



UNC  
SCHOOL OF LAW

*Human Rights Policy Lab*

**Solitary Confinement:  
From its Origins to Reparations for its Survivors**

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2021-2022*

*With gratitude to Disability Rights NC, NC-ACLU, and NC Prisoners Legal Services for their  
support, guidance and expertise.*

[SolConf-Origins-Repair](#)

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## **Executive Summary**

The Human Rights Policy Lab at North Carolina School of Law is committed to addressing the significant problems with solitary confinement which has been acknowledged as a form of torture. This report seeks to identify how we can redress and compensate survivors for their experiences in solitary. It examines solitary confinement holistically and uses existing reparation models to demonstrate the possible forms for meaningful solitary confinement reparations. The report is presented in seven sections.

SECTION ONE identifies the human rights-related definition of solitary confinement and compares it to current definitions found in U.S. laws. Section One also describes the forms of solitary confinement and demonstrates the lack of differentiation between punitive and so-called non-punitive solitary housing. Finally, it explores the different names for solitary confinement and hypothesizes about why prisons avoid using the term solitary confinement.

SECTION TWO explains the origins of solitary confinement in the United States. It demonstrates how a well-meaning idea unfolded into the massive use of solitary today. To that end, it includes a brief history of the ways that the Quakers promoted the use of solitary confinement in the first high security prison based upon a view that it would help incarcerated persons—a view that was both wrongful, and further exploited by prisons across the United States. It describes the Quakers current involvement with prison reform and identifies the need for a reparations-related effort given the historic origins of solitary confinement.

SECTION THREE identifies particular populations of incarcerated persons who are already marginalized and are often disproportionately confined to solitary confinement and the adverse effects it has on those groups. These groups include non-white incarcerated persons, women, LGBTQ incarcerated persons, minors, and persons with disabilities who are in prisons. SECTION

THREE also details the use of solitary confinement with immigrant detainees and the disregard for lawful procedures by Immigration Customs and Enforcement (ICE).

SECTION FOUR gathers data on the use of solitary confinement during the COVID-19 pandemic. It also discusses the pandemic plans and protocols for medical isolation in prisons. It further explores how the United States prison system mishandled the pandemic and recounts the some of the most significant missteps and the consequences of harmful carceral practices.

SECTION FIVE tells the stories of solitary confinement survivors and their experiences. It highlights how the survivors' experiences mirror the effects noted in solitary confinement studies. It reveals how every sector of their lives are affected by the devastating experience of isolation: their physical and mental health, relationships, eating habits, and more.

SECTION SIX analyzes the federal government responses to solitary confinement. This section is supplemented by Appendix A that details decades worth of efforts to obtain federal legislation and policies to address the harms of solitary confinement.

SECTION SEVEN examines the possibilities of reform through the three branches of North Carolina state government. It details specific actions from the last administration and political cycle. The section also recommends certain actions each branch can take in advancing solitary reform.

SECTION EIGHT explores the possibilities for reparations based on United Nation practices and procedures when responding to claims of human rights violations. It includes a description of U.S.-based and international reparation models in other circumstances as relevant to the need for reparations for solitary confinement.

SECTION NINE covers the growing concern over solitary confinement use. It recognizes that previous domestic and global reparation schemes and their respective situations closely align

the experience of solitary confinement survivors. Finally, it calls back to the importance of centering survivors in the conversation and humanizing their experiences.

## I. Solitary Confinement Defined

In December 2015, the United Nations General Assembly adopted rules of minimum standards for the conditions and treatment of incarcerated persons<sup>1</sup>, commonly known as the Mandela Rules.<sup>2</sup> The rules provide the first official international definition of solitary confinement.<sup>3</sup> The Mandela Rules define solitary confinement as holding an individual for 22 hours or more per day in a space without any “meaningful human contact.”<sup>4</sup> Prolonged solitary confinement refers to the same practice extended for 15 consecutive days or longer.<sup>5</sup> The UN’s definition closely resembles those currently adopted by the U.S State Department of Justice (DOJ)<sup>6</sup> and the American Bar Association (ABA)<sup>7</sup>. The DOJ further acknowledges that solitary confinement imposes *effective* isolation even absent *literal* isolation, such as in cases of double-celling.<sup>8</sup> The Mandela Rules carry the force of “soft law”<sup>9</sup> in defining solitary confinement and thus require a political and legal commitment to domesticate the rules’ provisions.<sup>10</sup> Soft law is defined as “an instrument or measure that, while not strictly legally binding, has some normative

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<sup>1</sup> G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Jan. 8, 2016) [hereinafter Nelson Mandela Rules].

<sup>2</sup> See Nelson Mandela, *The Long Walk to Freedom* (1994).

<sup>3</sup> *Id.*

<sup>4</sup> Nelson Mandela Rules, *supra* note 1, at Rule 44.

<sup>5</sup> *Id.* at Rule 45.

<sup>6</sup> Report and Recommendations Concerning the Use of Restrictive Housing, U.S. Department of Justice (accessed Oct. 12, 2021 <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing>). [hereinafter D.O.J. Report].

<sup>7</sup> A.B.A. Res. 108A, *Report on Solitary Confinement*, American Bar Association, 1 (Feb. 5, 2018).

<sup>8</sup> D.O.J. Report, *supra* note 6; See generally Call, J.E. et. al, *Overcrowding in American Prisons Policy Implications of Double-Bunking Single Cells* (1982) (defining double celling as the practice of housing two or more incarcerated persons in a cell designed for single occupancy).

<sup>9</sup> Glossary Soft Law (EU), *Thomas Reuters Practical Law* (2022).

<sup>10</sup> Juan E. Méndez, *Torture, Solitary Confinement, and International Law*, *Solitary Confinement: Effects, Practices, and Pathways toward Reform*, 124-25 (2019).

or coercive effects.” This includes much of international law but especially human rights law. The definitions relied upon by the DOJ, ABA, and other U.S. agencies governing national and state-level corrections do not create binding legal standards,<sup>11</sup> and as a result, the use and practice of solitary confinement continues in a variety of forms and purposes.<sup>12</sup>

Currently, many incarcerated persons experience conditions of extreme isolation for punitive and non-punitive reasons.<sup>13</sup> Protective custody exposes persons who are incarcerated to nearly the same restrictive circumstances of solitary confinement endured by those punished for violating rules.<sup>14</sup> The use of solitary confinement as a disciplinary tool covers violations from violent offenses to “moving too slowly in the lunch line.”<sup>15</sup> The cells used for solitary confinement often double as treatment spaces for people suffering severe mental health crises, acute medical emergencies, or physical disabilities.<sup>16</sup> Solitary confinement also serves the purpose of administrative convenience, such as the isolation of some people for indeterminate periods of time during investigations or for reasons such as a lack of adequate bed space in the general population.<sup>17</sup>

The terminology used to describe solitary confinement varies. For example, the U.S. Bureau of Prisons insists that federal prisons use the benign term of Special Housing Units (SHU) as an attempt to obscure the nature of the practice.<sup>18</sup> Similarly, many jurisdictions have employed

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<sup>11</sup> See generally D.O.J. Report, *supra* note 6; see generally A.B.A. Res. 108A, *supra* note 7.

<sup>12</sup> See Peter Scharff Smith, *Solitary Confinement – Effects and Practices from the Nineteenth Century until Today*, Solitary Confinement: Effects, Practices, and Pathways toward Reform, 38-39 (2019).

<sup>13</sup> Méndez, *supra* note 10, at 122.

<sup>14</sup> Kenneth McGinnis, et al., *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, 28-29 (2014).

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

<sup>16</sup> *Id.* at 28.

<sup>17</sup> *Id.* at 12-13.

<sup>18</sup> Stephanie Chen, ‘Terrible Tommy’ spends 27 years in solitary confinement, CNN. (accessed Oct. 10, 2021 at <http://www.cnn.com/2010/CRIME/02/25/colorado.supermax.silverstein.solitary/>).

an assortment of euphemisms: restrictive housing, disciplinary segregation, control units, special management, or some combination of similar terms.<sup>19</sup> The classification “supermax”, used regularly during the height of the War on Drugs,<sup>20</sup> seeks to convey that these prisons are reserved for the most dangerous persons who are incarcerated.<sup>21</sup> These terms only serve to obscure the practice of solitary confinement and disguise its purpose: *restrictive housing* softens the practice; *supermax* characterizes it according to the presumed type of person subjected to it.<sup>22</sup> Regardless, they apply conditions meant to enforce extreme isolation and deprivation.<sup>23</sup> Among the many terms substituted, perhaps the truest description is captured by the colloquial term often used by the persons who experience it firsthand: the hole.<sup>24</sup>

## II. Historical Origins of Solitary Confinement and Quaker Theology

Solitary confinement is a practice which predates the establishment of the United States. Yet, its history in the U.S. bears a unique origin. In 1787, Quaker Dr. Benjamin Rush founded the Philadelphia Society for Alleviating the Miseries of Public Prisons. Dr. Benjamin Rush, believed that criminal behavior was similar to a disease, and could be cured with simplicity and silence.<sup>25</sup> Therefore, the group for these practices in a new prison called Eastern State Penitentiary.<sup>26</sup> In 1829, Eastern State Penitentiary opened its doors in Philadelphia.<sup>27</sup> Widely

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<sup>19</sup> *The Dangerous Overuse of Solitary Confinement in the United States*, ACLU, 3 (2014) [hereinafter *Dangerous Overuse*].

<sup>20</sup> Méndez, *supra* note 10, at 120-23.

<sup>21</sup> *Dangerous Overuse*, *supra* note 19, at 8.

<sup>22</sup> *See id.*

<sup>23</sup> Méndez, *supra* note 10, at 122-23.

<sup>24</sup> *Dangerous Overuse*, *supra* note 19, at 3.

<sup>25</sup> Laura Magnani, *America's First Penitentiary: A 200 Year Old Failure*, 23-25 (1990).

<sup>26</sup> *Id.*

<sup>27</sup> Ruth Flower, *Solitary Confinement and Quakers*, FCNL (Sep. 28, 2016), <https://www.fcnl.org/updates/2016-09/solitary-confinement-and-quakers>.

considered the first “supermax” prison, Eastern State Penitentiary housed over 200 incarcerated persons at its height.<sup>28</sup>

The practices of incarceration at the Eastern State Penitentiary were harmful and resemble practices deemed to constitute torture. Individuals were hooded, so as not to witness other humans or plan a potential escape.<sup>29</sup> Incarcerated persons were then isolated to small individual cells, containing a toilet and a bed, and little else but a skylight, a worktable, and a bible: “to remind the inmate that penitence would only be achieved through the light from heaven, the word of God, and honest work.”<sup>30</sup> Incarcerated persons spent the entirety of their sentences in solitary.<sup>31</sup> Eventually, this practice changed due to the swelling prison populations of the late 19<sup>th</sup> century, allowing incarcerated persons to congregate “for worship, work, educational, or recreational activities.”<sup>32</sup>

What occurred as a result was ultimately cataclysmic.<sup>33</sup> Although Quakers eventually denounced the practice, the system had taken hold. Eastern State Penitentiary is no longer in operation but remains open as a historical site.<sup>34</sup> The theology which led Quakers to engage in what amounted to torture of persons incarcerated within the Eastern State Penitentiary also informs the formation of Quakers a group largely dedicated to social justice.<sup>35</sup> Modern Quakers largely oppose solitary confinement, yet the egregious consequences linger.

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<sup>28</sup> *Id.*

<sup>29</sup> William C. Kashatus, *Saving Eastern State Penitentiary*, Historylive, (January 6, 1997).

<sup>30</sup> William Kashatus, “*Punishment, Penitence, and Reform*”: *Eastern State Penitentiary and Controversy Over Solitary Confinement*, Pennsylvania Heritage (1999) <http://paheritage.wpengine.com/article/punishment-penitence-reform-eastern-state-penitentiary-controversy-solitary-confinement/>

<sup>31</sup> Kashatus, *supra* note 29.

<sup>32</sup> Kashatus, *supra* note 29.

<sup>33</sup> *Id.*

<sup>34</sup> Eastern State Penitentiary, <https://easternstate.org/halloween/> (last visited Oct. 11, 2021).

<sup>35</sup> Dwight L. Wilson, *The Social Justice Testimony*, Quaker Information Center, Earlham School of Religion, (Oct. 13, 2011), <https://quakerinfo.org/quakerism/social-justice>.



The Quaker experiment, irrespective of its stated purpose to create a humane prison focused on reform, constitutes a form of torture. Moreover, solitary confinement as implemented at the Eastern State Penitentiary was never fully embraced by all Quakers.<sup>36</sup> Elizabeth Fry, a prominent Quaker in the United Kingdom visited Scottish prisons and was immensely disturbed by the practice of solitary confinement, and the poor conditions incarcerated persons in which lived.<sup>37</sup> Yet the Quakers’ “experiment” has been replicated throughout prisons today and became a vehicle for torture and a mechanism of mainstream punishment throughout the United States.

The organization responsible for lobbying for the creation of Eastern State Penitentiary, the Philadelphia Society for Alleviating the Miseries of Public Prisons, still exists. Under the name Pennsylvania Prison Society, the group lobbies for humane treatment of incarcerated people.<sup>38</sup> However, the Pennsylvania Prison Society today does not devote most of their resources to ending solitary confinement, nor do Quakers engage in what they may owe as a form of reparations to those who have suffered from isolation.<sup>39</sup> Much like the rest of the history, the failure of Quakers to address what they may owe suggests the adage of William Faulkner “The past is not dead, actually it is not past.”<sup>40</sup>

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<sup>36</sup> Ruth Flower, *Solitary Confinement and Quakers*, Friends Committee on National Legislation (September 28, 2016).

<sup>37</sup> Flower, *supra* note 36.

<sup>38</sup> Our history, Pennsylvania Prison Society, <https://www.prisonersociety.org/history> (last visited Oct. 11, 2021).

<sup>39</sup> Policy, Pennsylvania Prison Society, <https://www.prisonersociety.org/history> (last visited Oct. 11, 2021).

<sup>40</sup> Scott Horton, *The Past Is Not Past. Or Is It?*, Harper’s Magazine, (Mar. 24, 2008) <https://harpers.org/2008/03/the-past-is-not-past-or-is-it/>

### III. The Use of Solitary Confinement<sup>41</sup>

Solitary confinement is not administered across the board equally. Therefore, certain groups of incarcerated persons are disproportionately held in solitary confinement. Studies have shown the non-white incarcerated persons, women, LGBTQ+ incarcerated persons, minors and elderly incarcerated persons, immigrants, and those with disabilities face more time in solitary confinement. As a result of historic and going racial discrimination, Black persons across are more likely to be incarcerated and more likely to be placed in solitary confinement than other racial groups.<sup>42</sup> Not only is this true in adult detention centers, data shows the same racial disparities apply to juvenile detention centers.<sup>43</sup> While men are more likely than women to be incarcerated and to be placed in solitary, women are more likely to be in solitary for minor, non-violent infractions.<sup>44</sup> Further, some aspects of solitary can be especially harmful for women, particularly for pregnant women.<sup>45</sup>

There are other groups that are known to be especially susceptible to the adverse consequences of isolation that nevertheless are held in isolation at shockingly high rates. Young people are at higher risk of suicide when placed in isolation,<sup>46</sup> and at higher risk of developing

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<sup>41</sup> We use the word “survivor” rather than victim to describe those persons who have experienced solitary confinement and lived for two reasons: (1) because many do not, in fact, survive the experience; and (2) because identifying them as “victims” might give the impression of powerlessness when survivors of solitary, particularly survivors of extended time in solitary, in fact reveal they have remarkable resilience through the mere fact of their survival.

<sup>42</sup> See, e.g., Joshua C. Cochran et al. *Solitary Confinement as Punishment: Examining In-Prison Sanctioning Disparities*, 35 Just. Quarterly 3, 381-411 (2018) (noting that solitary confinement was more likely to be used as a sanction for Black and younger persons who are incarcerated than for white and older persons who are incarcerated); see also Corey Stone, *16 Going On 30: A Criticism of Iowa’s Reverse Waiver Statute*, 21 J. GENDER RACE & JUST. 459 (2018) (noting that Black and Latin@ children are far more likely to be tried as adults in Iowa, and thus to receive mandatory solitary confinement under Iowa’s “reverse waiver” statute).

<sup>43</sup> *Id.*

<sup>44</sup> *Still Worse Than Second-Class: Solitary Confinement of Women in the United States*, AM. CIV. LIBERTIES UNION (2019).

<sup>45</sup> *Id.* at 9.

<sup>46</sup> Sanjana Biswas, *Solitary Confinement of Juveniles in the Florida Prison System: Analyzing National and State Issues & Strategies for the Protection of America’s Children*, 17 WHITTIER J. CHILD. & FAM. ADVOC. 1 (2018)

other mental health issues.<sup>47</sup> Elderly people are at a higher risk of adverse health outcomes, isolation causes health issues and exacerbates existing ones.<sup>48</sup> People with preexisting mental illnesses<sup>49</sup> are at high risk of experiencing greater illnesses even when held in short term isolation.<sup>50</sup> Yet they are also often more likely to be isolated as punishment for inability to abide by prison rules.<sup>51</sup>

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), an international human rights treaty signed and ratified by the United States, defines torture as the intentional infliction of “severe pain or suffering, whether physical or mental” on an individual for punishment “or for any reason based on discrimination of any kind.”<sup>52</sup> There is no valid justification for torture under CAT.<sup>53</sup> CAT further requires each State to “undertake to prevent ... other acts of cruel, inhuman, or degrading treatment or punishment ... when such acts

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(citing a Department of Justice report that indicated that more than 60% of children who commit suicide in juvenile correctional facilities had a history of solitary confinement).

<sup>47</sup> See Biswas, *supra* note 46 at 3. See also Julie Laken Harnisher et al., *Loss Due to Death and Its Association with Mental Disorders in Juvenile Detainees*, 66 JUV. & FAM. CT. J. 1, 12 (2015) (arguing that youth who experience high-risk losses, many of whom end up in detention centers, need strong social support if they are to avoid the more negative outcomes associated with such losses).

<sup>48</sup> *Social Isolation, Loneliness in Older People Poses Health Risks*, NAT’L INST. OF HEALTH: NAT’L INST. ON AGING (Apr. 23, 2019), <https://www.nia.nih.gov/news/social-isolation-loneliness-older-people-pose-health-risks>.

