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# CAGED IN: THE DEVASTATING HARMS OF SOLITARY CONFINEMENT ON PRISONERS WITH PHYSICAL DISABILITIES

Jamelia N. Morgan †

## INTRODUCTION

Robert Dinkins is paralyzed from the waist down and uses a wheelchair. Prison officials confiscated his wheelchair when he was placed in solitary confinement, “forcing him to crawl” around on the ground and “eat [his] meals on the floor.”<sup>1</sup>

Damon Wheeler is hard of hearing. He alleged that he was unable to access his hearing aids for 86 days after prison officials confiscated them prior to transferring him into the Special Housing Unit (SHU), a form of solitary confinement.<sup>2</sup>

Abdul Malik Muhammad is blind. He alleged that he was kept in solitary confinement for six weeks in part because prison officials did not know where to place him.<sup>3</sup> During those six weeks, he was denied access to showers, fresh clothes, recreation, telephone calls, and visitation.<sup>4</sup>

J.M. is a deaf prisoner.<sup>5</sup> He reported that he was held in solitary confinement for two weeks for failing to respond to an oral command spoken by some corrections officials behind his back, which he could not hear.<sup>6</sup>

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† A version of this article was previously published by the ACLU and is available at its website located at <https://www.aclu.org/report/caged-devastating-harms-solitary-confinement-prisoners-physical-disabilities?redirect=CagedIn>.

1. *Dinkins v. Corr. Med. Servs.*, 743 F.3d 633, 634 (8th Cir. 2014); see also Complaint for Declaratory & Injunctive Relief at ¶ 370, *Disability Rights Fla. v. Jones*, No. 4:16-cv-00047-WS-CAS (N.D. Fla. Jan. 26, 2016), <http://www.floridajusticeinstitute.org/wp-content/uploads/2016/01/drf-complaint.pdf> [hereinafter *Disability Rights Florida Complaint*] (“From October 2012 through December 2013, Mr. Jackson was not permitted to have his wheelchair in his CM cell. He was forced to drag himself across the dirty and abrasive cell floor, where it was very difficult to transfer to the bed, toilet, and wash basin.”).

2. *Wheeler v. Butler*, 209 F. App’x 14, 14-15 (2d Cir. 2006).

3. Complaint at ¶ 20, *Muhammad v. Wicomico Cty. Dep’t of Corr.*, No. 15-cv-02679 (D. Md. Sept. 10, 2015) [hereinafter *Wicomico Cty. Complaint*].

4. *Id.* ¶ 2.

5. J.M. did not provide his full name. Survey Responses from Five Deaf Prisoners, Maryland Correctional Institution-Jessup, to author 7 (Apr. 22, 2016) [hereinafter *Survey Responses from Five Deaf Prisoners*] (on file with author).

6. *Id.*

Solitary confinement of more than 15 days can amount to torture.<sup>7</sup> Locked in cells roughly the size of a regular parking space, prisoners are confined alone in their cells for approximately 22 hours per day or more in a maximum-security environment with little to no human interaction or access to natural light. Most of life's daily activities—from dressing, to grooming, to using the toilet—take place within the confines of a small cell. On rare occasions when prisoners are permitted to leave their cells—for example, to go to the exercise yard—the prisoner must be escorted by prison security staff, often while shackled with chains tied tightly around the ankles, waist, and wrists. Many are strip-searched every time they leave their cells. Prisoners are typically unable to participate in work opportunities or rehabilitative programming, such as educational courses or vocational training programs.

Given these highly restrictive and isolating conditions, it is not surprising that solitary confinement is known to inflict acute and devastating mental and physical harms upon prisoners.<sup>8</sup> Yet, despite the harms caused, corrections officials continue to overuse solitary confinement in American prisons and jails. On any given day, approximately 80,000 to 100,000 persons<sup>9</sup> are held in conditions amounting to solitary confinement. Some languish in isolation for months, years, or even decades.<sup>10</sup> This continued overuse of solitary confinement is an affront to one of the foundational, professed goals of incarceration: rehabilitation. Solitary confinement prevents prisoners from participating in rehabilitative programming. Instead, solitary confinement ruins lives, often leaving those subjected to its harms irrevocably damaged.

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7. See Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur of the Human rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 76-78, U.N. Doc. A/66/268 (Aug. 5, 2011), <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>. [hereinafter *Interim Report of the Special Rapporteur*].

8. See discussion *infra* Part III. A-B.

9. THE LIMAN PROGRAM, YALE LAW SCHOOL, ASS'N OF STATE CORR. ADM'RS, *TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3* (2015), [https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman\\_administrativesegregationreport.pdf](https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf). The data collected does not include those prisoners who are “held awaiting trial or in military or immigration detention.”

10. See, e.g., Matt Pearce, *Last “Angola 3” Prisoner is Freed After Decades in Solitary Confinement*, L.A. TIMES, (Feb. 19, 2016, 7:01 PM), <http://www.latimes.com/local/lanow/la-na-last-angola-3-prison-released-20160219-story.html> (discussing case of Albert Woodfox who was released in February 2016 after being held for over three decades in solitary confinement in the Louisiana State Penitentiary at Angola).

Recent advocacy focused on ending solitary confinement has sought to roll back more than four decades of “tough on crime” rhetoric and policies, which have led to mass incarceration,<sup>11</sup> hyper-incarceration,<sup>12</sup> and the over-emphasis on punitive rather than rehabilitative approaches to crime and punishment. The movement to end solitary confinement has had tremendous success in recent years—and calls for reform have come from the highest offices in the land, including both President Barack Obama<sup>13</sup> and Supreme Court Justice Anthony Kennedy.<sup>14</sup> Legislative campaigns and litigation at the state and local levels have been successful in ending indefinite placements in solitary confinement;<sup>15</sup> enacting state laws and policies that

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11. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 4 (2010) (observing that “mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”).

12. See Loïc Wacquant, *Class, Race & Hyper-incarceration in Revanchist America*, 139 *DÆDALUS* 74, 78 (2010), <http://loicwacquant.net/assets/Papers/CLASS-RACEHYPERINCARCERATION-pub.pdf> (arguing that incarceration is concentrated in, and targeted against, certain classes, races, and geographic locales, with its primary target being low-income Black men in urban settings).

13. In his historic op-ed for *The Washington Post* on this issue, President Obama remarked, “[h]ow can we subject prisoners to unnecessary solitary confinement, knowing its effects, and then expect them to return to our communities as whole people? It doesn’t make us safer. It’s an affront to our common humanity.” Barack Obama, *Why We Must Rethink Solitary Confinement*, *WASH. POST* (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html).

In the summer of 2015, the President ordered then-Attorney General Loretta Lynch to conduct an audit of the overuse of solitary confinement in federal prisons. The outcome of the review was an extensive report along with a set of recommendations and guiding principles—that the President adopted—that will inform the Federal Bureau of Prisons’ ongoing efforts to reform solitary confinement. See U.S. DEP’T OF JUSTICE, *U.S. DEP’T OF JUSTICE REPORT & RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING* (2016), <http://www.justice.gov/dag/file/815551/download> [hereinafter *DOJ REPORT & RECOMMENDATIONS*].

14. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (“[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. . . . In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”).

15. See, e.g., Settlement Agreement at ¶ 32, *Ashker v. Brown*, No. 4:09-5796-CW (N.D. Cal. Aug. 31, 2015), [http://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement\\_Agreement.pdf](http://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf).

limit the use of solitary confinement for vulnerable groups,<sup>16</sup> such as youth, pregnant women, and persons with mental disabilities; and garnering national attention on the practice through human rights reports<sup>17</sup> and congressional hearings.<sup>18</sup> Perhaps the most poignant message has come from prisoners themselves at California's Pelican Bay State Prison where thousands participated in a third hunger strike, lasting sixty days, beginning in July 2013 to protest the long-term isolation of prisoners.<sup>19</sup>

Despite these successes, considerably less attention has been paid to one of the most vulnerable groups harmed by the pervasive use of solitary confinement: people with physical disabilities. People with physical disabilities are often placed into solitary confinement for the same reasons as those who do not have disabilities: they were deemed a risk to the safety and security of the corrections institution; they violated a rule; they were identified as a member of a vulnerable group and separated from the general population; or they have a communicable disease. But for people with physical disabilities, some are placed into solitary confinement for reasons that have nothing to do with the safety and security of the corrections institution. Prisoners and detainees with disabilities may be placed into solitary confinement because there are no accessible housing units in which to hold them, as in the case of prisoners who use wheelchairs. Some have even been punished with solitary confinement for violating rules that are caused by their disabilities.

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16. See generally Settlement Agreement, *Peoples v. Fischer*, No. 1:11-cv-02694 (SAS) (S.D.N.Y. Dec. 16, 2015), available at <https://www.nyclu.org/en/press-releases/historic-settlement-overhauls-solitary-confinement-new-york> [hereinafter *Peoples Settlement Agreement*].

17. See generally THE BRONX DEFENDERS, *VOICES FROM THE BOX: SOLITARY CONFINEMENT AT RIKERS ISLAND* (2014), <http://www.bronxdefenders.org/wp-content/uploads/2014/09/Voices-From-the-Box.pdf> ; N.Y.C.L. UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS* (2012), <https://www.nyclu.org/en/publications/report-boxed-true-cost-extreme-isolation-new-yorks-prisons-2012>.

18. See Erica Goode, *Senators Start a Review of Solitary Confinement*, N.Y. TIMES (June 19, 2012), [http://www.nytimes.com/2012/06/20/us/senators-start-a-review-of-solitary-confinement.html?\\_r=0](http://www.nytimes.com/2012/06/20/us/senators-start-a-review-of-solitary-confinement.html?_r=0).

19. *Ashker v. Governor of California: Case Timeline*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown> (last visited Oct. 6, 2016); see also Sal Rodriguez, *One Year Anniversary of Pelican Bay Hunger Strike Against Solitary Confinement*, SOLITARY WATCH (July 3, 2012), <http://solitarywatch.com/2012/07/03/one-year-anniversary-of-pelican-bay-hunger-strike-against-solitary-confinement/> (discussing two 2011 hunger strikes at Pelican Bay).

The placement of people with disabilities into solitary confinement is deeply troubling.<sup>20</sup> People with physical disabilities constitute one of the most vulnerable groups living in isolation in prisons and jails across America. Although all prisoners and detainees rely on staff to provide for their basic human needs—nutritious food, clean water, medical care, and mental health treatment—people with physical disabilities rely on corrections staff to an even greater extent. People with physical disabilities not only rely on corrections staff to meet their basic human needs, but they also may require additional support to perform everyday tasks—be it support in eating meals, taking showers, getting dressed, or attending medical appointments.<sup>21</sup> In addition, prisoners and detainees with physical disabilities typically require accommodations that will provide them with equal access to programs, services, and activities offered within the corrections facility.<sup>22</sup> This may include providing them with assistive devices (e.g., canes, wheelchairs, hearing aids, etc.) and services (e.g., sign language interpreters, assistance with dressing, etc.), and/or modifying a set program or curriculum.

In solitary confinement, all are vulnerable to the devastating psychological and physical effects of near total isolation, including social and sensory deprivation. But, for those with physical disabilities, the harmful effects of solitary confinements may be even more harmful. As explained in greater detail below, people with physical disabilities have unique medical and mental health needs, and many are denied regular access to necessary care while in solitary confinement. Limited access to health care can exacerbate some existing physical disabilities and limited to no access to regular physical activity—whether exercise or other activity—can also be detrimental.

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20. See, e.g., Email from Dean Westwood, formerly incarcerated, Diversity and Inclusion Consultant, to author (July 29, 2016, 21:38 EST) (on file with author). (“When I asked why I was being isolated and held in seclusion, I was told that they [would] put me wherever they want whenever they want. All because I had a physical disability, not because I had broken any rules and certainly not because of my financial crime that was the reason I was incarcerated. Simply because I had a physical disability I was made to endure isolation and abuse at an indescribable level.”).

21. See, e.g., Class Action Complaint at ¶ 93, *Lewis v. Cain*, No. 3:15-cv-00318-BAJ-RLB (M.D. La. May 20, 2015), <http://www.clearinghouse.net/chDocs/public/PC-LA-0015-0001.pdf> (alleging failures by Louisiana Department of Corrections to provide assistance to prisoners unable to feed themselves, engage in self-care, or perform personal hygiene tasks without assistance from staff).

22. Although Title II specifically mentions reasonable modifications, see 42 U.S.C.A. § 12131(2) (West 2016), this article will use the more commonly known term “reasonable accommodations.”

Federal law, most notably the Americans with Disabilities Act (ADA) enacted in 1990, establishes comprehensive protections for people with disabilities, including protections from discrimination on the basis of disability and guarantees of equal access. Yet, despite these robust protections, the needs of people with disabilities are not being met in prisons and jails nationwide. Although it has been over twenty-five years since the passage of the ADA,<sup>23</sup> recent litigation and media reports show that by failing to remove architectural barriers, prison officials continue to deny people with disabilities equal access to critical areas in corrections facilities, including housing units, medical centers, recreation yards, law libraries, and visitation rooms. Even where states have facilities that provide equal access to prisoners with physical disabilities, these facilities have become woefully overcrowded and understaffed.<sup>24</sup> In addition, recent court complaints allege that corrections systems continue to deny people with disabilities equal access to prison programs, services, and activities, including educational and vocational courses<sup>25</sup> and telephone privileges.<sup>26</sup>

Beyond this, the barriers preventing equal access to prison programs, services, and activities are heightened for those persons with physical disabilities held in solitary confinement. When held in solitary confinement, prisoners may be prohibited from participating in programming, including educational and vocational programs, and may be outright denied visitation or telephone privileges. However, even in those corrections systems where prisoners in solitary confinement are offered access to programming, people with physical disabilities are effectively barred from participating due to architectural barriers that can prevent them from accessing the physical location where the programming takes place. Moreover, people with sensory disabilities such as deafness or blindness are often effectively excluded from programming in cases where the materials are not provided in a format that is accessible to them. Locked away and locked out of opportunities to engage in any constructive activity offered by programming, the sensory and social deprivation experienced by these prisoners is magnified. As a

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23. *Id.* at §§ 12101-213.

24. *See, e.g.*, Second Amended Complaint at ¶¶15, 25-26, 41-45, *Wilson v. Livingston*, No. 4:14-cv-01188 (S.D. Tex. Jan. 26, 2015) (alleging that the Texas Department of Criminal Justice assigned only one specialist trained in serving prisoners with disabilities to handle the entire Estelle facility and required Blind prisoners to reside in transitory housing because there were no accessible beds available in permanent housing units). To see a video of the Estelle Unit, visit here: <https://www.youtube.com/watch?v=lyEkTbqIpxw>.

25. *See, e.g.*, Amended Complaint at ¶¶ 2, 11-25, *Williams v. Baldwin*, No. 3:16-50055 (N.D. Ill. Apr. 19, 2016).

26. *See, e.g.*, Disability Rights Florida Complaint, *supra* note 1, at ¶ 21(c).

result, they languish behind bars in a state of idleness, devoid of both mental stimulation and constructive activity, left in an environment of near total isolation.

This article draws from interviews with currently and formerly incarcerated people with disabilities, disability rights advocates, prisoners' rights advocates, medical experts, legal scholars, and correctional officials, and examines the conditions of confinement, harms, and challenges facing prisoners with physical disabilities in solitary confinement. In addition, this article fills some of the gaps in data and where possible builds on existing data to provide a snapshot into (1) the number of people with physical disabilities; (2) the number of prisoners with physical disabilities in solitary confinement; and (3) the volume of grievances filed by prisoners with disabilities in ten state prison systems: California, Florida, Georgia, Illinois, Louisiana, Nevada, Ohio, Pennsylvania, Rhode Island, and Virginia. Finally, the article closes by discussing the available legal protections and by offering a set of recommendations to federal, state, and local officials and policymakers to guide reforms for prisoners with physical disabilities in solitary confinement.

#### A. *Why We Must Act Now*

People with disabilities comprise a large proportion of those living in prisons and jails. The huge population of incarcerated persons with disabilities calls for a complete re-examination—and in some cases, overhaul—of prison and jail policies governing the treatment of people with disabilities. The crowded, decrepit, unsanitary, and violent prisons heighten the vulnerabilities, unmet needs, and serious pain and suffering inflicted on those persons with disabilities. The challenges they face will only increase as the prison population ages, as will the magnitude of the harms experienced if these issues go unaddressed.

##### 1. Disabilities are Common in Prisons and Jails

A recent study by the U.S. Department of Justice estimates that 32% of prisoners and 40% of jail detainees report having at least one physical or cognitive disability.<sup>27</sup> The data shows that the proportion of people with

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27. JENNIFER BRONSON, ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *DISABILITIES AMONG PRISON AND JAIL INMATES*, 2011-12 I (2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf> [hereinafter *BJ'S DISABILITY REPORT*]. The article defines disability to include "hearing, vision, cognitive, ambulatory, self-care, and independent living, which refers to the ability to navigate daily life schedules, activities, and events without assistance."



disabilities far outnumbers the incident rates in the free world, where about 10.9% of persons report having a disability.<sup>28</sup> Given the large proportion of prisoners with physical disabilities, it is even more imperative to address the challenges they face in prisons and jails to ensure that the needs of this group do not go unmet.

## 2. Heightened Vulnerabilities

America's prisons and jails are dangerous and dehumanizing places.<sup>29</sup> Recent media exposés and court cases tell stories of deplorable living conditions,<sup>30</sup> woefully inadequate medical and mental health care,<sup>31</sup> sexual abuse and rape,<sup>32</sup> and allegations of purposeful starvation.<sup>33</sup> Gripping accounts of neglect,<sup>34</sup> abuse,<sup>35</sup> riots,<sup>36</sup> suicides,<sup>37</sup> and violence<sup>38</sup> amongst pris-

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28. *Id.* at 3. According to the BJS DISABILITY REPORT, Prisoners were about 2 times more likely than persons in the general population to report independent living, ambulatory, and hearing disabilities; about 3 times more likely to report a visual disability; and 4 times more likely to report a cognitive disability. Forty percent of jail inmates, compared to 9% of those in the general population, reported having a disability. . . . When compared to the general population, jail inmates were about 2.5 times more likely to report an ambulatory and independent living disability, more than 3 times more likely to report a visual and hearing disability, and 6.5 times more likely to report a cognitive disability[.]

29. *See, e.g.*, Andrew Cohen, *One of the Darkest Periods in the History of American Prisons*, ATLANTIC (June 9, 2013).

30. *See, e.g.*, Press Release, AM. CIV. LIBERTIES UNION, *Civil Rights Groups File Lawsuit Alleging Massive Civil Rights Violation at Mississippi Prison* (May 30, 2013), <https://www.aclu.org/news/civil-rights-groups-file-lawsuit-alleging-massive-human-rights-violations-mississippi-prison?redirect=prisoners-rights/civil-rights-groups-file-lawsuit-alleging-massive-human-rights-violations>.

31. *See* Brian Joseph, *Jailhouse Medicine - A Private Contractor Flourishes Despite Controversy Over Prisoner Deaths*, PRISON LEGAL NEWS (Apr. 1, 2016), <https://www.prisonlegalnews.org/news/2016/apr/1/jailhouse-medicine-private-contractor-flourishes-despite-controversy-over-prisoner-deaths/>; Eyal Press, *Madness*, THE NEW YORKER (May 2, 2016), <http://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners>; Danny Robbins, *Women's Deaths Add to Concerns about Georgia Prison Doctor*, ATLANTA J. CONST., <http://investigations.myajc.com/prison-medicine/womens-deaths-add-concerns/>.

32. *See, e.g.*, NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 3-5 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

33. Press Release, *supra* note 35.

34. *See, e.g.*, Julie K. Brown, *Disabled inmate sues Florida over bathroom ban*, MIAMI HERALD (Apr. 6, 2016, 1:30PM), <http://www.miamiherald.com/news/special-reports/florida-prisons/article70290622.html> (describing allegations by prisoner, a wheelchair user, who reported being denied access to a restroom and then being ridiculed by corrections staff after he urinated on himself).

oners and by corrections staff<sup>39</sup> reveal—with few exceptions—nationwide failures of epic proportions and systems ill-suited to manage the task of true

35. See, e.g., CAL. OFFICE OF THE INSPECTOR GENERAL, 2015 SPECIAL REVIEW: HIGH DESERT STATE PRISON, SUSANVILLE, CA 42 (2015) (describing case involving a prisoner with mobility-related disabilities who was picked up from out of his wheelchair and thrown into his cell after he “resisted being placed in a cell”); Joe Coscarelli, *8 Appalling Stories of Inmate Abuse from Rikers Island’s Teen Jails*, N.Y. MAG. (Aug. 1, 2014, 3:19 PM), <http://nymag.com/daily/intelligencer/2014/08/8-appalling-stories-of-abuse-from-rikers-island.html>; David M. Reutter, *Abuse and Assault Continue at Pennsylvania Jail*, PRISON LEGAL NEWS (Feb. 15, 2011), <https://www.prisonlegalnews.org/news/2011/feb/15/abuse-and-assaults-continue-at-pennsylvania-jail/>; Benjamin Weiser & Michael Schwartz, *U.S. Inquiry Finds a ‘Culture of Violence’ Against Teenage Inmates at Rikers Island*, N.Y. TIMES (Aug. 4, 2014), <http://www.nytimes.com/2014/08/05/nyregion/us-attorneys-office-reveals-civil-rights-investigation-at-rikers-island.html>.

36. See, e.g., Kenneth Lipp, *Alabama Prisoners Use Secret Cell Phones to Protest—and Riot*, DAILY BEAST (Mar. 21, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/03/21/alabama-prisoners-use-secret-cell-phones-to-protest-and-riot.html>; Matthew Teague, *DoJ to investigate Alabama prisons in “possibly unprecedented” move*, GUARDIAN (Oct. 6, 2016, 5:17 PM), <https://www.theguardian.com/us-news/2016/oct/06/alabama-prison-doj-investigation>.

37. See Ames Alexander, *NC prisons hit with year’s 5th inmate suicide*, CHARLOTTE OBSERVER (July 6, 2016, 11:58 AM), <http://www.charlotteobserver.com/news/local/article87947232.html>; Hillel Aron, *Why Are So Many Inmates Attempting Suicide at the California Institution for Women?*, L.A. WEEKLY (July 20, 2016, 8:08 AM), <http://www.laweekly.com/news/why-are-so-many-inmates-attempting-suicide-at-the-california-institution-for-women-7156615>; Associated Press, *DOC: Arizona prison inmate found unresponsive in cell dies*, WASH. TIMES (July 20, 2016), <http://www.washingtontimes.com/news/2016/jul/20/doc-arizona-prison-inmate-found-unresponsive-in-cell/>.

38. See Rebecca Boone, *Private prison company CCA to face trial in violence lawsuit*, U.S. NEWS (July 7, 2016, 5:22 PM), <http://www.usnews.com/news/us/articles/2016-07-07/private-prison-company-cca-to-face-trial-in-violence-lawsuit>; Dave Gilson, *What We Know About Violence in America’s Prisons*, MOTHER JONES (July/Aug. 2016), <http://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons>; C1 Staff, *CO union calls on DOC to address violence at Auburn Correctional Facility*, CORRECTIONSONE.COM (Mar. 18, 2015), <http://www.correctionsone.com/officer-safety/articles/8466463-CO-union-calls-on-DOC-to-address-violence-at-Auburn-Correctional-Facility/>; Stephanie Stokes, *Gang Violence Prompts Georgia State Prison Lockdowns*, WABE (July 6, 2016), <http://news.wabe.org/post/gang-violence-prompts-georgia-state-prison-lockdowns>; *Ohio’s Prisons Grow Less Violent Despite More Assaults on Guards*, PRISON LEGAL NEWS (June 11, 2015), <https://www.prisonlegalnews.org/news/2015/jun/11/ohios-prisons-grow-less-violent-despite-more-assaults-guards/>.

39. See, e.g., Disability Rights Florida Complaint, *supra* note 1, at ¶¶ 368-372 (alleging assault by a corrections officer on a prisoner, a wheelchair user, in retaliation for that prisoner’s pro se lawsuit naming other corrections officers as defendants).

rehabilitation. These accounts fly in the face of our constitutional protections against cruel and unusual punishment and contribute to human suffering on a massive scale.

Hidden among these systemic failures are people with disabilities—mental and physical—left to languish in despair, isolated, shut off, and prohibited from gaining equal access to programs and services. The brutality of prison and jail life in America means that prisoners face a serious risk of physical and psychological harm, especially those in those facilities that are overcrowded and understaffed.<sup>40</sup> In such an environment, those with physical disabilities may be just as susceptible to sexual assault as are those prisoners with mental illnesses or psychiatric disabilities,<sup>41</sup> as well as physical and mental abuse,<sup>42</sup> due to their perceived vulnerabilities. Though there is limited research on the prevalence of sexual abuse among incarcerated people with disabilities, if rates mirror those found in the free world, there is reason to believe that people with disabilities experience victimization at disproportionately higher rates. According to one report, people with disabilities were three times more likely than non-disabled people to be victims of violent crime.<sup>43</sup> This is particularly true for people with physical disabili-

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40. See *infra* text accompanying note 82 (discussing how overcrowding in prisons can lead to an increase in violence).

41. See Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. OF CORR. HEALTH CARE 58 (2009) (“Sexual orientation and mental illness/disability of the victim were identified as motivating the sexual assault of one-quarter of victims who were assaulted by other inmates.”). Indeed, the Prison Rape Elimination Act (PREA) includes affirmative obligations on the part of prison officials to make sure that prisoners with disabilities are protected from sexual abuse and harassment. Specifically, PREA regulations require that information relating to sexual abuse resources and services be made accessible to people with disabilities. 28 C.F.R. § 115.16 (2016); see also SANDRA HARRELL ET AL., MAKING PREA AND VICTIM SERVICES ACCESSIBLE FOR INCARCERATED PEOPLE WITH DISABILITIES: AN IMPLEMENTATION GUIDE FOR PRACTITIONERS ON THE ADULT & JUVENILE STANDARDS, NAT’L PREA RES. CTR. 6-9 (2015), <http://www.vera.org/sites/default/files/resources/downloads/prea-victim-services-incarcerated-people-disabilities-guide.pdf> [hereinafter Guide on MAKING PREA ACCESSIBLE].

42. Talila A. Lewis, *#DeafInPrison Campaign Fact Sheet*, HEARD, <http://www.behearddc.org/images/pdf/deafinprison%20fact%20sheet%20.pdf> (discussing reported abuses of deaf prisoners).

43. See, e.g., GUIDE ON MAKING PREA ACCESSIBLE, *supra* note 42, at 5-6 (“[P]eople with disabilities were three times more likely to be the victims of violent crimes than their counterparts without disabilities, and those with multiple disabilities experienced higher rates of violent victimization than those with one disability.”) (citing Erika Harrell, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 244535, *Crime Against Persons with Disabilities, 2009-2012 – Statistical Tables* (2014)).

ties who are even more vulnerable in corrections environments. The high level of violence in corrections facilities exposes all prisoners to a heightened risk of physical harm. In turn, corrections officials may turn to solitary confinement as a means to protect prisoners from harm.

One deaf-blind prisoner at Tomoka Correctional Institution has the intellectual capacity of a young child. He is constantly subjected to sexual assault. Multiple elderly (70+ years old) wheelchair users are housed [t]here and are beaten by their impaired assistants. These impaired assistants regularly withhold food and refuse to take blind or wheelchair bound prisoners to the bathroom or shower if these individuals do not perform sexual acts for or with these and other persons. They have been known to spend days in their own feces and urine, afraid or unable to leave their cells. Two deaf prisoners attempted to help the blind prisoners when they could by helping them get showers. These prisoners (blind and wheelchair users) are beaten (bones have been shattered and heads split open) when they complained to guards.<sup>44</sup>

According to court complaints, human rights reporting, and media accounts, people with physical disabilities have been the subject of harassment, taunting, and ridicule both by other prisoners and even by corrections staff.<sup>45</sup> For instance, people who are blind or low vision face acute vulnerabilities in prisons and jails.<sup>46</sup> They may be vulnerable to physical vio-

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44. James Ridgeway & Jean Casella, *Deaf Prisoners in Florida Face Abuse and Solitary Confinement*, SOLITARY WATCH (May 21, 2013), <http://solitarywatch.com/2013/05/21/deaf-prisoners-in-florida-face-brutality-and-solitary-confinement/>.

