of the final negotiations of the Mandela Rules in Cape Town, South Africa. During the final meeting, these corrections directors worked on a panel sponsored by the United States and participated in the negotiations that led to the inclusion of solitary confinement protections into the SMRs.⁶⁸ Advocates present at that meeting, including ACLU staff, believe the corrections directors’ presence was instrumental in bringing the U.S. delegation on board with the solitary confinement restrictions finalized in those rules.⁶⁹

Participation by U.S. corrections professionals in international forums and exchange programs also helps drive changes to policy and practice related to solitary confinement here at home. Starting with the work of the Prison Law Office in Berkeley, California, and now including organizations such as the Vera Institute of Justice and Amend—a project of the University of California, San Francisco—there has been a deliberate effort to foster programs that bring U.S. corrections officials to Europe to meet their counterparts and expose them to alternate models of penal practice, notably in Norway.⁷⁰ These programs have already led to measurable impacts in

⁶⁶ 2014 ASCA-LIMAN SURVEY, *supra* note 1, at i.

⁶⁷ See Raemisch, *supra* note 56.

⁶⁸ Fathi, *supra* note 55.

⁶⁹ *Id.*

⁷⁰ See Donovan Foughty, *Norway Prison Tour: Lessons Learned on Criminal Justice Reform*, DOCKET, Winter 2016, at 2, available at <https://prisonlaw.com/wp-content/uploads/2015/12/Norway-Article-Docket-Magazine3.pdf> [<https://perma.cc/LVX7-HVH6>]; Press Release, Wash. State Dep’t of Corr., Washington Corrections Secretary and Vera Institute to Study Prison Reforms in Norway (Oct. 28, 2019), available at <https://www.doc.wa.gov/news/2019/10282019p.html> [<https://perma.cc/>]

several systems.⁷¹ Opportunities for exchange and learning in a field that is most often insular and apprehensive about new ideas provide support for corrections professionals to change their culture and reject the use of solitary confinement as a one-size-fits-all approach to prison management.

F. Public Information and Media Coverage

Another significant driver of this movement is public access to more information about the practice of solitary confinement. For too long, the practice existed in the shadows of the criminal justice system—widely acknowledged but rarely discussed. Many systems did not—and many still do not—collect basic data on how many people are in solitary, for what reason, and for how long. This lack of transparency and accountability extended to the public’s lack of knowledge about the practice. Indeed, prior to 2010, there were few media reports on solitary confinement in the United States, despite its pervasive use and corrosive impacts. This began to change with the founding of *Solitary Watch*, a web-based, single-issue journalism site that creates and collates print and online reports on solitary confinement and efforts to reform the practice.⁷² At the same time, advocacy campaigns nationwide have been remarkably successful in engaging media attention through human rights reports, arts collaborations, utilization of social media, local op-eds by community leaders, and engagement with the editorial boards of major news media.⁷³ In a widely discussed and somewhat controversial piece, Oprah Winfrey even toured a solitary confinement prison to explore the need for reform.⁷⁴ As a result of these strategies, the questions of whether solitary confinement is inhumane, whether it inflicts

S76L-L36W]; see also *What We Do*, AMEND, <https://amend.us/whatwedo/> [<https://perma.cc/QH6G-W9K2>] (detailing corrections exchange programs between U.S.-based corrections officials and staff with Norwegian counterparts).

⁷¹ Maurice Chammah, *I Did It Norway*, MARSHALL PROJECT (Oct. 31, 2017), <https://www.themarshallproject.org/2017/10/31/i-did-it-norway> [<https://perma.cc/7VWQ-4TC4>]; Dashka Slater, *North Dakota’s Norway Experiment*, MOTHER JONES (July/Aug. 2017), <https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/> [<https://perma.cc/Y3DL-WJBX>].

⁷² See *About Solitary Watch*, SOLITARY WATCH, <https://solitarywatch.org/about/> [<https://perma.cc/LRS6-MELN>].

⁷³ See *Stop Solitary – Websites and Articles*, ACLU, <https://www.aclu.org/stop-solitary-websites-and-articles> [<https://perma.cc/H3RK-SKYK>] (collecting sources of media coverage, reports, studies, videos, films, and broadcasts about solitary confinement); see also Raemisch, *supra* note 56; Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX (Apr. 17, 2019, 4:30 PM), <https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform> [<https://perma.cc/654Y-ZQTT>].