<sup>49</sup> We include in discussions of this category persons who have suffered trauma, since they present a vulnerable category for mental health reasons, even though they may never have been diagnosed. We note that the data on trauma may be limited (but see Julie Laken Harnisher et al., *supra* note 47) since there are many factors, which contribute to trauma, and many of the people most likely to experience certain forms of trauma are massively underserved, particularly in the area of mental health. Ryan Mutter et al., *Profile of Adolescent Discharges from Substance Abuse Treatment*, SAMHSA The CBHSQ Report (April 01, 2015) (noting that in 2011, 44.5% of youths discharged from substance abuse treatment had been referred there by the criminal justice system, and that 26% of discharged youths had no health insurance).

<sup>50</sup> Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 374 (2018) (noting that centuries of scientific studies have pointed to a single conclusion: that “the extreme isolation and harsh conditions of confinement in [solitary confinement] typically exacerbate the symptoms of mental illness.”)

<sup>51</sup> Kyleigh Clark, *The Effect of Mental Illness on Segregation Following Institutional Misconduct*, 45 CRIM. JUST. & BEHAVIOR 9, 1363, 1363 & 1376 (Sept. 2018) (finding that “those with a mental illness [are] more likely to be placed in segregation when compared with the aggregate of all other disciplinary options.”).

<sup>52</sup> CAT, Article 1; see also Mendoza, Leann Nicole (explaining additional treaties and their relevant provisions to use in arguing against the use of solitary confinement).

<sup>53</sup> CAT, Article 2.

are committed by ... a public official.”<sup>54</sup> This section will show that, not only are certain groups more likely to experience “severe pain or suffering” in isolation, but that there are systematic uses of isolation for unlawful discriminatory purposes.

Many of the international treaties that the United States has ratified specifically address the necessity of protecting vulnerable groups from conditions that are harmful to them. When assessing solitary confinement as a form of torture, it is important to consider that conditions that might not count as cruel, inhuman or degrading in every circumstance may count as such when imposed on certain groups

### **A. Black Incarcerated Persons**

Across both gender and age, Black persons who have been incarcerated are more likely to be confined in isolation than their white counterparts. Therefore, the effects of solitary confinement in the U.S. are disproportionately felt by Black Americans. In *Race and the Politics of Isolation in U.S. Prisons*, Bonnie Kerness and Jamie Bissonette Lewey describe the U.S. history of using solitary confinement as a mechanism for controlling and suppressing racial minorities.<sup>55</sup> Starting with the first uses of solitary confinement in the Eastern Penitentiary, the authors describe repeated failures of isolation to produce any positive outcomes for incarcerated persons. “[B]y the mid-1800s,” they write, “the penitentiary experiment was already a much-documented failure,” with incarcerated persons in isolation experiencing psychosis and terrors

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<sup>54</sup> CAT, Article 16; *see also* ICCPR, Articles 7 & 10. ICCPR Art. 10 presents certain problems, however. Like the Iowa “reverse waiver” statute, it says that juvenile detainees must be “separated” from adult prison populations, but it does not prevent such separation from occurring by use of solitary confinement. Also, it would be interesting to see an argument against use of solitary confinement based on Religious Freedom, under both the 1st Amendment and under Article 18 of the ICCPR. Are people in solitary confinement allowed to participate in worship services? Moreover, community is an integral part of many religious practices.

<sup>55</sup> Bonnie Kerness & Jamie Bissonette Lewey, *Race and the Politics of Isolation in U.S. Prisons*, 22 ATL. J. OF COMM’N 1, 21-41 (2014).

rather than repentance or an ability to reintegrate into society in a meaningful way.<sup>56</sup> In Eastern Penitentiary, the first incarcerated person was Charles Williams, a black man.<sup>57</sup> He was in solitary for two years straight.<sup>58</sup> No one spoke to him unless necessary and if he was removed, Charles was hooded.<sup>59</sup>

The practice of disproportionately isolating Black incarcerated persons has been demonstrated to result in devastating harm. A study examining a Florida state prison's infraction data from 2005-2011 revealed that Black incarcerated persons are significantly more likely to suffer solitary confinement as a punishment than their white counterparts.<sup>60</sup> Another study suggests that women of color are overrepresented in solitary confinement although women do not commit violent infractions as frequently as male incarcerated persons; rather, women of color are held in solitary because they fail to conform to guards' ideas about how white women should act.<sup>61</sup> Black incarcerated persons are more likely to be reported for violent infractions, a phenomenon inseparable from racial discrimination.<sup>62</sup>

The most notable violations are those that offend Constitutional protections. Although seeking relief by alleging constitutional violations may be a viable option, the standard of

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<sup>56</sup> See *id.* at 24. They also note that the celebrated English novelist wrote of the Philadelphia penitentiary: "The system is rigid, strict and hopeless solitary confinement, and I believe it, in its effects, to be cruel and wrong." *Id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 24-25.

<sup>60</sup> Cochran, *supra* note 67. See also Alexandria M. Foster, *Unfinished Uniformity in Systematic Sentencing: Oppressive Treatment and Disproportionate Punishment Outcomes for Black Women in Federal Prisons*, 6 IND. J. LAW & SOCIAL EQUALITY 2, 267, 276 (2018) (noting that in a California prison, 61.4% of the women in solitary confinement are Women of Color).

<sup>61</sup> See Heidi Cerneka, "We Will Not Be Invisible" Women and Solitary Confinement in the U.S., 17 WIS. J. L. GENDER, & SOC'Y 2, 107, 117 (2017). See generally, Corey Stone, *16 Going On 30: A Criticism of Iowa's Reverse Waiver Statute*, 21 J. GENDER RACE & JUST. 459 (2018) (noting that highly publicized portrayals of Black children as "superpredators" have fueled racist stereotypes that lead to punishing Black children more quickly and more severely than their white counterparts.)

<sup>62</sup> *Id.*

scrutiny drastically changes depending on which constitutional violation is asserted.<sup>63</sup> For example, the Court has held that equal protection claims relating to race must be adjudicated based on the highest standard of scrutiny— strict scrutiny.<sup>64</sup> Strict scrutiny requires a compelling governmental interest, and acts or legal principles that affect equal protection must be narrowly tailored.<sup>65</sup> Thus, discriminatory laws based on race, national origin, religion, and alienage must overcome a high bar to pass muster.<sup>66</sup>

Notwithstanding strict scrutiny, the Court has articulated a more lenient standard, “the Turner standard,” which would apply to any right “that must be compromised for the sake of proper prison administration.”<sup>67</sup> Thus, it created more flexibility in denying constitutional rights for “administrative” purposes.<sup>68</sup> This standard violates the 1990 UN “Basic Principles for the Treatment of Prisoners.”<sup>69</sup> These principles prohibit prisons from discriminating on basis of race, color, or national origin.<sup>70</sup> Nonetheless, the United States has repeatedly discriminated on the basis of race; solitary confinement is no exception.

## **B. Incarcerated Minors**

Solitary confinement is disproportionately used on minors and has a disproportionate effect on their health. On average, about 20% of the adult incarcerated population spent time in solitary based on a 2015 DOJ report.<sup>71</sup> Comparatively, the Survey of Youth in Residential Placement (“SYRP”) found that 35% percent of youth reported being isolated.<sup>72</sup> The use of

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<sup>63</sup> Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, UC Irvine 5 L. Rev. 759, 774-76 (2015).

<sup>64</sup> Legal Information Institute, *Strict Scrutiny*, Cornell Law School (2022).

<sup>65</sup> See Armstrong, supra note 63, at 773.

<sup>66</sup> See Legal Information Institute (2022).

<sup>67</sup> See Armstrong, supra note 63, at 776.

<sup>68</sup> *Id.*

<sup>69</sup> G.A. Res. 45/111, United Nations Standard Basic Principles for the Treatment of Prisoners (Dec. 4, 1990).

<sup>70</sup> *Id.*

<sup>71</sup> Ian Manuel, *I Survived 18 Years in Solitary Confinement*, New York Times (2021).

<sup>72</sup> *Data on Solitary*, Stop Solitary for Kids (2022).

solitary confinement is not only disproportionate, but the effects are more pronounced because minors' brains are still developing. The American Civil Liberties Union of Washington state notes that the prolonged stress from isolating can causes irreparable damage the parts of the brain and stunt development.<sup>73</sup> Thus, the harms caused to juveniles is exacerbated when compared to their adult counterparts who placed in solitary. In fact, one study indicates, “juveniles are nineteen times more likely to kill themselves in solitary confinement than they are to kill themselves when they are housed with the general population.”<sup>74</sup>

The U.S. officials responsible for the incarceration of youth have known about the particularly deleterious effects incarceration has on minors for decades. In 1974, it enacted the Juvenile Justice and Delinquency Prevention Act (“JJDP”) to create programming inside and outside of incarceration to decrease the number of minors in the criminal justice system.<sup>75</sup> While juvenile detention has decreased significantly in the last fifty years and the inhuman treatment has come to light, the juvenile system still traumatizes and causes irreparable harm to minors. However, Congress passed the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, or the First Step Act<sup>76</sup>, which among other things eliminated the use of solitary confinement on juveniles in the federal prison system. While only affecting a few hundred youth, it was an imperative step into reducing the use of solitary confinement on minors incarcerated in the United States.

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<sup>73</sup> Amy Roe, *Solitary confinement is Especially Harmful to Juveniles and Should Not Be Used to Punish Them*, ACLU-WA (2017).

<sup>74</sup> Jacob Zoghlin, *Punishments in Penal Institutions: (Dis)-Proportionality in Isolation*, 21 HUM. RS. BRIEF 24, 26 (2014).

<sup>75</sup> Pub. L. No. 93-415, 34 U.S.C. § 11101 (1974).

<sup>76</sup> S. 3649, 115th Cong. (2018).

International law provides some measure of protection against solitary confinement for youth. For example, the UN ratified the Rules for Protection of Juveniles Deprived of their Liberty in 1990.<sup>77</sup> These Rules prohibit juveniles from being housed with incarcerated adults unless they are family.<sup>78</sup> Additionally, the document states that all personnel should “ensured the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation.”<sup>79</sup> On the other hand, the Mandela Rules prohibit the use of solitary confinement on children at all.<sup>80</sup> All of the following provisions have a well-documented history of being violated in U.S. facilities. Important bodies of law inside and outside of the United States, have made it clear that incarcerated juveniles are subject to irreparable harm inside of prison, and especially in solitary confinement. To comply with basic human rights principles, the United States must eliminate its use on minors in state prisons.

### **1. Black and Hispanic Incarcerated Minors**

While minors are disproportionately affected by the use of solitary confinement, racial bias compounds the effects and therefore, particularly affects Black and Hispanic males. Young Black males endure disproportionately worse outcomes than any other group both from incarceration generally and from solitary confinement specifically. The effects of solitary confinement, which Black males experience more than any other group, can be compounded with the effects of incarceration generally. Additionally, Black and Hispanic detained youth experience higher numbers of losses of caregivers, siblings, or close friends – many to violence – in comparison to non-Hispanic white detained youth.<sup>81</sup> “Losses can exacerbate existing mental

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<sup>77</sup> G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 5.

<sup>80</sup> Nelson Mandela Rules, *supra* note 1, at rule 45.

<sup>81</sup> See Harnisher et al., *supra* note 47, at 5 (noting that, among the several cohorts sampled in juvenile detention centers in Illinois, about 1/5 had lost a caregiver; and more than 15% of deceased caregivers died by violent means.



disorders ... and, left unaddressed, can impede treatment and recovery,”<sup>82</sup> notes one study, while another argues that the use of solitary confinement is particularly harmful to juveniles because, juveniles are still developing until their mid-twenties,<sup>83</sup> and isolation is “even more harmful when a juvenile has a history of abuse, trauma, or disability because it worsens their existing condition or triggers a new condition.”<sup>84</sup>

A significant cause for the disproportionate harm for young Black males starts with the fact that young Black males are incarcerated at higher rates than other racial groups. Although Black males represent only 17% of youth in the United States, they represent about 40% of youth in correctional facilities.<sup>85</sup> Thus, as noted above the Constitutional and legal violations against black minors are compounded. They face greater time in solitary because of both their race and age. Therefore, this treatment violates domestic and international law alike, which explicitly outline the prohibition of discrimination based on race and the inhumane treatment of incarcerated minors.

### **C. Incarcerated Women**

Women, particularly Black and Hispanic women, also experience particularly damaging harms from solitary confinement. Black and Latina are overrepresented in solitary confinement.<sup>86</sup> Additionally, women are sent to solitary confinement for different reasons than men. For example, women are generally isolated from the general prison populations for non-

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13.9% had lost a sibling, more than half of them by violent means. 67.6% lost at least one close friend, 85.9% of these deaths were due to violence. One quarter of the youth lost “at least one other important person” to violence. The authors further note, at 9, that “two-thirds of detained youth reported having experienced multiple losses, compared with only 20% of youth in a general population survey.”)

<sup>82</sup> See *id.* at 2.

<sup>83</sup> See Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, National Public Radio (October 10, 2011).

<sup>84</sup> See Biswas, *Global variation in the prevalence of suicidal ideation, anxiety and their correlates among adolescents: A population based study of 82 countries*, eClinical Medicine (2020).

<sup>85</sup> *Id.*

<sup>86</sup> *Supra* note 44.

violent infractions,<sup>87</sup> sometimes even pending an institutional investigation of their complaints about staff sexual misconduct.<sup>88</sup> Incarcerated women are more likely to be sexually victimized by staff than incarcerated men,<sup>89</sup> and solitary has been frequently “used to retaliate against or retraumatize victims of past abuse.”<sup>90</sup> Furthermore, a study by the ALCU noted that women in solitary confinement, especially those who have been sexually abused can “experience acute psychological suffering.”<sup>91</sup>

Incarcerated women are more likely to have higher rates of mental illness than incarcerated men,<sup>92</sup> and isolation can exacerbate the symptoms of mental illness.<sup>93</sup> In a report by the Vera Institute of Justice concluded that women in solitary had significantly high levels of mental health issues than women in the general population and men placed in solitary confinement.<sup>94</sup> In Oregon, they found that women placed in solitary confinement had more than double the amount of serious mental health diagnoses than the general population.<sup>95</sup> With an estimated 70% of incarcerated women having a history of mental illness, it is not surprising that those with mental illness are “more likely to be placed in segregation when compared with the aggregate of all other disciplinary options.”<sup>96</sup> In some cases, isolation is used as a way of monitoring those who exhibit signs of

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<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 13.

<sup>89</sup> *See generally* Blitz et. al, Sexual Violence Inside Prisons: Rates of Victimization, J. Urban Health (2006).

<sup>90</sup> *supra* note 44, at 9.

<sup>91</sup> *Id.* at 10.

<sup>92</sup> Rachel E. Severson, *Gender Differences in Mental Health, Institutional Misconduct, and Disciplinary Segregation*, 46 CRIM. JUST. & BEHAV. 12, 1719-1737 (2019).

<sup>93</sup> *See id.*

<sup>94</sup> *Supra* note 44, at 8.

<sup>95</sup> *Id.*

<sup>96</sup> *See* Clark, the Effect of Mental Illness on Segregation Following Institutional Misconduct at 1376.

mental illness, such as self-harm.<sup>97</sup> It is therefore no surprise that “[s]olitary confinement not only triggers latent mental illness...that had been kept under control, but it also causes mental illness.”<sup>98</sup>

This unlawful treatment violates international and domestic law alike. In 2010, the United Nations adopted the Bangkok Rules, which focused on the treatment of incarcerated women.<sup>99</sup> It noted that incarcerated woman should be “treated fairly and equally during... imprisonment, particular attention being paid to the special problems which women offenders encounter, such as pregnancy and child care.”<sup>100</sup> Additionally, a 2020 report by the United States Commission on Civil Rights found that even with federal legal protections like the Civil Rights of Institutionalized Persons Act and the Prison Rape Elimination Act (“PREA”), incarcerated women still faced high rates of physical, psychological, and sexual abuse.<sup>101</sup> Further, there were many incarcerated women who had “insufficient satisfaction of their constitutional rights.”<sup>102</sup> Thus, the current use of solitary confinement and incarceration in general, violates fundamental human rights locally and globally.

### Theresa’s Story

Theresa was arrested when she was 17 years old. When she was 23 years old, she reported sexual misconduct by one of her prison guards and was placed in solitary confinement for ten days while her allegation was investigated. That ten-day stay turned into **one hundred forty-five days**. Theresa says that other female inmates had experienced similar misconduct from the same guard, but had not reported it because “you’re really just not protected there [in prison].”

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<sup>97</sup> See generally, Alexandria M. Foster, *Unfinished Uniformity in Systematic Sentencing: Oppressive Treatment and Disproportionate Punishment Outcomes for Black Women in Federal Prisons*, 6 IND. J. L. & SOC. EQUAL. 2, 267-282, 276 (2018).

<sup>98</sup> See Heidi Cerneka, “We Will Not Be Invisible” Women and Solitary Confinement in the U.S., 17 WIS. J. L. GENDER, & SOC’Y 2, 107, 124 (2017).

<sup>99</sup> G.A., United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (Dec. 21, 2010).

<sup>100</sup> *Id.*

<sup>101</sup> The United States Commission on Civil Rights, *Women in Prison: Seeking Justice Behind Bars* (Feb 2020).

<sup>102</sup> *Id.*

“There’s no routine for your day. So you’re just sitting there ... but as the days continue, you’d realize that you’re talking to yourself... And then every day turns into you fighting for your life. Like, every day you spend telling yourself, ‘*Don’t kill myself, don’t kill myself. This will be over.*’” She began to cry. “And you don’t touch anybody, or see anybody, or have any conversations or books to read.”

“Even though I’ve got out, I can’t build relationships with people. You feel like you don’t deserve... they get it in your mind that you’re like a servant, and then you get out here and you feel like you don’t deserve to be around regular people.”

“They just take everything that you should have as a human – like a shower – and they use it as punishment.” She recounted instances of guards saying things through the door to persons incarcerated in solitary, such as, “I’ll give you ibuprofen when *I* want to give you ibuprofen.” “It’s a control thing,” Theresa explains, “They are letting you know you’ll get whatever they give you whenever they feel like it, or nothing at all if they feel like it.”