45. See, e.g., Complaint at ¶¶ 73-77, *Gizewski v. N.Y. State Dep't of Corr. & Cmty. Supervision*, No. 9:14-cv-124-GTS-DJS (N.D.N.Y. Feb. 4, 2014) (describing allegations by New York state prisoner that a corrections officer pushed him out of his wheelchair and kicked him in his abdomen, resulting in the prisoner losing consciousness); S. POVERTY LAW CTR., *CRUEL CONFINEMENT: ABUSE, DISCRIMINATION AND DEATH WITHIN ALABAMA'S PRISONS* 18 (2014), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/cruel\\_confinement.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/cruel_confinement.pdf) [hereinafter *CRUEL CONFINEMENT*] (“A hearing-impaired prisoner reports being hit by a corrections officer for not responding to an order he couldn’t hear.”); Maurice Chammah, Report: Blind, Deaf, Disabled Inmates Abused in Prison, *The Texas Tribune* (Jan. 27, 2015), <https://www.texastribune.org/2015/01/27/report-blind-deaf-disabled-inmates-abused-prison/> (describing letters written by prisoners alleging attacks by corrections staff resulting in “serious injuries, including missing teeth, busted skulls, broken bones, ruptured eyeballs and prolonged hospitalizations.”).

46. Relying on data gleaned from a survey to prisoners at the facility, the Prison Justice League concluded that 46 percent of prisoners who identified as deaf, blind, or as possessing a physical disability, have been victims of assault at the hands of other prisoners and corrections staff. PRISON JUSTICE LEAGUE, *CRUEL & UNUSUAL PUNISH-*

lence,<sup>47</sup> including stabbings and sexual assaults, as well as robbery, and theft. They are often the subject of harassment and ridicule.<sup>48</sup> Some are even taunted for purportedly “faking” their disability, which in turn exposes them to serious harm due to the failure of corrections staff to take them seriously and properly accommodate those disabilities.

The harms experienced by people with disabilities due to their heightened vulnerabilities are morally untenable and unnecessary, especially when considering that people with physical disabilities are often held in protective custody, a version of solitary confinement, on account of these heightened vulnerabilities to physical violence, sexual assault, and harassment. Though some prisoners may have to be separated from the general population to protect them from harm, these same prisoners should not be forced to endure the extreme social and sensory deprivation of solitary confinement as a condition of their safety. Reducing the number of prisoners with disabilities exposed to solitary confinement will require addressing and ending the violence and abuse that have tragically come to characterize prisons and jails across the country.

## B. *Why It Can Get Worse*

### 1. Crowded Prisons

Overcrowding is a serious problem in corrections institutions across the country. According to the most recent data from the Bureau of Justice Statistics, prison overcrowding—above 100 percent capacity—remains a serious issue in several states, including Alabama (192.7%),<sup>49</sup> California (136.6%),<sup>50</sup> Colorado (115.1%),<sup>51</sup> Delaware (161.7%),<sup>52</sup> Hawaii (159.2%),<sup>53</sup>

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MENT: EXCESSIVE USE OF FORCE AT THE ESTELLE UNIT 6 (2015), [https://static.texastribune.org/media/documents/Cruel\\_\\_Usual\\_Punishment\\_-\\_PJL\\_Final.pdf](https://static.texastribune.org/media/documents/Cruel__Usual_Punishment_-_PJL_Final.pdf).

47. *Id.* at 9-10.

48. *See, e.g.*, *Casey v. Lewis*, 834 F. Supp. 1569, 1581 (D. Ariz. 1993) (describing legally blind prisoner who reported incidents where urine and feces were thrown into his cell).

49. By the end of 2014, Alabama prisons were at 192.7% of the design capacity for which those prisons were designed. PRISONERS IN 2014, *supra* note ????, at 12. Design capacity refers to the “number of beds that the facility was originally designed to hold.” *Id.* at 11.

50. By the end of 2014, California operated its prisons at 136.6% of the capacity for which those prisons were designed. *Id.* at 12.

51. Colorado operated its prisons at 115.1% of the design and operational capacity by yearend 2014. Operational capacity “is based on the ability of the staff, programs, and services to accommodate a certain size population[.]” *Id.* at 11.

Idaho (109.3%),<sup>54</sup> Illinois (171.1%),<sup>55</sup> Iowa (112.8%),<sup>56</sup> Kansas (104.1%),<sup>57</sup> Kentucky (104.5%),<sup>58</sup> Louisiana (119.3%),<sup>59</sup> Maine (103.1%),<sup>60</sup> Massachusetts (130.1%),<sup>61</sup> Minnesota (101.3%),<sup>62</sup> Missouri (100.7%),<sup>63</sup> Nebraska (159.6%),<sup>64</sup> New Hampshire (124.3%),<sup>65</sup> New York (102.8%),<sup>66</sup> Ohio (131.9%),<sup>67</sup> Oklahoma (115.7%),<sup>68</sup> Pennsylvania (101.2%),<sup>69</sup> Vermont (117.1%),<sup>70</sup> Virginia (117.6%),<sup>71</sup> Washington (102.6%),<sup>72</sup> West Virginia (126.3%),<sup>73</sup> and Wisconsin (131.4%)<sup>74</sup> as well as the Federal Bureau of Prisons (128%).<sup>75</sup>

Prison overcrowding compromises the quality of care and safety of people with disabilities. First, prisoners held in overcrowded prisons are often exposed to decrepit, unsanitary living conditions<sup>76</sup> and limited access

52. Delaware prisons were at 161.7% of design capacity for the state's prison facilities by the end of 2014. *Id.* at 12.

53. By the end of 2014, prisons in Hawaii were at 159.2% of design capacity. *Id.*

54. Idaho prisons were at 109.3% of operational and design capacity by 2014. *Id.*

55. In 2014, Illinois prisons operated at 171.1% of their design capacity. *Id.*

56. Iowa prisons in 2014 operated at 112.8% of design and operational capacity. *Id.*

57. Kansas prisons were at 104.1% of that state's design capacity in 2014. *Id.*

58. Kentucky prisons in 2014 operated at 104.5% of operational capacity. *Id.*

59. Louisiana prisons in 2014 operated at 119.3% of operational capacity. *Id.*

60. Maine prisons in 2014 operated at 103.1% of operational capacity. *Id.*

61. Massachusetts prisons in 2014 operated at 130.1% of design capacity. *Id.*

62. Minnesota prisons ran at 101.3% of operational capacity in 2014. *Id.*

63. Missouri prisons ran at 100.7% of operational capacity in 2014. *Id.*

64. Nebraska prisons in 2014 operated at 159.6% of design capacity. *Id.*

65. New Hampshire prisons in 2014 operated at 124.3% of design capacity. *Id.*

66. In 2014, New York prisons operated at 102.8% of design capacity. *Id.*

67. In 2014, Ohio prisons operated at 131.9% of rated capacity. *Id.* Rated capacity "measures the number of beds assigned by a rating official to each facility[.]" *Id.* at 11.

68. Oklahoma prisons operated at 115.7% of design capacity in 2014. *Id.* at 12.

69. Pennsylvania operated its prisons at 101.2% of the design and operational capacity by year end 2014. *Id.*

70. Vermont prisons operated at 117.1% of the design capacity in 2014. *Id.*

71. Virginia prisons operated at 117.6% of the design capacity in 2014. *Id.*

72. Washington prisons ran at 102.6% of operational capacity in 2014. *Id.*

73. In 2014, West Virginia prisons operated at 126.3% of rated capacity. *Id.*

74. In 2014, Wisconsin prisons operated at 131.4% of design capacity. *Id.*

75. The Federal Bureau of Prisons operated at 128% of rated capacity. *Id.*

76. *See, e.g.,* Coleman v. Schwarzenegger, 922 F.Supp.2d 882, 931 (E.D. Cal. 2009) ("[C]rowding generates unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the risk that infectious diseases will spread."); CRUEL CONFINEMENT, *supra* note 45, at 10 ("The conditions within the state's prisons, which are grossly overcrowded, make spread of disease nearly inevitable. Prisoners in every facility report the presence of vermin, especially rats and spiders. At the Fountain Cor-

to medical care<sup>77</sup>—even in cases involving serious health emergencies. Second, overcrowded prisons can contribute to an increase in incidents of violence,<sup>78</sup> particularly for prisoners with psychiatric disabilities who cannot cope with the stress of incarceration and/or are unable to control their behavior.<sup>79</sup> Increased violence may lead to rule violations by prisoners, which in turn leads to greater reliance on punitive forms of punishment for those violations using sanctions like solitary confinement. Third, overcrowded prisons place an additional financial strain on corrections systems already struggling with limited funding<sup>80</sup> and/or staffing shortages.<sup>81</sup> As a

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rectional Facility in Atmore, there were large amounts of what appeared to be rat droppings on cans of food in the kitchen. At Holman, the SPLC was informed that a bird had been flying around in the kitchen for several weeks. What appeared to be bird droppings were found on a bed in a prison dorm.”).

77. See, e.g., *Dealing with California's Overcrowded Prisons*, NPR (May 26, 2011, 1:00 PM), <http://www.npr.org/2011/05/26/136685989/dealing-with-californias-overcrowded-prisons>.

78. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (2012), <http://www.gao.gov/assets/650/648123.pdf> (noting that overcrowding contributes to “increased inmate misconduct, which negatively affects the safety and security of inmates and staff”); see also U.N. OFFICE ON DRUGS & CRIME, HANDBOOK ON PRISONERS WITH SPECIAL NEEDS, at 45, U.N. Sales No. E.09.IV.4 (2009) [hereinafter HANDBOOK ON PRISONERS WITH SPECIAL NEEDS] (“[P]risoners with disabilities are easy targets for abuse and violence from other prisoners and prison staff.”).

79. See, e.g., Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J AM. ACAD. PSYCHIATRY & L. 104, 105 (2010), <http://www.jaapl.org/content/38/1/104.full.pdfhtml> (“Persons with mental illness are often impaired in their ability to handle the stresses of incarceration and to conform to a highly regimented routine. They may exhibit bizarre, annoying, or dangerous behavior and have higher rates of disciplinary infractions than other prisoners. Prison officials generally respond to them as they do to other prisoners who break the rules. When lesser sanctions do not curb the behavior, they isolate the prisoners in the segregation units, despite the likely negative mental health impact. Once in segregation, continued misconduct, often connected to mental illness, can keep the inmates there indefinitely.”).

80. See, e.g., Grant Schulte, Nebraska prison funding a priority despite budget shortfall, WASH. TIMES (Sept. 18, 2016), <http://www.washingtontimes.com/news/2016/sep/18/nebraska-funding-a-priority-despite-budget-/>; Johnathan Silver, *Texas Prisons Ponder Cutting \$250 Million*, Tex. Trib., (Aug. 3, 2016, 12:00 AM), <https://www.texas-tribune.org/2016/08/03/prisons-agency-could-see-250-million-budget-cuts/>.

81. See, e.g., Michael Dresser, *Maryland has severe shortage of correctional officers, union says*, THE BALTIMORE SUN (Jun. 30, 2016, 7:28 PM), <http://www.baltimoresun.com/news/maryland/bs-md-afscme-prisons-20160630-story.html>; Patrick Marley & Jason Stein, *Facing Staffing Shortage, Wisconsin Raises Prison Workers'*

result, overcrowding will limit the ability of corrections systems to provide such access, although, in practice, people with disabilities are entitled to equal access under the ADA.<sup>82</sup> Criminal justice and disability rights advocates alike should be concerned that overcrowded prisons will result in people with disabilities continuing to be denied equal access to programs, services, and activities in prisons and jails nation-wide.

## 2. Aging Prisoners

As the prison population ages, research indicates that the number of prisoners living with physical disabilities in American prisons will also increase significantly.<sup>83</sup> From 2007 to 2010, the “number of sentenced prisoners aged 65 or older increased by 63 percent, while the overall population of sentenced prisoners grew only 0.7 percent in the same period.”<sup>84</sup> Lengthy

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*Wages*, GOVERNING (May 9, 2016), <http://www.governing.com/topics/public-justice-safety/tns-wisconsin-prison-workers.html>; Mark Peters, *Prison Guards Are Hard to Capture as Jobless Rates Fall*, WALL ST. J. (March 19, 2016, 6:01 PM), <http://www.wsj.com/articles/prison-guards-are-hard-to-capture-as-jobless-rates-fall-1458597678>; Jen Fifield, *Many States Face Dire Shortage of Prison Guards*, THE PEW CHARITABLE TRUSTS (Mar. 1, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2016/03/01/many-states-face-dire-shortage-of-prison-guards>.

82. See Riyah Basha, *At Huron Valley Correctional Facility, Reflections of State-wide Prison Woes*, THE MICH. DAILY (June 1, 2016, 8:40 PM), <https://www.michigandaily.com/section/news/huron-valley-correctional-facility-reflections-statewide-prison-woes> (noting that in Michigan, prison overcrowding is one of the factors limiting the ability of staff at Huron Valley Correctional Facility to meet the health care needs for women, contributing to shocking accounts of neglect and substandard care for people with physical disabilities).

83. See HUMAN RIGHTS WATCH, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 73-75* (2012), [https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf) [hereinafter *OLD BEHIND BARS*]; see also *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY*, AM. CIV. LIBERTIES UNION (2012), [https://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf) (stating that the population of elderly prisoners is expected to increase significantly, and that from 1995 to 2010, “the number of state and federal prisoners age 55 or older nearly quadrupled (increasing 282 percent), while the number of all prisoners grew by less than half (increasing 42 percent).” See also *OLD BEHIND BARS* at 6; *Accommodation of Wheelchair-Bound Prisoners*, 10 AMERICANS FOR EFFECTIVE LAW ENFORCEMENT MONTHLY L. J. 301, 301 (2009), <http://www.aele.org/law/2009all10/2009-10MLJ301.pdf> (stating that “A growing population of aging prisoners, as a result of a number of factors, including sentencing changes with more lifetime or effectively lifetime sentences, along with denial of parole for repeat offenders or offenders with more serious crimes, also has presented correctional officials with many more disabled prisoners.”).

84. *OLD BEHIND BARS*, *supra* note 83, at 6.



prison sentences, an increase in the age of prisoners entering the system, as well as parole policies that offer limited chances for release<sup>85</sup> have all contributed to the growth in the elderly prison population. As the elderly prison population grows, so too will the cost of providing adequate medical care to meet the needs of these prisoners.<sup>86</sup> With each passing year, it will become even more imperative that prison and jails nation-wide work to address the needs of prisoners with disabilities without excluding them from prison programs, services, and activities, and without resorting to harmful practices like solitary confinement.

### C. *Scope of the Report & Definitions*

This article discusses the challenges facing prisoners with physical disabilities in solitary confinement, including why prisoners with physical disabilities are placed into solitary confinement and the harmful effects of the conditions of their confinement. In addition, this article captures some of the general challenges and hardships faced by people with disabilities in correctional settings, such as lack of access to proper medical and mental health care, as well as rehabilitative therapy, programming, visitation, and other necessities.

One initial challenge with studying prisoners with disabilities is that the definition of disability is broad.<sup>87</sup> There are a variety of physical disabilities and each one manifests itself uniquely in each individual. Another limitation is that there is no precise definition of disability across state and federal corrections institutions.<sup>88</sup> Although the broad diversity and scope of physical disabilities cannot be covered adequately in one report, this article focuses on physical disabilities commonly found in correctional settings: hearing, vision, and mobility-related disabilities.

This article will use the following definitions:

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85. According to Human Rights Watch, “[e]ven percent of federal prisoners age 51 or older are serving sentencing ranging from 30 years to life.” *OLD BEHIND BARS*, *supra* note 83, at 6.

86. *OLD BEHIND BARS*, *supra* note 83, at 72.

87. For example, under the ADA, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).” 42 U.S.C. § 12102(1) (2012). The term “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A) (2012).

88. *BJS DISABILITY REPORT*, *supra* note 27, at 2.

- Accommodation: Any (1) alterations to the physical plant, structure, or environment of a building; (2) modification to a program curriculum, format, or schedule; or (3) equipment, aide, assistance, or support that is provided to allow a person with a disability to gain access to a program, service, or activity.
- Mobility-related disabilities: Disabilities that affect one's ability to ambulate or move around. This includes disabilities that result from "congenital conditions, accidents, or progressive neuromuscular diseases [and] may include conditions such as spinal cord injury (paraplegia or quadriplegia), cerebral palsy, spina bifida, amputation, muscular dystrophy, cardiac conditions, cystic fibrosis, paralysis, polio/post-polio, and stroke."<sup>89</sup> For example, prisoners with mobility-related disabilities would include those who use wheelchairs, including manual or electric wheelchairs, walkers, canes, prosthetic devices, or special shoes.
- Deaf, or hard of hearing: Persons who are deaf have "hearing loss so severe that there is very little or no functional hearing."<sup>90</sup> The lowercase "d" will be used to refer to "the audiological condition of not hearing," and the uppercase "D" will be used to "refer[ ] to a particular group of Deaf people who share a language—American Sign Language (ASL) [or other signed languages] and a culture."<sup>91</sup> People who are hard of hearing have hearing loss but "there may be enough residual hearing that an auditory device, such as a hearing aid or FM system . . . provides adequate assistance to process speech."<sup>92</sup>

#### Blind or Low Vision:

- Legally blind is "[a] level of visual [disability] that has been defined by law to determine eligibility for benefits. It refers to central visual acuity of 20/200 or less in the better eye with the best possible correction, or a visual field of 20 degrees or less."<sup>93</sup>

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89. JOHNS HOPKINS UNIV., HOMEWOOD STUDENT AFFAIRS, STUDENT DISABILITY SERVS., <http://studentaffairs.jhu.edu/disabilities/about/types-of-disabilities/> (last visited Sept. 27, 2016).

90. *How are the terms deaf, deafened, hard of hearing, and hearing impaired typically used?* WASH. UNIV. (Aug. 24, 2015), <http://www.washington.edu/doit/how-are-terms-deaf-deafened-hard-hearing-and-hearing-impaired-typically-used> [hereinafter *Deaf Terminology*].

91. *Community and Culture—Frequently Asked Questions*, NATIONAL ASS'N. OF THE DEAF, <http://nad.org/issues/american-sign-language/community-and-culture-faq> (last visited Sept. 27, 2016).

92. *Deaf Terminology*, *supra* note 90.

93. *Glossary of Eye Conditions*, AM. FOUND. FOR THE BLIND (last visited Sept. 27, 2016), <http://www.afb.org/info/living-with-vision-loss/eye-conditions/12>.

- Low vision refers to “[v]ision loss that may be severe enough to impede a person’s ability to carry on everyday activities, but still allows some functionally useful sight. Low vision may be caused by macular degeneration, cataracts, glaucoma, or other eye conditions or diseases. Low vision may range from moderate impairment to near-total blindness.”<sup>94</sup>
- Deaf-blind: People with combined visual and hearing loss that “cause difficulties with communication, access to information[,] and mobility.”<sup>95</sup>
- Assistive devices: Devices that help facilitate access to programs, services, and activities by helping to “maintain or improve an individual’s functioning and independence . . . [and] prevent impairments and secondary health conditions.”<sup>96</sup> Assistive devices for persons with spinal cord injuries include: manual wheelchairs, motorized wheelchairs, ramps, and lower bunks.<sup>97</sup> Additional assistive devices include: crutches, walkers, artificial limbs, canes, orthotics, special footwear, bottom bunks, shower chairs, grab bars in the shower, and special bedding.<sup>98</sup>
- Auxiliary aids and services: Auxiliary aids and services are devices that facilitate effective communications with people with sensory or communication disabilities (e.g., hearing, seeing, speaking, etc.). Auxiliary aids and services for people who are blind or low vision include: Braille material, books on tape, glasses, canes, readers, access to magnifiers, large print material, closed circuit TV, talking computer, zoom text software, scanner, talking watches, electronic vending, and TDD Telephone.<sup>99</sup> Auxiliary aids and services for people who are deaf or hard of hearing include: video phones, visual notification systems, TTD, TTY phones, hearing aids and batteries, cochlear implants and charg-

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94. *Id.* (noting that low vision “cannot be fully corrected by eyeglasses, contact lenses, or surgery. However, a person with low vision may benefit from any of a variety of available optical devices, such as electronic magnifying glasses or eyeglass-mounted telescopes. In addition, special software developed for computer users with low vision can display type in large size or read text aloud.”).

95. *Definitions of deafblindness*, SENSE, <https://www.sense.org.uk/content/definitions-deafblindness> (last visited Sept. 27, 2016).

96. *Assistive devices and technologies*, WORLD HEALTH ORG., <http://www.who.int/disabilities/technology/en/> (last visited Sept. 27, 2016).

97. Jessie L. Krienert, et al., *Inmates with Physical Disabilities: Establishing a Knowledge Base 1* SOUTHWEST J. OF CRIM. JUSTICE 20 (2003), [http://www.swacj.org/swjcrj/archives/1.1/Krienert\\_et\\_al.pdf](http://www.swacj.org/swjcrj/archives/1.1/Krienert_et_al.pdf) [hereinafter *Inmates with Physical Disabilities*].

98. *Id.*

99. *Id.* at 19.

ers, sign language interpreters, closed caption, strobe lights, flashing alarms, shake awake alarms, and pocket talkers.<sup>100</sup>

#### D. *Methodology*

This article draws from evidence obtained from a variety of sources including first-hand interviews with prisoners, formerly incarcerated individuals, lawyers, disability rights advocates, service providers who work in prisons and jails, and current and former corrections personnel; policies and data obtained through public records requests submitted to state Departments of Correction; court pleadings and judicial opinions; articles from news outlets; and finally, academic journals.

The article includes data gathered from ten state Departments of Corrections. Public records requests were submitted to ten jurisdictions for information on the numbers of prisoners with mobility, hearing, and visual disabilities. Responses were obtained from ten jurisdictions; the responses ranged in scope and comprehensiveness. These ten jurisdictions are discussed in order to provide a glimpse into the practices of state Departments of Corrections and were chosen to provide variation in prison population size, geography, and capacity.

There are a few limitations with the methodology for this article. First, because there is no single definition of disability across state Departments of Corrections, the definitions of disability provided in the public records requests may not have captured all the prisoners with disabilities in the particular state prison system. For instance, if the public records request sought records for all persons with “mobility impairments” and the state Departments of Corrections instead tracks persons with “spinal cord injuries,” the responsive documents may not have included the full range of mobility-related disabilities. As a result, the records produced in response to the request may have been under-inclusive. To address this problem, where possible, the public records requests were drafted to include the state’s own definition of disability, or multiple definitions of disability, to ensure the broadest coverage possible.

Second, the data on incidence rates provided in this article are only estimates based on self-reported data from ten state Departments of Corrections. In some cases, the data responses received from the state Departments of Corrections were inconsistent across states. For instance, where states did provide data on mobility-related disabilities, there were some that collected data on all mobility-related disabilities represented in the state prison system, others that tracked only the number of assistive devices distributed

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100. *Id.* at 20.

as a way to capture the number of prisoners with mobility-related disabilities, and still others that tracked some mobility-related disabilities and not others. These variations in data collection make it somewhat difficult to standardize results across states. Where possible, the data charts and analysis note where distinctions exist in the self-reported data.

### E. *A Note on Language*

This article adopts both the “people-first” language and “identity-first” language when discussing people with disabilities. “People first language [aims] to avoid perceived and subconscious dehumanization when discussing people with disabilities[.]”<sup>101</sup> “The basic idea is to improve a sentence structure that names the person first and the condition second, i.e. ‘people with disabilities’ rather than ‘disabled people,’ in order to emphasize that they are people first.”<sup>102</sup> Alternatively, the identity-first language rejects people-first language as an attempt to separate a person’s disability from that person’s identity.<sup>103</sup> Advocates for identity-first language contend that a person’s disability cannot be separated from that person’s identity, and that “disability plays a role in who the person is, and reinforces disability as a positive cultural identifier.”<sup>104</sup> According to experts in disability rights and culture, “[i]dentity-first language is generally preferred by self-advocates in the autistic, deaf, and blind communities.”<sup>105</sup> Accordingly, identity-first language will be used when referring to deaf or blind people. Finally, the article is grounded in the perspectives of disability scholars who argue that “disabled people have redefined the problem of disability as the product of a disabling society rather than individual limitations or loss[.]”<sup>106</sup>

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101. *People First Language*, NAT’L BLACK DISABILITY COALITION, <http://blackdisability.org/content/people-first-language-0> (last visited Sept. 27, 2016).

102. *Id.*

103. See Lydia X. Z. Brown, *Identity-First Language*, AUTISTIC SELF ADVOCACY NETWORK, <http://autisticadvocacy.org/home/about-asan/identity-first-language/> (last visited Sept. 27, 2016) (providing a comprehensive overview of the arguments supporting and opposing people-first language); Rosemarie Garland-Thomson, *Becoming Disabled*, N.Y. TIMES (Aug. 19, 2016), [http://www.nytimes.com/2016/08/21/opinion/sunday/becoming-disabled.html?\\_r=0](http://www.nytimes.com/2016/08/21/opinion/sunday/becoming-disabled.html?_r=0) (discussing debate in around the “politics of self-naming”).

104. *Portrayal of People with Disabilities*, ASS’N OF UNIV. CTR. ON DISABILITIES, <https://www.aucd.org/template/page.cfm?id=605> (last visited Sept. 27, 2016).

105. *Id.* (noting that simply asking people for their preferences for terminology is also recommended).

106. See, e.g., JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE* 105 (1996); Phil Smith, *There is No Treatment Here: Disability and Health Needs in A State Prison System*, 25 *DISABILITY*

It is also important to note that effective reforms aimed at removing barriers and ensuring equal access for prisoners with disabilities must adopt an intersectional lens. An intersectional lens recognizes that people with disabilities have diverse lived experiences<sup>107</sup> and possess multiple identity traits<sup>108</sup> that may intersect and overlap to compound the forms of marginalization and oppression they experience while incarcerated. Due to the well-known racial disparities<sup>109</sup> of mass incarceration, it is not surprising that many disabled persons identify as members of historically marginalized racial minority groups.<sup>110</sup> They may also identify as gay, lesbian, bisexual, or transgender.<sup>111</sup> Furthermore, according to the most recent report by the Bu-

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STUD. Q. (2005), <http://dsq-sds.org/article/view/571/748> [hereinafter *Disability & Health Needs in a State Prison System*]. See also Subini Ancy Annamma, et al., *Disability Critical Race Studies (DisCrit): Theorizing at the intersection of race and disability*, 16 RACE ETHNICITY & EDUC. 1, 12-13 (2013).

107. See, e.g., Vilissa Thompson & Alice Wong, *#GetWokeADA26: Disabled People of Color Speak Out, Part Two*, RAMP YOUR VOICE!/DISABILITY VISIBILITY PROJECT (July 26, 2016), <https://disabilityvisibilityproject.com/2016/07/26/getwokeada26-disabled-people-of-color-speak-out-part-two/> (capturing perspectives of disabled people of color).

108. See CAROL GILL & WILLIAM CROSS, JR., DISABILITY IDENTITY AND RACIAL-CULTURAL IDENTITY DEVELOPMENT: POINTS OF CONVERGENCE, *in* RACE, CULTURE, AND DISABILITY: REHABILITATION SCIENCE AND PRACTICE 49 (Fabricio E. Balcazar et al. eds., 2010) (“Disability status intersects with multiple axes of diversity and marginalization, including race, gender, sexuality, class/caste, and age. Moreover, varieties of impairment—physical, sensory, learning, psychiatric—contribute to disabled people’s diversity of experience and perspectives.”); Subini Ancy Annamma et al., *supra* note 106, at 12 (“DisCrit emphasizes multidimensional identities . . . rather than singular notions of identity, such as dis/ability, social class, or gender.”).

109. See generally ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL & ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>; THE WAR ON MARIJUANA IN BLACK & WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS, AM. CIV. LIBERTIES UNION (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rell.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf).

110. MATTHEW W. BRAULT, AMERICANS WITH DISABILITIES: 2010, HOUSEHOLD ECONOMIC STUDIES, U.S. CENSUS BUREAU 6 (2012), <https://www2.census.gov/library/publications/2012/demo/pg70-131.pdf> (listing age-adjusted and unadjusted disability rates by gender and race).