⁷⁴ Oprah Winfrey, *Reforming Solitary Confinement at an Infamous California Prison*, 60 MINUTES (July 22, 2018), <https://www.cbsnews.com/news/60-minutes-reforming-solitary-confinement-at-an-infamous-california-prison/> [<https://perma.cc/S84B-GSF6>].

suffering and permanent damage, whether it costs too much, and whether it does anything to rehabilitate prisoners are now emerging fully in the mainstream media and public discourse.⁷⁵

All of these agents of reform are critical to creating a tipping point to achieve lasting change and an end to solitary confinement in the United States. But the question remains of how to ensure that the practice of solitary confinement becomes unacceptable everywhere in this country no matter the reason—or at least for any reason not justified by international human rights standards.

III. CREATING A NATIONAL TIPPING POINT TO END SOLITARY CONFINEMENT

Is the current momentum for reform enough to shift the culture both inside and outside prison walls to fundamentally rethink how we manage and operate corrections institutions and how we treat our fellow human beings? An honest answer is yes, but with more and somewhat different effort. The current drivers of reform will remain central to achieving these goals; however, there are several key components that must be addressed more rigorously if we are to achieve the tipping point that sends solitary confinement to the dustbin of history. These components include: (1) mobilizing to generate a sufficiently strong shift in public support of ending solitary confinement; (2) documenting, researching, and promoting alternatives to solitary confinement that allow for the safe, humane, and effective management of carceral institutions;⁷⁶ and (3) implementing greater oversight and accountability in corrections institutions generally. These components not only support each other, but also foster sustainable and permanent change in the current culture and operations of corrections in this country.

A. *Shifting Public Opinion*

For the first time in U.S. history, a sitting president, Barack Obama, and several presidential primary candidates publicly questioned the use of

⁷⁵ See, e.g., Editorial, *Solitary Confinement Should Be a Last Resort*, WASH. POST (Aug. 21, 2011), https://www.washingtonpost.com/opinions/solitary-confinement-should-be-a-last-resort/2011/08/11/gIQAxys6UJ_story.html?fb_ref=NetworkNews&fb_source=home_multiline [https://perma.cc/UGA4-PPNJ]; Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons.*, MOTHER JONES (Nov./Dec. 2012), <https://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer/> [https://perma.cc/34H3-XHMD]; Wykstra, *supra* note 73.

⁷⁶ See *infra* Section III.B.

solitary confinement in this country.⁷⁷ The 2020 Democratic primary candidates either labeled solitary confinement “torture,” called for its abolition or near abolition, or at the minimum, advocated for implementation of the Mandela Rules.⁷⁸ It is doubtful that any prison condition has ever received such high-level, public political attention in the history of the republic.

This substantial recognition by national leaders raises the question of where the public now stands on this issue. For advocates such as myself, it also raises questions about how we might support a more definitive shift in public opinion against the practice and how much of the public needs to care about an issue to actually shift existing norms. Fortunately, in recent years, shifting cultural norms have produced numerous examples of major, and relatively rapid, changes in public opinion on divisive issues. For example, in both the campaigns for marriage equality and marijuana legalization, there were major inflection points in public opinion between 2010 and 2012 where suddenly the majority of U.S. adults supported both causes—whereas during the decade prior, support for these causes was consistently in the 20% to 30% range.⁷⁹ New sociological research provides some explanation for these public policy victories through experimental models that show that these types of movements are successful when they coalesce at least 25% of public supporters who will actively mobilize to challenge existing social norms or conventions.⁸⁰ The key here seems to be that although the required proportion of supporters needed to reach a tipping point in public opinion may be

⁷⁷ See Joshua Manson, Katie Rose Quandt & James Ridgeway, *Where the Democratic Presidential Candidates Stand on Solitary*, SOLITARY WATCH (Oct. 22, 2019), <https://solitarywatch.org/2019/10/22/where-the-democratic-presidential-candidates-stand-on-solitary-confinement/> [<https://perma.cc/S4SX-FK74>]; Obama, *supra* note 23.