“I feel like I still have to ask. Like, even when I’m at work I’ll go ask somebody if I’m allowed to use the bathroom, and they’re like, ‘What?’” ‘cuz they don’t know my story... I find myself asking permission to do anything at all.”

“Everybody [in solitary confinement] is so angry. I’ve seen a girl go up to the flap [of her door] and she had stapled her eyelids shut.” She also recounts an episode where a guard had taunted someone who was upset, and later that day “they opened the door and she was hanging from the ceiling.”

“It turns you into a terrible person. I even found myself being so rude. I would always have to reflect all the time... You don’t even feel like a human... you’re in a room and you have nothing but to think all day long... There’s no routine. People need stuff to do, like, consistently every day. Like you wake up and you make your bed. Those are the little things... they take.”

#### **D. Survivors with Disabilities**

Incarcerated persons with physical disabilities are disproportionately affected by being placed in solitary confinement particularly as a result of a lack of reasonable and necessary accommodations and services. Incarcerated persons with physical disabilities are confined to solitary more often as a result of prisons and jails failing to provide reasonable accommodations, aids, and services. The lack of resources and denial of effective communication strategies means that incarcerated persons with disabilities have

significant difficulty in complying with rules and orders. Thus, incarcerated persons with disabilities, especially those who are deaf and blind, often get placed in solitary confinement for violating prison rules and orders given by officials that have not been meaningfully or effectively communicated. For example, a deaf incarcerated person was punished to two weeks in solitary confinement because he failed “to respond to an oral command spoken behind his back.”<sup>103</sup> He was later released after he was provided an interpreter.<sup>104</sup> This person had no hearing aid before he was placed in solitary.<sup>105</sup>

The ADA requires that public entities under Title II must communicate effectively with those who have communication disabilities.<sup>106</sup> The Department of Justice’s (“DOJ”) publication on effective communication explains why proper communication is important by stating that “[t]he purpose of the effective communication rules is to ensure that the person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to, the covered entity.”<sup>107</sup> To meet this purpose, public entities must provide auxiliary aids and services to those with communication disabilities.<sup>108</sup>

In selecting auxiliary aids and services, the DOJ emphasizes that “title II entities are **required** to give primary consideration to the choice of aid or service requested by the person who has a communication disability.”<sup>109</sup> If the first choice cannot be provided due to certain limitations, the public entity is still obligated to provide an alternative if there is any available. However, the ADA expressly explains an exception where a public entity cannot provide reasonable

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<sup>103</sup> *Caged In: Solitary Confinement’s Devastating Harm on Prisoners with Physical Disabilities*, AM. CIV. LIBERTIES UNION (Jan. 2017) (emphasis added).

<sup>104</sup> *See id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See* U.S. Department of Justice, *Effective Communication* (Jan. 2014).

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *Id.*

<sup>109</sup> U.S. Department of Justice, *supra* note 105 at 6.

accommodations because doing so would “fundamentally alter” the activity or program.”<sup>110</sup> Furthermore, a public entity may refuse to provide reasonable accommodations after demonstrating that doing so would place “undue financial and administrative burdens.”<sup>111</sup>

The ALCU noted examples where wheelchair users were unable to go to their hearing because of the lack of accessibility.<sup>112</sup> The lack of accommodation to persons who are incarcerated who have disabilities “compromises their ability to successfully defend themselves in a disciplinary hearing.”<sup>113</sup> The failure to provide meaningful accommodations and to impose punishments based on a person’s disability violates the Americans with Disabilities Act (“ADA”), a federal law enacted in 1990 to protect from discrimination and ensure equal access to opportunities that are given to able-bodied people. Title II of the ADA focuses on federal, state, and local governments providing public services and therefore, best serves to address the issue of solitary confinement.

Prisons, jails, and other similar facilities all qualify as public entities under Title II of the ADA.<sup>114</sup> Therefore, prison/ jail officials are legally required to prevent discrimination and ensure equal access to people with disabilities. Title II requires public entities to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>115</sup>

While this section has provided examples of persons who are incarcerated with physical

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<sup>110</sup> See 28 C.F.R. § 35.130(b)(7)(i).

<sup>111</sup> 28 CFR § 35.150(a)(3).

<sup>112</sup> *Caged in*, *supra* note 102.

<sup>113</sup> See *id.*

<sup>114</sup> See 42 U.S.C.A. § 12131 (defining what qualifies as a “public entity” under Title II of the ADA); see 28 C.F.R. § 35.130(b).

<sup>115</sup> 28 C.F.R. § 35.130(b)(7)(i).

disabilities, it is important to recognize that the ADA is dedicated to protecting people with any type of disability.

### **E. LGBTQ+ Survivors**

LGBTQ+ incarcerated persons are disproportionately targeted and placed in solitary confinement. “LGBTQ People Behind Bars” explains that LGBTQ+ incarcerated persons are placed in solitary confinement for “protective custody.”<sup>116</sup> For example, the Department of Justice found that “lesbian, gay, and bisexual prisoners are substantially more likely to be subjected to solitary confinement or segregation than heterosexual prisoners, with 28% of LGBTQ+ prisoners being placed in solitary confinement over the course of one year, compared to 18% of heterosexual prisoners.”<sup>117</sup> The true purpose of this placement is to punish LGBTQ+ individuals for being potential victims, however.<sup>118</sup> LGBTQ+ incarcerated persons face heightened dangers due to the high rates of sexual abuse and multiple forms of violence from staff and other incarcerated persons.<sup>119</sup> As a result, excessive and extensive use of solitary confinement has been used to house them.<sup>120</sup> A survey entitled “Coming Out of Concrete Closets” reveal that 85% of 1,118 LGBTQ+ incarcerated persons have reported being in solitary confinement in which half of the respondents reported staying in solitary for two or more years.<sup>121</sup>

LGBTQ+ incarcerated persons are often punished simply because of their identity. The “Coming Out of Concrete Closets” survey indicated that over a third of LGBTQ+ incarcerated

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<sup>116</sup> *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Oct. 2018) at 10.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 13.

<sup>120</sup> *Id.* at 14.

<sup>121</sup> *See* Jason Lydon et al., *Coming Out of Concrete Closets: A Report on Black and Pinks National LGBTQ Prisoner Survey* (Oct. 21, 2015).

persons have been punished for having consensual sex.<sup>122</sup> Of those punished, about two-thirds went to solitary confinement as punishment.<sup>123</sup> An article entitled “No Touching Allowed for Many LGBTQ+ People in Prison” tells the account of J and his friend Carlos by stating that:

After a Thanksgiving Day meal, “J,” who was incarcerated at North Central Correctional Institute in Massachusetts, complained of a [stomachache]. His friend Carlos, who requested to be identified by his first name only, leaned down from his top bunk and rubbed J’s head jokingly. “There, there,” he said, as the men laughed. Later that day, Carlos, who identifies as gay, was taken to solitary confinement in the Special Housing Unit (SHU).<sup>124</sup>

The officer who witnessed this interaction accused Carlos of violating the Prison Rape Elimination Act.<sup>125</sup> Carlos was released from SHU after other prison officials aligned with him.<sup>126</sup> The important note here is that PREA does not prohibit physical touch of a platonic nature and it follows that Carlos was placed in solitary confinement for no reason.<sup>127</sup> As a result of his punishment, Carlos lost a lot including his place in the housing unit, job, and “good time credits” even though he was released.<sup>128</sup>

The use of solitary confinement for protection has been normalized against LGBTQ+ incarcerated persons. For example, the same survey indicated that of those who have been placed in solitary confinement, half of them went involuntarily for their own protection.<sup>129</sup> Furthermore, thirty eight percent of LGBTQ+ incarcerated persons reported that they voluntarily chose to be

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<sup>122</sup> *Id.* at 33.

<sup>123</sup> *Id.*

<sup>124</sup> Lizzie Kane, *No Touching Allowed for Many LGBTQ+ People in Prison: Behind Bars Consensual Sex or Even Friendly Gestures Are Often Met with Solitary Confinement and Other Harsh Punishments*, SOLITARY WATCH, (Sep. 16, 2021).

<sup>125</sup> *See id.*; *see also* Mendoza, Leann Nicole (explaining the Prison Rape Elimination Act and how it regulates the use of solitary confinement).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See* Lydon et al., *supra* note 121 at 35.



placed in solitary confinement.<sup>130</sup> The reasoning behind voluntarily going to solitary confinement is choosing that kind of isolated torture rather than life-threatening harms at the hands of other incarcerated persons and prison staff.<sup>131</sup> Specifically, incarcerated persons who identified as trans women, Two-Spirit, and cisgender gay men have higher rates of involuntary placement in solitary confinement.<sup>132</sup> The survey quotes another survey from 2014 entitled “Roadmap for Change” to highlight other effects of solitary confinement on LGBTQ+ incarcerated persons by stating that:

For many LGBT and gender non-conforming people, protective custody remains the default placement for periods of days, months, years, and in some cases, decades... solitary confinement usually restricts a person’s access to education, work, and program opportunities. These opportunities are not only essential for maintaining a person’s mental health, but are usually necessary for achieving good time credit and being paroled. This means that LGBT people...are also more likely to serve the maximum time (or longer) of non-life sentences.<sup>133</sup>

The excessive use of solitary confinement on LGBTQ+ incarcerated persons stigmatize them solely for their identity. Instead of focusing solely on identity, prison officials should strive for protection of LGBTQ+ incarcerated persons using alternative means.

Currently, the best legal avenues for LGBTQ+ incarcerated persons and the disproportionate use of solitary confinement on them, mirror that of groups above—PREA and the Constitution.<sup>134</sup> Notably, the Eighth Amendment is an especially important constitutional protection for transgender person being denied medical care.<sup>135</sup> In terms of international law, many of the soft laws above are the strongest legal avenue. DePaul University also noted that the current

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 35 (quoting *Roadmap for Change* to explain other harms of solitary confinement on LGBTQ+ prisoners).

<sup>134</sup> *LGB Prisoners’ Rights*, Justia (2022).

<sup>135</sup> *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, National Center for Transgender Equality at 11.

treatment of LGBTQ+ incarcerated persons violated rulings by the Inter-American Court of Human Rights and European Court of Human Rights.<sup>136</sup>

## F. Immigrant Survivors

Immigrants are disproportionately impacted by solitary confinement. One major aspect separating immigrants from others in solitary is that their harms involve civil law instead of criminal. Immigrants are placed in solitary confinement as detainees in immigrant detention centers. Immigration and Customs Enforcement (“ICE”) was called out in “DHS Is Locking Immigrants in Solitary Confinement” for inflicting severe harm onto immigrants, specifically by imposing solitary confinement as punishment.<sup>137</sup> Further findings, showed the alleged “reasons” why ICE punished immigrants with solitary including: wearing a hand cast, sharing a consensual kiss, or needing a wheelchair. ICE also reportedly put LGBTQ individuals and people with mental illness in solitary as ‘protective custody,’ citing their own safety.”<sup>138</sup>

Another review reports disturbing statistics about immigrants and solitary confinement:

Our review of more than 8,400 solitary confinement incident reports spanning 2012 to early 2017 show that in nearly a third of the cases, detained immigrants were described as having a mental illness. The records show at least 373 instances of individuals being placed in isolation because they were potentially suicidal, and another 200-plus cases of people already in solitary confinement being moved to “suicide watch” or another form of observation — in many cases another solitary cell.<sup>139</sup>

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<sup>136</sup> *Re: Request for an Advisory Opinion on Differentiated Approaches to Persons Deprived of Liberty Under Article 64(I) of the American Convention on Human Rights*, DePaul University College of Law.

<sup>137</sup> See Naureen Shah, *DHS Is Locking Immigrants in Solitary Confinement*, AM. CIV. LIBERTIES UNION, (May 24, 2019), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/dhs-locking-immigrants-solitary-confinement> (recognizes Ellen Gallagher as exposing the serious misconduct at ICE).

<sup>138</sup> *Id.*

<sup>139</sup> Maryam Saleh and Spencer Woodman, *A Homeland Security Whistleblower Goes Public About ICE Abuse of Solitary Confinement*, The Intercept (May 21, 2019).

Currently, there is guidance and standards that ICE is obligated to follow in order to protect immigrant detainees placed in solitary confinement. However, ICE continually fails to comply with its own procedures and standards. In 2011, ICE released an operations manual called the Performance-Based National Detention Standards (“PBNDS”).<sup>140</sup> The purpose of these detention standards is to improve conditions, safety, and security for both staff and detainees. In addition, ICE released a directive in 2013 regarding the use of solitary confinement.<sup>141</sup> The purpose of the 2013 directive on the use of segregation is to establish policy and procedures so that ICE can review detainees placed in solitary confinement.<sup>142</sup> Ironically, ICE’s directive emphasizes the severity of the use of segregated housing on immigrant detainees.<sup>143</sup> ICE reiterates that placement in segregated housing is only should occur only when *necessary* and *as a last resort* in addition to complying with standards and there is no alternative.<sup>144</sup> This promising policy is in stark contrast to ICE’s actions, however.

#### **IV. Use of Solitary Confinement During the COVID-19 Pandemic**

The unconscionable use of solitary confinement has dramatically increased since the onset of the COVID-19 pandemic in early 2020. This section will discuss the known research about the public health effects of mass incarceration, the pandemic management policies that were previously in place, and how solitary confinement has been inappropriately used throughout COVID-19.

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<sup>140</sup> See U.S. Immigration and Customs Enforcements, *2011 Operations Manual ICE Performance-Based National Detention Standards*, (2021), <https://www.ice.gov/detain/detention-management/2011>. (This was later revised in 2016 to comply and be consistent with other federal laws).

<sup>141</sup> *Id.*

<sup>142</sup> See U.S. Immigration and Customs Enforcement, *Review of the Use of Segregation for ICE Detainees*, (Sep. 4, 2013).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (emphasis added).

## A. Mass Incarceration and Public Health Concerns

With 664 people incarcerated per 100,000 of the population, the United States has the highest incarceration rate of any country in the world.<sup>145</sup> This number shows no sign of decreasing; in the last 40 years, the U.S. prison population increased by 500%.<sup>146</sup> This extreme level of mass incarceration puts the roughly 1.8 million people living in jails and prisons<sup>147</sup> at an increased risk for a number of health concerns. Mass incarceration creates conditions that make the incarcerated population especially susceptible to the spread of infectious diseases, such as the flu. People in jails and prisons sleep, eat, and live in close quarters, with nowhere to go if someone gets sick, and cleaning supplies are usually limited or restricted. Of most pertinent concern in the midst of the COVID-19 pandemic, people who are incarcerated do not have equal access to the flu vaccine, which is known to be one of the most effective ways to control flu outbreaks.<sup>148</sup>

The detrimental effects that an influenza pandemic could have among correctional facilities was documented well before the onset of COVID-19. As early as 2009, for example, one study identified a lack of appropriate quarantine space and an increased need for mental health services as major concerns that correctional departments should be prepared to address.<sup>149</sup>

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<sup>145</sup> Emily Widra and Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POLICY INITIATIVE (Sep. 2021), <https://www.prisonpolicy.org/global/2021.html>.

<sup>146</sup> Press Release, Partners in Health, *Why Decarceration Is Vital for Public Health Amid COVID-19*, (Jan. 26, 2021), <https://www.pih.org/article/why-decarceration-vital-public-health-amid-covid-19>.

<sup>147</sup> Jacob Kang-Brown et al., *People in Jail and Prison in Spring 2021*, VERA INST. OF JUST. (June 2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf>.

<sup>148</sup> Nicole Wetsman, *Prisons Battling COVID-19 Face Another Disease Threat This Fall*, THE VERGE (Sep. 11, 2020), <https://www.theverge.com/2020/9/11/21432118/prisons-jails-covid-pandemic-flu-season-testing-trust> (“In 2011 in Maine, two prisons that vaccinated fewer than 10 percent of persons incarcerated had outbreaks. In 2018, a woman died of the flu in an Oregon prison that only gave flu shots to 18 percent of inmates.”).

<sup>149</sup> Laura M. Maruschak et al., *Pandemic Influenza and Jail Facilities and Populations*, AM. J. PUBLIC HEALTH (Oct. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504367/>.

In 2018, during an unusual flu season, a woman in the custody of the Oregon Department of Corrections died from the flu after the facility she where was held failed to buy an adequate number of flu shots for the number of people incarcerated there.<sup>150</sup>

### **B. Existing Policies: Medical Quarantine and Isolation**

Correctional departments have protocols in place for the management of infectious and communicable diseases.<sup>151</sup> The standard policies include medical quarantine and isolation. In broad terms, quarantine requires separating and restricting the movement of people who have been exposed to a contagious disease until it can be determined that they are not sick or otherwise do not pose a risk of transmitting the disease.<sup>152</sup> This may be determined based on the time elapsed since the initial exposure,<sup>153</sup> or in cases such as COVID-19, by lab results.<sup>154</sup> Similarly, medical isolation is the separation of people who have a confirmed infection of a contagious disease, or who are suspected to be infected based on their symptoms.<sup>155</sup>

In North Carolina, medical quarantine and isolation procedures are outlined in the Department of Public Safety Health Policy & Procedures Manual. Incarcerated persons who are “reasonably suspected of having a communicable disease” are to be immediately isolated in “health care facility isolation rooms.”<sup>156</sup> The type and duration of isolation is determined using

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<sup>150</sup> Jayati Ramakrishnan, *Family of Woman who Died in Prison Flu Outbreak Gets \$70K Settlement*, THE OREGONIAN/OREGONLIVE (Aug. 1, 2019), <https://www.oregonlive.com/pacific-northwest-news/2019/08/family-of-woman-who-died-in-prison-flu-outbreak-gets-70k-settlement.html>.

<sup>151</sup> U.S. Dep’t of Justice Federal Bureau of Prisons Policy, Infectious Disease Management Program Statement; N.C. Dep’t of Public Safety Prisons Health Services Policy and Procedure § Infection Control – Reporting [hereinafter NC DPS Infection Control Manual].

<sup>152</sup> See *State Quarantine and Isolation Statutes*, NAT’L CONF. OF STATE LEGISLATURES (Sep. 24, 2021), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx> [hereinafter *State Quarantine and Isolation Statutes*].

<sup>153</sup> See *id.*

<sup>154</sup> *Covid-19 in Correctional Facilities: Medical Isolation*, AMEND (last visited Nov. 20, 2021), <https://amend.us/covid-19-in-correctional-facilities-medical-isolation>.