111. Karen I. Fredriksen-Goldsen et al., *Disability Among Lesbian, Gay, and Bisexual Adults: Disparities in Prevalence and Risk*, 102 AM. J. OF PUB. HEALTH 16 (2012) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3490559/> (finding higher rate of disability among lesbian, gay, and bisexual adults); Tracy Garza, *Why our community should fight for disability rights, too*, TRANSGENDER LAW CTR. (Dec. 28, 2012), <http://transgenderlawcenter.org/archives/2923>.

reau of Justice Statistics, it is estimated that 56% of state prisoners, 45% of federal prisoners, and 64% of jail detainees have a mental illness.<sup>112</sup> Given that, it is likely that incarcerated persons with physical disabilities will also have a history of psychiatric disability. Taken together, it is not surprising that those with physical and mental disabilities struggle to adapt to the frequently harsh conditions of prison life, which in some cases, leads to tragic outcomes.<sup>113</sup> Reforms that address the challenges facing people with disabilities must provide intersectional solutions that acknowledge the many ways that they may be marginalized in prisons and jails nationwide.

### I. SPOTLIGHT ON TARGET JURISDICTIONS

There is no publicly available data on the numbers of people with disabilities in solitary confinement.<sup>114</sup> Information is also limited as to the types

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112. DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, 1 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> [hereinafter MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES].

113. *Blind Prisoner Dies After Confrontation with the Guards*, PRISON LEGAL NEWS (Feb 15, 2011), <https://www.prisonlegalnews.org/news/2011/feb/15/blind-texas-prisoner-dies-after-confrontation-with-guards/>.

114. Out of the ten public records requests sent to the targeted jurisdictions, only three produced the requested data on the number of persons with physical disabilities in solitary confinement or restrictive housing. The Nevada Department of Corrections reported that three blind or low vision prisoners, five deaf or hard of hearing prisoners, and 23 prisoners with mobility-related disabilities were held in some form of restrictive housing. See Letter from Brooke Keast, Public Information Officer, Nev. Dep't of Corr. to author (Aug. 26, 2016) (on file with author).

Georgia reported that between 15 and 21 prisoners with a hearing disability, 703 and 731 prisoners with a visual disability, and five and seven prisoners listed as having another type of "impairment" are held in some form of restrictive housing, with conditions similar to solitary confinement, as of the date of the response. See Email from Jason Mitchell, Assistant Counsel, Georgia Dep't of Corrections, Office of Legal Services (Sept. 27, 2016, 11:58 AM).

The Pennsylvania Department of Corrections reported 56 prisoners with vision disabilities, 12 prisoners with hearing disabilities, and 28 prisoners with mobility disabilities. See Email from Andrew Filkosky, Agency Open Records Officer, Office of Chief Counsel, Pa. Dep't of Corr., to author (Oct. 31, 2016).

The remaining states did not possess or maintain records with that information. See, e.g., Email from Dianne Houpt, Public Information Specialist, Florida Dep't of Corr. (Aug. 15, 2016, 3:17PM) (on file with author); Email from Trina Hirsig, Assistant Gen. Counsel, Class Actions, California Dep't of Corr. & Rehabilitation to author (Aug. 12, 2016, 6:43PM) (on file with author); Email from Kathleen Kelly, Chief Legal Counsel, Rhode Island Dep't of Corr. (July 28, 2016, 10:05 AM) (on file with author) (noting that there were no records related to the request and that Rhode Island DOC did not

of physical disabilities that exist within state and federal prison populations. Although data on the exact number of prisoners with disabilities in jails, prisons, and detention centers across the nation are difficult to locate, by some estimates, at least 26 % of state prisoners nationwide report a hearing or visual impairment, or physical disability.<sup>115</sup> Including cognitive disabilities and disabilities that limit the ability to independently care for oneself increases the proportion of prisoners with physical disabilities in prisons and jails to 32% and 40% percent, respectively.<sup>116</sup> Moreover, as noted, over half of state prisoners, 45% of federal prisoners, and 64% of jail detainees have a psychiatric disability.<sup>117</sup> By contrast, among non-institutionalized persons, approximately 12.6% of the U.S. population reports possessing a disability.<sup>118</sup> Based on this data, it is clear that people with disabilities are overrepresented in prisons and jails.

The lack of publicly available data on the number of prisoners with disabilities is concerning. Reforms to end solitary confinement have emphasized that it is overused and unjustified especially for vulnerable populations including prisoners with disabilities. Yet, without data to track the number of prisoners with disabilities, their location within the local, state, or federal correctional system, or the nature of their disability, it will be nearly impossible to provide accommodations for these prisoners,<sup>119</sup> deter-

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identify any prisoners having the disabilities in some form of solitary confinement); Letter from Susan Wall Griffin, Atty. for the Secretary, Louisiana Dep't of Public Safety & Corr. to author 2 (July 25, 2016) ("The Department does not track the housing locations of these categories of offenders beyond to which institution the offender is assigned."); Email from Roger Wilson, Chief Inspector, Ohio Dep't of Rehabilitation and Corr. (Jun. 10, 2016) (on file with author); Letter from Lisa Weitekamp, FOIA Officer, Illinois Dep't of Corr. to author (Feb. 2, 2016) (on file with author); Email from Michele S. Howell, Legal Issues Coordinator, Virginia Dep't of Corr (Oct. 24, 2016) (on file with author).

115. *Inmates with Physical Disabilities*, *supra* note 97, at 13.

116. BJS DISABILITY REPORT, *supra* note 27, at 1.

117. MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, *supra* note 116, at 1.

118. LEWIS KRAUS, 2015 DISABILITY STATISTICS ANNUAL REPORT, INSTITUTE ON DISABILITY/UCED 3 (2015), [http://www.disabilitycompendium.org/docs/default-source/2015-compendium/annualreport\\_2015\\_final.pdf](http://www.disabilitycompendium.org/docs/default-source/2015-compendium/annualreport_2015_final.pdf).

119. *See, e.g.*, Brief in Supp. of Pl.'s Mot. for Specific Performance at 8, Langford, et al., v. Bullock, et al., Civ. Action No. 6:93-cv-00046-DWM-JCL (D. Mont. June 24, 2013), [https://www.aclumontana.org/sites/default/files/field\\_documents/1494\\_brief\\_in\\_support.pdf](https://www.aclumontana.org/sites/default/files/field_documents/1494_brief_in_support.pdf) [hereinafter Langford Brief] ("MSP does not track disabled prisoners. . . . Accordingly, even if a disabled individual is properly identified, it is unlikely he will receive the necessary accommodation." (citing Program Access Assessment & Facility Accessibility Survey Report at 11, Langford, et al., v. Bullock, et al., Civ. Action



mine the extent to which this group is subjected to the overuse of solitary confinement, or whether reform efforts, in the states that have pursued them, have been effective in removing prisoners with disabilities from solitary confinement. For the corrections systems, such information is essential to measure the effectiveness of efforts to reform solitary confinement. For outside advocates, such data will be necessary in order to provide transparency and hold correctional systems accountable. Finally, without data on the volume of prisoners with disabilities, or the nature of their disabilities, it will be difficult to ensure that their needs—whether it be access to critical areas in a correctional facility, assistive devices, or other accommodations—are met while in prison. At a minimum, correctional systems must be accountable for keeping careful, comprehensive, and accurate records that identify the number of persons in solitary confinement, or any other type of restrictive housing, and their specific disabilities and corresponding needs.

This article aims to fill some of the gaps in data and builds on existing data by providing a snapshot into both the number of prisoners with physical disabilities and the volume of grievances filed by prisoners with disabilities in ten state Departments of Correction: California, Florida, Georgia, Illinois, Louisiana, Nevada, Ohio, Pennsylvania, Rhode Island, and Virginia.

#### A. *Population Data*

The information below provides a snapshot of the number of persons with physical disabilities in ten state prison systems along with other indicators, such as the number of assistive devices and special passes (e.g., for lower bunks or for an attendant) distributed.

A few state-specific findings are important to highlight:<sup>120</sup>

- Approximately 1 out of 10 prisoners in the state of California reports, or has been identified as, having a hearing, visual, and/or mobility-related disability.
- Approximately 21% of prisoners in the Florida Department of Corrections (DOC) have been assigned some kind of assistive device or special pass (e.g., passes providing access to lower bunks

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No. 6:93-cv-00046-DWM-JCL (D. Mont. June 27, 2013)); *see also id.* at 6 (“[Montana State Prison] has failed to establish a comprehensive screening process to identify prisoners with . . . mobility, vision, speech and hearing disabilities, as the ADA requires. . . . As a result, Defendants fail to accommodate disabled prisoners in programs and facilities[.]”).

120. Jurisdictions were asked to report on data from January 2013 through the present (or the date of the public records requests).

or permitting the prisoner to have support from an attendant or assistant, etc.).

- Almost 1 in 20 prisoners in Pennsylvania state-run prisons have been identified as blind or low vision and/or deaf or hard of hearing.
- The Illinois Department of Corrections does not track or keep data on the number of prisoners who have disabilities or the nature of their disability.
- Although we asked all states to provide data on the numbers of prisoners with physical disabilities in solitary confinement, only two states (Nevada and Georgia) provided records with this information.

CHART 1: PRISONERS AS A PERCENTAGE OF TOTAL CUSTODY POPULATION<sup>121</sup> BY STATE AND DISABILITY

State	Blind and/or Deaf	Total Disability	Mobility, Assistive Devices, and Special Passes
California	2.03%	8.07%	5.38%
Florida	≤1.0%	2.29%	20.93%
Georgia	≤1.0%	3.28%	3.10%
Illinois	No Data	No Data	No Data
Louisiana	1.08%	1.21%	2.55%
Nevada	≤1.0%	No Data	No Data
Ohio	1.45%	3.98%	N/A
Pennsylvania	4.46%	7.06%	7.07%
Rhode Island	≤1.0%	1.47%	1.31% <sup>122</sup>
Virginia	≤1.0%	N/A	N/A

#### B. *Limited Data on Complaints Filed by Prisoners with Physical Disabilities*

Requests for data on complaints, also known as grievances, were submitted to ten state Departments of Corrections. The responses produced by these state Departments of Corrections raised real concerns. State re-

121. See Prisoner in 2014, *supra* note 1, at 3 (Custody population data was obtained from the Bureau of Justice Statistics).

122. The Rhode Island Department of Corrections' response includes only mobility devices. Letter from Susan Lamkins, Programming Services Officer, Rhode Island Dep't of Corr., to author (Apr. 26, 2016) (on file with author).

sponses varied. Some responded that they did not collect data on complaints filed by prisoners with physical disabilities, or provided incomplete, and in some cases arguably inaccurate data. As described in further detail below, the lack of quality data on the complaints or grievance filed by prisoners with physical disabilities means that corrections officials are limited in their ability to adequately respond to the needs of this group. Given the well-known harms of solitary confinement, failure to track and monitor data on grievances filed by prisoners with physical disabilities suggests that prisons have no effective way of knowing about the harms caused by solitary confinement, or addressing those harms. Ultimately, prisoners with physical disabilities are left with little recourse in corrections institutions, leaving them even more marginalized and isolated.

Grievance procedures are administrative processes that allow prisoners to present their requests, complaints, individual needs, or other issues to correctional staff and officials and to seek administrative resolution of those concerns. To initiate the grievance process, a prisoner will fill out a grievance form<sup>123</sup> and submit the form to the corrections staff member responsible for collecting grievances.

Corrections staff and officials will then review the grievance and submit a response to the prisoner, usually granting or denying the prisoner's specific request. For instance, if the prisoner requests a shower chair, or vibrating alarm, corrections staff and officials may respond by granting the refill request, or rejecting the request for a prescription drug. If the prisoner is dissatisfied with the response from corrections staff, the prisoner may appeal to a higher official within the prison facility. These processes typically require multiple levels of appeal to complete.

There are strict guidelines governing grievance procedures and the specifics of those policies vary by state.<sup>124</sup> Grievance procedures may set forth strict time limits for filing an appeal,<sup>125</sup> specific criteria for what may

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123. See, e.g., *State of Iowa, Department of Corr. Offender Grievance Compl.*, UNIV. OF MICH. LAW SCHOOL, [https://www.law.umich.edu/special/policyclearinghouse/Documents/Iowa\\_Sample\\_Grievance\\_Form.pdf](https://www.law.umich.edu/special/policyclearinghouse/Documents/Iowa_Sample_Grievance_Form.pdf).

124. See, e.g., *Prison and Jail Grievance Policies*, UNIV. OF MICH. LAW SCHOOL, <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonGrievanceProceduresandSamples.aspx> (last visited July. 13, 2018) (listing sample grievance policies and procedures for state prisons and local jails).

125. See, e.g., *Administrative Policies & Procedures, Tenn. Dep't of Corr., Index # 501.01* at 2-3 (May 1, 2004), UNIV. OF MICH. LAW SCHOOL, [https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison\\_and\\_Jail\\_Grievance\\_Policies/Tennessee\\_Policy.pdf](https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/Tennessee_Policy.pdf) (last visited Oct. 13, 2016).

be included in a grievance form,<sup>126</sup> or what types of matters may or may not be raised.<sup>127</sup> Additionally, the procedures and policies governing grievance systems—again, the primary mechanism for notifying prison officials of a problem, need, or other concern—are notoriously complex procedures that are too difficult for some prisoners to fully understand.<sup>128</sup>

At the same time, grievances can provide a vehicle for systematically examining the issues faced by prisoners in local, state, or federal correctional systems. Grievances can provide an overview of common issues arising from prisoners, the responsiveness of the correctional system to those concerns, and the efficacy of any implemented reforms.<sup>129</sup> For example, corrections systems with a high proportion of pending or unresolved grievances, as compared to resolved grievances, will raise concerns about the system's responsiveness to the issues affecting people with disabilities. In this way, grievances help corrections officials evaluate the effectiveness of specific facilities or the entirety of their correctional systems, on an aggregate level. Additionally, public access to data on grievances and can allow for greater public monitoring and oversight of corrections systems.

Yet, despite the importance of comprehensive tracking mechanisms to monitor the volume and nature of grievances filed by prisoners with disabilities, not only have corrections systems nation-wide declined to publish data on the volume and nature of grievances filed by all prisoners, let alone prisoners with disabilities, but they have also failed to track and maintain internal records containing this information.

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126. See, e.g., *Administrative Regulation, Colo. Dep't of Corr., Regulation No. 850-01* at 3-4 (Dec. 15, 2015), [https://www.law.umich.edu/facultyhome/margoschlang/er/Documents/Resources/Prison\\_and\\_Jail\\_Grievance\\_Policies/Colorado\\_Policy.pdf](https://www.law.umich.edu/facultyhome/margoschlang/er/Documents/Resources/Prison_and_Jail_Grievance_Policies/Colorado_Policy.pdf).

127. See, e.g., *Administrative Directive, Inmate Grievance Procedure, Ark. Dep't of Corr., No. 04-01 2* at 2-3 (Feb. 1, 2004), [https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison\\_and\\_Jail\\_Grievance\\_Policies/Arkansas\\_Policy.pdf](https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/Arkansas_Policy.pdf) (list visited Sept. 27, 2016) (listing types of complaints by prisoners that are prohibited).

128. Jean F. Andrews, *Deaf Inmates: Cultural and Linguistic Challenges and Comprehending the Inmate Handbook*, 36 CORRECTIONS COMPENDIUM 14 (2011), available at <https://deafinprison.com/2012/03/09/136/> (noting that a study of five prison handbooks determined that each handbook included text at or above an eleventh grade English reading level, which is well above the reading level for the average deaf person).

129. See, e.g., Press Release, Va. Dep't of Corr., Virginia's Restrictive Housing Reforms Highlighted by the U.S. Department of Justice: Few Offenders Remain in Restrictive Housing in Virginia Prisons (Mar. 3, 2016), [http://vadoc.virginia.gov/news/press-releases/16mar3\\_DOJ.shtm](http://vadoc.virginia.gov/news/press-releases/16mar3_DOJ.shtm) (noting 71% reduction in prisoner grievances since reforms to reduce population in restrictive housing at Red Onion State Prison).

Ten target jurisdictions were each sent open records requests for information on all grievances filed by persons with disabilities, and the number of those grievances that remain pending or were resolved, in a two-year period. Although the responses varied, overall, the data provided by the jurisdictions was non-existent, incomplete, or inaccurate. The responses from the ten jurisdictions as relates to the grievances filed by prisoners with physical disabilities included some notable findings:

- The Florida DOC reported 792 grievances filed by prisoners with disabilities from January 2013 through January 2015. However, the Department reported that only 44 of those grievances were resolved during that same time period.<sup>130</sup>
- The Ohio Department of Rehabilitation and Correction reported that approximately 1,839 prisoners in its state-run facilities have a disability, but reported only three grievances filed by prisoners with disabilities from January 2013 to January 2015 and reported that all three grievances were resolved.<sup>131</sup>
- The Pennsylvania DOC reported that 132 grievances related to the ADA were filed by prisoners with disabilities from January 2013 through January 2015. The Pennsylvania Department of Corrections does not have records to track whether those grievances were resolved or pending as of January 2016.
- The Louisiana DOC reported that 186 grievances were filed by prisoners with disabilities from January 2013 through December 2015. According to the Department's reported data only 10 grievances were resolved during the same time period.
- The Illinois and Virginia DOCs do not maintain records that track information on grievances filed by prisoners with disabilities and do not monitor whether those records were pending or resolved.

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130. The Florida Department of Corrections reported that as of March 23, 2016, 41 grievances remained pending. The records did not specify what happened to the remaining 751 grievances that were neither resolved nor remain pending from January 2013 through March 23, 2016. *See* Email from Donna Beard, Office of General Counsel, Florida Dep't of Corr. to author (Mar. 24, 2016) (on file with author).

131. Ohio reported that from January 2015 to January 2016, 43 accommodations requests were approved by DOC officials, ten were partially approved, and 30 were denied. *See* Email from Roger Wilson, Chief Inspector, Ohio Dep't of Rehabilitation & Corr. to author (June 21, 2016) (on file with author). It is not clear whether the requests for these accommodations were filed separately from the grievances.

CHART 2: GRIEVANCES OF PRISONERS WITH DISABILITIES FILED, RESOLVED, AND PENDING FROM JANUARY 2013 TO JANUARY 2015

State	# of grievances filed	# of grievances resolved	# of grievances pending <sup>132</sup>
California	No Data	No Data	No Data
Florida	792	44	41 <sup>133</sup>
Georgia	29	25	8 <sup>134</sup>
Illinois	No Data	No Data	No Data
Louisiana	186 <sup>135</sup>	10	0
Nevada	No Data	No Data	No Data
Ohio	3 <sup>136</sup>	3 <sup>137</sup>	No Data <sup>138</sup>
Pennsylvania	132	No Data	No Data <sup>139</sup>

132. Grievances that are noted as “pending” are marked from the date listed on the state Department of Corrections’ letter responding to the public records request.

133. As of March 23, 2016. See Email from Donna Beard, Office of General Counsel, Florida Dep’t of Corr. to author (Mar. 24, 2016) (on file with author).

134. As of March 17, 2016. See Email from Georgia Dep’t of Corr. to author (on file with author).

135. According to the Louisiana Department of Corrections, the total number “includes accommodations requested or recommended through medical call outs in additional to formal grievances during the relevant time period.” Letter from Susan W. Griffin, Att’y for the Sec’y, Louisiana Dep’t of Public Safety & Corr. to author 2 (Mar. 17, 2016) (on file with author).

136. The records submitted from Ohio are from January 2015 to 2016 only. The Ohio Department of Corrections reported that they were unable to query the data using the precise terms of the public records request (i.e. “disabilities”), but after using the search term “handicapped facilities,” the search returned a total of 3 grievances filed. Email from Roger Wilson, Chief Inspector, Ohio Dep’t of Rehabilitation & Corr. to author (June 10, 2016) (on file with author).

137. The records submitted from Ohio are from January 2015 to 2016 only. See Email from Roger Wilson, Chief Inspector, Ohio Dep’t of Rehabilitation & Corr., to author (June 21, 2016) (on file with author).

138. The Ohio Department of Corrections did not have data on the number of grievances filed by prisoners with disabilities. A public records official from Ohio stated that “[a]ll grievances are resolved within 14 days of receipt by the inspector unless there is an extension of an additional 14 days. There are no pending grievances from 2015.” Email from Roger Wilson, Chief Inspector, Ohio Dep’t of Rehabilitation & Corr., to author (June 10, 2016) (on file with author). However, the Ohio Department of Corrections did report that from January 2015 to January 2016, there were 43 accommodations that were approved, 10 that were partially approved, and 30 that were denied. Email from Roger Wilson, Chief Inspector, Ohio Dep’t of Rehabilitation & Corr., to author (June 21, 2016) (on file with author).

139. As of May 4, 2016.

Failure to track and monitor the volume and nature of grievances—including those filed, resolved, or pending—impedes the ability of the correctional institutions to meet the needs of prisoners with disabilities. By not responding to grievances, or failing to monitor the status of filed grievances to ensure that they are resolved in a timely manner, Departments of Correction effectively cut off prisoners with disabilities from one of the only available mechanisms for seeking assistance or raising even serious concerns regarding necessary accommodations, safety risks, medical and mental health care, to name a few.

This failure to meet the needs of prisoners with physical disabilities exposes them to an increased risk of harm in correctional institutions. Cut off from responsive grievance systems, prisoners with physical disabilities are made even more vulnerable to physical injury in cases where the grievance involves threats posed by other prisoners or dangerous conditions due to architectural barriers in facilities. Similarly, unresponsive grievance systems may result in worsening disabilities where grievances challenging inadequate medical care and the failure to provide proper accommodations, physical therapies, or proper prescription medications, go unaddressed by correctional authorities. In light of these harms, it is imperative for corrections systems to develop robust databases with comprehensive information on prisoners with disabilities that can equip systems to address the acute and diverse concerns of this group.

### III. SOLITARY CONFINEMENT HARMS PRISONERS WITH PHYSICAL DISABILITIES

Decades of research establishes that solitary confinement inflicts devastating mental and physical harms on human beings.<sup>140</sup> Current research suggests that solitary confinement can not only destroy the human psyche, but it can also result in physical deterioration due to the limited access to exercise, physical therapies, and quality medical and mental health care.<sup>141</sup>

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140. See Metzner & Fellner, *supra* note 79, at 104-05; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333-38 (2006), [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law\\_journal\\_law\\_policy](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy).

141. Expert Report of Brie Williams 8-13, *Parsons v. Ryan*, No. 2:12-cv-00601-NVW (MEA) (D. Ariz. Nov. 8, 2013), <https://www.aclu.org/legal-document/parsons-v-ryan-expert-report-brie-williams-md-ms> [hereinafter Dr. Brie Williams Expert Report]; see also Class Action Complaint ¶ 75(c), *Lewis v. Cain*, Civil Action No. 3:15-cv-00318-BAJ-RLB (May 20, 2015), [https://www.laaclu.org/sites/default/files/field\\_documents/2015\\_Lewis\\_v\\_Cain\\_Complaint\\_1.pdf](https://www.laaclu.org/sites/default/files/field_documents/2015_Lewis_v_Cain_Complaint_1.pdf) (describing prisoner who is quadriplegic who alleges he did not receive physical therapy for years).

The physical harms of solitary confinement cannot be easily undone and may lead to long-term disabilities and increased health care costs once the prisoner is released from prison—and over 95 percent of prisoners will be.<sup>142</sup> The result is that prisoners are made worse off by incarceration, and then are released back into the community with greater needs for medical and mental health services due in part to the lack of care or low-quality treatment they received in prison.<sup>143</sup>

Prisoners with disabilities are uniquely harmed by the negative health effects of solitary confinement. What's more, they receive even less access to programs available to prisoners held in solitary confinement because they are not provided with accommodations to allow them to participate in these programs. Due to their disabilities, they are neglected and even more isolated while in solitary confinement.

#### A. *Psychological Harm*

Prolonged isolation has a devastating effect on human beings.<sup>144</sup> Locked in a cell that is roughly the size of a regular parking space for upwards of 22 hours or more per day, prisoners in solitary confinement engage in most of life's basic activities—whether eating, washing, using the toilet, or dressing—all within a few square feet of space. It is no wonder that some, suffering from the psychological harms of solitary have “become so desperate for relief that they [have] set their mattresses afire,” “[torn]

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142. Timothy Hughes & Doris J. Wilson, *Reentry Trends in the United States: Inmates Returning to the Community after Serving Time in Prison*, BUREAU OF JUSTICE STATISTICS <http://www.bjs.gov/content/reentry/reentry.cfm> (last visited Apr. 2, 2018).

143. *See, e.g.*, *Lawson v. Dallas Cnty.*, 286 F.3d 257, 260 (5th Cir. 2002) (“Lawson was in good health when he entered the jail. However, without proper medical care paraplegics such as Lawson are at risk of developing decubitus ulcers, caused by unrelieved pressure on the body, which can be life-threatening. Various medical equipment and personal assistance used to prevent decubitus ulcers are part of basic medical training for doctors and nurses and are standard medical procedure in caring for paraplegics.”)

144. *See, e.g.*, Letter from Daniel Reeder, prisoner at Louisiana State Penitentiary at Angola, to author (Jan. 26, 2016) (on file with author) (“Back in 2009, I was placed in solitary confinement, a young, healthy man. [T]he disability . . . created, [m]entally and [p]hysically from long term isolation IS inhumane, they are creating animals. . . . The lack of mobility and human contact over a long period of time has destroy[ed] my mind and health[.] I have an unhealthy weight gain and severe lower back pain from only having a 2 foot by 4 foot of space in the cell to move around[.] For 23 hours a day I’m confin[e]d to this place. I have develop[ed] extreme paranoia of others around me and violent thoughts. In the past few years I started having really bad anxiety attacks when I have human to human contact[.] I’ve lost the ability to interact with others.”).



their sinks and toilets from the walls, ripp[ed] their clothing and bedding, and destroy[ed] their few personal possessions” all in order “to escape the torture of their own thoughts and despair.”<sup>145</sup> In light of these devastating harms,<sup>146</sup> major U.S. health organizations, including the National Commission on Correctional Health Care, the American Psychiatric Association, the Mental Health America, the American Public Health Association, the National Alliance on Mental Illness, and the Society of Correctional Physicians, have all issued formal policy statements that oppose prolonged solitary confinement, particularly for prisoners with mental illnesses.<sup>147</sup>

Mental health experts studying the issue by and large agree that long-term solitary confinement is psychologically harmful.<sup>148</sup> A series of scientific studies dating back to the mid-1960s conclude that solitary confinement is psychologically damaging. Persons subjected to solitary

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145. Frank Rundle, *The Roots of Violence at Soledad*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 167 (Erik Olin Wright ed., 1973), <https://www.ssc.wisc.edu/~wright/Published%20writing/pop.c8.pdf>.

146. See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature*, 34 *CRIME & JUST.* 441, 476-81 (2006) (summarizing literature discussing harms of solitary confinement).

147. See, e.g., National Commission on Correctional Health Care, *Solitary Confinement (Isolation)* (2016), <http://www.ncchc.org/solitary-confinement> [hereinafter *NCCHC Statement*]; The National Alliance on Mental Illness, *Public Policy Platform*, <https://www.nami.org/getattachment/About-NAMI/Policy-Platform/Public-Policy-Platform-up-to-12-09-16.pdf>; American Public Health Association, *Solitary Confinement as a Public Health Issue* (2013), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>; Society of Correctional Physicians, *Position Statement, Restricted Housing of Mentally Ill Inmates* (2013), [http://accpmed.org/restricted\\_housing\\_of\\_mentally.php](http://accpmed.org/restricted_housing_of_mentally.php); American Psychiatric Association, *Position Statement on Segregation of Prisoners with Mental Illness* (2013), [http://www.dhcs.ca.gov/services/MH/Documents/2013\\_04\\_AC\\_06c\\_APA\\_ps2012\\_PrizSeg.pdf](http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf); Mental Health America, *Policy Position Statement 24: Seclusion and Restraints* (2015), <http://www.nmha.org/positions/seclusion-restraints>.