⁷⁸ For example, Senator Bernie Sanders called for an end to solitary confinement, calling it “a form of torture and unconstitutional, plain and simple.” Manson, Quandt & Ridgeway, *supra* note 77. Similarly, Beto O’Rourke stated, “[L]et’s absolutely end solitary confinement,” and Pete Buttigieg stated that he would “reduce the over-reliance on solitary confinement and abolish its prolonged use, bringing the United States in line with international human rights standards, which view the use of solitary confinement in excess of 15 days as *per se* torture.” *Id.* Joe Biden has declared that he will “start by ending the practice of solitary confinement, with very limited exceptions such as protecting the life of an imprisoned person.” *Id.* Finally, Senator Kamala Harris’s criminal justice platform also called to end the death penalty and solitary confinement. *Id.*

⁷⁹ See Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/W649-5FJ8>]; *Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [<https://perma.cc/GV6X-JLLL>].

⁸⁰ Damon Centola, Joshua Becker, Devon Brackbill & Andrea Baronchelli, *Experimental Evidence for Tipping Points in Social Convention*, 360 SCIENCE 1116, 1118 (2018).

relatively modest, those supporters must be dedicated and willing to speak out and speak up.⁸¹ In some ways, this makes intuitive sense in a democratic society as large and diverse as the United States. A variety of opinions will always have the support of a few, but such opinions and positions will stay on the fringe of society without challenging existing social norms because their supporters are either content to let them remain minority positions or too timid to express their opinions loudly, publicly, and consistently. This dynamic appears to change when even a small coalition of 25% of the public becomes motivated to aggressively advocate or speak out for change so that a once-fringe position becomes accepted as the mainstream popular opinion relatively rapidly.⁸²

This research and the recent historical examples of the marriage-equality and marijuana-legalization campaigns have important implications for the next stage of the campaign to abolish solitary confinement. Speaking as the Director of the ACLU's Stop Solitary Campaign, who has worked with a broad coalition of national and local groups over the last decade, I can say that Stop Solitary is a fairly advanced, yet traditional public advocacy campaign. The campaign has been successful at generating consistent media attention and public education⁸³ about the issue, which has translated into tangible wins and policy changes and otherwise promising efforts in many jurisdictions.⁸⁴ The approach has focused on broad-based coalition building and consciousness-raising in an attempt to reach at least 51% of the public. In part, this is because the practice of solitary confinement remained so hidden for so long from the public. It is also because much of the campaign's

⁸¹ See *id.* at 1116 (“[T]he power of small groups comes not from their authority or wealth but from their commitment to the cause.”).

⁸² *Id.* at 1118.

⁸³ See, e.g., ALONE & AFRAID, *supra* note 2; BRIEFING PAPER, *supra* note 21; ACLU & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [<https://perma.cc/6MEM-4VUQ>] [hereinafter GROWING UP LOCKED DOWN].

⁸⁴ See Kelan Lyons, *Advocates Push to Curtail Solitary Confinement in CT Prisons*, CT MIRROR (Jan. 23, 2020), <https://ctmirror.org/2020/01/23/advocates-push-to-curtail-solitary-confinement-in-ct-prisons/> [<https://perma.cc/Z8YH-SMNR>]; John L. Micek, *ACLU Court Settlement Means Pa. Will End Solitary Confinement on Death Row*, PA. CAP.-STAR (Nov. 18, 2019), <https://www.penncapital-star.com/criminal-justice/aclu-court-settlement-means-pa-will-end-solitary-confinement-on-death-row/> [<https://perma.cc/C2ND-QDBG>]; G. Wayne Miller, *ACLU Sues State over Use of Solitary Confinement for Inmates with Mental Illness*, PROVIDENCE J. (Oct. 25, 2019, 8:55 AM), <https://www.providencejournal.com/news/20191025/aclu-sues-state-over-use-of-solitary-confinement-for-inmates-with-mental-illness> [<https://perma.cc/549V-Z2X4>]; Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado's Prisons*, ACLU (Dec. 5, 2018, 4:30 PM), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons> [<https://perma.cc/Y9KV-D6B4>].

approach has focused on top-down change; piecemeal reform through protection of vulnerable populations, such as youth, pregnant women, and persons with mental illness; and appeals to the broadest possible swath of the public.⁸⁵ At the same time, much of the campaign's efforts have focused on local-level or state-based campaigns rather than a national movement.

But if the goal is to generate a tipping point in public opinion, a better strategy seems to be looking at how to build and empower the movement's dedicated base of supporters across the country to aggressively push against the existing status quo that allows solitary confinement to exist in our society. This will require that the campaign identify and cultivate that base of dedicated supporters and that it communicate effectively with them in order to help inform the public perception of the issue. This does not mean that the ACLU will stop its aggressive state advocacy campaigns or discontinue its focus on policy/legislative reform at that level, but it does mean that more time and energy must be dedicated to national movement-building for a small, but vocal and empowered minority.