<sup>155</sup> See *State Quarantine and Isolation Statutes*, *supra* note 152.

<sup>156</sup> NC DPS Infection Control Manual, *supra* note 150.

the Control of Communicable Diseases Manual<sup>157</sup> and guidelines issued by the Centers for Disease Control and Prevention (CDC), but isolation is to continue at a minimum “until the patient is determined to be non-infectious.”<sup>158</sup>

It is important to note that the purpose of separating an individual who is incarcerated from the general prison population for medical reasons is fundamentally distinct from the purpose of solitary confinement. Medical isolation, whether for COVID-19 or any other condition, should never be used as a form of punishment.<sup>159</sup>

## **C. Response to COVID-19**

### **1. Policy Guidance and Updates**

In response to the COVID-19 pandemic, the Centers for Disease Control (CDC) released guidance for reducing community transmission in prisons and jails.<sup>160</sup> While the guidance calls for any person testing positive for or showing symptoms of COVID-19 to be separated from others, it also explicitly requires that “medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice.”<sup>161</sup> For locations where solitary confinement units are used for medical isolation out of necessity because of space limitations, the CDC offers ways to ensure that the experience is “operationally distinct,” including medical services and access to media and personal property, and regular

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<sup>157</sup> The Control of Communicable Diseases Manual is published by the American Public Health Association.

<sup>158</sup> NC DPS Infection Control Manual, *supra* note 150

<sup>159</sup> See generally *COVID-19 in Correctional Facilities: Medical Isolation*, AMEND (last visited Nov. 21, 2021), <https://amend.us/covid-19-in-correctional-facilities-medical-isolation/> (providing graphics that contrast the features of solitary confinement and ethical medical isolation or quarantine).

<sup>160</sup> *Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Updated June 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>161</sup> See *id.*

communication about the duration and purpose of the isolation.<sup>162</sup> Notably, it also suggests increased telephone privileges to support mental health while in isolation.<sup>163</sup>

In a joint statement with the United Nations, the WHO issued a statement at the start of the pandemic, stressed that some restrictions may be necessary to control the spread of COVID-19, but they must be “necessary, evidence-informed, proportionate (i.e. the least restrictive option) and non-arbitrary.”<sup>164</sup> It also said that responses to the pandemic must never amount to torture or punishment, and should comply with the Mandela Rules.<sup>165</sup>

The Federal Bureau of Prisons’ Pandemic Response Plan contains extensive policies for medical isolation and quarantine.<sup>166</sup> Using language from the CDC’s guidelines, this Plan recognizes that medical isolation for COVID-19 should be distinct from disciplinary or administrative restrictive housing, both in name and in practice, and encourages consultation of psychology services to ensure that vulnerable individuals are taken care of when isolated.<sup>167</sup> The BOP Plan suggests facilities such as those normally used for education, religious services, and recreation as potential quarantine spaces.<sup>168</sup> However, the BOP Plan defines the ideal medical isolation room as a “single, well-ventilated room with a solid door and an attached bathroom,” and passively approves of using cells that are normally used for solitary confinement if they are the only rooms available that meet these requirements.<sup>169</sup>

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<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> Federal Bureau of Prisons, *COVID-19 Pandemic Response Plan*, Module 4 (Updated July 16, 2021), [https://www.bop.gov/foia/docs/COVID\\_pandemic\\_plan\\_docs\\_v6\\_2021\\_07\\_16.pdf](https://www.bop.gov/foia/docs/COVID_pandemic_plan_docs_v6_2021_07_16.pdf) [hereinafter BOP Pandemic Response Plan].

<sup>167</sup> *Id.* at Module 4, page 6-7; *see also* N.C. Dep’t of Health and Human Services COVID-19 Outbreak Toolkit for Local Confinement Facilities (Updated Aug. 2020), <https://covid19.ncdhhs.gov/media/563/download>.

<sup>168</sup> *See* BOP Pandemic Response Plan, *supra* note 166, at 3.

<sup>169</sup> *See id.* at 7.

Despite the abundance of pandemic preparedness plans and guidance issued specifically in response to COVID-19, prisons and jails quickly faced a crisis. The recommended COVID-19 safety protocols, such as staying six feet apart from other people and frequent sanitizing, are nearly impossible in prison environments. Overcrowding, inadequately trained staff, and high population turnover only exacerbated the problem and contributed to community spread;<sup>170</sup> in a single week in December 2020, over 25,000 incarcerated persons tested positive for COVID-19.<sup>171</sup> Nationwide, there have been over 439,000 cases of COVID-19 within the U.S. prison system.<sup>172</sup>

## 2. Use of Solitary Confinement

Under such extreme conditions, there is a need to keep people who had been exposed to the virus separated from the general population. However, even strict adherence to the medical isolation protocols does not allow for use of solitary confinement units for medical purposes, and many people who spent time in “medical isolation” during the pandemic reported experiences much more similar to punitive solitary confinement.

In addition to violating both the Mandela Rules and CDC guidance, public health experts have emphasized since the beginning of the pandemic that solitary confinement is ineffective as a means to control a virus. Dr. Homer Venters, former chief medical officer of the New York City Jail System and president of Community Oriented Correctional Health Services, wrote that

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<sup>170</sup> Katie Park et al., *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021), <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic>; Keri Blankinger & Keegan Hamilton, *“I Begged Them to Let Me Die”: How Federal Prisons Became Coronavirus Death Traps.*, THE MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>.

<sup>171</sup> *Id.*

<sup>172</sup> *National Covid-19 Statistics*, THE COVID PRISON PROJECT (Updated Nov. 19, 2021), <https://covidprisonproject.com/data/national-overview/>.



correctional facilities should resist the impulse to “lock people away in cells, with the notion that germs won’t spread if people are sealed in individual cells,” adding that “[n]othing could be farther from the truth.”<sup>173</sup>

An immediate problem is that solitary confinement units require more staff for daily operations, meaning more people have to interact in close proximity.<sup>174</sup> In a brief on the ethical use of medical isolation, Amend at the University of California San Francisco warned that fear of solitary confinement would deter people from reporting symptoms of COVID-19, which would increase the spread of infection within facilities and prevent people from getting treatment.<sup>175</sup> This could be worsened by preemptive lockdowns, in which there is little interaction between prison staff and the people in their custody, because symptoms are more likely to go undetected.<sup>176</sup> As the COVID-19 pandemic continues, information about solitary confinement use during the past two years is starting to surface. From early 2020, there are reports of solitary confinement being used as a preventative measure before people were sick or even exposed to the virus. In Colorado, people incarcerated in state prisons were held in single-person cells for weeks or months in an effort to stop the spread of COVID-19.<sup>177</sup> Despite a state-wide policy, some people reported spending longer than the 15-day limit in medical isolation.<sup>178</sup> Unsurprisingly, these extreme measures were not justified by the results; the rate of infection

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<sup>173</sup> Dr. Homer Venters, *Coronavirus Behind Bars: 4 Priorities to Save the Lives of Prisoners*, THE HILL (Mar. 23, 2020), <https://thehill.com/opinion/criminal-justice/488802-coronavirus-behind-bars-4-priorities-to-save-the-lives-of-prisoners>.

<sup>174</sup> *See id.*

<sup>175</sup> David Cloud et al., *The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce COVID-19 Transmission in Correction Settings*, AMEND (Apr. 9, 2020), [https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary\\_Amend.pdf](https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf).

<sup>176</sup> *See id.*

<sup>177</sup> John Herrick, *Coronavirus Lockdowns in Prisons Test Limits of Colorado’s Rules on Solitary Confinement*, PRISON LEGAL NEWS (July 1, 2021), <https://www.prisonlegalnews.org/news/2021/jul/1/coronavirus-lockdowns-prisons-test-limits-colorados-rules-solitary-confinement/>.

<sup>178</sup> *See id.*

among people in custody of Colorado Department of Corrections was 5.5 times higher than the general population of the state.<sup>179</sup> Reports from later in the pandemic are equally as alarming. There are examples of people being placed into solitary confinement because of offenses like “unauthorized cleaning supplies.”<sup>180</sup> A woman incarcerated in Texas was put into solitary confinement for speaking to the media about the deteriorating health conditions inside the federal prison where she was held.<sup>181</sup> In San Diego, three men were moved to solitary after a local newspaper published a photograph of them holding up a sheet with the message “WE DON’T DESERVE 2 DIE” – a desperate attempt to tell the outside world what was happening inside the county jail.<sup>182</sup>

In total, an estimated 300,000 people were in solitary confinement at the height of the pandemic in 2020, which is an almost 500% increase from pre-pandemic levels.<sup>183</sup> There is no evidence that it was worth the suffering; as of this writing in November 2021, over 2,600 people have died from COVID-19 while incarcerated in United States correctional facilities.<sup>184</sup> In the discussion about how we as a society reacted to the COVID-19, the safety and dignity of the people living in the custody of our correctional systems must be a part of the conversation.

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<sup>179</sup> *See id.*

<sup>180</sup> *What Coronavirus Quarantine Looks Like in Prison*, THE MARSHALL PROJECT (Mar. 18, 2020), <https://www.themarshallproject.org/2020/03/18/what-coronavirus-quarantine-looks-like-in-prison>.

<sup>181</sup> Christopher Connelly, *'We're All Really Scared': Life in Federal Lockup Remains Uncertain During COVID-19 Outbreak*, KERA NEWS (Apr. 13, 2020), [https://www.keranews.org/texas-news/2020-04-13/were-all-really-scared-life-in-federal-lockup-remains-uncertain-during-covid-19-outbreak?fbclid=IwAR3uCKjoI\\_B4xjLQ4XNMdVI7idindaK0k91beTKDJZ9xEGP79Y32gX2HgIY](https://www.keranews.org/texas-news/2020-04-13/were-all-really-scared-life-in-federal-lockup-remains-uncertain-during-covid-19-outbreak?fbclid=IwAR3uCKjoI_B4xjLQ4XNMdVI7idindaK0k91beTKDJZ9xEGP79Y32gX2HgIY).

<sup>182</sup> Jeff McDonald and Kelly Davis, *Inmates in Jail Photo Penalized, Moved to Isolation, Relatives Say*, THE SAN DIEGO UNION-TRIBUNE (Apr. 15, 2020), <https://www.sandiegouniontribune.com/news/watchdog/story/2020-04-15/inmates-in-jail-photo-placed-into-isolation-relatives-say>.

<sup>183</sup> *Solitary Confinement is Never the Answer*, UNLOCK THE BOX (June 2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/une2020Report.pdf>.

<sup>184</sup> *National Covid-19 Statistics*, *supra* note 172.

## V. Narratives of Solitary Confinement Survivors and its Effects

A clinical description of the physical space and isolating conditions of solitary confinement alone would not adequately convey the overwhelming effects it has on so many. Institutional narratives defending the practice have dominated the discourse in the United States,<sup>185</sup> and public apprehensions about crime can often make the experiences of incarcerated persons particularly easy to ignore.<sup>186</sup> However, any effort to reform or end solitary confinement must also engage in counter-storytelling to illuminate its human costs.<sup>187</sup> Toward that effort, a team of students with the Human Rights Policy Lab at the University of North Carolina School of Law conducted individual interviews with people who suffered prolonged solitary confinement to better understand the continuing challenges of their experiences. What follows are descriptions as told by these survivors.

### \***Brandon’s Story**

Brandon was just 21 years old when he was received a life sentence. During the first month of his sentence, he heard an announcement for a religious service. A religious person and looking for a source of strength at the beginning of his long sentence, he picked up his bible and headed to the designated area for the service. On his way, a guard met him and asked where he was going. Brandon responded to the guard, who “thought [Brandon] was being smart” and had him sent to solitary. Brandon stayed there for two weeks before he even had a hearing, at which hearing he was found guilty of “disrespect.” Brandon recounts, “I didn’t go out of my way to break any rules ... Now I’m being punished for trying to go to church!”

Brandon also described experiences with prison guards. “[Prison guards] do all kinds of stuff just because they can. Hold your trays, spit in your food.” The effect is that “you’re disenfranchised with normality, with being human. You are treated like scum of the earth, less than, hideous, abominable... A lot of the [good] officers didn’t [stay] because in training they were taught to treat us as property, to not help [and they didn’t want to] treat their fellow humans like that.” Brandon suffered a traumatic assault prior to being incarcerated, but said that, when he was first in solitary, there was “no psychiatrist – no accommodating trauma.” Even later in his sentence, he said, “They

<sup>185</sup> See generally *Dangerous Overuse*, *supra* note 19.

<sup>186</sup> See Colleen P. Eren, *Let Bernie Madoff, and Many More, Out of Prison*, N.Y. TIMES (Feb. 17, 2008).

<sup>187</sup> See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

\* To preserve the privacy of the individuals we interviewed, many of their names have been changed.

don't really allow access – you have to fill out a form.” Moreover, he said, “You see everybody as against you, so you're not going to seek any sort of administrative help. You don't even know how.”

“I know at least six people hung themselves while I was there. Everybody can't be in a room with *themselves*.” One suicide in particular has stuck with Brandon. He was asked to check on a man who had not come out for recreation. Not wanting to disturb the man's privacy, Brandon “just hollered out, ‘Yo, man, you coming?’ and he never said nothing.” At the end of the day, “when they came to serve him dinner, it just so happens they were training a new girl,” and so when the man didn't take his tray, they checked on him rather than passing by.

When he found bugs in his cell, Brandon wouldn't kill them the way some would. “He's just trying to survive,” he would say of the bugs. His sentence was ultimately shortened, and Brendon is now reunited with his three children. Nevertheless, he says, “I'm still overwhelmed at the least little thing. You [get] stuck in a time-warp...”

When asked what forms of reparations would be meaningful, Brandon discussed two main forms of reparations: (1) formal acknowledgment of the harms caused by solitary confinement; and (2) monetary compensation.

“[An apology] only goes so far ... but it is an *acknowledgment* that there was something wrong, that there was a disservice. It's a formal acceptance that ‘Yes we did this and it was wrong.’ That mindset [that refuses to acknowledge wrongdoing] still keeps our communities different ... What has to be changed is the ideology. The only way history is gonna change, *people* gotta change.”

“If they can pay \$30,000 a year to lock me up, why they couldn't spend \$28,000 - \$30,000 to help me get my life back? [Or] to put people in jobs where they wouldn't be in a position to do crimes [in the first place]?”

The cells used for solitary confinement are small and bare. The typical cell is, no bigger than the average parking space<sup>188</sup> or, as survivor Kerwin Pittman put it, “a small bathroom.”<sup>189</sup> Another survivor, Drew Doll, described the space as 5 steps wide and 7 steps long.<sup>190</sup> Survivor Omar Guess could stretch out his arms and touch both walls.<sup>191</sup> There is a solid metal door with a thin slot through which meals, mail, laundry, and the occasional small item are passed.<sup>192</sup> Any time

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<sup>188</sup> *Id.*

<sup>189</sup> Zoom Interview with Kerwin Pittman (Sept. 24, 2021) [hereinafter Kerwin].

<sup>190</sup> Zoom Interview with Drew Doll (Oct. 8, 2021) [hereinafter Drew].

<sup>191</sup> Telephone Interview with Omar Guess (Sept. 29, 2021) [hereinafter Omar].

<sup>192</sup> Kerwin, *supra* note 188; Zoom Interview with Laurie Sykes (Oct. 4, 2021) [hereinafter Laurie].

a person leaves the space, they must put their hands through this slot to be cuffed. Otherwise, the slot remains closed.<sup>193</sup> The metal door also has a rectangular window that provides a minimal view into the hallway, but the shutter for the window is mounted to the exterior for the guards to control; usually, the guards leave it shut.<sup>194</sup>

Some of these spaces have windows.<sup>195</sup> These windows provide no access to fresh air and allow for very limited sunlight.<sup>196</sup> Usually, the windows are narrow and rectangular, located near the ceiling.<sup>197</sup> Kerwin sometimes folded the mat on his bed to stand high enough for a glimpse of the outside world.<sup>198</sup> However, most cell windows are designed to obscure any views outside.<sup>199</sup> When Drew was first sent to the hole, he could spot a church beyond the prison grounds, and he measured time by counting Sunday morning services.<sup>200</sup> Unfortunately, the windows at his facility were soon painted black.<sup>201</sup> Survivor Tiffany Gabe says that her windows were already painted black before she arrived.<sup>202</sup>

Usually, guards adjust the lights on a regular schedule: on at 5 a.m., Kerwin recalls, and off 6 or 7 p.m.<sup>203</sup> However, Kerwin adds, a spiteful guard might turn the light on at 4:30 a.m. instead.<sup>204</sup> Another survivor, Laurie Sykes, remembers that the lighting was often too dim to read her mail.<sup>205</sup> During most nights, the only source of light was through the bottom of the door.<sup>206</sup>

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<sup>193</sup> Kerwin, *supra* note 188.

<sup>194</sup> *Id.*

<sup>195</sup> Kerwin, *supra* note 188; Drew, *supra* note 189; Omar, *supra* note 190; Zoom Interview with Tiffany Gabe (Oct. 8, 2021) [hereinafter Tiffany]; Laurie, *supra* note 191.

<sup>196</sup> Kerwin, *supra* note 188; Drew, *supra* note 189; Laurie, *supra* note 191.

<sup>197</sup> Kerwin, *supra* note 188; Drew, *supra* note 189.

<sup>198</sup> Kerwin, *supra* note 188.

<sup>199</sup> Drew, *supra* note 189.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Tiffany, *supra* note 194.

<sup>203</sup> Kerwin, *supra* note 188.

<sup>204</sup> *Id.*

<sup>205</sup> Laurie, *supra* note 191.

<sup>206</sup> Kerwin, *supra* note 188.