148. See, e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *AM. J. OF PSYCHIATRY* 1450, 1451-53 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *CRIME & DELINQ.* 124, 130-45 (2003), <http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf>; Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 *SOC. JUST.* 14-16 (1988), [http://www.jstor.org/stable/29766384?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/29766384?seq=1#page_scan_tab_contents); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 *CRIM. BEHAV. & MENTAL HEALTH* 85, 89-93 (1997).

confinement have displayed the following: negative attitudes and affect;<sup>149</sup> insomnia;<sup>150</sup> anxiety;<sup>151</sup> panic;<sup>152</sup> withdrawal;<sup>153</sup> hypersensitivity to stimuli;<sup>154</sup> ruminations;<sup>155</sup> cognitive dysfunction;<sup>156</sup> hallucinations;<sup>157</sup> loss of control;<sup>158</sup> irritability, aggression, and rage;<sup>159</sup> paranoia;<sup>160</sup> chronic apathy;<sup>161</sup> lethargy;<sup>162</sup> depression;<sup>163</sup> self-mutilation;<sup>164</sup> suicidal ideation and behavior;<sup>165</sup> and lower levels of brain function, including a decline in electroencephalogram (EEG) activity,<sup>166</sup> which were observed after only seven days in isolation.<sup>167</sup>

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149. See, e.g., Michael Bauer et al., *Long-Term Mental Sequelae of Political Imprisonment in East Germany*, 181 J. NERVOUS & MENTAL DISEASE 257, 258-61 (1993); Korn, *supra* note 148, at 8-19; Miller & Young, *supra* note 148, at 85-94; Peter Suedfeld et al., *Reactions and Attributes of Prisoners in Solitary Confinement*, 9 CRIM. JUST. & BEHAV. 303, 315-18 (1982).

150. See, e.g., Bauer et al., *supra* note 149, at 259.

151. See, e.g., Henrik Andersen et al., *A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement*, ACTA PSYCHIATRICA SCANDINAVICA 19, 20-25 (2000); Stuart Grassian & N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49, 54 (1986); Grassian, *supra* note 148, at 1452; Haney, *supra* note 148, at 133.

152. See, e.g., Grassian, *supra* note 140, at 335.

153. See, e.g., Haney, *supra* note 148, at 134; Miller & Young, *supra* note 148, at 93.

154. See, e.g., Grassian, *supra* note 148, at 1452; Haney, *supra* note 148, at 134.

155. See Haney, *supra* note 148, at 134; Miller & Young, *supra* note 148, at 89-91.

156. See, e.g., Grassian, *supra* note 148, at 1452-53; Haney, *supra* note 148, at 133-34; Korn, *supra* note 148, at 15; Miller & Young, *supra* note 148, at 90.

157. See, e.g., Grassian, *supra* note 148, at 1451-53; Haney, *supra* note 148, at 134; Korn, *supra* note 148, at 15.

158. See, e.g., Grassian, *supra* note 148, at 1453; Haney, *supra* note 148, at 138-39.

159. See, e.g., Bauer et al., *supra* note 149, at 259-60; Grassian, *supra* note 148, at 1453; Haney, *supra* note 148, at 134; Miller & Young, *supra* note 148, at 90-91.

160. See, e.g., Grassian, *supra* note 148, at 1453.

161. See Haney, *supra* note 148, at 139.

162. See, e.g., *id.*

163. See, e.g., Andersen et al., *supra* note 151, at 22; Haney, *supra* note 148, at 134; Korn, *supra* note 148, at 14-15.

164. See, e.g., Grassian, *supra* note 148, at 1453.

165. See, e.g., Grassian, *supra* note 148, at 1453; Haney, *supra* note 148, at 134.

166. Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. OF ABNORMAL PSYCHOL. 54, 57-58 (1972).

167. *Id.*

The astonishingly high rate of completed suicides alone reveals the dangers of solitary confinement. Shockingly, approximately 50% of all suicides in prisons happen among the 5-6%<sup>168</sup> of all prisoners held in solitary confinement.<sup>169</sup> According to a 2014 study, detainees held in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population—youth and people with serious mental illness were particularly susceptible to self-harm.<sup>170</sup>

The devastating effects of solitary confinement do not end after release. In June 2015, the tragic consequences of solitary confinement came to a focal point. Kalief Browder, a twenty-two-year-old who was imprisoned on Rikers Island in New York for three years, two of which he spent in solitary despite never being convicted of a crime, took his own life approximately two years after his release.<sup>171</sup> Like so many prisoners exposed

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168. See TIME IN CELL, *supra* note 9, at 3 (estimating that approximately 80,000-100,000 prisoners are held in solitary confinement); see also DANIELLE KAEBLE ET AL., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 5 (Jan. 21, 2016), available at <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>. (Data on the total numbers of persons held in state and federal prisons in the United States (1,561,500) was taken from the 2014 Bureau of Justice Statistics Report).

169. Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REPORT 1, 11 (2011), available at <https://www.probono.net/prisoners/stopsol-reports/attachment.212211>; see also Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 516 (2004), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1202&context=plr> (stating that “More than half of prison suicides in New York take place in twenty-three-hour lockdown units, although less than 10% of the inmate population is housed in them.”).

170. See, e.g., Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH, 442, 445-446 (2014), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>; see also Expert Report of Professor Craig Haney at 45-46 n.119, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P (E.D. Cal. 2010), available at [http://rbgg.com/wp-content/uploads/\\_Haney,%20Dr.%20Craig%20\(3201\),%2010-30-08,%20OCR.pdf](http://rbgg.com/wp-content/uploads/_Haney,%20Dr.%20Craig%20(3201),%2010-30-08,%20OCR.pdf) (noting that in California prisons in 2004, 73% of all suicides occurred in isolation units, even though these units make up approximately 6% of the state’s total prison population).

171. Jennifer Gonnerman, *Kalief Browder, 1995-2015*, THE NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>. See Stephon Johnson, *State Assembly Passes ‘Kalief’s Law’ to Reform Pretrial Detention*, N.Y. AMSTERDAM NEWS (June 9, 2016, 12:18 PM), <http://amsterdamnews.com/news/2016/jun/09/state-assembly-passes-kaliefs-law-reform-pretrial/> (noting that in July 2016, the New York State Legislature passed “Kalief’s Law” to reduce the time spent in jail pre-trial and to ensure a speedy trial).

to the horrors of solitary, the harms inflicted upon Kalief extended well beyond his release from prison.

Prisoners with physical disabilities are not spared from the devastating toll solitary confinement inflicts upon the human psyche. For those prisoners with existing psychiatric disabilities, the harms of solitary confinement can be compounded.<sup>172</sup> In solitary confinement, access to mental health professionals is usually limited, if offered at all. Even where offered by the correctional institution, prisoners with physical disabilities may be unable to participate in individual and group mental health-focused classes where they require accommodations to facilitate meaningful communications in the classes, or access class locations, and such accommodations are not provided by corrections staff. People with physical disabilities will suffer even greater psychological harms in correctional systems where they do not receive these accommodations that allow them to communicate effectively with mental health professionals.

For example, barriers to communication may make it difficult for prisoners with sensory disabilities to communicate their symptoms or other pertinent information effectively. Prisoners with sensory disabilities may have “increased mental health care needs.”<sup>173</sup> Deaf prisoners, or those prisoners with severe speech impediments, who experience harassment and abuse in the corrections environment, may lack the accommodations to communicate their needs to mental health professionals, thereby increasing their vulnerabilities to harm in correctional institutions. Without effective communication between mental health professionals and regular access to mental health treatment and therapies, prisoners who are deaf or hard of hearing and/or blind or low vision, may experience mental and psychological deterioration, diminishing their ability to function in prison.

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172. See, e.g., Wicomico Cty. Complaint, *supra* note 3, ¶ 27 (noting that plaintiff was in an “extremely emotionally fragile state during his five and a half week stay in solitary confinement” due to the recent death of his twelve year old son); Bruce A. Arrigo & Jennifer L. Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY, 622, 627-29 (2008) (discussing negative psychological consequences of long-term solitary confinement).

173. HANDBOOK ON PRISONERS WITH SPECIAL NEEDS, *supra* note 78, at 46 (“Increased mental health care needs have been noted for example among prisoners who have sensory disabilities—conditions which are isolating in themselves and more so in prisons, where the special needs of such persons are rarely taken into account and where they can be victims of psychological abuse and bullying.”).

## B. *Physical Harms*

Beyond the damaging psychological effects of solitary confinement, there is also evidence to suggest that the practice can be physically debilitating. Movement in solitary confinement is highly controlled. There is almost no out-of-cell time, and movement outside of one's cell is usually impeded by required restraints and strip searches. Beyond this, architectural barriers prevent prisoners with physical disabilities from not only accessing critical areas of the prison, but also even moving around within their cells. Blanket security policies banning the use of assistive devices within their cells can leave prisoners with physical disabilities with limited ability to care for themselves, perform exercises to avoid total inactivity, or even access food or necessary medications.

Stress, limited access to regular, appropriate health care, including medically necessary prescription and physical therapies, among other factors, can lead to diminished health outcomes for all prisoners.<sup>174</sup> This is especially true for prisoners with physical disabilities. Prisoners with physical disabilities are particularly susceptible to worsening physical health while in prison,<sup>175</sup> as they are likely to “have particular health care needs

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174. See, e.g., Maurice Chamah, *Do You Age Faster in Prison?*, THE MARSHALL PROJECT (Aug. 24, 2015, 7:15 AM), [https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison?utm\\_medium=email&utm\\_campaign=sharetools&utm\\_source=email&utm\\_content=post-top#.HBxRJ3fLL](https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison?utm_medium=email&utm_campaign=sharetools&utm_source=email&utm_content=post-top#.HBxRJ3fLL); see also HANDBOOK ON PRISONERS WITH SPECIAL NEEDS, *supra* note 78, at 44 (“The difficulties people with disabilities face in society are magnified in prisons, given the nature of the closed and restrictive environment and violence resulting from overcrowding, lack of proper prisoner differentiation and supervision, among others. Prison overcrowding accelerates the disabling process, with the neglect, psychological stress and lack of adequate medical care, characteristic of overcrowded prisons.”).

175. See, e.g., Complaint at ¶¶ 6-8, *Fox v. Peters*, Civil Action No. 6:16-cv-01602-MC, ECF No. 1 (Aug. 8, 2016) (“Plaintiff entered the Oregon Department of Corrections in late 2010. On July 11, 2015, Plaintiff collapsed in his segregation cell at Two Rivers Correctional Unit. As a result he went into spinal shock, and suffers from a central cervical cord injury. Plaintiff is now physically paralyzed and uses a wheelchair for mobility. He has very limited use of his upper extremities, and no use of his lower extremities.”); see also Order 2, *Fox v. Peters*, Civil Action No. 6:16-cv-01602-MC, ECF No. 14 (Aug. 11, 2016), <https://docs.justia.com/cases/federal/district-courts/oregon/ordce/6:2016cv01602/128326/14> (“Upon beginning his prison term in 2010, Fox was an able-bodied individual.”) (citation omitted)(footnote omitted). (Due to the neglect of prison officials, Fox sustained injuries in July 2015.) (citation omitted). (While the cause of Fox’s injuries is likely disputed, no one disputes that Fox has severe limitations with mobility.”)).

related to their disability, such as physiotherapy, regular eyesight and hearing examinations and occupational therapy.”<sup>176</sup>

Prisoners with physical disabilities held in solitary confinement are often denied access to the very physical and pharmacological therapies that will help them maintain their health or prevent physical deconditioning. This type of care is difficult to obtain while incarcerated—but the difficulties multiply when prisoners are placed into solitary confinement. For example, a stroke survivor will typically require regular physical, occupational, and speech therapies in order to fully recover from a stroke.<sup>177</sup> Similarly, people with quadriplegia will need specific prescription regimens and routine physical therapies in order to maintain healthy living. Yet, strict schedules in solitary confinement result in disrupted treatment plans where corrections officials refuse to modify schedules to allow these prisoners with mobility-related disabilities to take medications at specific times.

Doctors and health care professionals agree that solitary confinement is harmful to one’s physical health. The National Commission on Correctional Health Care (NCCHC) has explicitly acknowledged the adverse physical health effects of prolonged solitary confinement. The NCCHC observed that:

The inherent restriction in meaningful social interaction and environmental stimulation and the lack of control adversely impact the health and welfare of all who are held in solitary confinement. . . . The World Health Organization (WHO), United Nations, and other international bodies have recognized that solitary confinement is harmful to health. The WHO notes that effects can include gastrointestinal

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176. HANDBOOK ON PRISONERS WITH SPECIAL NEEDS, *supra* note 78, at 46; *see also* Memorandum & Order on Plaintiff’s Motion for Preliminary Injunction at 5, *Reaves v. Dep’t of Corr.*, 195 F.Supp.3d 383, 4 (D. Mass. 2016) (“Reaves’s condition has significantly deteriorated during his twenty years of incarceration. When he was in rehabilitation shortly after his injury, he was able to shave the left side of his face, brush his teeth, and feed himself. He could sit in a wheelchair and take a shower on a shower stretcher. Now, he is unable to do any of those things. His hip and knee joints are frozen and can no longer be bent to sit in a wheelchair, while his elbows cannot be unlocked from a bent position. He cannot open his hands and fingers from clenched fists. The skin on his legs is susceptible to long-lasting open wounds and requires daily care and bandaging. He is underweight. He testified that his condition continued to worsen during his most recent stay at SBCC, during which he lost weight, muscle tone, and flexibility in his lower extremities, and incurred increased tightness in his arms and left wrist. He testified that he does not understand what it means to be ‘healthy’ as a quadriplegic.”).

177. *See, e.g.*, Letter from A.C., prisoner, to author (Jun. 22, 2016) (on file with author) (reporting that he was not offered any physical therapy after he had a stroke on Aug. 29, 2015). A.C. has not provided permission to be identified.

and genitourinary problems, diaphoresis, insomnia, deterioration of eyesight, profound fatigue, heart palpitations, migraines, back and joint pains, weight loss, diarrhea, and aggravation of pre-existing medical problems.<sup>178</sup>

Failure to meet the important health care needs of people with disabilities can result in deconditioning, such as the loss of physical fitness or muscle due to limited exercise. In some cases, failure to respond to the health care needs of people with disabilities, even in the short-term, can lead to death.<sup>179</sup>

### C. *Short Stays in Solitary Confinement Can be Harmful*

Even short stints in solitary confinement can lead to serious physical consequences for people with disabilities. Dean Westwood has quadriplegia. He relies on a motorized wheelchair to ambulate and a host of assistive devices to maintain healthy living and prevent physical decline. Dean reports that while being booked into an Oregon jail, he was rough-handled by jail staff, pulled from out of his wheelchair, and dressed in clothes that were approximately three times smaller than his normal clothing size. Following the booking process, he was placed alone in a cell and denied access to his anti-spasm prescription medications, as well as medications to prevent him from urinating on himself, for approximately 48 hours.

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178. NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, *supra* note 147.

179. For example, people with quadriplegia may be at risk of death due to a condition known as autonomic dysreflexia, particularly if they are rough handled, placed into tight clothing, or subjected to other mistreatment that leads to over stimulation in the area of the body that is below the spinal cord injury. Autonomic dysreflexia is a common and dangerous side effect of spinal cord injuries:

Autonomic dysreflexia means an over-activity of the Autonomic Nervous System. It can occur when an irritating stimulus is introduced to the body below the level of spinal cord injury, such as an overfull bladder. The stimulus sends nerve impulses to the spinal cord, where they travel upward until they are blocked by the lesion at the level of injury. Since the impulses cannot reach the brain, a reflex is activated that increases activity of the sympathetic portion of autonomic nervous system. This results in spasms and a narrowing of the blood vessels, which causes a rise in the blood pressure. Nerve receptors in the heart and blood vessels detect this rise in blood pressure and send a message to the brain. The brain sends a message to the heart, causing the heartbeat to slow down and the blood vessels above the level of injury to dilate. However, the brain cannot send messages below the level of injury, due to the spinal cord lesion, and therefore the blood pressure cannot be regulated. *Other Complications of Spinal Cord Injury: Autonomic Dysreflexia (Hyperreflexia)*, LOUIS CALDER MEM'L LIBRARY, UNIV. OF MIAMI/JACKSON MEM'L MED. CTR., <http://calder.med.miami.edu/pointis/automatic.html> (last visited Oct. 17, 2016).

The combination of the rough handling by staff, tight clothes, and lack of medications resulted in Dean experiencing autonomic dysreflexia. Autonomic dysreflexia occurs when the nervous system goes into overdrive due to the presence of an irritating stimulus in areas of the body that are paralyzed and if untreated may result in a stroke or heart attack. Dean began to experience violent seizures and urinated on himself. For nearly 48 hours, Dean endured painful muscle spasms alone in an isolation cell in the jail infirmary, where he was placed flat on his back on a bed that neither contained a slide board nor a hooyer lift, an assistive device that would have allowed Dean to get onto and off of the bed. Only after repeated complaints to corrections and medical staff was Dean finally able to receive his prescription medications to end the painful seizures.

In total, Dean reports that he remained in virtual isolation for a total of 6-7 days, where he was confined to his cell for 24 hours per day, while Oregon state prison officials worked to find a facility to place him. Dean was not provided with any materials to occupy the time and states that the only human interaction he had was with corrections staff, and even then, those interactions were rare. For Dean, the experience in isolation resulted in an “incalculable mental toll” that continues to trouble him to this day.<sup>180</sup>

### 1. Architectural Barriers in Facilities

Architectural barriers<sup>181</sup> to access are magnified in solitary confinement. Wheelchairs are often too large to fit inside isolation cells, which are

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180. Telephone Interview with Dean Westwood, formerly incarcerated, Diversity and Inclusion Consultant (July 20, 2016).

181. Architectural barriers include things like narrow hallways or doorways; stairs not equipped with handrails; showers, toilets, or cells that do not include grab bars; uneven or jagged floor surfaces; protruding objects on walls or floors; high food counters or sinks; and door knobs that require full-fisted twisting, pushing, or pulling. Architectural barriers may make it difficult for prisoners to access prison cells, recreation yards, showers, sleeping areas, particularly when no other accommodations, such as assistive devices or staff support, are provided to the prisoner to facilitate access through other means. *See, e.g., Disability & Health Needs in a State Prison System, supra* note 106 (describing prisoner in Northwest State Correctional Facility—St. Albans who reported that, following a stroke that rendered him partially paralyzed, he was not provided with access to grab bars in the shower). These barriers have exposed prisoners with physical disabilities to a heightened risk of physical harm and some have sustained serious injuries.

A review of reports, court cases, and stories from advocates reveal that many prison facilities remain inaccessible to wheelchair users. *See, e.g., Phipps v. Sheriff of Cook Cnty.*, 681 F. Supp. 2d 899, 904 (N.D. Ill. 2009) (noting allegations by plaintiffs who were wheelchair users and were denied access to showers, toilets, and sinks, and as



typically no larger than the size of an average bathroom. Even in cases where a wheelchair could pass through the front door of an isolation cell, once inside the cell, a wheelchair user will likely be unable to maneuver within the cell.<sup>182</sup> Moreover, even where wheelchairs could fit within isolation cells, prison officials have banned wheelchairs where they have decided that having a wheelchair, or another assistive device, such as a walker or cane, poses a security risk. Such security policies can result in prisoners with physical disabilities who rely on assistive devices having absolutely no accommodations that will enable them to move around their cell while held in solitary. Finally, because prisoners in solitary have such limited time outside, architectural barriers can keep them inside of their cells even where permitting to leave for brief shorts or excursions to the “recreation” yard or cell.

Court cases have captured horrific allegations by prisoners with mobility-related disabilities in solitary confinement. In one case, Tony Goodman

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a result were unable to maintain proper hygiene, developing bed sores and rashes); *see also* Casey, *supra* note, 52 at 1575, (noting that the cell door was too narrow to fit a wheelchair in the units in Florence’s Central Unit in Arizona); *ADA/Section 504 Design Guide: Accessible Cells in Correctional Facilities*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION 1 (last visited Sept. 27, 2016), [http://www.ada.gov/accessible\\_cells\\_pt.pdf](http://www.ada.gov/accessible_cells_pt.pdf) [hereinafter *ADA/Section 504 Design Guide*] (“[M]any correctional facilities do not have enough cells that are accessible to inmates with disabilities.”). The Design Guide also notes that security is not compromised by making cells accessible to wheelchair users: “Accessible cells do not compromise the security of prison personnel. In fact, having accessible cells increases security because they allow inmates with mobility disabilities to function independently, minimizing the need for assistance from guards.”

The lack of physical access to prison facilities poses a real danger and raises the risk of potentially serious injuries to prisoners with physical disabilities. *See, e.g.*, *Johnson v. Hardin Cnty.*, 908 F.2d 1280, 1282-84 (6th Cir. 1990) (alleging injury due to fall from elevated and inaccessible shower). In Texas, Blind and low vision prisoners at the Estelle Unit brought suit against the Texas Department of Criminal Justice after several prisoners alleged suffering injuries on account of their cells being improperly suited to house persons with visual disabilities. *See* Complaint at ¶¶ 27-34, 47, 58-60, 66, *Wilson v. Livingston*, Civil Action No. 4:14-1188 (Jan. 26, 2015). Inaccessible features, such as overhead lockers, made it such that blind or low vision prisoners were forced to climb up to reach important legal documents or medications, predictably leading to injury. Such injuries likely could have been avoided if blind and low vision prisoners had been placed in units with proper accommodations, such as units with lockers located on the ground, and provided with other assistance.

182. *See, e.g.*, Rachael SeEVERS, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, DISABILITY RIGHTS WASHINGTON 16-17 (June 22, 2016), <http://www.disabilityrightswa.org/making-hard-time-harder>.

“claimed that he was confined for 23–to–24 hours per day in a 12–by–3–foot cell in which he could not turn his wheelchair around.”<sup>183</sup> Goodman also alleged that he was “unable to use the toilet and shower without assistance,” “injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own,” and as a result, was “forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste.”<sup>184</sup> In another case, Jerome Crowder, a federal prisoner, alleged that while in administrative detention, he was unable to use his wheelchair to ambulate in his cell, which led to bedsores and muscular discomfort.<sup>185</sup> Phillip Jaros, who used a walking cane to move around, alleged that he was able to take only four showers per month because the showers at the facility where he resided did not have grab bars and he feared injury.<sup>186</sup>

Even more troubling is that, though contrary to federal disability law, prisons and jails have placed people with disabilities into solitary confinement because accessible cells were not available. As explained in further detail below, the law requires that accessible cells be provided at every security classification or custody level.<sup>187</sup> In practice, this means that prison officials may not hold prisoners with low security classifications in cells that are located in higher security units, simply because those are the only units with cells that can fit wheelchairs. Despite this mandate, not all prison facilities have accessible cells to accommodate prisoners who use wheelchairs at every security level.<sup>188</sup> And some corrections officials have placed prisoners with disabilities into solitary confinement because cells in less restrictive housing that could safely hold these prisoners were not readily available.

The allegations in a recent court complaint demonstrate this problem. Due to a spinal cord injury, Richard Trevino required a wheelchair to move around, along with readily available diapers to manage his incontinence.<sup>189</sup>

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183. *See, e.g.*, *United States v. Georgia*, 546 U.S. 151, 155 (2006).

184. *Id.*; *see also* *Bradley v. Puckett*, 157 F.3d 1022, 1024 (5th Cir. 1998) (alleging that prison officials denied prisoner access to a shower for months, forcing him to wash up with toilet water, which led to a fungal infection).

185. *Crowder v. True*, No. 91 C 7427, 1993 WL 532455, at \*1 (N.D. Ill. Dec. 21, 1993).

186. *Jaros v. Illinois Dep’t of Corr.*, 684 F.3d 667, 669 (7th Cir. 2012).

187. 28 C.F.R. § 35.152(b) (2010).

188. *See, e.g.*, *Crayton v. Hedgpeth*, No. C 08-00621 WHA (PR), 2013 WL 4496714, at \*2 (E.D. Cal. Aug. 22, 2013) (alleging that plaintiff fell multiple times while in his cell in solitary confinement because it was not equipped with grab bars).

189. *Trevino v. Woodbury Cty. Jail*, No. C14-4051-MWB, 2015 WL 300267, at \*1, \*2 (N.D. Iowa Jan. 22, 2015), *report and recommendation adopted*, No. C14-4051-

Trevino was placed in solitary confinement because the Woodbury County Jail where he was booked did not have any cells that could fit his wheelchair.<sup>190</sup> The facility also did not have any guardrails to allow safe movement around his cell and did not have any assistive apparatus, such as a hoist or transfer board, which would allow for Trevino to safely transfer himself into and out of his wheelchair.<sup>191</sup> The toilet and showers in the jail were similarly inaccessible and did not have guard rails, chairs, or other accommodations to ensure Trevino's safe use.<sup>192</sup> Trevino's cell was also not equipped with an emergency call button to allow Trevino to communicate with staff during emergencies.<sup>193</sup> In fact, staff largely ignored Trevino's request for clean clothes or access to showers, refusing to provide Trevino with a container to house his soiled diapers, which caused his cell to reek with a strong odor.<sup>194</sup> Prison authorities denied Trevino access to programming and prevented him from communicating with other prisoners.<sup>195</sup> Isolated and mistreated, Trevino became depressed and started cutting himself.<sup>196</sup>

## 2. Self-Care

Certain physical disabilities may limit one's ability to engage in self-care and tend to personal hygiene needs. For example, prisoners with ambulatory disabilities may require assistance and support from health care professionals, or trained corrections staff, to engage in daily tasks, such as showering, dressing, or relieving oneself. The need for assistance with self-care may be temporary or long-term depending on the nature of the disability. For instance, prisoners with quadriplegia, or paraplegia, may have specific medical needs that require regular access to clean medical equipment, such as colostomy and/or urostomy bags that remove urine and other waste in cases where the colon or bladder is no longer functional.<sup>197</sup> Without

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MWB, 2015 WL 2254931 (N.D. Iowa May 13, 2015), *aff'd per curiam*, No. 15-2179 (8th Cir. Dec. 1, 2015).

190. *Id.* at \*1.

191. *Id.*

192. *Id.*

193. *Id.* at \* 2.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See generally* Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) (denying defendant's motion to dismiss detainee's ADA claims where he alleged jail officials denied him access to sufficient water to take his medications to sustain his kidney functioning and refused to provide him with any soap and enough water to clean his hands when he changed his colostomy and urostomy bag).

accessible facilities and assistance from health care professionals, or corrections staff, people with disabilities often struggle to meet these basic needs in prisons and jails.<sup>198</sup>

In solitary confinement, there are limitations on the number and kinds of property that prisoners may keep in their cells. In addition, prisoners have limited access to medical personnel and assistance from correctional staff. These restrictions are purportedly in place for safety and security reasons, but can create considerable challenges for persons who require regular access to sterile and durable medical equipment and supplies—catheters, pressure socks, colostomy bags, soap to cleanse after handling colostomy bags—to properly perform self-care. However, in some cases, access to clean medical equipment has been outright denied, or the equipment provided has been unsterile, improperly maintained, or otherwise not suitable for use.

a. *The Mark Gizewski Story: Denial of Access to Proper Assistance*

According to a lawsuit filed in 2014, Mark Gizewski was born with severe disabilities due to side effects of the drug Thalidomide, offered as an antidote to treat morning sickness among pregnant women.<sup>199</sup> The drug left Gizewski with hands that were missing fingers, deformities in his limbs, anal abnormalities that caused difficulties with bowel movement, and a left leg that was seven inches shorter than the right.<sup>200</sup> New York State correctional officials placed Gizewski into solitary confinement where he was denied access to necessary cleaning tools and denied the right to shower for

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198. *See, e.g.*, Bradley, 157 F.3d at 1024 (“[Prisoner Mondric Bradley] testified that, because of his disability, he needs assistance to dress and undress himself and that he needs a shower chair to prevent him from falling in the shower. He stated that after he was locked down, he complained about his inability to clean himself, but that the prison officials ignored his complaint. Bradley testified that in order to clean himself he used the toilet in his cell, which ultimately gave him a fungal infection and blisters. He stated that after he came down with the infection and after several complaints, his infection was treated and officials began to take him to the medical clinic to use the bathtub and special shower facilities. Bradley testified that he had gone several months without being able to clean himself before he was provided with the opportunity to bathe.”).

199. Complaint at ¶ 12, *Gizweski v. New York State Dep’t of Corr. & Cmty. Supervision*, Civ. Action No. 9:14-cv-124 (N.D.N.Y. Feb. 4, 2014) [hereinafter *Gizweski Complaint*]; *see also* James Ridgeway, *Severely Disabled Man Sues New York State Prisons for Neglect, Abuse*, SOLITARY WATCH (Mar. 27, 2014), <http://solitarywatch.com/2014/03/27/severely-disabled-man-sues-new-york-state-prisons-neglect-abuse/>.