B. Documentation, Research, and Promotion of Alternatives

The last decade of reform has created a proliferation of state-level experimentation with new programs designed to reduce the overall use of solitary confinement, limit its duration, and create alternatives for vulnerable populations, such as individuals with serious mental illness.⁸⁶ But despite these attempts at innovation, there is still very little public documentation or evidence-based research on these alternative programs. This lack of data capture, low-level capacity for data analysis and collection in many jurisdictions, and the historic reluctance of some corrections systems to allow outside access prevents researchers from studying and analyzing the results of reform initiatives.⁸⁷ As a consequence of these structural problems,

⁸⁵ See, e.g., ALONE & AFRAID, *supra* note 2, at 2–3 (focusing on juveniles); BRIEFING PAPER, *supra* note 21, at 6–7, 13 (describing the impact of solitary confinement on people with mental illness, pregnant women, and youth); GROWING UP LOCKED DOWN, *supra* note 83, at 1–5 (focusing on youth).

⁸⁶ See BRIEFING PAPER, *supra* note 21, at 12–14 (discussing federal and state experimentation with reform programs).

⁸⁷ See Lauren-Brooke Eisen, *Private Prisons Lock Up Thousands of Americans with Almost No Oversight*, BRENNAN CTR. FOR JUST. (Nov. 8, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/private-prisons-lock-thousands-americans-almost-no-oversight> [https://perma.cc/MDZ5-BGL6]; Matt Ford, *The Missing Statistics of Criminal Justice*, ATLANTIC (May 31, 2015), <https://www.theatlantic.com/politics/archive/2015/05/what-we-dont-know-about-mass-incarceration/394520/> [https://perma.cc/HUW2-J3DR] (“No one knows exactly how many people are currently kept in isolation in American prisons.”); Wendy Sawyer, *Since You Asked: Is It Me, or Is the Government Releasing Less Data About the Criminal Justice System?*, PRISON POL’Y INITIATIVE (Nov. 14, 2019), <https://www.prisonpolicy.org/blog/2019/11/14/criminal-justice-data/> [https://perma.cc/T7N8-6KFG].

after years of reform efforts, there is still no clear road map for reform or consensus around alternatives that work.

Indeed, many of the so-called alternatives to indefinite solitary, such as step-down programs,⁸⁸ could devolve into long-term isolation where there is little to no difference between the prior practice and the current “reform.”⁸⁹ Some of the oldest reform efforts, such as New York’s law excluding people with diagnosed serious mental illness (SMI) from solitary units, have also proven easy to undermine. For instance, advocates have found that prisoners who were previously diagnosed as SMI in New York prisons were mysteriously and somewhat miraculously re-diagnosed with a much less severe mental illness so that they could be placed in isolation.⁹⁰ As a lawyer working on civil rights cases challenging the use of solitary, I have also been on the receiving end of departments of corrections’ arguments that they no longer have solitary confinement units as long as they *only* place people in isolation for twenty-one hours and fifty-nine minutes a day, as opposed to the common definition of twenty-two hours a day. That type of manipulation is unfortunately typical where changes to institutional culture lags far behind public pressure and official reform efforts.

Changing the long-ingrained culture of corrections, which is addicted to the use of solitary confinement as a one-size-fits-all solution to all its many problems,⁹¹ continues to be a consistent and significant obstacle to real and lasting reform. Although legislatures have passed laws, courts have issued orders, and several corrections leaders have vocally supported reform, conditions in most jurisdictions are still slow to change.⁹² Structural

⁸⁸ Step-down programs use transitional units that are less restrictive than solitary units but more restrictive than general-population units to transition prisoners from solitary confinement to the general population of the prison.

⁸⁹ Jean Casella & Aviva Stahl, *Opening the Door*, PRISON LEGAL NEWS (Aug. 30, 2017), <https://www.prisonlegalnews.org/news/2017/aug/30/opening-door/> [https://perma.cc/6BJL-V9UD].

⁹⁰ Victoria Law, *New York Supermax*, SOLITARY WATCH (Dec. 14, 2017), <https://solitarywatch.org/2017/12/14/new-york-supermax/> [https://perma.cc/NUD6-SQJ9].