Inside the space is a bed and a combination toilet sink.<sup>207</sup> The beds can be either concrete slabs or metal frames bolted to the walls.<sup>208</sup> On top of the bed is a thin mat and a pillow made of plastic to prevent it from getting wet.<sup>209</sup> Omar often got sores from sleeping on the mats, likely due to friction with the metal frame.<sup>210</sup> But people sent to the hole for serious offenses sometimes lose the privilege bedding.<sup>211</sup> Meanwhile, the toilet sink serves as the primary source for water.<sup>212</sup> Kerwin recalls listening to the maddening sound of the sink, constantly dripping even when it was off.<sup>213</sup>

Survivors report that temperatures can sometimes fluctuate significantly.<sup>214</sup> Although many facilities use air conditioning, the steel and concrete designs often make the entire prison very cold.<sup>215</sup> However, people sent to the hole only have what the guards allow them to have, which means they are often denied access to blankets or additional clothing to keep warm, and clothing can even be taken away as an additional form of punishment and humiliation.<sup>216</sup>

The personal hygiene items given to people in solitary confinement are limited and substandard.<sup>217</sup> The deodorants do nothing<sup>218</sup> and toothbrushes are small combs with tiny bristles that slip onto the finger.<sup>219</sup> Kerwin believes that his early onset hair loss was a direct result of being denied lotion while in solitary confinement as his scalp dried out and his hairline receded.<sup>220</sup>

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<sup>207</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>208</sup> Kerwin, *supra* note 189.

<sup>209</sup> *Id.*

<sup>210</sup> Omar, *supra* note 191.

<sup>211</sup> *Id.*

<sup>212</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>213</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>214</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>215</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>216</sup> Kerwin, *supra* note 189.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Tiffany says that women in her facility were sometimes denied access to tampons, pads, or additional sheets of toilet paper beyond the daily allotment of three sheets.<sup>221</sup>

People in the hole eat worse food.<sup>222</sup> While in the general population, Drew worked in the kitchen and had access to eat what he wanted.<sup>223</sup> But once he was sent to solitary, the quality diminished significantly.<sup>224</sup> Meals are delivered on a tray through the door slot.<sup>225</sup> Laurie would save the morning tea to drink throughout the day “just to have something.”<sup>226</sup> Drew would save his milk cartons each day to get water from the toilet sink; no cups were ever provided.<sup>227</sup> Meanwhile, Kerwin’s dietary restrictions prevented him from eating red meat or pork, and guards would respond by depriving him of food or trying to force feed him.<sup>228</sup> Uncooperative behavior could also result in the replacement of ordinary meals with Nutraloaf,<sup>229</sup> a notorious block of various mashed-up ingredients so vile it has attracted claims across the country as a violation of cruel and unusual punishment.<sup>230</sup> Many people in solitary confinement simply choose to go without food and become malnourished.<sup>231</sup> Refusal to eat usually provokes further punishment: Kerwin describes an incident in which a person with obvious signs of mental health deterioration

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<sup>221</sup> Tiffany, *supra* note 195.

<sup>222</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>223</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>224</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>225</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>226</sup> Laurie, *supra* note 192.

<sup>227</sup> Drew, *supra* note 190.

<sup>228</sup> Kerwin, *supra* note 189.

<sup>229</sup> Tiffany, *supra* note 195.

<sup>230</sup> Arin Greenwood, *Taste-Testing Nutraloaf*, SLATE (June 24, 2008) <https://slate.com/news-and-politics/2008/06/can-prison-food-be-unconstitutionally-bad.html>.

<sup>231</sup> Kerwin, *supra* note 189.

stopped eating until the guards entered his room, hogtied him, and carried him to the showers to lie under the water.<sup>232</sup>

Persons in solitary confinement have extremely limited opportunities to leave their rooms.<sup>233</sup> The transportation of a person from solitary confinement occurs one at a time, requiring two guards and restraints, even when attempting to shower.<sup>234</sup> Some have access to a fenced area outside, but most have no real access to fresh air and no allotted exercise time.<sup>235</sup> While people in solitary confinement are supposed to get at least an hour outside of their cell per day, the lack of adequate staff results in a person going days without leaving their room.<sup>236</sup> The time spent outside of the cell does not allow for any meaningful social interaction with other people serving time in the facility.<sup>237</sup> This form of extreme isolation has been linked to “anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.”<sup>238</sup>

Regardless of the purpose behind a person’s isolation or their behavior during it, they experience an extreme deprivation of stimulating activity.<sup>239</sup> Although some lower security facilities allow radios or writing materials, most do not. Drew said that they do not even allow clocks or calendars.<sup>240</sup> A person in solitary confinement also has no continued access to any work or education programs, and any privileges to use these programs accrued beforehand are lost.<sup>241</sup> The only recreational materials that people in the hole can enjoy are books from the library and

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<sup>232</sup> *Id.*

<sup>233</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>234</sup> Kerwin, *supra* note 189.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Med. Ethics*, J. OF THE AM. ACAD. OF PSYCH. AND THE L. (Mar. 2010) <http://jaapl.org/content/38/1/104.full>.

<sup>239</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>240</sup> Drew, *supra* note 190.

<sup>241</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Laurie, *supra* note 192; Tiffany, *supra* note 195.



letters from home.<sup>242</sup> Access to books can vary by facility: Laurie was able to make book selections through a paper form,<sup>243</sup> but Omar was never offered a choice.<sup>244</sup> However, a person in solitary can request a religious text of their choice.<sup>245</sup> Drew says that at one point, he could receive books sent to him by friends or family, but this is no longer allowed.<sup>246</sup> Tiffany reveals she cannot receive books from the outside or keep any pictures or photographs sent to her.<sup>247</sup> Aside from letters, people in solitary have limited knowledge of current events.<sup>248</sup> Drew, an avid baseball fan, said one of his top priorities upon being released from solitary was to find out how his favorite teams had fared in the previous season and who won the World Series.<sup>249</sup>

Letters from home prove to be the most significant form of solace for those in the hole.<sup>250</sup> Kerwin, who was first incarcerated as a teenager, took great comfort in the letters from his mother.<sup>251</sup> She wrote to him every week and drew pictures of flowers. Kerwin could smell her on the letters.<sup>252</sup> Laurie similarly described the letters she received as her “only sanity.”<sup>253</sup> Kerwin notes that while he was fortunate to have such reliable support on the outside, many do not.<sup>254</sup> Visitation while in solitary is rigidly controlled and strictly limited to immediate family or an attorney.<sup>255</sup> Visitation varies as it is as the discretion of prison superintendents.<sup>256</sup> Drew explains

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<sup>242</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>243</sup> Laurie, *supra* note 192.

<sup>244</sup> Omar, *supra* note 191.

<sup>245</sup> Drew, *supra* note 190.

<sup>246</sup> *Id.*

<sup>247</sup> Tiffany, *supra* note 195.

<sup>248</sup> Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192.

<sup>249</sup> Drew, *supra* note 190.

<sup>250</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>251</sup> Kerwin, *supra* note 189.

<sup>252</sup> *Id.*

<sup>253</sup> Laurie, *supra* note 192.

<sup>254</sup> Kerwin, *supra* note 189.

<sup>255</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>256</sup> Drew, *supra* note 190; Laurie, *supra* note 192.

that all visitations were conducted through a video teleconferencing screen, which “doesn’t feel like visitation.”<sup>257</sup> Laurie says visitations were frequently denied to her, and “one of [her] biggest upsets” was the day her out-of-state brother was prevented from seeing her entirely.<sup>258</sup>

### **Joseph’s Story**

Even guards, whose lives might, theoretically, be made simpler by using solitary confinement to deal with problematic charges do not all think it is a productive tool for deterring or correcting bad behavior. One former guard responded to a few questions from us, noting:

“Solitary confinement created more work for deputies. Day to day tasks took longer. Their [the inmates’] behavior was poor. Locking someone who already misbehaves in a small room for 23 hours just makes them behave worse... the longer someone stayed in solitary usually the worse their behavior got.”

The feeling of isolation permeates. “There is no upside to being friends with the guards,” says Drew, so he kept to himself.<sup>259</sup> Omar said, “You could actually have a seizure in your cell and an officer wouldn’t rush to save you.”<sup>260</sup> Meanwhile, communication among people kept in solitary confinement was not facilitated.<sup>261</sup> On occasion, Laurie recalls hearing people singing.<sup>262</sup> Other times, it was their echoing screams.<sup>263</sup> Kerwin remembers hearing “grown men crying every night.”<sup>264</sup> Tiffany says there is “no sense of unity [among people held in solitary confinement] because everybody is so angry.”<sup>265</sup> She felt like she did not deserve to be around “regular people” and that she could never build relationships with anyone.<sup>266</sup>

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<sup>257</sup> Drew, *supra* note 190.

<sup>258</sup> Laurie, *supra* note 192.

<sup>259</sup> Drew, *supra* note 190.

<sup>260</sup> Omar, *supra* note 191.

<sup>261</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>262</sup> Laurie, *supra* note 192.

<sup>263</sup> *Id.*

<sup>264</sup> Kerwin, *supra* note 189.

<sup>265</sup> Tiffany, *supra* note 195.

<sup>266</sup> *Id.*

Kerwin became close with a man in a neighboring cell who went by the name of T.K.<sup>267</sup> The only way they could communicate was by standing on the toilet sink and yelling through the vents to each other. This was the only human interaction Kerwin experienced in the hole.<sup>268</sup> But gradually, T.K.'s condition deteriorated, and communication became difficult.<sup>269</sup> T.K. had already served several months in solitary before Kerwin arrived, and began to "lose sight of reality."<sup>270</sup> T.K. would get angry, jump on his bed, and make as much noise as possible at all hours of the night.<sup>271</sup> T.K.'s minimal help r from the medical staff did nothing to improve T.K.'s condition. Punishing him for his behavior only made it worse.<sup>272</sup> T.K. began refusing food and made multiple attempts at suicide.<sup>273</sup> Kerwin eventually watched the guards respond to an emergency medical call and bring T.K. out "half-dead" on a stretcher.<sup>274</sup> Individuals with pre-existing mental illness and juveniles are more likely to die by suicide if they have experienced solitary confinement.<sup>275</sup> Of all deaths by suicide of incarcerated people, nearly half are completed by those in solitary confinement.<sup>276</sup> Solitary confinement may result in prolonged or permanent psychological disability<sup>277</sup>, including visual and auditory hallucinations, insomnia and paranoia, uncontrollable feelings of rage and fear, distortions of time and perceptions, and post-traumatic stress disorder (PTSD).<sup>278</sup>

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<sup>267</sup> Kerwin, *supra* note 189.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 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?tid=a\\_inl\\_](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl_)

<sup>276</sup> *Id.*

<sup>277</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. UNIV. J. OF L. & POL'Y, 325, 354 (2006), [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law\\_journal\\_law\\_policy\\_](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy_)

<sup>278</sup> *Solitary confinement facts*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/resource/solitary-confinement-facts> (last visited Nov. 16, 2021).

Survivors of solitary confinement also often report physical complications, including “hypertension, such as chronic headaches, trembling, sweaty palms, extreme dizziness and heart palpitations,” in addition to eating and digestive issues.<sup>279</sup> Survivors have severely diminished health outcomes due to “[s]tress, enforced idleness, and limited access to health care, including medically necessary prescriptions and physical therapies.”<sup>280</sup>

Drew recalls that though he could request a visit with a doctor, the primary care physician overseeing his facility was a podiatrist, not a general practitioner.<sup>281</sup> During his time in solitary, Drew “tended not to ask for medical care” because “they just want to knock you out” with sedatives rather than treat.<sup>282</sup> Tiffany says that guards would sometimes mock requests for ibuprofen and treat people as if their medical concerns were fake.<sup>283</sup> Many segregation facilities do not provide regular check-ups on those in isolation.<sup>284</sup> Persons with mental health conditions often go entirely ignored until their circumstances was an emergency.<sup>285</sup> Drew once heard another man calling for help for hours until falling silent.<sup>286</sup> Later, Drew discovered that the man died in his cell.<sup>287</sup> “That’s the terrifying part,” says Drew, “to realize that no one cares.”<sup>288</sup>

The process for sending a person to isolation often happens quickly and without concern for context, especially when administrators believe that isolation has been “earned” through rule

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<sup>279</sup> Mary Murphy Corcoran, *Effects of Solitary Confinement on the Well Being of Prison Inmates*, APPLIED PSYCH. OPUS, [https://wp.nyu.edu/steinhardt-appsych\\_opus/effects-of-solitary-confinement-on-the-well-being-of-prison-inmates/](https://wp.nyu.edu/steinhardt-appsych_opus/effects-of-solitary-confinement-on-the-well-being-of-prison-inmates/).

<sup>280</sup> Jamelia Morgan, *Caged In: Solitary Confinement’s Devastating Harm On Prisoners With Physical Disabilities*, AM. CIVIL LIBERTIES UNION (Jan. 2017), [https://www.aclu.org/sites/default/files/field\\_document/010916-aclu-solitarydisabilityreport-single.pdf](https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf).

<sup>281</sup> Drew, *supra* note 190.

<sup>282</sup> *Id.*

<sup>283</sup> Tiffany, *supra* note 195.

<sup>284</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>285</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Tiffany, *supra* note 195.

<sup>286</sup> Drew, *supra* note 190.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

violations.<sup>289</sup> When Laurie was sentenced to 60 days in solitary after being charged with unauthorized access to the internet, the administrators \hearing her case had no interest in her side.<sup>290</sup> Laurie had become distraught upon learning of her husband’s sudden death and told her work release employer that she had no information about the cause.<sup>291</sup> Later, Laurie spoke with her son on the phone and mentioned that her employer was trying to find an obituary online.<sup>292</sup> The phone log of this conversation was the evidence against Laurie.<sup>293</sup> Laurie “kept trying to tell [the administrators]” that she had not accessed the internet and that she “couldn’t stop [her employer] from looking stuff up if he wants to.”<sup>294</sup> Despite her efforts, she was sent to solitary confinement, during which time she wrote multiple grievances to the administrative offices of the prison.<sup>295</sup> She did not hear back until after she returned to the general population, which she says “felt like a slap in the face.”<sup>296</sup>

“Every day [of solitary confinement] turns into fighting for your life,” says Tiffany, who spent her time in isolation “looking around, not knowing what to do.”<sup>297</sup> She had no routine, just the thoughts in her own head.<sup>298</sup> Omar felt like he was “going to lose [his] mind looking at those walls every day.”<sup>299</sup> Laurie “cried a lot” as she read her mail.<sup>300</sup> A person has to “turn [their] mind off” and “try not to think” while in the hole, says Drew.<sup>301</sup> He claims that he would have taken any deal they offered him to get out as he became increasingly desperate for human contact.<sup>302</sup> Drew

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<sup>289</sup> Laurie, *supra* note 192.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> Tiffany, *supra* note 195.

<sup>298</sup> *Id.*

<sup>299</sup> Omar, *supra* note 191.

<sup>300</sup> Laurie, *supra* note 192.

<sup>301</sup> Drew, *supra* note 190.

<sup>302</sup> *Id.*

believes that the space serves to put coercive pressure on people within it but its worst effects are not necessarily deliberate: instead, those conditions are the inevitable result of “mindlessness” on the part of prison managers who put people into isolation out of convenience.<sup>303</sup> Kerwin contends that every aspect of solitary confinement is “designed to break you or make you crazy or deter you from wanting to go to the hole.”<sup>304</sup> The only way he could make it through was through the support of his family and by keeping as much of a structured routine as he could manage by regularly working out in his cell, reading books, eating meals, and treating his time as if it was a program he could work.<sup>305</sup>

“Things that are not normal become normal in that space,” says Kerwin, and it took “sheer will and resilience and some part of a divine plan” to survive the experience.<sup>306</sup> Kerwin recalls that once he was back in the general population, he would catch himself standing at his cell door as if he could not leave, even when he had the freedom to move.<sup>307</sup> Tiffany says that her experience in solitary confinement significantly impaired her ability to communicate with others, including family, and that she felt herself becoming “mean”, and inconsiderate.<sup>308</sup> She would try to remind herself of her mother’s advice: “Don’t let your heart get hard.”<sup>309</sup> Since his experience, Drew does not ever want the door closed and has a hard time sitting in one spot.<sup>310</sup>

Survivors may spend weeks, months, and years languishing in solitary, but release feels sudden.<sup>311</sup> There are no formal transitions back into normal social situations. Survivors are released

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<sup>303</sup> *Id.*

<sup>304</sup> Kerwin, *supra* note 189.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Tiffany, *supra* note 195.

<sup>309</sup> *Id.*

<sup>310</sup> Drew, *supra* note 190.

<sup>311</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

into the general population or into their communities on the outside without any professional assessment of their mental state, emotional state, or their ability to reintegrate into society.<sup>312</sup> “No one asked me if I was okay,” says Laurie, “and I didn’t feel okay.”<sup>313</sup> Omar reflects, “I was not prepared, mentally, to be released.”<sup>314</sup> Survivors describe the experience as “sensory overload.”<sup>315</sup> Once outside, survivors must seek counseling, peer support, and mental health services on their own as they try to cope with the trauma of extreme isolation.<sup>316</sup>

Today, the survivors interviewed here have found themselves in better places. Tiffany takes care of her son and has discovered her love for writing and creativity.<sup>317</sup> Omar has earned his HVAC certification and now works as a supervisor for the Durham County government.<sup>318</sup> He says he is “not in that dark place anymore.”<sup>319</sup> Laurie serves as a Peer Support Specialist for other survivors trying to transition back into their communities.<sup>320</sup> She fosters for a local animal shelter and graduated from college with a 4.0 GPA in July 2021.<sup>321</sup> Drew also serves in a Peer Support group doing work he loves and that makes him feel valuable.<sup>322</sup> He says he feels reconnected to his family and now lives in a house with plenty of space outside to walk and enjoy nature.<sup>323</sup> Kerwin has become a social justice activist and advocate in Raleigh, NC.<sup>324</sup> He is the Founder and Executive Director of Recidivism Reduction Educational Program Services (RREPS), serves as a

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<sup>312</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>313</sup> Laurie, *supra* note 192.

<sup>314</sup> Omar, *supra* note 191.

<sup>315</sup> Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192.

<sup>316</sup> Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>317</sup> Tiffany, *supra* note 195.

<sup>318</sup> Omar, *supra* note 191.

<sup>319</sup> *Id.*

<sup>320</sup> Laurie, *supra* note 192.

<sup>321</sup> *Id.*

<sup>322</sup> Drew, *supra* note 190.