200. *Gizewski Complaint*, *supra* note 204, at ¶ 13.

approximately six days.<sup>201</sup> Gizewski complained that prison staff denied him access to proper pain medications to handle his chronic pain,<sup>202</sup> denied him an accessible shower and shower brush to allow him to properly clean himself,<sup>203</sup> and refused to replace his prosthetic leg that was too big.<sup>204</sup> Prison authorities also refused to provide Gizewski with a light-weight wheelchair, and instead placed him in a heavy wheelchair, which proved difficult to maneuver due to his missing limbs.<sup>205</sup>

### 3. Disrupted Medical Therapies

In solitary confinement, prisoners often have limited access to necessary medical care. Most importantly, staffing shortages and limited budgets across correctional systems have resulted in egregious denials of appropriate medical care.<sup>206</sup> Beyond this, medical therapies are often disrupted in solitary confinement.<sup>207</sup> Prisoners with disabilities may also come to prison with specific medications and schedules for taking those medications, which are necessary to ensure the efficacy of a particular treatment program. However, prisoners are usually not permitted to keep prescription drugs with them at all times and may only access these prescription drugs at certain times. When it is time to access prescription drugs, medical staff will often come by and observe the prisoner ingest the prescription drug.

Such stiff schedules and regulations can pose barriers to optimal therapeutic outcomes for prisoners with physical disabilities. For example, certain prisoners may require prescription medications to assist with chronic muscle pain. The optimal time to take those prescription drugs may be immediately prior to bed time. However, that particular prison facility may have policies and/or practices that allow for medication distribution only during normal business hours—9 a.m. to 5 p.m.—and may not allow the

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201. *Id.* ¶¶ 67-70.

202. *Id.* ¶ 23.

203. *Id.* ¶ 15.

204. *Id.* ¶¶ 24-25.

205. *Id.* ¶¶ 16, 38, 50.

206. *See, e.g.,* Danny Robbins, *Women's deaths add to concerns about Georgia prison doctor*, ATLANTA J. CONST., <http://investigations.myajc.com/prison-medicine/womens-deaths-add-concerns/> (last visited Oct. 17, 2016).

207. *See, e.g.,* *Hightower v. Tilton*, No. C08-1129-MJP, 2012 WL 1194720, at \*3 (E.D. Cal. Apr. 10, 2012) (“Following his assignment to Ad-Seg, his seizure, heart, pain, and stomach medications were confiscated; no replacement medications were issued for several days. A month later, his medications were confiscated again.”); *Torres v. Doe*, No. 2377 C.D. 2010, 2011 WL 10858421, at \*1 (Pa. Commw. Ct. Aug. 2, 2011) (prisoner alleged being denied access to asthma medications while in the restricted housing unit).

prisoner a modification to the policy to accommodate that circumstance.<sup>208</sup> Thus, that prisoner would not be allowed to take his prescription medications at the optimal time. Without modifying the prisoner's specific medical regimen to accommodate the schedule change, prison authorities can seriously disrupt the prisoner's treatment program, which may lead to deleterious health effects.<sup>209</sup>

#### 4. Limited to No Physical Activity

Exercise is vital for the physical health of all people.<sup>210</sup> Limited to no physical activity contributes to a whole host of adverse health outcomes, including decreased muscle mass and strength (deconditioning),<sup>211</sup> osteoarthritis in older adults,<sup>212</sup> and increased risk of developing or worsening hypertension, as well as other diseases, such as cardiovascular disease, heart failure, kidney disease, and even death.<sup>213</sup>

Prisoners with disabilities require regular exercise to maintain overall health or prevent a decline in their physical health.<sup>214</sup> For instance, prisoners

208. For example, a detainee in county jail raised a similar type of claim alleging that even though he took his "pain medications at least four times per day to treat nerve damage in his back," the jail where he was housed failed to provide him with the pain medications at the appropriate time. Civil Class Action Complaint for Declaratory & Injunctive Relief ¶ 97, *Hernandez v. Cnty. of Monterrey*, Civil Action 13-02354 (May 23, 2013), available at <http://www.clearinghouse.net/chDocs/public/JC-CA-0107-0001.pdf> [hereinafter *Hernandez Complaint*].

209. Interview with Dean Westwood, formerly incarcerated, Diversity and Inclusion Consultant (Feb. 26, 2016).

210. Courts have recognized that regular physical exercise is vital for physical health. *See, e.g., Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983) ("Inmates require regular exercise to maintain reasonably good physical and psychological health."). Denying prisoners access to physical exercise can violate the Eighth Amendment. *See, e.g., Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("[C]onfinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment.").

211. Dr. Brie Williams Expert Report, *supra* note 147, at 4 ("Leading causes of deconditioning include prolonged bed-rest and the absence of regular physical activity.").

212. Dr. Brie Williams Expert Report, *supra* note 147, at 9 ("Physical inactivity exacerbates disability in osteoarthritis patients.").

213. Dr. Brie Williams Expert Report, *supra* note 147, at 9-10.

214. *See, e.g., HELL IS A VERY SMALL PLACE* 94 (Jean Casella et al. eds., 2016). Herman Wallace spent 41 years in solitary confinement. He died three days after his release from prison. John Schwartz, *Herman Wallace, Freed After 41 Years in Solitary, Dies at 71*, N.Y. TIMES (Oct. 4, 2013), [http://www.nytimes.com/2013/10/05/us/herman-wallace-held-41-years-in-solitary-dies-at-71.html?\\_r=0](http://www.nytimes.com/2013/10/05/us/herman-wallace-held-41-years-in-solitary-dies-at-71.html?_r=0).

with mobility-related disabilities require regular access to physical exercise to maintain proper physical functioning and prevent muscular atrophy, decubitus ulcers, or other problems.<sup>215</sup>

However, even though the benefits of regular access to physical exercise are well-known, prisoners held in solitary confinement have been denied regular access to physical activity. Prisoners typically have limited time out of their cells and little access to outdoor recreation, if any. If outdoor recreation is available, it usually takes place in a small cage located on a yard that offers minimal protection from baking hot or freezing cold weather and limited access to seating and water. This may mean that prisoners must spend one to two hours outside in the freezing cold, or unbearably hot weather—sometimes without access to water, shaded areas, or benches to sit.<sup>216</sup>

These “recreation” cages are often inaccessible to people with disabilities. Recreational areas may be riddled with structural deficiencies—potholes in the asphalt, cracks in the concrete—all of which create barriers to persons who rely on mobility devices to ambulate. Wheelchairs may not fit into the small cages and persons who rely on assistive devices like walking canes may not be able to navigate the pathway to and from the recreation cages, particularly where the ground surface surrounding the recreation spaces are uneven, cracked, or otherwise create unnavigable barriers for people with disabilities. Furthermore, when assistive devices are confiscated for security reasons, prisoners with mobility-related disabilities are prevented from engaging in even therapeutic exercise.<sup>217</sup>

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215. *See, e.g.*, Lawson, 286 F.3d at 260 (“Lawson is a paraplegic who is paralyzed from the chest down. . . . Lawson was in good health when he entered the jail. However, without proper medical care paraplegics such as Lawson are at risk of developing decubitus ulcers, caused by unrelieved pressure on the body, which can be life-threatening. Various medical equipment and personal assistance used to prevent decubitus ulcers are part of basic medical training for doctors and nurses and are standard medical procedure in caring for paraplegics.”).

216. *See, e.g.*, Suppl. Expert Report of Brie Williams, M.D., M.S. 1, *Parsons v. Ryan*, No. 2:12-cv-00601-NVM (MEA) (D. Ariz. Sept. 8, 2014), available at <http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0026.pdf> (opining that exercise cages in the isolation units at the Arizona Department of Corrections were too small and provided no chairs or benches for sitting, no source of drinking water, and ventilation or cooling).

217. *See, e.g.*, *Bane v. Virginia Dep’t of Corr.*, No. 7:12-CV-159, 2012 WL 6738274, at \*1 (W.D. Va. Dec. 28, 2012) (“Because these items were confiscated, Bane allegedly had great difficulty maneuvering around the cell and could not perform the therapeutic walking exercises that eased the pain in his legs and prevented deterioration of his condition.”).

Recent court victories have resulted in prisoners in solitary confinement winning access to exercise and recreational facilities previously denied to them.<sup>218</sup> Prisoners with physical disabilities have also filed lawsuits challenging exclusion from exercise and recreational facilities. In one such case, Marc Norfleet, a wheelchair user housed in Menard Correctional Center, filed a lawsuit against the Illinois Department of Corrections for allegedly denying him regular access to exercise and recreational facilities, while at the same time “non-disabled inmates receive five to seven hours of exercise and recreation time a week.”<sup>219</sup> The appeals court reviewing Norfleet’s case found that he stated a claim for relief and vacated a district court judge’s decision dismissing the case.<sup>220</sup>

### 5. Physical Therapy

Prisoners with mobility-related disabilities may depend on regular access to physical therapy to maintain proper health and prevent muscular deconditioning. Routine physical therapy, ranging from once per week to multiple times per week, may be needed to prevent deformation of the legs or back.<sup>221</sup> In such cases, proper health care access is needed in order to prevent debilitation, or “further functional decline.”<sup>222</sup>

For example, one advocate reported that her client required routine physical therapy to rehabilitate muscles damaged by a gunshot wound and to regain his ability to walk short distances. Despite requests to prison offi-

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218. See, e.g., Susan Greene, *Legal Settlement Ends Colorado’s Practice of Denying Inmates Fresh Air*, COLO. INDEP. (July 5, 2016), <http://www.coloradoindependent.com/160085/colorado-settlement-inmates-fresh-air> (describing settlement with Colorado Department of Corrections that requires the state to provide prisoners at Colorado State Penitentiary and Sterling Correctional Facility with access to outdoor exercise facilities); *Peoples Settlement Agreement*, supra note 16, at 21 (“DOCCS will ensure that even under the most restrictive form of disciplinary housing, 16 and 17 year-old inmates shall, 5 days per week (excluding holidays), be offered out-of-cell programming and outdoor exercise, limiting time in their cells to 19 hours a day, except in exceptional circumstances referred to Central Office.”).

219. *Norfleet v. Walker*, No. 3:09-cv-00347-JPG-PMF, 2011 WL 55772834, at \*1 (S.D. Ill. Nov. 16, 2011).

220. *Norfleet v. Walker*, 684 F.3d 688, 691 (7th Cir. 2012).

221. See, e.g., Hilde Haualand, *Punished and Isolated: Disabled Prisoners in Norway*, 17 SCANDANAVIAN J. OF DISABILITY RESEARCH 74, 78 (2015), available at [https://www.researchgate.net/publication/265914027\\_Punished\\_and\\_isolated\\_disabled\\_prisoners\\_in\\_Norway](https://www.researchgate.net/publication/265914027_Punished_and_isolated_disabled_prisoners_in_Norway) (describing story of prisoner who required regular physical therapy to prevent deformation but did not receive physical therapy for the first five months of incarceration and only received treatment once every several weeks after that).

222. *Id.*



cials, her client struggled to obtain proper physical therapy. After he ended up in segregation, the physical therapy abruptly stopped for months.<sup>223</sup>

### C. *Rehabilitative Harms*

When held in solitary confinement, prisoners with physical disabilities are often prohibited from participating in any rehabilitative programming, even educational and vocational programs and activities. However, even in those corrections systems where limited access to rehabilitative programming is offered to prisoners in solitary confinement, architectural barriers prevent prisoners who rely on assistive devices from even accessing the physical location where programs and services are held. Prisoners may also be effectively excluded from these programs if they are not provided with assistive devices to allow them to ambulate in the certain areas of the facility where such programs are held, with or without the assistance of custodial staff. Moreover, materials and communications provided in rehabilitative programs are seldom provided in a format that all persons with sensory disabilities can understand.

By failing to provide people with disabilities with reasonable accommodations, or by failing to remove the architectural barriers that may keep them out of designated program areas, prison authorities have effectively barred them from participating in rehabilitative programs. As a result, these prisoners languish behind bars in a state of idleness, unable to engage in rehabilitative programming designed to offer mental stimulation and constructive activity. Locked away and locked out of opportunities to engage in constructive activity, or maintain contact with the outside world, the sensory and social deprivation experienced by these prisoners is magnified, leaving them in an environment of near total isolation. This exclusion is contrary to the purpose and aims of the ADA and other laws protecting the rights of people with disabilities.

Brian Follmer is a prisoner with neuropathy, which causes pain and weakness, limiting his ability to walk.<sup>224</sup> While incarcerated, Follmer has relied on a cane, wheelchair, and wheelchair assistant to move around the facility.<sup>225</sup> After being transferred to Santa Rosa Correctional Institution in Florida, Follmer was placed into solitary confinement and prison authorities confiscated his wheelchair.<sup>226</sup> Over Follmer's objections, prison authorities provided Follmer with a walker, which Follmer claimed worsened his con-

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223. Telephone Interview with Maggie Filler, Staff Attorney, Prisoners' Legal Services of Massachusetts (October 15, 2015).

224. Disability Rights Florida Complaint, *supra* note 1, ¶ 340.

225. *Id.*

226. *Id.* ¶ 341.

dition.<sup>227</sup> Without his wheelchair, Follmer has had difficulty participating in services and activities offered by the prison, including mental health groups offered to prisoners.<sup>228</sup>

D. *Solitary Confinement Inflicts Acute Harms on Prisoners with Sensory Disabilities*

In solitary confinement, there is often little to no access to natural light. Some solitary confinement cells have no windows. Artificial lights can be kept on for 24 hours a day. Most cells have a solid steel door with a narrow viewing window and small slot. Communication is highly curtailed, mainly occurring through these small slots designed for food trays, passing mail or medications, or cuffing prisoners prior to them exiting their cells. These harsh and isolating conditions are especially harmful for prisoners with sensory disabilities who experience profound and heightened isolation due not only to the sensory and social deprivation experienced by all prisoners subjected to solitary, but also because they face huge barriers to meaningful communication in correctional environments.

1. Deaf and Hard of Hearing Prisoners

Solitary confinement inflicts acute harms on prisoners who are deaf or hard of hearing. Deaf and hard of hearing people make up a significant portion of state prisoners. Research estimates that “between 35 and 40 percent of all inmates experience some degree of hearing loss, including 13 to 20 percent with significant hearing loss.”<sup>229</sup>

Deaf prisoners frequently find themselves isolated and marginalized in correctional institutions due in part to misconceptions about deaf culture and communication barriers caused by the failure on the part of corrections systems to ensure effective and meaningful communications between deaf prisoners and corrections staff, health care providers, and where permitted, visitors, including family and friends.

Language barriers pose considerable communication challenges. There is a low literacy rate among deaf individuals. Only “[a]bout 10 percent of the deaf school age population grows up to be literate adults reading at the tenth grade or above.”<sup>230</sup> Studies indicate that approximately 30% of

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227. *Id.* ¶ 342.

228. *Id.* ¶ 344.

229. *Inmates with Physical Disabilities*, *supra* note 101, at 15.

230. Jean Andrews et al., *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, J. OF INTERPRETATION 9, 12 (2007), <http://njdc.info/wp-content/uploads/2014/10/Bill-of-Rights-Due-Process-and-the-Deaf-Suspect-Defendants-JOI-2007.pdf>.

deaf persons who finish school at age 18 or above read at a 2.8 grade level or below—or are otherwise functionally illiterate.<sup>231</sup> Moreover, approximately 60% of deaf adults have a 3rd- to 4th-grade reading comprehension level.<sup>232</sup>

In correctional institutions, these low literacy rates are compounded by other language deficiencies, such as “difficulty with all or part of language including grammar, syntax, vocabulary, the social use of language, and using communication effectively.”<sup>233</sup> This results in a disproportionately high rate of people with language deficits in prisons, jails, and juvenile centers.<sup>234</sup>

That said, for many deaf people, American Sign Language is their primary language. American Sign Language is a “visual language” through which the “brain processes linguistic information through the eyes,” and where the “shape, placement, and movement of the hands, as well as facial expressions and body movements, all play important parts in conveying that information.”<sup>235</sup> Deaf people use their eyes to collect and process information in the same way hearing people use their ears.<sup>236</sup> Some studies have even found that deaf people have enhanced vision.<sup>237</sup> In this way, sighted deaf people rely on vision to communicate with the outside world. Vision is therefore a vital communication tool for sighted deaf people.

The bleak and highly-restrictive environment of solitary confinement strips sighted deaf prisoners of the opportunity to communicate with other human beings in any meaningful way. Prisoners who experience hearing

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231. *Id.*

232. *Id.*

233. Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. OF JUV. L. & POL'Y 37, 48 (2011), <http://jjlp.law.ucdavis.edu/archives/vol-15-no-1/LaVigne%20and%20Rybroek.pdf>.

234. *Id.* at 96-97.

235. *What is American Sign Language?*, NAT'L ASS'N OF THE DEAF (last visited Oct. 17, 2016), <https://nad.org/issues/american-sign-language/what-is-asl>. It is also important to recognize that American Sign Language is a language distinct from English. Just as it would be impossible for a non-Portuguese-speaker to try to understand a Portuguese-speaker by lip reading, it will also be impossible for a deaf person who does not understand English to try to use lip reading to understand an English-speaker. Lip reading, which is challenging even for individuals who speak the same language, is therefore a highly ineffective way of communicating with deaf prisoners.

236. Interview with Talila A. Lewis, Founder and Executive Director of HEARD (Nov. 18, 2015) (on file with author).

237. See, e.g., Laura Sanders, *Being Deaf Can Enhance Sight*, WIRED (Oct. 11, 2010, 12:10 PM), <http://www.wired.com/2010/10/deaf-sight-enhancement/>.

loss while incarcerated may face particularly harsh conditions in solitary confinement as they:

“may feel even more isolated than other inmates experiencing the same conditions of confinement, since those in isolated confinement with [typical] hearing may be able to have informal conversations by yelling, whereas this opportunity may not be available to those who are [deaf or hard of hearing].”<sup>238</sup>

Beyond this, deaf prisoners most likely arrive at prisons already having experienced social isolation. Researchers have discovered that “[deafness] is . . . a significant contributor to social isolation,” and “[e]ven mild hearing loss can impair language processing, negatively affecting health care access and use and leading to changes in cognitive and emotional status.”<sup>239</sup> Furthermore, in a typical isolation cell, there is almost no visual stimulation. Cell walls are gray, windowless, concrete and steel-enforced spaces with few air vents. As a result, deaf or hard of hearing persons in solitary are left without the ability to engage their sense of sight, occupy their minds, and connect with the outside world. Taken together, all of these factors can contribute to a heightened sense of isolation for deaf prisoners and make it so solitary confinement is experienced much more intensely.

Finally, communication barriers pose huge challenges for deaf people held in solitary confinement and can further marginalize them in correctional environments. Without accommodations like sign language interpreters, deaf prisoners will be left absolutely isolated, resulting in what some advocates refer to as a “prison in a prison.”<sup>240</sup> Isolation and communication barriers will severely undermine deaf prisoners’ ability to adapt and survive the harsh conditions of prison life. This inability to adapt to the harsh conditions of prison life can lead to tragic results. In one case, a twenty-three-year-old deaf man committed suicide after being held in solitary confinement for one month during which he was denied access to a sign language interpreter.<sup>241</sup>

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238. Dr. Brie Williams Expert Report, *supra* note 147, at 11.

239. Dr. Brie Williams Expert Report, *supra* note 147, at 10.

240. Talila A. Lewis, *#DeafInPrison Campaign Fact Sheet*, HEARD 1 (June 26, 2014), <http://www.behearddc.org/images/pdf/deafinprison%20fact%20sheet%20.pdf>.

241. *See* Second Amended Complaint, *Ulibarri et al. v. City & Cnty. of Denver*, 07-cv-01814-WDM-MJW (D. Colo. Feb 25, 2008), *available at* <http://www.clearing-house.net/chDocs/public/DR-CO-0008-0006.pdf>; *see also* Philip A. Janquart, *Judge Order Relief for Deaf California Prisoners*, COURTHOUSE NEWS SERV. (June 7, 2013, 9:34 AM), <http://www.courthousenews.com/2013/06/07/58332.htm> (noting order by federal district court to California Department of Corrections and Rehabilitation to provide sign language interpreters to deaf prisoners in solitary confinement).

## 2. Blind or Low Vision Prisoners

Prisoners who are blind or low vision rely mainly on their sense of hearing to engage with the world around them. However, in solitary confinement, opportunities to interact and communicate with the outside world are severely limited. These harsh restrictions are particularly severe for blind or low vision prisoners who communicate primarily using hearing and speech. While in solitary confinement, blind or low vision prisoners are unable to regularly engage in verbal communications with other prisoners and have limited meaningful verbal communications with staff—save for the limited and superficial interactions at cell front. Beyond this, in solitary confinement the disorienting and jarring sounds—ranging from prisoners shouting, to industrial fans, to the loud banging sounds that cell doors make when opening and closing—are constant. Such exposure can result in auditory overload, clogging their only means for obtaining information from their surroundings with senseless cacophony.

Moreover, in correctional systems where prisoners in solitary confinement are allowed to occupy the day by reading books, writing, watching television, or participating in hobby craft, blind or low vision prisoners are denied the chance to engage in these constructive activities when they are not provided with auxiliary aids and services, such as audio books or captioned television, to facilitate meaningful participation. With few opportunities for mental stimulation, these blind and low vision prisoners face even harsher conditions in solitary confinement, which can lead to extreme idleness.

Finally, even for seeing prisoners, the austere conditions in solitary confinement may have adverse effects. Due to reduced reliance on eye sight inside the tiny spaces where prisoners in solitary confinement are held, seeing prisoners have even reported diminished eyesight after extended stays in solitary. Uzair Paracha described the experience as follows:

I had Lasik surgery a few years before my arrest and it went well. Yet my eyesight deteriorated threefold in the nine years I was in isolation. We couldn't see anything beyond a few feet in front of our doors and nothing at all from our window. . . . I met several prisoners who had to get prescription eyeglasses for the first time in their lives while in the SHU. I mentioned this to the ophthalmologist in ADX and he told me that having your entire world just a few feet away weakens the eyesight.<sup>242</sup>

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242. HELL IS A VERY SMALL PLACE, *supra* note 215, at 48-49; *see also* Joseph Stromberg, *The Science of Solitary Confinement*, SMITHSONIAN (Feb. 19, 2014), <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/>

### 3. Communication Barriers

In solitary confinement, prisoners are dependent on staff to meet a myriad of basic human needs. When issues or challenges arise, prisoners held in solitary confinement must have the ability to communicate their needs and concerns to corrections staff, particularly during critical encounters such as medical or mental health appointments and emergencies. Communication barriers can be particularly harmful—and magnified—in solitary confinement if corrections staff do not follow measures to ensure effective communications with all prisoners, especially prisoners with sensory disabilities.<sup>243</sup>

For example, in one case, a deaf prisoner alleged that he was placed into solitary confinement following an altercation with another prisoner.<sup>244</sup> Robin Valdez claimed that “he was unable to express himself to corrections officers during these incidents due to the lack of sign language interpreters.”<sup>245</sup> Valdez “testified that he had poor eye sight,” but required a sign language interpreter to communicate effectively.<sup>246</sup> Valdez alleged that he was sprayed with chemical agents on one occasion and was “unable to communicate his injuries to prison staff” and as a result, received no medical attention.<sup>247</sup> During the disciplinary hearing, Valdez also alleged that he was “required to sit in his cell without any way of knowing what was being said, and without any method of communicating his version of events to the hearing officers.”<sup>248</sup> Following the hearing he was found guilty of misconduct.<sup>249</sup> In the prison facility where Valdez was held, Vaughn Correctional Center in Delaware, there were allegedly “no policies for accommodating the needs of deaf inmates.”<sup>250</sup>

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?no-ist (“His eyesight also deteriorated to the point where he was nearly blind, though it’s gradually improved since he was released.”).

243. *See, e.g.*, Survey Responses from Five Deaf Prisoners, *supra* note 10, at 13 (“The public needs to know about [the] limitations Deaf [prisoners] face in [gaining] access to inmate programs & psychological services, needs for staff training for visual communication[,] our need for equal access to outside communication (TDD & Deaf Videophone), or difficulty in daily communication with correctional officers.”).

244. *Valdez v. Danberg*, 576 F. App’x 97, 98 (3d. Cir. 2014).

245. *Id.* at 99.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

In another case, William Pierce, a deaf person<sup>251</sup> held in the District of Columbia's Correctional Treatment Facility,<sup>252</sup> was awarded \$70,000<sup>253</sup> in damages after a jury found the jail liable for not providing Pierce with any accommodation for his hearing disability, denying him the ability to properly communicate for approximately 51 days. Pierce had alleged that he was denied access to sign language interpreter during critical interactions with medical staff and rehabilitative programs, including classes on anger management and graphic design for approximately 51 days.<sup>254</sup> After Pierce submitted multiple requests for an interpreter, he alleged that they retaliated against him by putting him in solitary confinement for two weeks.<sup>255</sup>

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251. The federal district court described Pierce's disability as follows:

Pierce can make sounds that are audible, but he cannot speak words, and American Sign Language ("ASL") is his native language. Pierce relies on ASL to communicate with others—either by interacting directly with other persons who are using ASL themselves, or through the use of a video conferencing device that involves a remote interpreter. Pierce cannot, and does not, use a traditional telephone; instead, he ordinarily uses ASL via videophone to communicate with hearing individuals. Moreover, because Pierce's proficiency in reading and writing English is far below that of a hearing person, he rarely writes notes and only uses cellphone texting to convey simple, short messages. Also, as with many deaf individuals, Pierce has limited lip-reading ability.

Mem. Op. 4-5, *Pierce v. Dist. of Columbia*, Civil Action No. 13-0134 (KBJ) (D.D.C. Sept. 11, 2015), available at <http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2013cv00134/158123/90/> [hereinafter *Pierce Memorandum Opinion*].

252. The Correctional Treatment Facility (CTF) is a subset of the D.C. Jail and is managed by a private entity, the Corrections Corporation of America. Only low to medium security detainees can be held at CTF.

253. Press Release, AM. CIV. LIBERTIES UNION OF THE NATION'S CAPITAL, *ACLU Victory in Deaf Rights Case* (May 12, 2016), <http://aclu-nca.org/news/aclu-victory-in-deaf-rights-case>; Spencer S. Hsu, *U.S. Jury Orders D.C. Corrections to Pay \$70,000 to Deaf Inmate in ADA Claim*, WASH. POST (May 11, 2016), [https://www.washingtonpost.com/local/public-safety/us-jury-orders-dc-corrections-to-pay-70000-to-deaf-inmate-in-ada-claim/2016/05/11/6bf30a0a-1797-11e6-9e16-2e5a123aac62\\_story.html](https://www.washingtonpost.com/local/public-safety/us-jury-orders-dc-corrections-to-pay-70000-to-deaf-inmate-in-ada-claim/2016/05/11/6bf30a0a-1797-11e6-9e16-2e5a123aac62_story.html).

254. Complaint at ¶¶ 15, 27, 46, *Pierce v. Dist. of Columbia*, 146 F. Supp. 3d 197 (D.D.C. 2015) (No. 13-0134), available at <http://aclu-nca.org/sites/default/files/docs/Pierce.1.complaint.pdf>.

255. *Id.* ¶¶ 30, 45. The federal judge presiding over the case found that the D.C. Jail was aware that Pierce was deaf, but made no attempt whatsoever to assess the nature and scope of Pierce's disability. Specifically, the court found that "no staff person ever assessed Pierce's need for accommodation or otherwise undertook to determine the type of assistance that he would need to communicate effectively with others during his incarceration." The court was emphatic in its conclusion that such conduct violated the ADA:

Prisoners with sensory and communication disabilities also reported being denied access to services and programs because they were not properly notified. Most—if not all—the services received by prisoners in solitary confinement take place within the confines of a cell. Services in prisons are often provided according to rigid schedules, especially for prisoners who are housed in solitary confinement. Prisoners are placed on rigid schedules by notifications—commands from staff, alarms, and other alerts. Failure to see or hear the alert signalling the start of a particular activity may mean losing out on the chance to participate. Given the volume of prisoners that must be served, failure to respond to a cue, alert, or alarm may mean that a prisoner does not receive the proper dosage of prescription drugs that day, misses a meal,<sup>256</sup> or exercise.