⁹¹ See *supra* note 4 and accompanying text.

⁹² For example, even in the state with the most significant reforms to date, Colorado, change has been uneven and required constant vigilance. For example, after Colorado banned long-term solitary confinement for prisoners with serious mental illness under state law, but before the state changed its policy to discontinue the use of solitary confinement beyond fifteen days, incarcerated people still reported the new conditions and “out-of-cell time” at the Colorado prisons as not being much different than they were previously. Alan Prendergast, *Prison Officials Claim Success in Reducing Solitary Confinement*, WESTWORD (Dec. 31, 2015, 7:32 AM), <https://www.westword.com/news/prison-officials-claim-success-in-reducing-solitary-confinement-7467578> [https://perma.cc/8S9G-5QC8]; see also LINDSAY M. HAYES, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 15 (1995) (“[F]ormal adoption of current national correctional standards by a prison system does not necessarily ensure that individual facilities have put those procedures into

challenges, such as understaffing and lack of training, are also significant problems that reinforce old culture and undermine new initiatives.

There is no question that achieving a lasting end to solitary confinement requires both clear alternatives and a shift in corrections culture and expectations. This in turn requires a focus on publishing research and results of reform from credible sources, as well as buy-in from corrections leadership. But supporting corrections leadership and staff to change practices they have relied on for decades often comes up against human inertia and lack of familiarity with, or trust in, alternatives. Building the necessary trust and skills corrections staff need to operate in a different manner will require substantial investments in staff training and education, as well as persistent and insistent leadership.

C. Promoting Oversight, Transparency, and Accountability

The carceral spaces in this country suffer from a lack of transparency, public oversight, and accountability. Unlike most of our sister nations with better run and more effective and humane carceral systems, the patchwork corrections system in the United States is subject to very little independent government oversight.⁹³ And the sporadic and beleaguered oversight mechanisms that do exist have virtually no enforcement power.⁹⁴ Instead, we have traditionally relied on courts to play the dominant oversight role in corrections—which means we have actually relied on private attorneys to bring cases to protect the lives and welfare of thousands on an ad hoc basis.⁹⁵

The result of this overwhelming lack of transparency and accountability in corrections is that the public has routinely ignored what happens behind bars. In short, the public does not tend to care about what it cannot see. And where the public does not care, the status quo—no matter how damaging—prevails or deteriorates. This deep structural failing presents formidable hurdles to achieving and maintaining alternatives to solitary confinement,

operation.”); *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> [<https://perma.cc/F85W-SBUF>] (“The Justice Department found in 2019 that the Alabama Department of Corrections had long been aware of the unconstitutional conditions in its prisons, yet ‘little has changed.’”).

⁹³ Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1385 (2010). For example, in the United Kingdom, the British Prison Inspectorate “has statutory power to inspect every adult prison and juvenile facility in England and Wales, as well as all places of immigration detention,” and every prison “is inspected at least twice every five years.” *Id.* at 1396.

⁹⁴ HAYES, *supra* note 92, at 15.

⁹⁵ I am one of the few attorneys in this country who litigates such cases and can say from years of experience (and basic common sense) that this is an unconscionable way to provide an essential government service.

because even when laws and policies are changed, there is very little actual impact on the operation of these institutions.⁹⁶

This means that if we want to create a meaningful tipping point towards the abolition of solitary confinement, reforms must be heavily policed, and clear implementation plans and accountability measures will be necessary to ensure that changes in the hearts and minds of the U.S. public translate into actual changes in corrections practices and conditions of confinement. Because there are few formal and effective accountability structures in place to ensure that prisons, jails, and juvenile detention centers operate in a humane and effective manner, this also suggests that creating a true tipping point will require the creation of more public oversight of these institutions generally. Ultimately, in order to stop solitary confinement, we must ensure that transparency, accountability, and oversight for all places of incarceration and detention become a part of the U.S. governmental landscape.

CONCLUSION

All the issues surrounding abolishing solitary require a long-term commitment from advocates, progressive forces in corrections, and political leaders—at the very least. Creating a tipping point against solitary confinement that once and for all banishes the practice as a barbarism of the past unfit for a civilized society is not an easy task by any means. But what the last ten years of solitary confinement reform has shown is that stakeholders from across the criminal justice system and society at large can work independently and together towards this shared goal. The tipping point starts with us.

⁹⁶ See *supra* note 92.