<sup>323</sup> *Id.*

<sup>324</sup> Kerwin, *supra* note 189.

field organizer for Emancipate NC, and sits on the Racial Equity Task Force developed by North Carolina Governor Roy Cooper.<sup>325</sup> The accomplishments of these survivors despite the trauma they endured are outstanding. However, many survivors of solitary confinement continue to face significant challenges and do not have adequate access or knowledge of available mental health services and peer support groups.<sup>326</sup> These survivors’ stories clarify the personal tragedies of this widespread and normalized violation of human rights by our federal and state governments. “You never understand the human side of prison until you experience it,” says Tiffany. “These are still people.”<sup>327</sup>

## VI. Federal and State Action on Solitary Confinement

### A. Solitary Confinement and Congress

In 2009, Atul Gawande published a long-form piece in *The New Yorker* entitled “Hellhole.”<sup>328</sup> In it, he captures the harsh realities of solitary confinement.<sup>329</sup> He posits, “[i]f prolonged isolation is—as research and experience have confirmed for decades—so objectively horrifying, so intrinsically cruel, how did we end up with a prison system that may subject more of our own citizens to it than any other country in history has?”<sup>330</sup> Senator Dick Durbin, a high ranking Democrat in the Senate and the Chair of the Senate Judiciary Committee at the time, read

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<sup>325</sup> *Id.*

<sup>326</sup> See Kerwin, *supra* note 189; Drew, *supra* note 190; Omar, *supra* note 191; Laurie, *supra* note 192; Tiffany, *supra* note 195.

<sup>327</sup> Tiffany, *supra* note 195.

<sup>328</sup> Atul Gawande, *Hellhole*, NEW YORKER (Mar. 23, 2009), [https://www.newyorker.com/magazine/2009/03/30/hellhole\\_](https://www.newyorker.com/magazine/2009/03/30/hellhole_)

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*



Gowande's piece and "couldn't forget it."<sup>331</sup> He began thinking about solitary confinement reform as a part of his agenda.<sup>332</sup>

This began the lengthy and ultimately unsuccessful journey of solitary confinement legislation. Over the course of Congressional history, there has been thirteen initiatives referencing solitary confinement issues. Of that three passed the House and two passed in the Senate. The first piece of legislation about solitary confinement to gain traction was the Solitary Confinement Study and Reform Act (SCSRA) of 2014.<sup>333</sup>

It was primarily sponsored by democratic Senator Cedric Richmond and the Congressional Black Caucus. The bill set out to do four things: create national standards for solitary confinement use, create a commission solely devoted to solitary confinement issues.<sup>334</sup> The Commission would then conduct a holistic study on solitary confinement and its impacts ranging for its effects on incarcerated persons to the legal system to the economy.<sup>335</sup> Using this information they would create a report outlining standard to "significantly reduce the use of solitary"<sup>336</sup> and grant funding would be reduced for any prison in noncompliance.<sup>337</sup> While unsuccessful this opened the door to studies by the Bureau of Prisons and investigations by the DOJ. For further information on legislation introduced to Congress but ultimately unsuccessful, please see Appendix A.

Notably, the 2016 Solitary Confinement Reform Act (SCRA)<sup>338</sup> introduced by Durbin was one of the first pieces of legislation that closely mirrored the time restraints for solitary

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<sup>331</sup> Jacki Lyden, *Solitary Confinement: Punishment or Cruelty?*, NPR (Mar. 10, 2013), <https://www.npr.org/2013/03/10/173957675/solitary-confinement-punishment-or-cruelty>.

<sup>332</sup> *Id.*

<sup>333</sup> H.R. 4618, 113th Cong. (2014).

<sup>334</sup> *Id.* at §3

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at §3(d)(3)(B)(ii).

<sup>337</sup> *Id.* at §3(d)(1); 4(c)(1).

<sup>338</sup> S. 3432, 114th Cong. (2016).

confinement use in the Mandela Rules.<sup>339</sup> The SCRA additionally would have prohibited the use of solitary on any disabled person, pregnant or recently pregnant persons. Finally, on December 18, 2018 Congress successfully passed the FIRST STEP Act<sup>340</sup> which would prohibit the use of solitary confinement on juveniles,<sup>341</sup> unless it was used as “ a temporary response to a covered juvenile’s behavior that poses a serious and immediate risk of physical harm to any individual, including the covered juvenile.”<sup>342</sup> The bill also creates maximum periods of confinement of three hours and directs staff members to seek mental health professionals for the juveniles, even if it requires a transfer to a facility with a greater capacity for care.<sup>343</sup> With pressure from the White House the First Step Act passed the Senate with only 12 dissenting votes—all from Republicans.<sup>344</sup> Two days later, the House passed the bill with overwhelming support from both parties.<sup>345</sup> On December 21, 2018, President Trump signed the First Step Act into law.<sup>346</sup> In the same year the Senate also re-codified the JJDP, which focused on safeguards for incarcerated minors.<sup>347</sup>

## **B. Where Federal Efforts Go from Here**

Federal legislative action is critical to reform because the courts seem unwilling to take action on solitary confinement notwithstanding Supreme Court dicta acknowledging the toll of solitary confinement isolation in U.S. prisons.<sup>348</sup> Jonathan Simon, in "Governing Through Crime," explains that “Americans...built a new civil and political order structured around the problem of

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<sup>339</sup> *Id.* at 2(b)(1)(A); §2(b)(5)(A)(ii)(II)(aa). (The language of the SCRA is slightly different as it limits solitary “to a duration of not more than 15 consecutive days, and not more than 20 days in a 60-day period,” but provides exceptions” and “to the briefest term and the least restrictive conditions practicable, including not less than 4 hours of out-of-cell time every day, unless the inmate poses a substantial and immediate threat.”).

<sup>340</sup> There were four different versions of the FIRST STEP Act, all with slightly different names, including the First Step Act and the First Step Act of 2018. Members and the press all colloquially referred to the legislative efforts as the “First Step Act,” so, for ease of reading, the bill will be referred to as the “First Step Act” hereinafter.

<sup>341</sup> *Id.*

<sup>342</sup> S. 3649, 115th Cong. (2018).

<sup>343</sup> *Id.* at §513(b).

<sup>344</sup> S. 756, 115th Cong. (2017).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> S. 3649, 115th Cong. (2018).

<sup>348</sup> Derek Gilna, *Association of State Correctional Administrators Study Criticizes Solitary Confinement*, PRISON LEGAL NEWS (Oct. 26, 2015) <https://www.prisonlegalnews.org/news/2015/oct/26/association-state-correctional-administrators-study-criticizes-solitary-confinement/>.

violent crime.”<sup>349</sup> In June 2021, a survey showed that “[a]n overwhelming majority (86%) of American voters support reforms in current Congressional legislation that would greatly restrict the use of solitary confinement, including 84% of Republicans and 90% of Democrats.”<sup>350</sup> Despite public support the decade-long federal efforts to reform the use of solitary confinement has only amounted to the restriction of solitary confinement for juveniles.

Reforming the use of solitary confinement for juveniles is “low-hanging fruit,” yet it took nearly a decade to achieve on the federal level. Other uncontroversial reforms have been given little attention, including the use of solitary confinement for pregnant women. Provisions banning the practice for pregnant women are not altogether uncommon<sup>351</sup>, but are not prominent. Therefore, should advocates focus more on human dignity and rights? Despite paralysis on the federal level, Congressional action is still important—particularly because bringing attention to the issue is so meaningful for so many survivors.<sup>352</sup>

## **VII. Combatting Solitary Confinement in the North Carolina State Government**

Generally, the North Carolina State government has taken little action on matters addressing the inhumane nature of solitary confinement. However, in recent years there have been several notable campaigns that sought to reform the use of solitary confinement and addressed general concerns about the North Carolina prison system.

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<sup>349</sup> *Id.*

<sup>350</sup> *Five in Six Voters Favor Sharply Restricting Use of Solitary Confinement*, UNI. OF MD. SCH. OF PUB. POLICY (June 29, 2021) <https://publicconsultation.org/criminal-justice/solitary-confinement/>.

<sup>351</sup> H.R. 176, 117th Cong. (2021) (included provision to limit the use of solitary confinement on pregnant women), Letter from Rep. Raul M. Grijalva, et al, to Gene L. Dodaro, Comptroller General of the United States, United States Government Accountability Office (Nov. 9, 2017)

<https://bass.house.gov/sites/bass.house.gov/files/GAO%20Report%20Request%20on%20Pregnant%20Women%2011-09-17.pdf> (requested and received GAO report on treatment of pregnant women in DHS facilities, though Members have not publicly acted on the report’s findings, which were published in January 2021).

<sup>352</sup> Telephone Interview with Omar Guess, Solitary Confinement Survivor (Sept. 29, 2021).

One of the primary reasons reform has been so slow is the constant administrative agencies changes employed by the government. For example, in 2011 the General Assembly consolidated all of its correction departments into a single agency called the North Carolina Department of Public Safety.<sup>353</sup> Thus, it would oversee both adult and juvenile corrections and also address crime control and public safety simultaneously. However, daily oversight was delegated to the Division of Prisons.<sup>354</sup> This changed once again, during a House budget proposal in 2019, which removed the Department of Adult Corrections and Juvenile Justice from under Public Safety’s authority into an independent cabinet level department solely overseeing adult corrects in North Carolina.<sup>355</sup>

### **A. The Legislative Route**

The most notable piece of solitary confinement reform in the state of North Carolina was the 2021N.C. Sess. Laws 143, “Dignity for Women Who Are Incarcerated Act.”<sup>356</sup> This legislation effectively banned the use of restrictive housing for incarcerated pregnant people.<sup>357</sup> However, over the course of the floor speech delivered by Representative Kristin Baker<sup>358</sup>, the primary sponsor of the bill, never once did she mention solitary confinement or restrictive housing.<sup>359</sup> In her five-minute floor speech that accompanied the unanimous passage of this bill in the North Carolina House, the primary sponsor devoted more time to praising corrections officers than discussing incarcerated pregnant persons.<sup>360</sup> Further, she did not mention the provision that

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<sup>353</sup> 2021 N.C. Sess. Laws 145 § 19.1 (iii).

<sup>354</sup> *Id.*

<sup>355</sup> 2019 N.C. Sess. Laws 236 § 5.

<sup>356</sup> 2019 N.C. Sess. Laws 143.

<sup>357</sup> *Id.* at §148-25.2.

<sup>358</sup> Yanqi Xu, *NC Lawmakers Introduce Bipartisan Bill to Limit Shackling of Pregnant Incarcerated Women*, The Pulse (April 20,2021) <https://pulse.ncpolicywatch.org/2021/04/20/nc-lawmakers-introduce-bipartisan-bill-to-limit-shackling-of-pregnant-incarcerated-women/#sthash.uthja3v.dpbs/>.

<sup>359</sup> North Carolina General Assembly, *Audio Archives: House Documents 2021*, NC General Assembly (May 10, 2021) <https://webservices.ncleg.gov/ViewDocSiteFile/8176/>.

<sup>360</sup> *Id.*

would prevent restrictive housing usage for incarcerated pregnant people.<sup>361</sup> While an important step, it apparent that solitary confinement reform often is delivered in a fashion complimentary to a larger statutory goal. It is seldom discussed explicitly and not viewed in a larger framework of national and international human rights implications.

### **1. Efficacy of Legislative Route**

While the General Assembly singularly possesses the most power when it comes to the question of regulating, reforming, and potentially abolishing solitary confinement, the chances of meaningful change from this branch are the least promising of the three in question. During the occasional legislative bright spot on the question, positive movement on the issue of solitary confinement is considered from the perspective of corrections officials and support staff rather than those of victim-offenders. With increasing frequency, solitary confinement reform is delivered to compliment a larger statutory goal. It is seldom discussed explicitly. When it is, it is kept in an incredibly localized context, rather than viewed in a larger framework of national and international human rights implications.

North Carolina has not adopted the Mandela Rules<sup>362</sup> which create standards that for the humane treatment of incarcerated persons. The Mandela rules start by noting that solitary should only be used as a last resort and should not “be imposed by virtue of a prisoner’s sentence.”<sup>363</sup> Additionally, it addresses the reduction and abolition of solitary for women, children, and the mentally ill.<sup>364</sup> The rules also ban the use of solitary confinement in the excess of fifteen days or any indefinite solitary confinement. Through lobbying of the Legislature, North Carolina has

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<sup>361</sup> *Id.*

<sup>362</sup> Nelson Mandela Rules, *supra* note 1 at 45.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 44.

successfully done away with the practice for pregnant women<sup>365</sup>, is fighting for the same in the case of those with mental illness, and successfully lobbied DPS to end the practice with minors<sup>366</sup>. The plights of the classes mentioned in the Mandela Rules and other international standards have shown that they resonate with the members of the General Assembly. Effective advocacy could prove incredibly valuable in ensuring that offenders belonging to those classes, and eventually all offenders, do not experience the torture of solitary confinement again.

## **B. The Judicial Route**

### **1. Analysis**

Judicial review of solitary confinement, much like the General Assembly's oversight, can be decisive on resolving the solitary confinement question. Unlike the General Assembly's personal and political barriers, North Carolina's judiciary as a whole struggle to address solitary confinement because of legal and procedural hurdles. The viability of state courts as an avenue for redress centers around two issues, one being accessibility, while the other stems from explicit permission by the Department of Corrections for North Carolina prisons to use solitary confinement. Notwithstanding any change in the other two branches, it is difficult to construct a civil case that would compel judiciary action.

State-level persons who are incarcerated are challenged in their search for recourse and injunction against solitary confinement by the appeals process that they must exhaust before they are able to take their case to court and receive the adjudication of a judge. Appeals must be filed through the Department of Public Safety hierarchy in order for an incarcerated person to have their

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<sup>365</sup> North Carolina General Assembly, *supra* note 358.

<sup>366</sup> Kevin W. Bliss, *New Sheriff Ends Juvenile Solitary Confinement at North Carolina Jail*, Prison Legal News, (March 5, 2019), <https://www.prisonlegalnews.org/news/2019/mar/5/new-sheriff-ends-juvenile-solitary-confinement-north-carolina-jail/>.

day in court.<sup>367</sup> The initial process, if correctly filed, allows 15 days for the Department to respond.<sup>368</sup> Then, under the second step, a 15-day period is afforded to the Department to review the complaint further.<sup>369</sup> If the complaint successfully passes steps 1 and 2, the incarcerated person face the third and longest step, where the department has 50 days with which to formulate a response.<sup>370</sup> After this, if the complaint details a tort pursuant to the North Carolina Tort Claims Act<sup>371</sup>, it goes before the North Carolina Utilities Commission sitting in its capacity as a quasi-judicial body. This was the case with the same defendant, Rocky Lee DeWalt, when he alleged negligent violence on the part of correctional officers and went before the North Carolina utilities commission in 2014.<sup>372</sup>

## 2. Efficacy of Judicial Route

All told, the judicial route is a tricky one. North Carolina detainees may proceed and seek monetary damages even if injunctions are rendered impossible by the passage of time and changes in the detainee's incarcerated status. An additional route is available to NC incarcerated persons through 18 U.S.C. § 1983. These may be pursued when federal statutes are in question and opportunities for redress within the institution have been exhausted.<sup>373</sup> At the state level, efforts such as the *DeWalt*<sup>374</sup> litigation are the way forward. *Dewalt* is a case directly challenging the imposition of solitary confinement in North Carolina.<sup>375</sup> While the plaintiffs all exhibited signs of mental illness, the nature of the case and scope of analysis by the court could fundamentally

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<sup>367</sup> North Carolina Department of Safety, *Policy & Procedure Manual*, NC DPS (2022), <https://www.ncdps.gov/our-organization/adult-correction/prisons/policy-procedure-manual?a=000003%2C002240%2C002507/>.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> 143 N.C.G.S. § 291.

<sup>372</sup> *Dewalt, et al. v. Hooks, et al.*, 859 S.E.2d 215 (N.C. 2021) (No. 19 CVS 14089).

<sup>373</sup> Notice to Inmates Filing Section 1983 Complaints (Dec. 1, 2020), <https://www.nced.uscourts.gov/pdfs/forms/prisonerCivilRightsComplaintPackage.pdf>.

<sup>374</sup> *Supra* note 371.

<sup>375</sup> Appellant's Br. 1.

restructure the use of solitary for all detainees.<sup>376</sup> However, *Dewalt* litigation is currently stalled. Although not yet a definitive win, this case has promise and could inspire further solitary confinement litigation. Further, cases that center those classes that are specifically mentioned in the Mandela Rules, must be pressed. As with the legislature, traction is hard to attain, but with cases in front of the court, daylight is visible, albeit faint.

## **C. The Executive Route**

### **1. Analysis**

What stops the executive branch from acting? The answer is twofold. First, North Carolina is a purple state. However, it is a purple state with an apparent conservative streak. In order for a Democratic candidate to win statewide, specifically the Governorship, the public perception of “tough on crime” is a prerequisite. However, as some have noted, North Carolina Democratic Governors are liberal but two of the last three were Attorney Generals. The second obstacle arises in the form of institutional inertia. Under the current executive set-up there is no single individual that controls the solitary confinement in North Carolina. These decisions are made by lower-level corrections officers on a daily basis and in a fluid environment. Further, if those individuals are not empowered to move away from solitary, then executive maneuvering is of little value.

The Department of Public Safety was contacted for this piece and provided the following information. “As of Nov. 8, 2021, a total of 728 offenders are in long-term restrictive housing, which is about 2.5 percent of the 29,187 prison population. An additional 430+ North Carolina offenders are in rehabilitative diversion units (RDU) and another 60 are in therapeutic diversion units (TDU.) These numbers do fluctuate.” This assessment seems benign at first glance, but advocates say it only paints part of the picture. One activist pointed out that there is currently no

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<sup>376</sup> Id. at 2.



mechanism for taking Department of Public Safety data and tracking which victim-detainees have been in solitary and for how much time. Additionally, they noted that the number the Department provided seemed not to include those in solitary for disciplinary reasons. They speculated that the number provided was likely only those victim-detainees currently in therapeutic solitary or in high-security maximum control solitary. These inconsistencies and lack of accountability and resources to fact check the statistics is an enormous obstacle to progress.