Yet, not all prisons notify prisoners in a manner that takes into account their sensory disability—especially in solitary confinement.<sup>257</sup> For example, Darren Morris, who is hard of hearing, sued Wisconsin prison officials for failing to accommodate his hearing disability. Morris, who was held in segregation at the Waupun Correctional Institution as of August 2006,

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[T]he District's employees and contractors did nothing to evaluate Pierce's need for accommodation, despite their knowledge that he was disabled. They did not ask Pierce what type of auxiliary aids he needed. They did not hire an expert to assess Pierce's ability to communicate through written notes or lipreading as opposed to sign language. They did not even consult the Department of Corrections' own policies to figure out what types of accommodations are ordinarily provided to inmates with hearing disabilities. Instead, they figuratively shrugged and effectively sat on their hands with respect to this plainly hearing-disabled person in their custody, presumably content to rely on their own uninformed beliefs about how best to handle him and certainly failing to engage in any meaningful assessment of his needs. This Court finds that, in so doing, the District denied Pierce meaningful access to prison services and intentionally discriminated against him on the basis of his disability in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

Pierce Memorandum Opinion, *supra* note 251, at 1-2.

256. *See, e.g.,* Jaros v. Ill. Dep't of Corr., 684 F.3d at 669, 671 (noting that prisoner missed meals due not being able to move fast enough to the cafeteria); Rainey v. County of Delaware, No.00-548, 2000 WL 10564556, at \* 5 (E.D. Pa. Aug. 1, 2000) (prisoner alleged that he missed meals on 15 occasions because his cell was the farthest distance from the cafeteria on the cell block and because he was unable to reach the cafeteria in time for meals).

257. For example, prisoners held in prisons run by the Illinois Department of Corrections brought suit challenging the Department's failure to provide emergency alarms in an accessible manner. *See* Class Action Complaint for Declaratory & Injunctive Relief at ¶¶ 3, 5, *Holmes v. Godinez*, 311 F.R.D. 177 (N.D. Ill. 2015) (No. 11-C-02961) (alleging that deaf and hard-of-hearing persons missed emergency alarms and other alerts for meals and visits due to IDOC's failure to accommodate deaf prisoners).



claimed that he missed meals, showers, recreation time, and medications because he could not hear the audio alerts that notified prisoners of meals, showers, and other important daily activities. At the time, Morris had only one functional hearing aid and could not always hear the auditory alerts.<sup>258</sup> After several days, DOC officials placed a placard in front of his door to note his hearing disability, but Morris still continued to miss meals.<sup>259</sup>

#### IV. FAILURES TO PROVIDE ACCOMMODATIONS AND ASSISTIVE DEVICES

When a person is incarcerated, every activity—and every minute of daily life—is monitored and controlled by prison authorities. Daily schedules control when a prisoner may eat, sleep, shower, visit with family, use the telephone, or attend educational programs. For prisoners with disabilities, proper accommodations and staff assistance and support are critical to ensure that they have the opportunity to participate in all aspects of prison life. For example, depending on the nature and type of disability, prisoners with mobility-related disabilities will be unable to engage in the full range of movements required for daily or routine tasks, such as dressing, or showering. Similarly, blind prisoners will be unable to write and submit grievances,<sup>260</sup> or participate in educational programs, where materials are not provided in Braille or text-to-audio formats. Without proper accommodations and assistance from corrections staff, prisoners with disabilities have been forced to rely on assistance from other prisoners.<sup>261</sup> In the best-case scenario, these prisoners may assist prisoners with disabilities out of kindness or compassion, or at worst, another prisoner might use assistance as a mechanism to later extort from the prisoner with a disability.

Prisoners are even more reliant on corrections staff to meet their basic human needs in solitary confinement. Each day, prisoners in solitary rely on corrections staff to escort them to showers, notify them of meals or medical appointments, and distribute legal and person mail. In solitary, most interactions take place at the front of each prisoner's cell, where prisoners re-

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258. *Morris v. Kingston*, 368 F. App'x 686, 688 (7th Cir. 2010).

259. *Id.*

260. *See, e.g.*, Amended Complaint at ¶¶ 32-47, *Blue v. Dep't of Public Safety & Corr. Servs.*, Civil Action No. 1:16-cv-00945-RDB (Sept. 6, 2016) (describing claims brought by class of blind prisoners who alleged that they were not provided with accessible materials for grievance forms and procedures).

261. For example, a blind or low vision prisoner may be forced to pay another prisoner to help write letters to family members or complete grievance forms. In solitary confinement, blind or low vision inmates may not even have that option as interaction with other prisoners can be limited or completely prohibited.

ceive important items such as meal trays and dosages for medications. Prisoners are typically required to get cuffed at the cell front—behind the back while standing with their hands through the narrow, cell-front slot—before they may be permitted to exit the cell for programming, outdoor recreation, or showers.<sup>262</sup>

Yet, for many persons with ambulatory disabilities, walking to the cell front door for these routine interactions is no simple task. Spinal cord injuries may render tasks such as walking or kneeling for handcuffing at the cell front door impossible, or nearly impossible, without serious pain or serious injury.<sup>263</sup> Without assistive devices or assistance, prisoners with disabilities may be hindered in their ability to move around, care for themselves, or engage in critical encounters at their cell front.<sup>264</sup>

The rigid schedules governing life in solitary confinement will exclude some prisoners with physical disabilities if facilities do not recognize and respond to their unique needs. In some cases, an appropriate response will require modifications to routine procedures and policies governing the daily activities of the prison to ensure that prisoners with disabilities are kept safe and have equal access to prison programs, activities, and services. In addition, prisoners with physical disabilities must have access to assistive devices in order to engage in routine activities such as showering, dressing, using the toilet, or simply moving around inside their cells. To ensure that prisoners with physical disabilities are able to participate in these tasks, prison authorities must provide proper wheelchairs, assistive devices—in good working condition—or other assistance.

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262. *See* Casey, 834 F. Supp. at 1575. (George Curly sued the Arizona Department of Corrections for failing to provide handrails that would ensure his safety while showering. Curly had an amputation below his knee and used a prosthetic device and crutches to move around. The Echo Unit in Tucson where Curly was held did not have any handrails in the shower stalls. As a result, on several occasions, Curly fell while showering and suffered injury. The Echo Unit eventually installed handrails).

263. *See, e.g.,* Bane v. Virginia Dep't of Corr., 2012 WL 6738274, at \*1 (W.D. Va. Dec. 28, 2012) (“Another effect of the increased security in Ad Seg is that whenever a prisoner is allowed to leave the cell—for example, for showers or recreation—he must kneel, with hands behind his back, facing away from the cell door so that prison staff can place him in restraints. Staff forced Plaintiff’s compliance with this requirement, despite Plaintiff’s protests that he had been exempted from kneeling by the VDOC Health Services Director. The kneeling allegedly caused Plaintiff great pain; in addition to the nerve damage in his legs, he suffers from osteoarthritis in the hips and knees.”).

264. *See, e.g.,* Lawson v. Dallas Cty., 286 F.3d 257, 260 (5th Cir. 2002) (noting that detainee often missed dressing changes for his ulcer wounds because he did not make it to the cell front door in time to receive care from the jail nurses).

However, not all prisons have provided the assistive devices and assistance required under law. Consequently, prisoners with mobility-related disabilities have brought lawsuits alleging that they have been forced to crawl around on the ground floor, hop on one leg, or endure serious pain just to engage in routine, daily activities.<sup>265</sup> Even where assistive devices have been provided, prison officials have confiscated them on the grounds that those devices pose a security risk and could be used as weapons.<sup>266</sup> Robert Dinkins sued the Missouri Department of Corrections challenging the adequacy of the medical services provided to him. After he was diagnosed with pernicious anemia, Dinkins alleged that prison officials failed to prescribe him appropriate treatment for the disease, resulting in paralysis below the waist.<sup>267</sup> Dinkins alleged that he began to experience “blackouts, weakness, and difficulty walking,” and alleges that he did not receive a proper examination for approximately six months.<sup>268</sup> Due to his worsening conditions, prison officials transferred Dinkins to the Transitional Care Unit and placed him in administrative segregation.<sup>269</sup> While in the Transitional

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265. See, e.g., Hernandez Complaint, *supra* note 208, ¶¶ 184-88 (alleging that Monterey County Jail failed to provide assistive devices such as walkers and canes to prisoners with ambulatory disabilities). The case settled on May 7, 2015. The settlement agreement includes provisions that require Monterey County Jail to provide persons with ambulatory disabilities with access to programming, including, but not limited to outdoor recreation, religious services, and educational classes. Settlement Agreement ¶ 31(l)(vi), Hernandez v. Cty. of Monterey, Civ. Action No. 13-2354 (May 7, 2015), <http://rbgg.com/wp-content/uploads/2015-05-11-Settlement-Agreement-Executed-by-All-Parties-in-Counterpart.pdf>.

266. See, e.g., Defreitas v. Montgomery Cty. Corr. Facility, 525 F. App'x. 170, 172 (3d Cir. 2013) (prohibiting prisoner from bringing crutches to the general population yard, gym, and weight room when other prisoners were present); Johnson v. Snyder, 444 F.3d 579, 582 (7th Cir. 2006), *overruled on other grounds by* Hill v. Tangherlini, 724 F.3d 965 (7th Cir. 2013) (permitting prisoner to use a crutch, but only if he agreed to be housed in administrative segregation); Kiman v. New Hampshire Dep't of Corr., 451 F.3d 274, 285-86 (1st Cir. 2006) (confiscating cane during stay in maximum security facility); Serrano v. Francis, 345 F.3d 1071, 1078 (9th Cir. 2003) (denying use of wheelchair in administrative segregation); Evans v. Dugger, 908 F.2d 801, 802 (11th Cir. 1990) (confiscating prisoner's braces, crutches, orthopedic shoes, and other personal items, permitting only the use of a wheelchair); *Bane*, 2012 WL 6738274, at \*1 (“In light of the increased security in Administrative Segregation (“Ad Seg”), staff confiscated [Bane’s] Canadian crutch, and the leg sleeves he wore underneath the rigid leg braces. The leg sleeves, nothing more than socks with the toes cut off, protected his skin from the intense rubbing caused by the leg braces. Staff also denied Bane use of a wheelchair while his sleeves and crutch were confiscated.”).

267. Dinkins v. Corr. Med. Servs., 743 F.3d 633, 634 (8th Cir. 2014).

268. *Id.*

269. *Id.*

Care Unit, Dinkins alleged that he was denied access to a wheelchair and forced to crawl on the floor, where he would eat his meals.<sup>270</sup> He claimed that his requests for assistance with his wheelchair and related accessories, placement into a wheelchair accessible cell, physical therapies, and preventive treatment, along with other accommodations, were all ignored by prison officials.<sup>271</sup>

A prisoner in Washington state prison reported being denied access to a wheelchair for almost two years while held in segregation.<sup>272</sup> The prisoner had been provided with a wheelchair while at his previous housing unit, but prison authorities confiscated the device when he was transferred to solitary confinement. As a result, the prisoner was left without the means to ambulate, which meant that he had to “drag[ ] himself across the floor in order to conduct his daily activities.”

Randall Jackson alleged that he did not have access to a wheelchair for over a year while he was in solitary confinement.<sup>273</sup> He also alleges that was held in almost continuous lockdown for 24 hours per day, 7 days per week, and permitted to leave his cell for only one hour three times per week.<sup>274</sup> According to his federal complaint, for the year that Jackson was in solitary, “[h]e was forced to drag himself across the dirty and abrasive cell floor, where it was very difficult to transfer to the bed, toilet, and wash basin.”<sup>275</sup>

Lloyd Brown claimed that he was denied access to recreation and showers for over two months after prison officials confiscated his crutches. Prison officials conceded to taking Brown’s crutches, but argued in court that medical records concluded that his “crutches were not medically required” once Brown was transferred to the Special Housing Unit where he was held for 65 days.<sup>276</sup> The appellate court determined that “the medical

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270. *Id.*

271. *Id.* at 634-35. On appeal, the Eighth Circuit held that Dinkin’s allegations that he was denied meals and adequate housing due to his disability amounted to “viable” claims under the Americans with Disabilities Act and the Rehabilitation Act. The court reversed the district court’s dismissal of claims for injunctive relief against defendants on these grounds.

272. *Making Hard Time Harder*, *supra* note 182, at 16-17.

273. Disability Rights Florida Complaint, *supra* note 1, ¶ 368.

274. *Id.* ¶ 370.

275. *Id.*

276. *Brown v. Lamanna*, 304 F. App’x 206, 207 (4th Cir. 2008); *see also* *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (finding that prison officials were deliberately indifferent to prisoner’s serious medical needs stemming from paraplegia by placing him in “administrative control,” “security control,” or “local control” areas in the facility that did not permit wheelchairs).

records [were] insufficient to show that Brown was ambulatory without assistance.”<sup>277</sup> The court further reasoned that if it were true that Brown’s need for crutches was obvious and that he was unable to walk without crutches, prison officials could not simply confiscate his crutches, but had an obligation to further investigate Brown’s condition to determine whether the medical records were correct.<sup>278</sup>

Following an alleged assault with a correctional officer, California prison officials placed Onofre Serrano, a partially paralyzed prisoner, into administrative segregation, also known as the secure housing unit, or the “SHU.” Serrano’s SHU cell was not accessible for wheelchair users and prison officials confiscated Serrano’s wheelchair. Serrano alleged that he was forced to “crawl into his bunk, hoist himself onto the toilet by the toilet seat, avoid the shower because the facility lacked an appropriate shower seat, and sit idle for outdoor exercise because the outdoor yard was not handicapped-accessible.”<sup>279</sup> Serrano remained in the SHU cell without access to his wheelchair for approximately 2 months.<sup>280</sup>

Two prisoners with paraplegia, Bobby Simmons and Ricky Marshall, filed a lawsuit against the Arkansas Department of Corrections after they were held in solitary confinement for thirty-two hours, denied meals, and rendered unable to use restroom facilities.<sup>281</sup> Simmons and Marshall were placed into segregation pursuant to prison policy after corrections staff determined that the two men had consumed alcohol. Prior to placing them into their segregation cells, prison officials “consulted” with medical staff to “ensure that no medical reason” prevented their confinement, and then “inspected the confines of the maximum security area” to ensure that both Simmons and Marshall could be housed there safely.<sup>282</sup> According to the trial transcript, the nurse approved placement for Simmons and Marshall on

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277. *Brown*, 304 F. App’x at 207.

278. *Id.* at 207-08 (The Fourth Circuit remanded the case for further proceedings to determine if in fact it was medically necessary for Brown to have access to crutches or a wheelchair in order to move around, take showers, and participate in recreation activities without pain and without further harm).

279. *Serrano v. Francis*, 345 F.3d 1071, 1074 (9th Cir. 2003).

280. *Id.* at 1078-79 (What is notable about this case is the Ninth Circuit’s finding of a protected liberty interest given Serrano’s status as a prisoner with a physical disability. Although the Ninth Circuit found that the defendants were entitled to qualified immunity with respect to Serrano’s due process claim, the court concluded as follows: “Serrano’s disability—coupled with administrative segregation in an SHU that was not designed for disabled persons—gives rise to a protected liberty interest. That is, the conditions imposed on Serrano in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him.”).

281. *Simmons v. Cook*, 154 F.3d 805, 806 (8th Cir. 1998).

282. *Id.*

the condition that they would be provided “access to the hospital for treatments . . . egg crate mattresses, and . . . other medical requirement[.]”<sup>283</sup>

Despite these detailed arrangements, neither Simmons nor Marshall received their requested accommodations while in segregation. Both were denied their egg crate mattresses and missed four consecutive meals because their wheelchairs could not access the area where staff placed food trays. Simmons and Marshall were also denied “necessary medical supplies, appropriate access to a handicapped-assistive toilet, and all other necessary assistance in using the toilet.”<sup>284</sup> Simmons and Marshall filed a lawsuit challenging these actions and were awarded compensatory damages in the trial court.<sup>285</sup>

Failure to provide accommodations and assistance to prisoners with physical disabilities in solitary confinement may lead to devastating consequences. Following amputation surgery at the end of 2006, Martinique Stoudemire contracted MRSA, a serious bacterial infection.<sup>286</sup>

Prison policy required that Stoudemire be quarantined in a segregation unit due to her infection, and she was quarantined in the segregation unit at Huron Valley.<sup>287</sup> Stoudemire claimed that prison officials managing the Huron Valley Women’s Facility held her in solitary confinement for two weeks with limited medical assistance and absolutely no contact with a prison doctor.<sup>288</sup> Stoudemire alleged that she received “extremely poor medical care while in segregation,” and that the “cells were not equipped to accommodate” her disability.<sup>289</sup> Specifically, Stoudemire alleged that she “was never provided with any assistive devices that might have allowed her to safely move between her bed, wheelchair, toilet, and shower,” and that “[t]here was no call button, so Stoudemire had to shout when she needed assistance.”<sup>290</sup> Stoudemire was “forced to crawl from her bed to the toilet.”<sup>291</sup> On one occasion, she defecated on herself when staff failed to respond to her requests for assistance.<sup>292</sup> During her two weeks in segregation, Stoudemire “received only one shower . . . and was required to

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283. *Id.* at 807.

284. *Id.*

285. *Id.* at 809 (The Eighth Circuit upheld the jury award on appeal and held that Simmons and Marshall had presented sufficient evidence to show a violation of the Eighth Amendment).

286. *Stoudemire v. Mich. Dep’t. of Corr.*, 614 F. App’x 798, 799 (6th Cir. 2015).

287. *Id.*

288. *Id.* at 800.

289. *Id.*

290. *Id.*

291. *Stoudemire v. Mich. Dep’t. of Corr.*, 614 F. App’x 798, 800 (6th Cir. 2015).

292. *Id.*

dress her wounds herself, which put her at risk of infection.”<sup>293</sup> The Michigan Department of Corrections settled suit with Stoudemire in May 2016, awarding her over \$200,000 for the harm caused.<sup>294</sup>

## V. HOW PRISONERS WITH PHYSICAL DISABILITIES END UP IN SOLITARY CONFINEMENT

### A. *What We Know About Persons with Physical Disabilities in Solitary Confinement*

There is limited research and data<sup>295</sup> on the number of persons with physical disabilities in prisons and jails and no concrete data on the numbers of persons with physical disabilities in isolation. In fact, until recently, there was little by way of data on the numbers of incarcerated people with disabilities period. In December 2015, the Bureau of Justice Statistics (BJS) produced a ground-breaking report that discussed the prevalence rates for six categories of disabilities—hearing, vision, cognitive, ambulatory, self-care, and independent living—in prison and jail inmates from 2011 to 2012.<sup>296</sup> BJS researchers report that from 2011 to 2012, “about 3 in 10 state and federal prisoners . . . reported having at least one disability.”<sup>297</sup> Of this population, approximately “40% of females and 31% of males in prison . . . reported a disability.”<sup>298</sup> This data reveals that prisoners are “nearly three times more likely . . . than the general population to report having at least one disability.”<sup>299</sup>

Cognitive disabilities were the most commonly reported disability.<sup>300</sup> Ambulatory disability—defined as difficulty walking or climbing stairs—

293. *Id.*

294. Paul Egan, *Double-amputee Who Had to Crawl to Toilet Settles Suit*, DETROIT FREE PRESS (May 12, 2016, 10:33 PM), <http://www.freep.com/story/news/local/michigan/detroit/2016/05/12/michigan-pays-200000-settle-lawsuit-ex-prisoner/84284926/>.

295. Data collection can be a useful tool for assessing the quality of programs and services provided to prisoners with disabilities. See e.g., HANDBOOK ON PRISONERS WITH SPECIAL NEEDS, *supra* note 78, at 49 (“Data collection and assessments should be undertaken on a regular basis, bearing in mind especially the scarcity of information and record keeping on prisoners with disabilities, to identify shortcomings and good practices, and to improve the situation of prisoners with disabilities.”).

296. See generally BJS DISABILITY REPORT, *supra* note 27.

297. *Id.* at 1.

298. *Id.*

299. *Id.*

300. *Id.* at 3.

was the second most common disability.<sup>301</sup> Older prisoners were most likely to report a disability in U.S. prisons and jails. Researchers report that 44% of prisoners aged 50 or older reported a disability as compared to 27% of prisoners aged 18 to 24.<sup>302</sup> As the numbers indicate, by sheer volume alone, the substantial numbers of prisoners with disabilities currently held in prisons and jails warrant greater attention not only to the challenges they face while incarcerated, but also potential solutions to address these “complicated . . . health concerns for modern correctional systems.”<sup>303</sup>

Given the high incident rates of people with disabilities in prison and jails, it is very likely that a significant proportion of those persons in solitary confinement are disabled. The number of prisoners held in isolation on a yearly basis is staggering. Almost one in five prisoners and 18 percent of detainees in jail were held in some type of restrictive housing in the past 12 months or less for those persons who were admitted to prison less than a year ago.<sup>304</sup> For prisoners under the age of 30, the rates of persons held in restrictive housing increase. According to another BJS report, “[a]mong inmates ages 18 to 19, 31% of those in prison and 25% of those in jail had spent some time in restrictive housing” and “[a]mong inmates ages 20 to 24, 28% of those in prison and 23% of those in jail had been in restrictive housing at some time during the past year.”<sup>305</sup>

#### B. *How Do Prisoners with Physical Disabilities End up in Solitary Confinement?*

Although there is no precise data on the number of people with physical disabilities in isolation, there is information on how they end up in solitary confinement. Corrections authorities have justified the use of solitary confinement for all prisoners based on the following:

##### 1. Administrative Segregation

Prisoners can be placed into administrative segregation for a variety of reasons, but the most common justification is that the individual poses some type of threat to the safety of persons and security of the institution.<sup>306</sup> Pris-

301. *Id.* at 2-3.

302. *Id.* at 4.

303. *Disability & Health Needs in a State Prison System*, *supra* note 106.

304. ALLEN BECK, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS 2011-12, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 1 (2015), <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

305. *Id.* at 4.

306. *See, e.g.*, N. CORR. INST., ADMIN. SEGREGATION PROGRAM, <http://www.ct.gov/doc/lib/doc/pdf/northernascc.pdf> (“Placement of an inmate on a Restrictive Hous-



oners can be held in administrative segregation for a short period of time (e.g., during an investigation for an alleged offense,<sup>307</sup> or while they wait for the corrections facility to find a cell that is wheelchair accessible), or in some cases, an indefinite period of time (e.g., due to an alleged gang affiliation).<sup>308</sup>

## 2. Protective Custody

Segregating prisoners to protect them from harm is generally referred to as protective custody.<sup>309</sup> Some adult corrections systems automatically place persons from vulnerable populations—youth,<sup>310</sup> elderly,<sup>311</sup> and LGBT prisoners,<sup>312</sup>—into protective custody. Prisoners with physical disabilities

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ing Status that results in a segregation of the inmates whose behavior while incarcerated poses a threat to the security of the facility or a risk to the safety of staff or other inmates. This inmate has demonstrated through his behavior that he is not appropriate for continued placement in general population and that he can no longer be safely managed in general population.”).

307. *See, e.g.,* *Bane v. Virginia Dep’t of Corr.*, 2012 WL 6738274, at \*1 (W.D. Va. Dec. 28, 2012) (“To protect Bane from the assaulting prisoner while they investigated the attack, PSCC staff transferred Bane to Administrative Segregation.”).

308. *See, e.g.,* *Rios v. Tilton*, No. 2:07-CV-0790 WBS KJN, 2013 WL 4541825, at \*6 (E.D. Cal. Aug. 27, 2013), *report and recommendation adopted*, No. 07-CV-0790 WBS KJN P, 2013 WL 6053815 (E.D. Cal. Nov. 15, 2013) (prisoner placed into administrative segregation due to gang affiliation); Plaintiff’s Second Amended Complaint ¶¶1-8, *Ashker v. Brown*, 4:09-cv-05796-CW, (N.D. Cal. May 31, 2012), <http://ccrjustice.org/sites/default/files/assets/Ruiz-Amended-Complaint-May-31-2012.pdf> (describing prisoners who had been held in solitary confinement for 11-22 years due to their alleged gang affiliation).

309. *See, e.g.,* *Herron v. Meyer*, 820 F.3d 860, 862 (7th Cir. 2016) (describing case of federal prisoner being placed into solitary confinement for protective reasons due to threats to his personal safety).

310. *See, e.g.,* HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES* 53-57 (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [hereinafter *GROWING UP LOCKED DOWN*] (describing policies requiring youth be placed into protective custody in adult facilities).

311. Adelyn Baxter, *Ninety Years Old, Deaf, and in the Hole in a Florida Prison*, PRISON LEGAL NEWS (July 10, 2014), <http://solitarywatch.com/2014/07/10/ninety-years-old-deaf-hole-florida-prison/> (describing prisoner who was placed into solitary for protective reasons after corrections staff “observed injuries suggesting that he had been assaulted.”).

312. JASON LYDON ET AL., *COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK’S NATIONAL LGBTQ PRISONER SURVEY*, BLACK & PINK 5, 35 (2015), <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf> (reporting that over 85% of 1118 respondents

are placed into protective custody due to vulnerabilities, often as a default solution after being harmed or threatened. In many state systems, conditions in protective custody are tantamount to placement into solitary confinement—that is, prisoners are held in small, concrete cells for approximately 22 hours or more per day with little to no access to natural light and almost total sensory and social deprivation.<sup>313</sup> In some cases, prisoners in protective custody are held in the very same units as prisoners held in solitary confinement for serious disciplinary infractions. For example, a victim of assault may be placed in the same unit as the person who assaulted him.

### 3. Medical Isolation

Prisoners may be placed into isolation for medical reasons. Prisoners experiencing suicidal thoughts may be placed into medical isolation where they can be observed, also known as “suicide watch,” until they are healthy enough to return to less restrictive housing. In addition, prison officials often place persons who have been diagnosed with contagious diseases, or who may be at risk for contracting these diseases, into medical isolation to prevent the spread of the disease.<sup>314</sup>

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had spent time in solitary confinement and that protective custody is a common reason for placement).

313. See Haney, *supra* note 148, at 135 (“Conditions of confinement for protective custody prisoners are in many ways similar to those in supermax confinement. That is, they are typically segregated from the rest of the prison population, restricted or prohibited from participating in prison programs and activities, and often housed indefinitely under what amount to oppressive and isolation conditions. Unlike supermax prisoners per se, however, many have some control over their status as protective custody (PC) prisoners (e.g., many have ‘volunteered’ for this status) and, although they live under the stigma of being PC prisoners, they are technically housed in these units for protection rather than for punishment.”).

314. Segregation for infectious diseases is permissible if there is a direct threat to the safety of others. However, prison officials cannot simply segregate based on stereotypes or unfounded fears. Prisoners with infectious diseases have successfully sued Departments of Corrections challenging automatic placement into segregation on account of their health condition. In these cases, the perceived health risk to other prisoners was not substantiated and, in large part, was based on fear, stereotypes, and other irrational concerns.

See, e.g., *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1295 (M.D. Ala. 2012) (“[T]he ADOC is currently violating the rights of the HIV-positive prisoners within its custody by categorically segregating them because of their HIV status and excluding them from the integrated housing for which they may be qualified.”). To be lawful, prison officials must base their decision to segregate for medical reasons on “reasonable medical judgments given the state of medical knowledge,” about “the nature of the risk (how the disease is transmitted),” “the duration of the risk (how long is the carrier

As a general matter, corrections authorities may not segregate people with disabilities into medical facilities unless the prisoner is actually receiving medical care.<sup>315</sup> Furthermore, placement into medical facilities is not permitted simply because accessible housing is not available, or because prison authorities believe that it is more convenient to place prisoners into those facilities. These policies are not always followed and prisoners with physical disabilities have been placed into designated medical areas even when they were not receiving medical treatment.<sup>316</sup>

#### 4. Disciplinary or Punitive Segregation

The primary objective of corrections institutions is to maintain security and control of their facilities and the persons they house. As part of the effort to maintain order, institutions have rules and regulations that govern the behavior of persons held within their walls. When prisoners break the rules of the prison, they are given disciplinary infractions, or tickets. Disciplinary infractions can range from failing to maintain proper hygiene or sanitary living conditions, to more serious offenses like assault or escape. Failure to adhere to prison rules and regulations can result in placement into solitary confinement.<sup>317</sup> Prisoners with physical disabilities, like non-dis-

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infectious,” “the severity of the risk (what is the potential harm to third parties),” and “the probabilities the disease will be transmitted and will cause varying degrees of harm.” *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 (1987).