## **2. Efficacy of the Executive Route**

Effective advocacy on this issue must be targeted at the Governor. Governor Cooper finds himself at some of his highest popularity but needing to shore up support with his base to avoid a return to a legislative Republican supermajority in the fall of 2022. In this instance, international standards may well carry weight via their employment in these discussions. With the current state of flux of the national government and the pandemic magnifying their office on a daily basis, governors have seen their profile soar across the country and regardless of party. Notably, the governor's 2020 Task Force for Racial Equity in Criminal Justice recommended that the Governor implement the Mandela Rules.<sup>377</sup> Additionally, several organization have campaigned Governor Cooper about adopting the Mandela Rules.<sup>378</sup> A commitment on a public scale by the Governor to abide by the Nelson Mandela Rules or the International Covenant on Civil and Political Rights would have monumental consequences. The opportunity is at hand to allow the Governor to take a positive lead on a prominent issue.

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<sup>377</sup> Luke Woolard, *Stop Torture in NC's Prisons*, Disability Rights North Carolina (January 27,2021), <https://disabilityrightsn.org/prisons-and-jails/stop-torture-in-ncs-prisons/>.

<sup>378</sup> *Id.*

## D. Taking the Next Steps

In closing, it is not clear if the legislature has the political will to address problems with solitary confinement. The judiciary is hard-pressed to address the issue as it is a common practice in North Carolina. Advocates can assist by supporting victims of solitary confinement to exercise the appeals process as quickly as possible.<sup>379</sup> Cases should center at-risk individuals identified by international standards against solitary confinement. Finally, the executive route is where the majority of advocacy and attention should be focused, and it must be focused quickly. The sitting Governor has cultivated the most progressive social agenda since 60s. To maintain his veto power, he will try strengthening his supporter base; it is imperative that advocates frame this course of action as being beneficial to that end. Favorable avenues exist via executive branch lobbying, but the winds of change are beginning to pick up. As the balance of power prepares to shift in two of the three branches, it is imperative for the executive to act in the best interest of victim-offenders. Torture cannot be allowed to persist. The wellbeing of thousands, and the soul of this state hang in the balance.

## VIII. Reparations for Solitary Confinement<sup>380</sup>

“I want them to understand what they’re doing to us;” “I don’t want it to happen to anyone else;” “I want it to stop;” “I want them to see that we’re *people*.” These are some of the common

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<sup>379</sup> so that they are allowed to appear before an impartial judge sooner, rather than a DPS employee ruling on the conduct of another DPS employee

<sup>380</sup> While we understand that turning to etymologies for answers is generally a bad idea, etymologies can nevertheless be useful starting points for understanding the connotations a word may carry. “Reparations” comes from the word *reparare* which means “to make ready again.” We note the impossibility of fully repairing the damage that has been done to most, if not all, survivors of solitary confinement. As one survivor said, “Something broke inside of me, and I can never get that back.” Nevertheless, “reparation” is the word used in torts and criminal law to refer to those things that are done to lessen or manage harms that have been done. Just as monetary compensation can never “repair” the loss suffered by the families of murder victims, the reparations proposed in this report will never be enough to fully repair the many harms suffered by survivors of solitary confinement. Instead, the purpose is to make the survivors “ready again” for life, to give them to tools they need to reenter society in a meaningful, constructive way.

responses survivors of solitary confinement gave when we asked them what, in an ideal world, they would want as a form of reparations. If we take for granted the well-documented fact that solitary confinement is so harmful to individuals as to amount to torture, we must next determine how we can make amends to the many people who suffer that torture at the hands of state and federal governments every day. We must consider what they need, what they want, and what will or might be a useful way to lessen or manage the harms suffered by survivors.<sup>381</sup>

#### **A. What do survivors of solitary confinement need and want?**

It is evident from the studies discussed above and from discussions with survivors themselves that some things are fundamental to their rehabilitation or successful reentry into society. The psychological toll of isolation, exacerbating existing and instigating new mental illnesses,<sup>382</sup> requires either access to exceptional mental health services, or else providing money for survivors to find their own. The stresses of isolation can manifest themselves in physical illnesses,<sup>383</sup> and so access to adequate medical care, especially medical care that addresses stress-induced or chronic illnesses is necessary. Those who are isolated as children experience developmental sabotage.<sup>384</sup> Because of their particularly poor outcomes after release, they should receive specialized attention when it comes health care.

Because survivors have a hard time forming relationships, reparations should include services that teach community-building and job-finding. Several of the survivors we spoke with

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<sup>381</sup> We also include in the discussion forms of reparations that would promote awareness and national recognition of the harms inflicted on the individuals who experienced solitary confinement. Promoting reflection, at both individual and societal levels, on how and why people suffer harm is a necessary part of ensuring we do not, as a nation, repeat our mistakes in the future.

<sup>382</sup> See generally, Haney, *supra* note 50; Biswas, *supra* note 46; Cerneka, *supra* note 61.

<sup>383</sup> See generally, Corcoran, *supra* note 279.

<sup>384</sup> See Amy Roe, *Solitary confinement is Especially Harmful to Juveniles and Should Not Be Used to Punish Them*, ACLU-WA (2017);

also described difficulty adjusting to new technologies, such as using a cellphone or accessing Zoom. In a society that relies increasingly heavily on such technologies, training in how to use them should be part of reintegrating survivors.

### **Mitchell's Story**

At the age of thirty-three he was moved to a prison where he felt very unsafe. "You're a new guy," he recounts, "they hollerin' at you, 'Man, you fresh meat!' [The other inmates]'ll show you how macho they are." Wanting some form of protection for himself, Mitchell saved up enough money to buy a knife from another inmate who worked in the metal shop. He was found out in a surprise "shake down" and sent to "the hole." He stayed there 35 days. During that time, he saw no doctors, no psychologists, and had no books. Over the years, Mitchell was in solitary confinement about six times, each time for about a month. "It *looked* as though things were improving [as the years went on]," he notes, because "they let you see a nurse and she takes your vitals [and] if you want to mail a letter out, someone will make sure it goes to a mailbox." But, he says, "that part was window-dressing."

Describing the effects of solitary confinement, Mitchell stated, "If you didn't have claustrophobia [before going in], you have it now... it looks like it's closing in on you. Oh, and get this! When they open the little crack in the door to give you food, a fly might come in. The poor fly and the poor human being. I can't always express what the damage was that was done to me: physiological and psychological... During some of those six times I was in that cell for 35 days, you don't know the time. You wake up in the middle of the night and you don't know if it's night or day – you break out in a cold sweat. You can't *hear* nothing. What do you do when everything is *still*?" In those circumstances, Mitchell said he would tell himself, "Lie still, remain calm, remain calm," and dab his sweat to keep from panicking.

After giving it some thought, Mitchell described the kind of reparations that would be meaningful to him: "I've heard that ... they have the United Nations in New York City that will *listen* to everybody's complaint. [They are] interested in the human condition and justice for *all*... I think the U.N. ought to look into solitary confinement in every country." He also indicated that he would be interested in working to create a memorial or a museum to commemorate those who experienced solitary confinement and to educate the public about solitary confinement's use and effects. He said he would like to visit the Legacy Museum that recently opened in Montgomery, Alabama. At one point, he said that maybe world leaders should experience solitary confinement for a time in order to understand the urgency of abolishing it; but he quickly rejected the idea: "No, no, I wouldn't wish it on anyone. All they need to do is take a sensitive ear and listen with their hearts."

Some have noted the vital importance of including survivors themselves in any discussion about what reparations are necessary and valuable.<sup>385</sup> All the survivors we spoke with said they wanted some form of public recognition that they had been wronged. Some said they wanted to sit down with the prison guards who impacted them in particularly negative ways, as happens in some Truth and Reconciliation Commissions or restorative justice programs. Others wanted formal apologies by leaders.

## **B. What are reparations?**

Reparations have often become synonymous with compensation or monetary damages; however, reparations come in various forms. Merriam-Webster Dictionary defines reparation as “the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.”<sup>386</sup> In 2005, the United Nations Human Rights Office of the High Commissioner created and adopted the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”<sup>387</sup> This document outlined and formalized five types of reparations: cessation and guarantees of non-repetition, restitution and repatriation, compensation, satisfaction, and rehabilitation.<sup>388</sup>

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<sup>385</sup> See, e.g., Gina Donoso, Inter-American Court of Human Rights' Reparations Judgments. Strengths and Challenges for a Comprehensive Approach, 49 REVISTA IIDH 29, 37 (2009) (arguing that by being an active part of the reparations process, “victims empower themselves and become social actors and survivors ... citizens entitled of [*sic*] their rights.”)

<sup>386</sup> Merriam Webster, *Reparation Definition and Meaning*, Merriam Webster, 2022 <https://www.merriam-webster.com/dictionary/reparation>

<sup>387</sup> United Nations Human Rights Office of the High Commissioner General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (December 16, 2005) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

<sup>388</sup> *Id.*

The United Nations outlines eight measures countries can take for non-repetition including providing human rights law education<sup>389</sup> and ensuring that military and law enforcement<sup>390</sup> abide by “international standards of due process, fairness, and impartiality.”<sup>391</sup> Restitution and repatriation includes actions like return of property, restoration of liberty, and recognition of the victim’s humanity, culture, and identity.<sup>392</sup> Compensation is providing monetary damages to victims<sup>393</sup> and can cover things like physical or mental harm, loss of earnings, and the costs of legal and medical assistance.<sup>394</sup> Rehabilitation includes services for victims and potentially for their next of kin, helping them cope with the long-term consequences of their trauma; examples includes medical, psychological, legal, and social services.<sup>395</sup> Finally, satisfaction largely covers government responses.<sup>396</sup> This includes but is not limited to sanctions, memorials to victims, public apologies or acknowledgements, and searches for disappeared victims or reburials that align with the wishes of families and communities.<sup>397</sup>

Often the most meaningful reparations include all five forms; several organizations like the Movement for Black Lives (M4BL) believe that all five reparation types must be included for it to be a “full reparation”.<sup>398</sup> Similarly, solitary confinement victims have highlighted those reparations do not just mean monetary compensation but instead, their voices show non-repetition, restitution, rehabilitation, and satisfaction are crucial to addressing their experiences.

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<sup>389</sup> *Id.* at 23(e).

<sup>390</sup> *Id.* at 23(a).

<sup>391</sup> *Id.* at 23(b) (outlining 8 measures countries can take for non-repetition).

<sup>392</sup> *Id.* at 19.

<sup>393</sup> *Id.* at 20.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 21.

<sup>396</sup> *Id.* at 22.

<sup>397</sup> *Id.*

<sup>398</sup> M4BL, Defining Reparations, MPBL (2020) <https://m4bl.org/wp-content/uploads/2020/11/defining-reparations.pdf>

### C. What examples of reparations do we have from a United States precedent?

The United States have given reparations on several occasions ranging from Tuskegee to Japanese Internment Camps to the 9/11 memorial fund. Due to the varying needs of the victims, reparations range in their execution. Notably two reparation models closely parallel to the experience of solitary confinement in United States prisons. As noted above, we frame the torture of solitary confinement as the wrong done by the government and therefore, will focus on reparations that responded to the torture and confinement of people.

One of the most similar situations to solitary that resulted in reparations is a system set-up by the city of Chicago. Commonly known as the Chicago Police Torture, Chicago tried to remedy its ugly past through several forms of reparations.<sup>399</sup> From 1972-1991 Jon Burge, a police officer and later a high-ranking commander, terrorized the west and south sides of Chicago.<sup>400</sup> He and a group of nearly all-white detectives tortured black suspects; victims recounted being shocked, poked by cattle prods, beaten, and sexual humiliated or assaulted.<sup>401</sup> From this, over 120 black criminal suspects were coerced into confessions, of which at least 13 were subsequently sentenced to death row.<sup>402</sup> As a later high- ranking government official other government employees like prosecutors and judges covered up Burge's terrible acts for a minimum of nine years, after Dr. Raba expressed concerned when suspect Andrew Wilson came in for an examination heavily beaten and implored Burge's tactics to be investigated.<sup>403</sup> Ultimately, Richard Daley, the then state

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<sup>399</sup> G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 N.W. J.L. & SOCIAL POL'Y 330, 330 (2016).

<sup>400</sup> *Id.*

<sup>401</sup> Andrew S. Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance*, [92 CHI.-KENT L. REV. 369,370 \(2017\)](#).

<sup>402</sup> *Id.*

<sup>403</sup> Joey L. Mogul, *The Struggle for Reparations in the Burge Torture Cases: The Grassroots Struggle That Could*, 21 PUB. INT. L. REP. 209, 211-12 (2016).

attorney explicitly told the mayor not to conduct an investigation.<sup>404</sup> However, Chicago citizens started to speak up and ask for answers from the city. Decades later they would get recognition on the international and US stage.

After years of trials against the state of Illinois and city of Chicago, activists and legal teams petitioned the Inter-American Commission for Human Rights and the United Nations Convention Against Torture in 2005.<sup>405</sup> While there was no action beyond a hearing for IACHR, the UNCAT issued a report and strongly affirmed the activists' position. This would be vital to later conversations of reparations.<sup>406</sup> Notably, the mayor refused to give victims of a formal apology in 2008, even after the UNCAT findings and substantial evidence against Burge.<sup>407</sup>

In 2011, Chicago Justice Torture Memorials was founded and would work with long-standing grassroots organizations to pass reparations legislation four years later.<sup>408</sup> This resolution, adopted in 2015, would pay living survivors 5.5 million dollars.<sup>409</sup> Additionally, the ordinance called for non-financial reparations to living survivors, their families, and families of deceased torture victims.<sup>410</sup> These non-financial reparations included: “psychological counseling at a dedicated community center, free education at the City Colleges, an official apology, the teaching of the torture scandal in the Chicago public schools, training, and a public memorial.”<sup>411</sup> While some noted that the monetary reparations were limited, as they only applied to living survivors, it was generally received very well amongst the community.<sup>412</sup>

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<sup>404</sup> *Id.* at 212.

<sup>405</sup> Taylor, *supra* note 359 at 336.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 339.

<sup>408</sup> *Id.* at 340.

<sup>409</sup> *Id.* at 348.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 345-48.



Like solitary confinement, this reparation model directly relates to the torture of those involved in the criminal justice system. This model exemplifies the government's ability to directly acknowledge their role and disregard for the well-being of torture victims. Additionally, the US prison system disproportionately affects racial minorities, and they often face higher rates of solitary. Therefore, this also parallels the Chicago reparations because it involves an acknowledgement that people of color and the disproportionate effect on them.

Another notable scheme is wrongfully incarcerated funds. Currently, thirty-eight states, Washington D.C., and the federal government have compensation for wrongfully incarcerated persons.<sup>413</sup> Compensation varies greatly from state to state. For example, annual compensation amounts range drastically from no monetary compensation (Montana) to 200,000 a year (D.C.).<sup>414</sup> Many states cap the amount wrongfully incarcerated individuals can receive, however. Wisconsin's current scheme pays up to \$5,000 a year but has a cap of \$25,000.<sup>415</sup> Caps disadvantage those wrongfully incarcerated for long periods of time because their experience is not equally compensated in comparison to shorter stints in prison.<sup>416</sup> Nineteen states offer additional services to those wrongfully incarcerated.<sup>417</sup> A 2019 report by the Montana legislature lists social services and how many states partake: tuition assistance (14 states), medical expenses

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<sup>413</sup> Innocence Project. *Let's Compensate the Innocent in All 50 states* (2022)

<https://innocenceproject.org/compensation-all-50-states/#:~:text=Now%2035%20states%20and%20the,law%20for%20the%20wrongfully%20convicted.>

<sup>414</sup> Montana Legislature Law and Justice Committee, *National Landscape of Compensation* (June 17, 2019) <https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Meetings/June-2019/LJIC-June28-2019-Ex19.pdf>

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* (On the other hand, several states recognize the extra harm done by time on death row or post-release supervisions and provide extra compensation ranging from \$25,000 to \$100,000 per year).

<sup>417</sup> *Id.*

(9 states), job search assistance (7 states), housing assistance (3 states), counseling services (12 states), re-entry services (6 states), and immediate assistance upon exoneration (1 state).<sup>418</sup>

Wrongful incarceration funds model a reparations system that directly tackles the problems with our prisons and criminal justice system.<sup>419</sup> Solitary confinement reparations could be set-up similarly to compensate based on time spent and should also provide social services across the board as the emotional, mental, and physical tolls are apparent.

While many reparation schemes in the US do not involve torture and prisons there are other notable models that highlight this country's ability to try to rectify wrongdoings. Almost 50 years after the internment and confinement of Japanese-Americans during WWII, President Reagan signed the Civil Liberties Act of 1988 which granted a presidential apology and monetary compensation of \$20,000 to living survivors of Japanese Internment Camps.<sup>420</sup> While flawed in its implementation, as some survivors never received payment, the government paid reparations of \$1.6 billion dollars (with inflation it is estimated to be around \$3.5 billion) to 82,219 Japanese Americans.<sup>421</sup> This shows the United States willingness to address confinement and their ability to retroactively address these issues. As for North Carolina, the most notable example is the

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<sup>418</sup> Id. (Noting that while compensation and services are available in a majority of the states, there is great variation in who determines if prisoners are approved for funds. Additionally, the burden of proof ranges from preponderance of evidence to needing an official pardon by the state).

<sup>419</sup> Id. See generally Innocence Project, Compensation the Wrongly Convicted <https://innocenceproject.org/compensating-wrongly-convicted> (covering the common shortcoming in current wrongful incarceration legislation).

<sup>420</sup> Scott Russell, *U.S. Reparations Efforts: Japanese Internment Camps During WWII and the Civil Liberties Act of 1988*, <http://www.mnchurches.org/blog/2021/01/7/us-reparations-efforts-japanese-internment-camps-during-ww-ii-and-civil-liberties-act#:~:text=The%20Act%20also%20directed%20reparations,82%2C219%20formerly%20interned%20Japanese%20Americans.>

<sup>421</sup> Id.

reparations paid out from forced sterilization.<sup>422</sup> While unrelated in topic it shows that North Carolina has the political will to pay reparations and address wrongdoings.

Overall, the United States has shown their ability to create and fund reparation models. By advocating for the adoption of the Mandela Rules or abolition of solitary confinement, the United States can take the next step in acknowledging and helping solitary confinement victims.

#### **D. What examples of reparations do we have from international precedent?**

The Inter-American Court of Human Rights (IACourtHR) is authorized to order three types of reparations when it finds violations of human rights: “(1) to ensure enjoyment of rights or freedoms, (2) to remedy consequences of violations, and (3) to award fair compensation.”<sup>423</sup> Although the IACourtHR almost exclusively required only monetary reparations for many years, it has moved, since the late 1990s, toward a much more expansive view of reparations, ordering that rehabilitative services be given to survivors,<sup>424</sup> that States investigate and publish<sup>425</sup> human rights violations, and that memorials be built.<sup>426</sup> Furthermore, the IACourtHR requires States to submit reports on their “compliance with all elements of the Court’s judgment” within six months or a year of a judgment being made against them.<sup>427</sup> Finally, in some of their judgments, the

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<sup>422</sup> Eric Mennel, Payments Start For N.C. Eugenics Victims, But Many Won’t Qualify, NPR (2014) <https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify>

<sup>423</sup> Douglass Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in *OUT OF THE ASHES: REPARATIONS FOR GROSS VIOLATIONS OF HUMAN RIGHTS*, K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens eds. (2006).

<sup>424</sup> *Id.*

<sup>425</sup> See Donoso, *supra* note 385385, at 45.

<sup>426</sup> See Cassel, *supra* note 423423. Cassel also notes that in several cases the IACourtHR has ordered States to “provide educational, medical or similar services or scholarships to survivors and affected family members” in some cases; to order States to “investigate, prosecute and punish the persons responsible [for human rights violations]” in other cases; to “name a street, school, plaza, memorial (or commemorative scholarship) for a victim;” and to order that “civil society should participate in the design and implementation [of training programs for prison, judicial and law enforcement personnel on the human rights of prisoners].”

<sup>427</sup> *Id.*

IACourtHR has taken into account the effects of human rights violations based on particular sensitivities of victims based on cultural or ethnic traditions.<sup>428</sup>

One prominent case to come out of IACourtHR is the Miguel Castro Castro Prison<sup>429</sup>. In this Peruvian prison, approximately 135 incarcerated women and 450 incarcerated men faced three days of torture by guards and other government employees<sup>430</sup>. Some incarcerated women, however, faced additional abuse; they were stripped-down, sexually abused, and faced further physical and psychological abuse<sup>431</sup>. Additionally, state agents forced incarcerated persons into solitary confinement, withheld medical care, and denied them communication with family members or attorneys.<sup>432</sup> The court found Peru to have violated numerous articles of the Inter-American Convention to Prevent and Punish Torture and other human right laws.<sup>433</sup> IACourtHR mandated Peru to investigate the employees in question and take punitive action against them.<sup>434</sup>

Additionally, it ordered an array of reparations, specifically citing that Peru would have to compensate and redress 42 dead incarcerated persons, 175 injured incarcerated persons, and 322 people who suffered cruel, inhuman, or degrading treatments.<sup>435</sup> The provisions included: returning the bodies of deceased incarcerated persons to next of kin, include victims in the Eyes that cries monument, public acknowledgement in two nationally circulated newspapers, a formal apology for the violations, implementing human rights educations, free medical and psychological services for victims and their families, and to pay reparations. Finally, the court noted the necessity

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<sup>428</sup> See Donoso, *supra* note 385385, at 46-51 for a discussion of these cases.

<sup>429</sup> Legal Information Institute, Miguel Castro-Castro Prison v. Peru, Cornell (2022)

[https://www.law.cornell.edu/women-and-justice/resource/miguel\\_castro-castro\\_prison\\_v\\_peru](https://www.law.cornell.edu/women-and-justice/resource/miguel_castro-castro_prison_v_peru)

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> Inter-American Court of Human Rights, Miguel Castro-Castro Prison v. Peru (November 25, 2006)

[https://corteidh.or.cr/docs/casos/articulos/seriec\\_160\\_ing.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf)

of using “a gender analysis” to determine “human rights violations that... women suffered particularly.”<sup>436</sup>

Currently, the European Court of Human Rights recognizes several forms of reparations in the form of “financial compensation, retrials, orders to investigate, or other structural reforms.”<sup>437</sup> There has been an improved rate of compliance from European governments which resulted in lower decisions.<sup>438</sup> With the increased monitoring from NGOs in Europe, there has been more responses such as action plans and reports from states.<sup>439</sup> For example, in *Kurt v. Turkey*, the applicant’s son was arrested and beaten by Turkish security forces.<sup>440</sup> After the beating, she never saw her son again and complained to the Commission.<sup>441</sup> After filing, Turkish authorities intimidated her continuously hoping she would withdraw the complaint.<sup>442</sup> The European Court found that the forces had violated the prohibition of torture and right to liberty and security.<sup>443</sup> Therefore, they awarded the son and mother non-pecuniary damages and legal fees.<sup>444</sup> The court awarded 15,000 euros to the son “to be held by the applicant for her son and his heirs” and 10,000 for the mother’s and emotional harm from “the anguish of knowing her son had been obtained with a complete absence of official information as to his subsequent fate.”<sup>445</sup>

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<sup>436</sup> See Donoso, *supra* note 385385, at 55 (citing IACourtHR, *Case of Miguel Castro-Castro Prison v. Peru*, Judgment of Nov. 25, 2006). See also Ruth Rubio-Marin & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 HUM. RTS. Q. 1062 (2011) (discussing gender-appropriate reparations).

<sup>437</sup> Christian De Vos, *For Hope for Human Rights, Look to Implementation*, JUSTICE INITIATIVE (Feb. 17, 2021).

<sup>438</sup> *See id.*

<sup>439</sup> *Id.*

<sup>440</sup> The Redress Trust, *Reparation: A sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law*, Redress (2003) <https://redress.org/wp-content/uploads/2018/01/SourceBook.pdf>

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

The African Court on Human and Peoples Right has also expanded their reparations work in the past three decades.<sup>446</sup> One example of the African’s Commission reparations work involves the case of *Comité Culturel pour la Democratie au Benin vs. Benin*.<sup>447</sup> Here, the Commission looked at different complaints against Benin. Application 16/88 involved the government’s arrest of students and workers who were subsequently detained without trial, some for a period of several months.<sup>448</sup> The detainees were tortured and poorly treated by public officials.<sup>449</sup> Additionally, the court reviewed application 17/88 where he was “kept under surveillance and deprived of his liberty for two years. His salary was suspended and his bank accounts frozen.”<sup>450</sup> The court did not order any additional reparations, finding that the new Benin government had repealed many of the unfair detention laws.<sup>451</sup> Additionally, the country introduced new amnesty laws, noting that every detainee was released.<sup>452</sup> Finally, some applicants had their previous employment reinstated.<sup>453</sup> Thus, the Commission assumed “that the actions taken by the government remedy the prejudices complained.”<sup>454</sup>

Our System can take a page from the books of both European and African Systems. By actively improving the role and standards of the System’s Commission and Court, compliance among member states will definitely improve and naturally the number of decisions will decrease. Furthermore, De Vos recognizes the steady improvement of human rights law by stating that “[t]his progress in the implementation of human rights decisions owes much to the substantial

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

growth of civil society engagement in this field over the past decade...litigators and advocates are increasingly incorporating implementation into their planning and litigation processes.”<sup>455</sup> The Inter-American System has ways to improve its role in promoting human rights and looking outside at others can greatly help.

There are other paths that current law does not address but the IACourtHR has begun to pioneer. Restorative justice programs, such as the ones initiated by Sujatha Baliga, focus on acknowledging wrongdoing and giving personal apologies to those who suffer harm. That kind of personal acknowledgment of the truth can have the dual effect of healing survivors and perpetrators of harm, and of putting pressure on the legislature to change the laws. Museums like the Legacy Museum recently opened in Montgomery, Alabama both provide opportunities to publicly acknowledge the harm suffered by individuals and groups of people and educate the public so as to avoid repeating our mistakes as a nation.

## **IX. Conclusion**

As government and human rights organizations begin to realize the dangers of solitary confinement, it is important to we ask ourselves how we will compensate survivors and those affected by this cruel form of imprisonment. With the growing understanding that it is a torturous practice that causes irreparable harm to all aspects of human life, we must acknowledge the extreme harm done to those placed in solitary confinement, especially those in vulnerable groups and those facing solitary confinement for prolonged periods of time. The U.S. government, other countries, and human rights organizations have all given reparations in schemes that closely align

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<sup>455</sup> Christian De Vos, *For Hope for Human Rights, Look to Implementation*, JUSTICE INITIATIVE (Feb. 17, 2021).

to solitary confinement. Therefore, it is not out of reach for solitary confinement survivors to receive reparations.

The conversations we had with survivors – listening to their experiences – felt to them, some said, like a form of reparations. Survivors want, maybe above all, to be acknowledged as human beings because, during their time in solitary confinement, they felt that the simple acknowledgment of their humanity was denied.



## Appendix A

### Federal Responses to Solitary Confinement: Legislative and Executive

<u>NAME</u>	<u>DATE</u>	<u>SPONSORS</u>	<u>KEY POINTS</u>	<u>PASSED?</u>
Record Expungement Designed to Enhance Employment (REDEEM) Act. <sup>456</sup>	March 2015	D: Cory Booker and Chaka Fattah R: Rand Paul <sup>457</sup>	Would ban the use of solitary confinement on juveniles, unless it is used “as a temporary response to the behavior of a juvenile that poses a serious and immediate risk of physical harm.” <sup>458</sup>	No.
SCSRA II <sup>459</sup>	July 2015	D: Richmond	Removed provisions that reduced grant funding for states not in compliances with national standards of solitary set in the bill <sup>460</sup> (see page 47 for information on the original SCSRA).	No <sup>461</sup>

<sup>456</sup> S. 675, 114th Cong. (2015).

<sup>457</sup> H.R. 1672, 114th Cong. (2015).

<sup>458</sup> *Id.* at §3(b)(1).

<sup>459</sup> Compare H.R. 3399, 114th Cong. (2015) with H.R. 4618, 113th Cong. (2014).

<sup>460</sup> Compare H.R. 3399, 114th Cong. (2015) with H.R. 4618, 113th Cong. (2014).

<sup>461</sup> H.R. 3399, 114th Cong. (2015).

Maintaining Dignity and Eliminating Unnecessary Restrictive Confinement of Youths (MERCY) <sup>462</sup>	August 2015 <sup>463</sup>	D: Booker and Durbin R: Paul Mike Lee. <sup>464</sup>	Would ban the use of solitary confinement "for... any reason other than as a temporary response to a covered juvenile's behavior that poses a serious and immediate risk of physical harm." <sup>465</sup>	The bill did not move during the 114 <sup>th</sup> Congress. <sup>466</sup>
Sentencing Reform and Corrections Act <sup>467</sup>	October 2015 <sup>468</sup>	R: Chuck Grassley D: Durbin. <sup>469</sup>	Would prohibit juvenile solitary confinement, except as a temporary response to behavior that poses a serious and immediate risk of harm. <sup>470</sup>	No
Bureau of Prisons ("BOP")	December 2015. <sup>471</sup>	N/A	Connected to Durbin's requested hearings for an	N/A

<sup>462</sup> S. 1965, 114th Cong. (2015).

<sup>463</sup> S. 1965, 114th Cong. (2015).

<sup>464</sup> S. 1965, 114th Cong. (2015).

<sup>465</sup> S. 1965, 114th Cong. (2015).

<sup>466</sup> S. 1965, 114th Cong. (2015).

<sup>467</sup> Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

<sup>468</sup> Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

<sup>469</sup> Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

<sup>470</sup> S. 2123, 114th Cong. (2015).

<sup>471</sup> Kenneth McGinnis, et al., *Special Housing Unit Review and Assessment*, FEDERAL BUREAU OF PRISONS (Dec. 2014) [https://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal\\_123014\\_2.pdf](https://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal_123014_2.pdf).

Independent Assessment			<p>independent assessment from the BOP.<sup>472</sup></p> <p>The report identified where the federal prisons needed operational and policy improvement. The areas identified were mental health care, time parameters for restrictive housing, segregation of inmates in protective custody.<sup>473</sup></p> <p>Subsequently, the Department of Justice (DOJ) undertook a review of BOP's use of solitary confinement.<sup>474</sup></p>	
	January 2016 <sup>475</sup>	Obama <sup>476</sup>	Banned solitary confinement for juveniles in response to low-level infractions, expanded	N/A

<sup>472</sup> Kenneth McGinnis, et al., *Special Housing Unit Review and Assessment*, FEDERAL BUREAU OF PRISONS (Dec. 2014) [https://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal\\_123014\\_2.pdf](https://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal_123014_2.pdf).

<sup>473</sup> *Id.*

<sup>474</sup> Press Release, The White House, *FACT SHEET: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>.

<sup>475</sup> *Id.*

<sup>476</sup> Cathy Krebs, Ban on Solitary Confinement of Juveniles in Federal Prisons, AM. BAR ASS'N (Feb, 8, 2016) <https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2016/ban-on-solitary-confinement-juveniles-federal-prison/>.

Obama's Executive Order			mental health treatment, and increased the time minors in solitary confinement could spend outside their cell. <sup>477</sup> It affected only a few hundred minors but was a significant acknowledgment of the damage solitary confinement causes. <sup>478</sup>	
Sentencing Reform and Corrections Act	September 2016	D: Durbin	Mirrored Obama's executive order in an attempt to codify his action.	No, Republic Senators Jeff Sessions and Tom Cotton quelled efforts. <sup>479</sup>
Formerly Incarcerated Reenter Society Transformed Safely	May 2018. <sup>481</sup>	R: Doug Collins and Goodlatte D: Hakeem Jeffries and	Mandated the BOP: to increase access and incentives for participation in education and vocational training programs" <sup>483</sup>	The bill passed through the House overwhelmingly with 236 Republicans and

<sup>477</sup> *Id.*

<sup>478</sup> Cathy Krebs, Ban on Solitary Confinement of Juveniles in Federal Prisons, AM. BAR ASS'N (Feb, 8, 2016) <https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2016/ban-on-solitary-confinement-juveniles-federal-prison/>.

<sup>479</sup> Grawert & Lau, *supra* note 467.

<sup>481</sup> H.R. 5682, 115th Cong. (2018).

<sup>483</sup> *Id.*

<p>Transitioning Every Person Act,” or the FIRST STEP Act<sup>480</sup> (House Version)</p>		<p>Karen Bass.<sup>482</sup></p>	<p>Banned shackling pregnant women and codified the BOP’s provision about providing feminine hygiene products.<sup>484</sup> Required “[t]he number of prisoners who have been placed in solitary confinement at any time during the previous year” to be included in the National Prisoner Statistics Program.<sup>485</sup> The bill did not include provisions on sentencing reform, but the House leads felt it was worth the trade-off for some prison reform.<sup>486</sup></p>	<p>134 Democrats voting on it.<sup>487</sup></p>
<p>First Step Act (Trump’s executive order version)<sup>488</sup></p>	<p>December 21, 2018.<sup>489</sup></p>	<p>President Trump<sup>490</sup></p>	<p>Included the requirement for data on solitary confinement in the National Prisoner Statistics Program and referenced</p>	<p>N/A</p>

<sup>480</sup> There were four different versions of the FIRST STEP Act, all with slightly different names, including the First Step Act and the First Step Act of 2018. Members and the press all colloquially referred to the legislative efforts as the “First Step Act,” so, for ease of reading, the bill will be referred to as the “First Step Act” hereinafter.

<sup>482</sup> H.R. 5682, 115th Cong. (2018).

<sup>484</sup> *Id.*

<sup>485</sup> H.R. 5682, 115th Cong. (2018).

<sup>486</sup> Eli Watkins, *House pushes ahead with White House-backed prison legislation*, CNN (May 22, 2018), <https://www.cnn.com/2018/05/22/politics/house-prison-reform-criminal-justice/index.html>.

<sup>487</sup> *Id.* (“the vast majority of the opposition on the Floor came from progressive Democrats who wanted the bill to include sentencing reform.”)

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

			language from Booker’s MERCY Act <sup>491</sup> , specifically language about prohibiting the use of solitary confinement on juveniles. <sup>492</sup>	
Solitary Confinement Reform Act (rewritten version) Senate. <sup>493</sup>	March 2019 <sup>494</sup>	D: Durbin and six Democratic colleagues. <sup>495</sup>	The bill would limit “solitary confinement to the briefest term and under the least restrictive conditions possible, because the overuse of solitary confinement threatens public safety, strains prison budgets, and violates fundamental human rights.” <sup>496</sup>	No
Reintroduced Solitary Confinement Study and Reform Act	September 2019 <sup>498</sup>	D: Richmond <sup>499</sup> and Durbin <sup>500</sup>	Nearly identical to the 113 <sup>th</sup> Congress’ version with small changes. <sup>501</sup>	No <sup>502</sup>

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> S. 719, 116th Cong. (2019).

<sup>494</sup> S. 719, 116th Cong. (2019).

<sup>495</sup> S. 719, 116th Cong. (2019).

<sup>496</sup> Press Release, Sen. Dick Durbin, *Durbin, Coons, Senators Introduce Bill To Limit Use Of Solitary Confinement* (Mar. 7, 2019) <https://www.durbin.senate.gov/newsroom/press-releases/durbin-coons-senators-introduce-bill-to-limit-use-of-solitary-confinement>.

<sup>498</sup> H.R. 4488, 116th Cong. (2019).

<sup>499</sup> H.R. 4488, 116th Cong. (2019).

<sup>500</sup> S. 719, 116th Cong. (2019), H.R. 4488, 116th Cong. (2019).

<sup>501</sup> *Compare* H.R. 4488, 116th Cong. (2019) *with* H.R. 4618, 113th Cong. (2014).

<sup>502</sup> S. 719, 116th Cong. (2019), H.R. 4488, 116th Cong. (2019).

(SCSRA) <sup>497</sup>				
Protecting the Health and Wellness of Babies and Pregnant Women in Custody Act <sup>503</sup>	October 2020 <sup>504</sup>	D: Bass <sup>505</sup>	Put limitations on pregnant women in solitary confinement but did not outright ban it. <sup>506</sup>	Passed the House under suspension of the rules but died in the Senate. <sup>507</sup>

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<sup>497</sup> H.R. 4488, 116th Cong. (2019).

<sup>503</sup> H.R. 7718, 116th Cong. (2020).

<sup>504</sup> H.R. 7718, 116th Cong. (2020).

<sup>505</sup> H.R. 7718, 116th Cong. (2020).

<sup>506</sup> H.R. 7718, 116th Cong. (2020).

<sup>507</sup> H.R. 7718, 116th Cong. (2020).