315. 28 C.F.R. § 35.152(b)(2)(ii) (2010); *see also* DISABILITY RIGHTS CA., REPORT ON INSPECTION OF THE SACRAMENTO COUNTY JAIL: EXECUTIVE SUMMARY 15 (Aug. 4, 2015), <http://www.disabilityrightscsca.org/pubs/702701.pdf>.

316. *See id.* (“In the Sacramento Jail, it is policy to place prisoners with physical disabilities and mobility impairments in single cells in the medical area . . . in which prisoners have no regular access to a day room or outdoor recreation. Housing prisoners in the infirmary solely because they use assistive devices, as the jail appears to do, is not an effective use of medical resources.”). *See generally* *Reaves v. Mass. Dep’t of Correction*, 195 F. Supp. 3d 383 (D. Mass. 2016). Sometimes, failure to provide proper medical care and accommodations for prisoners with disabilities may result in de facto solitary confinement. Timothy Reaves has quadriplegia and brought suit against the Massachusetts Department of Corrections alleging that the Department did not provide him with an adequate physical or occupational therapy program, and comprehensive treatment plan to manage his bowel movements, and for allegedly failing to prevent a dangerous condition known as autonomic dysreflexia. Reaves claimed that the Department also cut off Reaves from accessing outdoor recreation spaces and programming. Reaves was left in his cell in a state of virtual isolation and idleness, without proper treatment therapies to manage his disabilities, and as a result, his condition worsened.

317. For more serious offenses, such as escape or murder, a prisoner may also face criminal charges.

abled prisoners, can end up in solitary after being found guilty of disciplinary infractions that violate the institution's disciplinary policies.<sup>318</sup>

a. *Pathways into Solitary: Unique Challenges for Persons with Physical Disability*

Prisoners with physical disabilities have been punished because of actions—or inactions—caused by their disabilities.<sup>319</sup> For example, prisoners with physical disabilities that “cause problems such as vomiting or incontinence too often get disciplined for soiling their clothing instead of being evaluated by medical care staff.”<sup>320</sup> Such treatment is fundamentally unfair. Maintaining the safety and security of a prison does not require punishing someone for actions beyond their control. Rather, punishing someone on this basis reflects a disregard for the needs of people with disabilities and a lack of sensitivity to their lived experiences.

In addition, prisoners with sensory disabilities have been charged with failing to obey staff orders they could not hear or see, and subsequently disciplined with segregation.<sup>321</sup> For example, one deaf prisoner reports be-

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318. *See, e.g.*, Administrative Directive No. 9.5, Code of Penal Discipline, State of Conn. Dep't of Corr. (Feb. 1, 2016), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0905.pdf>.

319. *See, e.g.*, *Parms v. Pa. Dep't of Corr.*, No. CA 14-84, 2015 WL 1326323, at \*3 (W.D. Pa. Mar. 25, 2015) (“Here, Plaintiff alleges, among other things, that he was repeatedly issued misconducts and received disciplinary confinement for failing to obey orders he could not hear or comprehend, because no reasonable accommodations for his disability were provided by Defendant. In particular, Plaintiff alleges that he was housed on F block at SCI-Albion, where inmates were alerted of the time for meals and count by audible means only, such as a bell or loudspeaker, while other housing blocks at SCI-Albion have flashing lights accompanying the bell and/or moving message boards that announce movement times. . . . Because Plaintiff was unable to hear the audible announcements, he often failed to move for meals or stand for count on time, which resulted in disciplinary sanctions. Thus, Plaintiff asserts that he was essentially ‘punished for his deafness.’ . . . This claim falls within the ambit of Title II’s general prohibition against discrimination on account of one’s disability, to which Plaintiff’s allegations regarding the misconducts and discipline he received as a result of his failure to respond to verbal orders are particularly relevant. Thus, Defendant’s motion to dismiss such allegations will be denied.” (citations omitted)).

320. Robert B. Greifinger, *Commentary: Disabled Prisoners and “Reasonable Accommodation,”* 25 CRIM. JUST. ETHICS 2 (2010), <http://www.tandfonline.com/doi/abs/10.1080/0731129X.2006.9992190?journalCode=rcr20#.VxfRaNUrKUK> (noting that prisoners “face an increased risk of injury in difficult and dangerous prison environments”).

321. *See, e.g.*, *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1030 (S.D.N.Y. 1995) (describing prisoner who was disciplined for disobeying orders from corrections staff

ing held in solitary confinement for two weeks for “failing to respond to an oral command spoken behind his back.”<sup>322</sup> He reports that he did not receive a statement of reasons and that no hearing was held prior to his placement into solitary confinement. Only when he was provided with an American Sign Language interpreter did it become clear to prison officials that the charges were unfounded: “I received a hearing aid two weeks into my solitary. They had an interpreter. They understood that the officer made a mistake and I was exonerated and released.”<sup>323</sup>

Finally, prisoners with sensory disabilities face another hurdle in that they may not be able to understand the orientation manual or inmate handbook that governs behavior in the correctional institution. Violations of relatively minor prison rules can lead to placement in solitary. For example, prisoners may be punished for seemingly innocuous behavior like posting on Facebook,<sup>324</sup> failing to make the bed,<sup>325</sup> or having expired toothpaste.<sup>326</sup> Providing information in a format that is inaccessible to blind or deaf prisoners means that they will remain largely unaware of the rules, processes, and procedures governing life in their particular prison. As such, deaf and blind prisoners can violate prison rules—and face solitary confinement—because they lacked full understanding of the prison rules and regulations. For deaf prisoners, there are additional barriers to communication. Deaf individuals, on the whole, have lower literacy rates and educational levels as compared to hearing individuals.<sup>327</sup> Due to low literacy rates and limited

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which he did not understand); Shoshana Walter, *Disabled Prisoners' Rights Scrutinized in California County Jails*, THE HUFFINGTON POST (Oct. 8, 2012, 12:35 PM), [http://www.huffingtonpost.com/2012/10/08/disabled-prisoners-rights\\_n\\_1948542.html](http://www.huffingtonpost.com/2012/10/08/disabled-prisoners-rights_n_1948542.html) (“At Santa Rita Jail in Dublin, an inmate with 80 percent hearing loss was denied a hearing aid and then disciplined for failing to listen to deputies’ directions.”).

322. Survey Responses from Five Deaf Prisoners, *supra* note 6, at 7.

323. *Id.*

324. Dave Mass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), <https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook>.

325. GROWING UP LOCKED DOWN, *supra* note 310, at 52.

326. Conor Friedersdorf, *The Persecution of Chelsea Manning*, THE ATLANTIC (Aug. 13, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-ongoing-persecution-of-chelsea-manning/401195/>.

327. Only about 10% of deaf children are born to deaf parents. Melissa Peck, *Deaf Americans in the Criminal Justice System: An Overview of the Issues*, N.W. MO. STATE UNIV. 1 (2014), available at <http://www.nwmissouri.edu/library/owens/awards/2015/Peck.pdf>. Because parents play a primary role in a child’s language acquisition, the “vast majority of Deaf children are left physically unable to acquire the native language of their own parents. *Id.* Individuals who experience deafness prior to hearing spoken

education, deaf prisoners may face serious difficulties in trying to understand complex disciplinary procedures.

b. *Disciplinary Proceedings*

In some cases, prisoners charged with a disciplinary infraction may have the right to a disciplinary hearing along with other due process protections. These rights ensure that prisoners are not further deprived of their liberties—for example, by placement into punitive segregation, and the accompanying loss of privileges—without appropriate due process. The precise nature and scope of the procedural rights given to prisoners during these disciplinary hearings will depend on the nature of the disciplinary action or punishment.<sup>328</sup> Generally, in cases involving a loss of good time credits, or property, prisoners will have the right to: (1) written notification of the charges against them at least 24 hours prior to the hearing;<sup>329</sup> (2)

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language will have tremendous difficulty understanding and speaking English later on in life. For example, one would find it extremely difficult to understand Russian without having heard the language spoken. As a result, a majority of deaf individuals do not firmly grasp the mechanics (vocabulary, syntax, grammar) of the English language. Thus, providing documents in English-only formats would pose a serious barrier for deaf prisoners as they will be unable to process and understand the information. McCay Vernon, *ADA Routinely Violated by Prisons in the Case of Deaf Prisoners*, PRISON LEGAL NEWS (July 15, 2009), <https://www.prisonlegalnews.org/news/2009/jul/15/ada-routinely-violated-by-prisons-in-the-case-of-deaf-prisoners/>.

328. Where a prisoner faces possible punishment involving the loss of good time credits, the due process protections provided in *Wolff v. McDonnell* apply. *Wolff v. McDonnell*, 418 U.S. 539, 563-72 (1974). Where the loss of good time credits is not a potential punishment, due process protections are only required where the punishment imposed amounts to a deprivation of liberty that is an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995); see also *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000) (“A prisoner asserting that he was denied due process in connection with prison disciplinary hearings that resulted in segregative confinement or a loss of privileges must make a threshold showing that the deprivation of which he complains imposed an ‘atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.’” (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995))). Prisoners are not afforded the full range of rights in disciplinary hearings that are provided in their criminal case. Prisons systems have some discretion in deciding what rights will be given to prisoners during disciplinary hearings. *Wolff*, 418 U.S. at 556 (“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” (citations omitted)).

329. *Wolff*, 418 U.S. at 564.

information on the evidence brought against them and the basis for the punishment;<sup>330</sup> and (3) call witness and present documentary evidence at a disciplinary hearing, subject to limitations.<sup>331</sup> There is no recognized right to legal counsel during disciplinary proceedings; however, prisoners who are illiterate, or who require language, or other assistance because of their disability, may be entitled to assistance.<sup>332</sup>

Even where prisoners are provided with certain procedural protections during disciplinary proceedings, prisoners with physical disabilities will be denied their rights if hearings are not accessible—either because of structural barriers for prisoners with ambulatory disabilities, or communication barriers for prisoners with sensory disabilities.<sup>333</sup> For instance, persons who use wheelchairs will face significant obstacles if the location of the disciplinary hearing is not accessible to them. Moreover, if the evidence presented during the hearing is not accessible to prisoners who are blind or low vision, or deaf or hard of hearing, they will be unable to fully understand the charges against them and prepare a proper defense.<sup>334</sup> For example, only providing notice of the disciplinary hearing and summary of the charges against a blind or low vision prisoner in small font, rather than in a format accessible to the prisoner such as large font (or Braille, if the prisoner can understand Braille) will render meaningless any right guaranteeing advance notice of the hearing and a description of charges.

Similarly, not providing a sign language interpreter or real-time captioning during a disciplinary hearing will prevent a deaf prisoner from understanding the proceedings, or communicating with the officers conducting the hearing and investigators.<sup>335</sup> Because the failure to provide auxiliary aids and services to persons with sensory disabilities compromises their

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330. *Id.*

331. *Id.* at 566-67 (noting that prisoners may call witnesses and present documentary evidence where doing so “will not be unduly hazardous to institutional safety or correctional goals,” but there is no explicit right to confront and cross examine witnesses in a disciplinary hearing).

332. *Id.* at 570.

333. Hernandez Complaint, *supra* note 208, ¶ 155 (alleging that plaintiff was not provided with a sign language interpreter during his disciplinary hearing).

334. *See, e.g.,* Langford Brief, *supra* note 119, at 12-13 (“[Montana State Prison] regularly fails to take the necessary and appropriate steps to ensure effective communication by disabled prisoners during classification and disciplinary hearings in violation of the ADA.” (citation omitted)).

335. *See* Clarkson v. Coughlin, 898 F. Supp. 1019, 103-31 (describing prisoner who received 15 days in restrictive housing after corrections officials at Attica Corrections Facility failed to provide him with a sign language interpreter); Duffy v. Riveland, 98 F.3d 447, 450-52 (9th Cir. 1996) (noting that no qualified sign language interpreter was provided and that “[t]he disciplinary hearing took place, however, in Duffy’s ab-

ability to successfully defend themselves in a disciplinary hearing, which could result in placement into solitary confinement, it is imperative that prisoners with physical disabilities be afforded necessary accommodations during the investigatory phase, disciplinary hearing, and any appeals process.<sup>336</sup>

Without these accommodations, prisoners with sensory disabilities will be unable to benefit from any procedural protections provided during disciplinary hearings. In *Dunn v. Thomas*,<sup>337</sup> plaintiffs, a class of prisoners held in the custody of the Alabama Department of Corrections (ADOC), filed suit against ADOC challenging constitutionally inadequate medical care and violations under the Americans with Disabilities Act due to ADOC's failure to provide them with accommodations and services. The complaint also details stories of prisoners denied meaningful access to disciplinary hearings due to the ADOC's failure to provide interpreters and assistive devices to facilitate communication.

For example, Plaintiff Daniel Tooley, a deaf prisoner, alleged that prison officials failed to provide him with a sign language interpreter despite numerous requests.<sup>338</sup> Tooley alleged that "he d[id] not understand certain ADOC policies," "[could not] participate in any programs offered by the prison" because of communication barriers, and that ADOC "often reliev[ed] on other prisoners with limited sign language ability to 'communicate'" with him.<sup>339</sup> Tooley also alleged that ADOC officials failed to provide him with a sign language interpreter for a disciplinary hearing.<sup>340</sup>

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sence . . . and he was found guilty of the infraction . . . [and] sentenced to 15 days in disciplinary segregation, with credit for the eight days already served.").

336. Hernandez Complaint, *supra* note 208, ¶ 174 (alleging that plaintiff lost visitation, canteen, and recreation privileges after he was charged with a disciplinary infraction, denied a sign language interpreter in the disciplinary hearing, and, subsequently, found guilty).

337. *See generally* First Amended Complaint, *Dunn v. Thomas*, Civil Action No. 2:14-cv-00601 (M.D. Al. July 25, 2014), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/first\\_amended\\_complaint.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/first_amended_complaint.pdf) [hereinafter *Dunn Complaint*]. Plaintiffs achieved a historic settlement in this case wherein the Alabama Department of Corrections agreed to comprehensive reforms that make sure prisoners receive accommodations and services to which they are entitled under the ADA. Press Release, Southern Poverty Law Center, Alabama Agrees to Improve Conditions for Inmates with Disabilities Following SPLC Lawsuit (Mar. 16, 2016), <https://www.splcenter.org/news/2016/03/16/alabama-agrees-improve-conditions-inmates-disabilities-following-splc-lawsuit>.

338. *Dunn Complaint*, *supra* note 345, at ¶ 359.

339. *Id.*

340. *Id.*



Following a hearing that he did not understand, he was sentenced to a 30-day term in segregation.

Plaintiff Donald Turner raised similar claims, alleging that he was unable to adequately defend himself in a disciplinary hearing where he was charged with unauthorized use of a credit card because ADOC failed to provide him with a sign language interpreter.<sup>341</sup> Turner received 15 days in segregation following the hearing.<sup>342</sup>

Finally, Tommie Moore alleges that he was sentenced to ten days in segregation following a disciplinary hearing.<sup>343</sup> According to the complaint, corrections staff gave Moore, a blind prisoner, a disciplinary ticket after he did not stand up during prison count even though "he did not know that the correctional officer telling people to stand for count was speaking to him and the standard practice in the dormitory was that the prisoners who are blind did not stand for count."<sup>344</sup> Prison records showed that Moore pled guilty to the charge, but Moore alleged that he did not attend the "disciplinary hearing and did not admit to any misconduct or sign the disciplinary report."<sup>345</sup>

##### 5. Placements into Solitary Confinement Due to Lack of Accessible Housing

Prisoners with physical disabilities may also be placed into isolation for reasons separate and distinct from the safety of persons or the security of institutions.<sup>346</sup> Abdul Malik Muhammad, who is blind, was placed in solitary confinement at the Wicomico County Detention Center in Maryland for a little over 6 weeks. For the majority of his time in solitary, Muhammad was without "access to showers, phone calls, recreation, [or] a change of clothes, [and was denied access to] religious services, the commissary, visitation, or the library."<sup>347</sup> When Muhammad asked a corrections

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341. *Id.* ¶ 364.

342. *Id.*

343. Dunn Complaint, *supra* note 345, at ¶ 367.

344. *Id.*

345. *Id.*

346. I have been in and out of solitary confinement several times while on transfer to the hospital for treatment or diagnosis. A [disabled] inmate can be put into solitary if there is no room in the transfer part of the prison. While there you will be treated as if you were there for disciplinary action. ~ Bob Fossett, Wallace Pack 1 Unit, Texas

347. Wicomico Cty. Complaint, *supra* note 7, at ¶ 2. The complaint also alleges that defendants also "denied Mr. Muhammad a job that would have shortened his time at the Detention Center and excluded him from recreational activities because of his blindness." *Id.* ¶ 3. "In addition, the DOC refused to provide Mr. Muhammad with a slate and stylus that would have allowed him to write independently in Braille and it

official to explain why he was placed into solitary confinement, the official responded that prison authorities were trying to figure out where to house him. The lack of readily available housing units that could properly serve the needs of a blind prisoner meant that Muhammad experienced the social and environmental isolation of solitary confinement simply because of his disability.

Placement decisions similar to Muhammad's are troubling because the ADA expressly prohibits prison officials from segregating prisoners and other detained persons simply because there are no accessible beds in which to house them.<sup>348</sup> Even so, prisoners with ambulatory and sensory disabilities are still placed into solitary confinement simply because there is no accessible housing available.<sup>349</sup>

## 6. Trapped in Solitary

State and federal corrections systems may condition release from solitary confinement on the completion of rehabilitative programs and activities, as well as incident-free behavior. However, once in solitary confinement, prisoners with physical disabilities may find themselves unable to comply with such conditions, due to the inaccessibility of prison programming. As a result, they end up isolated for extended periods of time. This is because prisoners with disabilities are excluded from the benefits of "step-down" programs that require the successful completion of certain programming and behavioral goals to "progress" out of solitary confinement.

Prisoners with physical disabilities may be unable to reap the benefits of these step-down programs for a variety of reasons. First, where manuals specifying rules and procedures for progressing out of solitary confinement are not accessible to persons with sensory disabilities—for example, deaf persons requiring a sign language interpreter, or blind persons requiring audio text—these prisoners may not be able to understand what constitutes a violation of the step-down procedures, or what actions are required to get

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failed to make the modifications necessary to provide Mr. Muhammad with access to its law library." *Id.*

348. 28 C.F.R. § 35.152(b) (West 2016).

349. *See, e.g.,* *Armstrong v. Brown*, 103 F. Supp. 3d 1070, 1072 (N.D. Cal. 2015); *Trevino v. Woodbury Cty. Jail*, No. C14-4051-MWB, 2015 WL 300267, at \*1, \*2 (N.D. Iowa Jan. 22, 2015), *report and recommendation adopted*, No. C14-4051-MWB, 2015 WL 2254931 (N.D. Iowa May 13, 2015), *aff'd per curiam*, No. 15-2179 (8th Cir. Dec. 1, 2015). In 2015, the judge in *Armstrong* found that the California Department of Corrections and Rehabilitation had placed persons with mobility disabilities into administrative segregation for extended periods of time due to a lack of accessible housing—in direct violation of the court's prior orders. *Armstrong*, 103 F. Supp. 3d 1070 at 1072.

out of solitary confinement. As a result, they may fail to progress in the step-down program and lose the opportunity to get out of solitary confinement. Similarly, program materials may not be provided in a format that prisoners with sensory disabilities can comprehend. Second, programming locations may not be accessible to prisoners with ambulatory disabilities. Holding group programs, like anger management or hobby craft, in locations that do not accommodate wheelchairs, or in areas of the facility that have uneven, jagged floors that make it difficult for blind or low vision prisoners to navigate, will effectively bar them from accessing programs that can help reduce their time in solitary confinement.

### 7. Special Challenges for Deaf Prisoners

Deaf prisoners are particularly vulnerable to placement into solitary and are susceptible to falling into a never-ending cycle of isolated confinement. Deaf prisoners can wind up in solitary confinement because prison authorities did not provide them with prison rules and procedures—commonly referred to as a prisoner manual, or orientation handbook—in a format that they could understand. As a result, these prisoners end up with seemingly non-serious disciplinary infractions that result in their placement into solitary. For prisoners placed in solitary, getting out of isolation, where made possible through step-down programs, will require adhering to strict guidelines and procedures. If those guidelines are not in a format that deaf prisoners can understand, they may be denied access to programs that can shorten their time in solitary.

In addition, deaf prisoners who feel vulnerable or unsafe in dangerous prison facilities may voluntarily agree to placement into protective custody. However, without proper communication with corrections staff, they may do so without fully understanding what protective custody entails: lock-down in a highly-restrictive isolation cell for more than 22 hours per day.

## VI. LEGAL PROTECTION FOR PRISONERS WITH DISABILITIES IN SOLITARY CONFINEMENT

Robust legal protections exist to protect the rights of prisoners with disabilities. International standards, U.S. constitutional law, federal statutes and regulations, and state laws prohibit discrimination against people with disabilities, prevent their unjustified exclusion from mainstream society, and mandate that they receive equal access to programs and services offered to all. Prisoners with disabilities held in solitary confinement should receive these protections. Although the law as it relates to incarcerated persons with disabilities is largely undeveloped, it is an area ripe for litigation and policy reform.

The following section outlines the legal protections afforded prisoners with disabilities in solitary confinement under the various legal regimes.

#### A. *International Law*

International law and standards affirm the human rights of all people with disabilities and a commitment to protecting people with disabilities from cruel, inhumane, and degrading treatment when they are incarcerated.

##### 1. UN Convention on the Rights of People with Disabilities

The United Nations Convention on the Rights of People with Disabilities (“Convention”) affirms the basic human rights of all people with disabilities.<sup>350</sup> The guidelines provide important protections for all persons with disabilities that must be respected in prisons and jails. In particular, the Convention sets forth basic requirements for the 160 signatories, or Member States, to end systematic discrimination and to enact appropriate legislation that will protect and promote the rights of all people with disabilities. The United States signed the convention in 2009, but disappointingly has yet to ratify it.<sup>351</sup> Specifically, the Convention sets forth specific measures to ensure equal access to justice, liberty, and security of the person,<sup>352</sup> as well as freedom from torture, or cruel, inhuman or degrading treatment or punishment for all people with disabilities.<sup>353</sup> In addition, the Convention mandates that people with disabilities be provided with reasonable accommodations when they are incarcerated.<sup>354</sup>

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350. The United States has not signed the Convention and so the guidelines contained there are not binding. Treaties negotiated by the Executive Branch must be approved by the Senate by a two-thirds vote. U.S. CONST. art. II, § 2, cl. 2; see also *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (noting that not all international law obligations are binding under federal law).

351. HUMAN RIGHTS WATCH, *Senate Misses an Opportunity on Disability Convention* (Dec. 5, 2012, 11:11 AM), <https://www.hrw.org/news/2012/12/04/us-senate-misses-opportunity-disability-convention>.

352. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106 (Dec. 13, 2006), available at <http://www.un-documents.net/a61r106.htm>.

353. *Id.* at art. 15. (noting that Article 15 sets forth strict standards that no persons shall “be subjected to torture or to cruel, inhuman or degrading treatment or punishment[.]” and that Member States adopt “measures to prevent people with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.”).

354. *Id.* at art. 14(2).

## 2. Nelson Mandela Rules

In December 2015, the United Nations General Assembly adopted an updated version of its Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”). The Nelson Mandela Rules<sup>355</sup> establish basic principles and minimum standards for the treatment of prisoners in order to ensure that the human rights of all incarcerated persons are respected, providing standards for such aspects of prison management as medical care, mental health treatment, solitary confinement, and classification. The Nelson Mandela Rules also recognize the special challenges faced by prisoners with disabilities and set in place standards protecting them from mistreatment and inhumane conditions of confinement. Specifically, as it relates to prisoners with physical disabilities in solitary confinement the Nelson Mandela Rules:

- Prohibit indefinite solitary confinement and prolonged solitary confinement.<sup>356</sup> The Mandela Rules defines solitary confinement as “confinement of prisoners for 22 hours or more a day without meaningful human contact.”<sup>357</sup> Prolonged solitary confinement is confinement lasting beyond 15 days.<sup>358</sup>
- Mandate that solitary confinement may only be used in “exceptional circumstances as a last resort, for as short a time as possible and subject to independent review” by a competent authority.<sup>359</sup>
- Recommend that prison officials avoid imposing solitary confinement where doing so would worsen the health conditions of people with disabilities.<sup>360</sup>
- Require that medical professionals have the power to review and recommend decisions to place prisoners with physical disabilities into solitary confinement to ensure that their disability is not worsened due to that placement.<sup>361</sup>

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355. See Economic and Social Council Res. 2015/20 (Sept. 29, 2015), [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/RES/2015/20](http://www.un.org/ga/search/view_doc.asp?symbol=E/RES/2015/20) [hereinafter Mandela Rules].

356. *Id.* at Rule 43(1).

357. *Id.* at Rule 44.

358. *Id.*

359. *Id.* at Rule 45.

360. *Id.* at Rule 45(2) (stating that “[t]he imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.”).

361. *Id.* at Rule 46(3) (stating that “Health-care personnel shall have the authority to review and recommend changes to the involuntary separation of a prisoner in order to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner.”).

- Encourage effective and meaningful communications with prisoners with sensory disabilities.<sup>362</sup>

Subjecting prisoners with disabilities to solitary confinement may conflict with the standards set forth in the Nelson Mandela Rules. To begin with, the U.N. Special Rapporteur Against Torture has determined that, beyond 15 days, solitary confinement can amount to torture.<sup>363</sup> Thus, after this time period, holding prisoners with disabilities in solitary confinement can violate their fundamental human right to be free from cruel, inhumane, and degrading treatment under the U.N. Convention Against Torture. Similarly, placing prisoners with physical disabilities into solitary confinement where such placement exacerbates existing disabilities, or holding prisoners with sensory disabilities in solitary confinement without providing them with the means to effectively and meaningfully communicate, would be inconsistent with the Nelson Mandela Rules.

### B. *Constitutional Protections: The Eighth Amendment*

The U.S. Constitution “prohibits the infliction of ‘cruel and unusual punishments’ on those convicted of crimes.”<sup>364</sup> Stated differently, the Eighth Amendment provides a limitation on the extent to which the government can punish its prisoners. Punishments that are barbaric or torturous,<sup>365</sup>

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362. *Id.* at Rule 55 (stating that “[p]risoners with sensory disabilities should be provided with information in a manner appropriate to their needs[,]” and that “[t]he prison administration shall prominently display summaries of the information in common areas of the prison.”).

363. *See* Interim Report of the Special Rapporteur, *supra* note 11.

364. *Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991) (internal quotation marks omitted). Prisoners who seek to show an Eighth Amendment violation must show both an objectively serious harm and demonstrate that prison officials had knowledge of the serious harm and intentionally disregarded the risk of harm. Specifically, prisoners must show deliberate indifference on the part of corrections officials to “a substantial risk of serious harm[.]” *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *accord Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (holding that deliberate indifference to prisoner’s serious medical needs constitutes cruel and unusual punishment).

In *Farmer v. Brennan*, the Supreme Court held that deliberate indifference meant that the “[p]rison] official knows of and disregards an excessive risk to inmate health or safety . . . [and] the official . . . [is] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . draw[s] the inference.” *Farmer*, 511 U.S. at 837.

Prior to conviction, persons who are held pending trial may seek relief under the Fourteenth Amendment to the U.S. Constitution. *See generally Bell v. Wolfish*, 441 U.S. 520 (1979).

365. *In re Kemmler*, 136 U.S. 436, 933 (1890).

“involve the unnecessary and wanton infliction of pain,”<sup>366</sup> or that are “grossly disproportionate to the severity of the crime,”<sup>367</sup> violate the Eighth Amendment. In addition, prison authorities violate the Eighth Amendment when they deny prisoners medical care,<sup>368</sup> deprive them of their basic human needs,<sup>369</sup> or “deprive inmates of the minimal civilized measure of life’s necessities.”<sup>370</sup> In short, the Eighth Amendment mandates that corrections officials provide humane living conditions for prisoners.<sup>371</sup>

Although few courts have determined that solitary confinement as a practice on its own violates the Eighth Amendment, several courts have found that placing people with serious mental illness into solitary confinement is cruel and unusual punishment.<sup>372</sup> As one court reasoned, placing

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366. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

367. *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

368. *Estelle v. Gamble*, 429 U.S. at 103-04.

369. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

370. *Id.*

371. *See Farmer*, 511 U.S. at 832 (stating that “The [Eighth] Amendment . . . imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must “take reasonable measures to guarantee the safety of the inmates”).

372. *See, e.g., T.R. et al. v. South Carolina Dep’t of Corrections*, C/A No. 2005-CP-40-2925 (S.C. Ct. Comm. Pleas 5th J. Cir. Jan. 8, 2014) (finding major deficiencies in the Department of Corrections’ treatment of prisoners with mental illness, including solitary confinement, and ordering defendants to submit a remedial plan); *Ind. Protect. & Advocacy Servs. Comm’n v. Comm’r*, 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012) (holding that the Indiana Department of Correction’s practice of placing prisoners with serious mental illness in segregation constituted cruel and unusual treatment in violation of the Eighth Amendment); *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of prisoners with serious mental illness from “supermax” custody); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev’d on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (“Conditions in TDCJ-ID’s administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs’ class made up of mentally-ill prisoners”); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) (finding that the California Department of Corrections and Rehabilitation was in violation of the Eighth Amendment due to system-wide failure to provide adequate mental health care, and due to the deliberate indifference of prison officials to the needs of prisoners with mental illness); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (holding keeping prisoners with mental illness or those at a high risk for suffering injury to mental health in Pelican Bay isolation unit unconstitutional); *Casey*, 834 F. Supp. at 1549-50 (condemning placement and retention of prisoners with mental illness on lockdown); *H.B. v. Lewis*, 803 F. Supp. 246, 257 (D. Ariz. 1992) (finding 8th Amendment violation in part because of the lack of an adequate system for referring prisoners with behavioral problems to psychiatric

prisoners with mental illness into solitary confinement exposed them to risk of serious psychological harm and deterioration. The court emphasized that continued placement for prisoners with psychiatric disabilities in solitary confinement would expose them to “conditions that are ‘very likely’ . . . [to] inflict a serious mental illness or seriously exacerbate an existing mental illness[, and] cannot be squared with evolving standards of humanity or decency.”<sup>373</sup> Due to their vulnerabilities to further psychological harm, the court reasoned that placing these prisoners into solitary confinement violated the Eighth Amendment.<sup>374</sup>

As with prisoners who have psychiatric disabilities, prisoners with physical disabilities are also susceptible to serious harms in solitary confinement. These harms, as noted, include not only psychological damage, but also physical deterioration and deconditioning. Where placing a prisoner with a physical disability into solitary confinement makes it “very likely” for these harms to occur, the Eighth Amendment will likely bar such placement.

### C. *The Americans with Disabilities Act*

The passage of the Americans with Disabilities Act (ADA) was a watershed moment in the movement for equal rights for all people with disabilities.<sup>375</sup> The landmark civil rights legislation was the result of decades-long advocacy by people with disabilities, and in particular a fervent disa-

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staff); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials’ failure to screen out from SHU “those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there” states an Eighth Amendment claim).

373. *Madrid*, 889 F. Supp. at 1266.

374. *Id.* at 1267.

375. The ADA was not the first federal disability rights law. Congress passed the Rehabilitation Act of 1973 to protect persons with physical disabilities from discrimination in federal programs and any other programs receiving federal funding, including state and local governments. *See, e.g.*, U.S. Mem. of Law as Amicus Curiae on Issues Under the Americans With Disabilities Act & Rehabilitation Act That are Likely to Arise on Summ. J. or at Trial at 3 n.4, *Miller v. Smith*, Civ. Action No. 6:98-cv-109-JEG (S.D. Ga. Jun. 21, 2010), available at [https://www.ada.gov/briefs/miller\\_amicus.doc](https://www.ada.gov/briefs/miller_amicus.doc) [hereinafter *Miller Amicus Brief*].

In addition, the law protects people with disabilities from discrimination by federal employers, including those entities that contract with the federal government. Specifically, the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability” may because of their disability “be excluded from the participation in, be denied the benefits of, or be subjected to discrimination” by “any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a).



bility rights movement that sprang up in the 1970s.<sup>376</sup> Following the “culmination of 25 years of methodical congressional study, measured legislative steps, and finely tuned negotiation regarding the problem of” disability discrimination,<sup>377</sup> Congress enacted the ADA to address the historic exclusion, segregation, and discrimination<sup>378</sup> experienced by people with disabilities.

Under the Americans with Disabilities Act, “no qualified individual with a disability<sup>379</sup> shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>380</sup>

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The Rehabilitation Act was an important precursor to the Americans with Disabilities Act, providing a “regulatory foundation” and “enabl[ing] the ADA to withstand Congressional scrutiny.” *Equality of Opportunity: The Making of the Americans with Disabilities Act*, THE NATIONAL COUNCIL ON DISABILITY (2010), available at <http://files.eric.ed.gov/fulltext/ED512697.pdf> [hereinafter *Equality of Opportunity*].

In substance, the Rehabilitation Act and the ADA are similar and effectively provide the same legal protections for people with disabilities. The ADA states that the related federal regulations, which implement the statute’s requirements, do not apply a “lesser standard,” than the protections under the Rehabilitation Act of 1973. 42 U.S.C.A. § 12201 (West 2016) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”). In other words, protections under the ADA must be as comprehensive as those afforded to persons with physical disabilities under the Rehabilitation Act. See Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 192 (1994) (“Because Title II of the ADA essentially extends the antidiscrimination prohibition embodied in Section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under Section 504 for federally assisted programs.” (internal quotation marks omitted)).

376. *Equality of Opportunity*, *supra* note 375, at xvii.

377. Brief Amicus Curiae of the Nat’l Council on Disability in Support of Respondents, *Garrett v. Board of Trustees Univ. of Ala.*, 531 U.S. 356 (2001) (No. 99-1240) (2000), available at <http://www.ncd.gov/publications/2000/Aug2000> [hereinafter NCD Amicus Brief] (discussing support for findings regarding “nature and extent of discrimination”).

378. Congress collected extensive evidence of societal discrimination against people with disabilities. See NCD Amicus Brief ¶ I(B).

379. “The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C.A. § 12131(2) (West 2016).

380. *Id.* § 12132 (West 2016).

A plaintiff seeking to establish a claim under the ADA in court must show that 1) (s)he is a person with a disability<sup>381</sup> according to the statutory definition; 2) (s)he is otherwise qualified for the benefit in question; and 3) (s)he was excluded from the benefit of a program, service, or activity due to disability-based discrimination.<sup>382</sup> These sweeping protections aimed at ensuring equal access to public services, programs, or activities for all people with disabilities did not stop at the prison gates. Six years after the passage of the ADA, the Supreme Court ruled in *Pennsylvania Department of Corrections v. Yeskey* that the “benefits” from “services, programs, or activities” included prisoners, who even though incarcerated, rely on the state to meet their basic needs and provide them with rehabilitation.<sup>383</sup>

### 1. Reasonable Accommodations

The ADA requires public entities to “make reasonable modifications in policies, practices, or procedures[.]”<sup>384</sup> Reasonable accommodations help prevent discrimination against people with disabilities by providing them with the opportunity to “fully and equally participate in a program, service, or benefit.”<sup>385</sup> Reasonable modifications—also known as reasonable accom-

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381. Under the ADA, the term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment[.]

42 U.S.C.A. § 12102 (1) (West 2016). “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* at ¶ 2(a). “[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.* at ¶ 2(b).

382. *Id.* § 12132; *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (noting that for claims brought under the Rehabilitative Act, plaintiffs must also show that the “program or activity from which he is excluded receives federal financial assistance.”).

383. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (stating that “[M]odern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners”).

384. 28 C.F.R. § 35.130(b)(7) (2010).

385. *The Americans with Disabilities Act in Jail & Prison*, EQUIP FOR EQUALITY 3 (Apr. 5, 2016), <http://www.equipforequality.org/wp-content/uploads/2016/04/Prisoner-Rights-Under-the-ADA.pdf>.

modations—can vary considerably based on the specific needs of persons with a disability.<sup>386</sup>

For instance, say a prisoner with quadriplegia requires a motorized wheelchair, or a personal assistant to help with pushing a manual wheelchair, to access the dining hall, showers, recreational areas, and library in the facility. Under the ADA, prison officials would be required to provide a reasonable accommodation so that the prisoner can participate fully and equally in these benefits offered at the facility. By way of another example, say that a facility permits prisoners to use the telephone for only 30 minutes per day. Deaf or hard of hearing prisoners that rely on the telecommunication devices like video phones, TTDs, or relay services may in practice receive less time for phone calls due to the additional time it takes to set up these devices, as well as delays in transmitting and receiving messages. A reasonable accommodation could be one that would allot additional time for telephone calls by deaf prisoners to ensure that they have the same time for telephone calls as hearing prisoners.

## 2. Effective Communications

Under the ADA, corrections officials are required to provide communications to people with disabilities that are as effective as the communications provided to persons who do not have disabilities.<sup>387</sup> To meet this requirement, corrections officials must provide blind, low vision, deaf and/or hard of hearing persons with auxiliary aids and services to facilitate effective and meaningful communications during critical encounters—prison orientation, educational classes, job training, work assignments, meetings with counsellors, medical appointments, religious services, grievance pro-

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386. A modification or accommodation is reasonable if it does not fundamentally alter a program, service, or activity, or result in an undue burden. *See infra* Part VII.C.3 (“Limits to the ADA”).

387. 28 C.F.R. § 35.160 (a)(1) (2010) (“A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”). *See generally, Effective Communication*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION 6 (2014), <http://www.ada.gov/effective-comm.pdf> [hereinafter *ADA Requirements: Effective Communication*]. Public entities, including prisons and jails, are required to give “primary consideration” to the individual’s choice for a particular aid or service that serves to accommodate a communication disability. According to guidelines set forth by the U.S. Department of Justice, a public entity must “honor the person’s choice, unless it can demonstrate that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration or in an undue burden[.]”

ceedings, and vocational classes, etc.—unless doing so would cause an undue burden, or fundamentally alter the nature of a program.<sup>388</sup>

To ensure meaningful and effective communication with deaf, hard of hearing and/or blind, or low vision prisoners, prison officials must provide auxiliary aids and services, such as hearing aids, sign language interpreters, text-to-audio devices, vibrating alerts, and real-time captioning. When provided, the auxiliary aids and services must also be tailored to the specific needs of the individual. Public entities are required to give primary consideration to the particular assistive device or aid that the person with the communication disability requests. Corrections officials must provide these persons with the requested accommodation “unless it can demonstrate that another equally effective means of communication is available,” or that the requested accommodation “would result in a fundamental alteration or in an undue burden.”<sup>389</sup> Even where the requested accommodation “would result in an undue burden or a fundamental alteration,” prisons must still “provide an alternative aid or service that provides effective communication if one is available.”<sup>390</sup>

Furthermore, the auxiliary aids provided must properly function to be effective. Hearing aids that are broken<sup>391</sup> or do not fit well, will not provide effective communication. Similarly, effective communication requires that auxiliary services, such as sign language interpreters be qualified to complete the job. A qualified interpreter is one “who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.”<sup>392</sup> Permitting other prisoners to serve as sign language interpreters places deaf prisoners at risk by infringing upon their privacy, particularly during confidential medical visits, and

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388. See generally *ADA Requirements: Effective Communication*, *supra* note 387.

389. *Id.*

390. *Id.* The Department of Justice also advises public entities that:

“[I]n determining whether a particular aid or service would result in undue financial and administrative burdens, a title II entity should take into consideration the cost of the particular aid or service in light of all resources available to fund the program, service, or activity and the effect on other expenses or operations. The decision that a particular aid or service would result in an undue burden must be made by a high level official, no lower than a Department head, and must include a written statement of the reasons for reaching that conclusion.”

391. See generally *Gilmore v. Hodges*, 738 F.3d 266 (11th Cir. 2013) (challenging failure to provide batteries for hearing aids); see also Press Release, AM. CIV. LIBERTIES UNION, *ACLU Sues On Behalf of Prisoner at Lake Erie Correctional Who Was Denied Hearing Aid* (Apr. 7, 2016), <http://www.acluohio.org/archives/press-releases/aclu-sues-on-behalf-of-prisoner-at-lake-erie-correctional-who-was-denied-hearing-aid>.

392. 28 C.F.R. § 35.104 (2010).

creating reliance on other prisoners which can lead to exploitation.<sup>393</sup>If interpreting services are not available, video remote interpreting services may be used, particularly in emergency situations.<sup>394</sup>

### 3. Limits to the ADA

The comprehensive protections and guarantees provided to people with disabilities are not without limitation. Even where an individual can establish that she or he has a disability as defined by the statute, is otherwise qualified, and was excluded from the benefit of a program, service, or activity provided by a public entity, the public entity is not required to provide an accommodation where doing so constitutes an undue burden.<sup>395</sup> Specifically, a prison can defend against a lawsuit alleging a violation under the ADA for failing to provide a reasonable accommodation where providing the requested accommodation “would result in a fundamental alteration in the nature of a service, program or activity, or in undue financial and

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393. See, e.g., *Armstrong v. Brown*, 857 F. Supp. 2d 919, 933 (N.D. Cal. 2012) (“Reliance on other prisoners for access to basic services, such as food, mail, showers and toilets by prisoners with disabilities leaves them vulnerable to exploitation and is a dangerous correctional practice.”); *Pressure Mounts for Oregon to Use “Qualified” Interpreters for Deaf Inmates*, OR. PUB. BROADCASTING (Sept. 22, 2014), <http://www.opb.org/radio/programs/thinkoutloud/segment/pressure-mounts-for-oregon-to-use-qualified-interpreters-for-deaf-inmates/> (Interview with Talila A. Lewis, Founder and Executive Director, HEARD).

394. Video remote interpreting (VRI) uses “videoconferencing technology, equipment, and a high speed Internet connection with sufficient bandwidth to provide the services of a qualified interpreter, usually located at a call center, to people at a different location.” *Video Remote Interpreting*, NAT’L ASS’N OF THE DEAF, <https://nad.org/issues/technology/vri> (last visited Oct. 18, 2016). A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

- (1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
- (2) A sharply delineated image that is large enough to display the interpreter’s face, arms, hands, and fingers, and the participating individual’s face, arms, hands, and fingers, regardless of his or her body position;
- (3) A clear, audible transmission of voices; and
- (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI. 28 C.F.R.

§ 35.160(d) (2010).

395. *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999).

administrative burdens.” The ADA defines “undue burden” as an “action requiring significant difficulty or expense[.]”<sup>396</sup>

Moreover, prison authorities are not required to provide reasonable accommodations where doing so would pose a “direct threat” or a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”<sup>397</sup> Additionally, “[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities.”<sup>398</sup> Although this provision may limit the extent to which the public entity must provide reasonable modifications, the provision also calls for assessments based on actual risks rather than speculation, stereotypes, or generalizations, which suggests that public entity must offer written justifications, or actual evidence before alleging safety risks.<sup>399</sup>

#### D. *Prison Litigation Reform Act*

The Prison Litigation Reform Act (“PLRA”) applies to all lawsuits filed pursuant to federal law by prisoners, including prisoners with disabilities. Under the PLRA, prisoners are prohibited from filing a lawsuit in federal court until they have attempted to resolve their dispute using the

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396. 42 U.S.C.A. § 12111(A) (West 2016). Prison officials have the burden of proving in court that the requested accommodation would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7) (2010). Courts have adopted a list of factors to consider in determining whether an accommodation is reasonable or unduly burdensome. One court discussed the fact-intensive inquiry as follows:

Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff. Whether the requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability. The overall focus should be on whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.

*Dadian v. Village of Wilmette*, 269 F.3d 831, 838–39 (7th Cir. 2001) (citations and internal quotation marks omitted). In general, determining whether a particular accommodation that is requested by a prisoner is reasonable requires case-by-case analysis into the prisoner’s disability, specific accommodation requested and its benefits to the prisoner, as well as the institutional interests (e.g. cost, security, administration, etc.).

397. 28 C.F.R. § 35.104(4) (2010).

398. 28 C.F.R. § 35.130(h) (2010).

399. *See, e.g., Wheeler v. Tinsman*, No. 2:11-CV-02002, 2014 WL 1053738, at \*2 (W.D. Ark. Mar. 18, 2014).

administrative procedures for the particular prison in which they are held.<sup>400</sup> In other words, prisoners must demonstrate that they have complied with, and received no relief from, the prison's own grievance system prior to filing a lawsuit in court. Failure to do so will result in the prisoner's complaint, even a meritorious one, being dismissed from court.

For example, if a blind prisoner brings a lawsuit under the ADA alleging that prison officials failed to provide him with any accommodations so that he could participate in vocational classes, religious services, and recreation, and there is no evidence that he submitted a request to prison authorities for these accommodations, his complaint will be dismissed. Thus, where administrative remedial procedures are not strictly followed, prisoners with physical disabilities in solitary confinement may not be able to obtain relief in court even where constitutional, ADA, or other violations of federal law have occurred.<sup>401</sup>

#### E. *Protection & Advocacy Monitoring and Oversight*

Protection and advocacy ("P&A") organizations "provide legal representation and other advocacy services to all people with disabilities (based on a system of priorities for services)."<sup>402</sup> Federal statutes allow P&A organizations a right of access to records and related information during their investigations.<sup>403</sup> P&A organizations have the authority under federal and state laws to provide legal representation and other advocacy services to individuals with physical, mental, developmental, and intellectual disabilities living in correctional institutions, among other facilities. These P&A agencies maintain a presence in both public and private facilities that house individuals with disabilities are responsible for investigating and monitoring institutions for violations of disability laws, and pursuing remedial action to address violations when found.<sup>404</sup> In recent years, several P&A

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400. 42 U.S.C.A. § 1997e (a) (West 2016) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

401. See, e.g., NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, HUMAN RIGHTS WATCH 16-17 (2009), <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> (describing attempts by prisoners to establish good cause for failing to exhaust grievance procedures that have been rejected by courts).

402. P&A/CAP Network, NAT'L DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/about/paacap-network.html> (last visited Oct. 18, 2016).

403. 42 U.S.C.A. §§ 10805(a)(4), 15043(a)(2)(I) (West 2016).

404. 42 U.S.C.A. §§ 10805(a)(1), 15043(a)(2)(A)-(B) (West 2016).

organizations have filed lawsuits on behalf of prisoners with physical disabilities challenging their mistreatment while held in solitary confinement.<sup>405</sup>

#### F. *State Law*

In addition to federal law and regulations, state laws and regulations provide protections to people with disabilities, including incarcerated persons. Though state laws prohibit discrimination on the basis of disability, offering protections similar to the ADA,<sup>406</sup> each state court's interpretation of that law remains the controlling authority. A review of the specific state laws and cases is necessary to determine the nature and scope of protections offered under these state statutes.

### VII. RECOMMENDATIONS FOR ENDING SOLITARY CONFINEMENT OF PRISONERS WITH DISABILITIES

Solitary confinement is an overused, ineffective, and harmful practice. Despite the claims that solitary confinement is only used when necessary, the research detailed in this article shows how some prisoners with physical disabilities are held in conditions amounting to extreme—and in some cases—prolonged isolation for reasons that are unrelated to maintaining the safety and security of the facility. Prisoners with disabilities may be placed into solitary due to lack of accessible cells, miscommunication leading to disciplinary charges, or for their own protection. These prisoners with disabilities languish in highly restrictive conditions where they are deprived of meaningful social interaction and almost all constructive activity with little to no actual justification for their continued placement. As noted, there is no evidence that long-term isolation makes prisons and jails safer. Indeed, most of the evidence suggests the opposite effect—that solitary confinement can increase the incidents of violence and contributes to increased recidivism amongst persons subjected to its use.<sup>407</sup> Prolonged isolation for

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405. *Making Hard Time Harder*, *supra* note 182, at 16-17, 18.

406. *See, e.g.*, CAL. CIV. CODE § 51 (West 2016); LA. STAT. ANN. § 46:2254 (West 2016); MASS. GEN. LAWS ANN. ch. 93, § 103 (West 2016).

407. AM. CIV. LIBERTIES UNION, THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT 9 (2014) (“A 2006 study found that opening a supermax prison had no effect on prisoner on prisoner violence in Arizona, Illinois and Minnesota. The same study found that creating a supermax had only limited impact on prisoner on staff violence in Illinois, none in Minnesota and actually increased violence in Arizona. Moreover, limiting the use of solitary confinement has been shown to decrease violence in prison. A reduction in the number of prisoners in segregation in Michigan has resulted in a decline in violence and other misconduct. Similarly, Mississippi saw a 70% reduction in violence levels when it closed an entire solitary confinement unit.”); *see also*



persons with physical disabilities, such as persons with quadriplegia, other spinal cord injuries, or stroke survivors coping with paralysis, may result in physical deterioration, especially where regular physical therapy is not provided. Moreover, failing to accommodate prisoners who use wheelchairs, or other assistive devices, like walking canes or walkers, may mean the denial of access to even the limited programming that is sometimes available to prisoners in solitary confinement. Without accommodations to permit effective communication for deaf and hard of hearing prisoners, and access to accessible reading materials for blind and low vision prisoners, the extreme conditions of social isolation in solitary are compounded.

This article highlights a few guiding principles and specific reforms to address the challenges faced by incarcerated persons with physical disabilities, specifically those in solitary confinement.<sup>408</sup> These principles and recommendations build on the guiding principles set forth in the Department of Justice's Report and Recommendation Concerning the Use of Restrictive Housing released in January 2016.<sup>409</sup> The report was produced in response to a directive by President Obama calling on the Department of Justice to review the overuse of solitary confinement in federal prisons nationwide and to identify potential alternatives to its use. The DOJ report and its recommendations set forth over 50 guiding principles for solitary reform writ large and a host of specific policy changes for the federal Bureau of Prisons (BOP) and other detention agencies within the DOJ, including banning youth in solitary, diverting those with serious mental illness out of solitary, reforming protective custody, prohibiting the use of solitary confinement for low-level disciplinary infractions, and shortening mandatory lengths of stay in solitary confinement units. While the Department's guiding principles are a move in the right direction, they did not address the unique issues prisoners with physical disabilities face in solitary confinement. Accordingly, more rigorous requirements are still necessary to make correctional systems safer and more humane.

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LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMM, RECIDIVISM IN CONNECTICUT 41-42 (2001), <http://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/2001recidivismconnecticut.pdf> (discussing recidivism rates of prisoners who spent time in administrative or disciplinary segregation).

408. These guiding principles are in no way limited to persons with physical disabilities, but should apply generally to all prisoners.

409. DOJ REPORT & RECOMMENDATIONS, *supra* note 13, at 14, 46, 59-62, 86-87, 102, 106.

### A. *Recommended Action*

The recommendations below are offered to serve as guidance to corrections and state officials legally obligated to follow the ADA and federal officials tasked with enforcing the ADA's mandates in prisons and jails nation-wide. The recommendations provide potential reforms for common challenges encountered by incarcerated persons with physical disabilities. In practice, implementing the ADA for individual's prisoners with physical disabilities may require case-by-case assessments into their needs, as well as the needs and resources of each correctional entity. The proposed reforms are aimed at reducing the overuse of solitary confinement and ensuring that in those systems where solitary confinement continues to be used, the rights of persons with physical disabilities are respected.

#### 1. Correctional Systems

Recommended actions for Federal, state, and local correctional system:

- Amend existing, or adopt new, administrative policies to reflect the recommendations made in the model policies section discussed below.
- Establish data procedures to improve tracking and monitoring of incarcerated persons with physical disabilities. This will include adopting formal definitions of types of disabilities, as well as data collection on people with disabilities within the corrections system on an annual basis. The data systems should be designed to ensure ease in searching for key terms and filtering data.
- Create policies, procedures, and systems to permit both medical and security/custody to be apprised of all relevant information related to a prisoner's disability, or reasonable accommodation.
- Complete a system-wide, self-evaluation of each facility to determine whether facilities are compliant with the ADA.<sup>410</sup> Buildings should be assessed to see whether they comply with the 2010 ADA Standards for Accessible Design.<sup>411</sup>
- Assign a competent and knowledgeable ADA Coordinator to each facility in the jurisdiction. The ADA Coordinator should be responsible for serving as the facility expert on the ADA, leading

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410. See *The Americans with Disabilities Act: Title II Technical Assistance Manual*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <https://www.ada.gov/taman2.html#II-8.0000> (last visited Oct. 18, 2016), for guidance on what should be included in a self-evaluation plan.

411. *2010 ADA Standards for Accessible Design*, U.S. DEP'T OF JUSTICE (Sept. 15, 2010), <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm> [hereinafter *2010 ADA Standards for Accessible Design*]

training programs for corrections staff on ADA compliance, coordinating with medical and mental health professionals to understand the needs of people with disabilities, managing all requests for accommodations from people with disabilities, and working with the appropriate officials to establish the budget for ADA-related compliance, accommodations, and other measures. The ADA coordinator should be full-time and provided with the autonomy, time, and authority to complete their required duties. To the extent feasible, corrections institutions should seek to hire people with disabilities to fill these roles to provide an opportunity for those who have personal knowledge and a deep understanding of the issues facing this group.

- Establish an ADA Committee to be comprised of corrections officials and staff from all aspects of prison services and management (e.g., custody, programming, visiting, classification, medical and mental health, etc.), as well as prisoners. The ADA Committee is responsible for addressing existing disability-related challenges, identifying policies to prevent ongoing and future ADA violations, and handling all other issues related to managing and accommodating prisoners with disabilities, particularly those held in solitary confinement system-wide.
- Provide training and support for medical personnel and custody staff on working with people with disabilities (e.g., Deaf culture and sensitivity training, etc.). Where feasible, training sessions should be led by, or in partnership with, individuals and organizations with expertise in working with people with disabilities.
- Develop robust systems to gather information on incarcerated persons with disabilities to ensure that medications and accommodations remain with the person even following a transfer within the corrections system and despite security classification.
- Develop a clear and comprehensive process by which prisoners may request accommodations, or seek review of any decision denying a request for an accommodation. The procedure for requesting accommodations should be available in formats accessible to prisoners who are blind, low vision, and/or deaf or hard of hearing.

## 2. Federal

### a. *Congress*

- Pass the Solitary Confinement Reform Act (S. 3432) introduced by Senator Dick Durbin (D-Il) to reduce the use of solitary confinement, improve conditions of confinement, and provide protections that limit time spent in solitary confinement for prisoners held in the custody of the Federal Bureau of Prisons. This bill

also prohibits BOP officials from placing prisoners with physical disabilities into solitary confinement, unless certain conditions are met, in cases where a licensed medical professional has determined that solitary confinement would exacerbate existing disabilities.

- Congress should enact appropriate legislation to ban the placement of prisoners with physical disabilities into solitary confinement, except in rare and exceptional cases, for a short duration, and only where the prisoner “poses a credible continuing and serious threat to the security of others or to the prisoner’s own safety[.]”<sup>412</sup>
- Congress should enact legislation requiring the BOP, state, and local jurisdictions to collect data on the number of incarcerated persons with disabilities, as well as those in solitary confinement, or other forms of restrictive housing, reasons for placement in solitary confinement, and average length of stay.
- Congress should appropriate additional federal funding for Protection & Advocacy organizations to increase their capacity to engage in monitoring and oversight of corrections institutions and to increase their capacity to advocate on behalf of incarcerated persons with physical disabilities more broadly.

b. *Department of Justice*

- The Office of the Inspector General of the Department of Justice should investigate the conditions of confinement for incarcerated persons with disabilities in the BOP.
- The Department of Justice should audit state and federal prisons on an annual or bi-annual basis to evaluate whether corrections facilities have completed self-evaluation plans or are otherwise in compliance with the regulations governing public entities under Title II of the Americans with Disabilities Act.
- The Department of Justice should augment its existing guidelines on the treatment of prisoners in solitary confinement, or restrictive housing in the *DOJ Report and Recommendations Concerning the Use of Restrictive Housing*, to include prisoners with physical disabilities consistent with the recommendations in this article.

3. State and Local

State legislature and municipal bodies should:

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412. ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION) TREATMENT OF PRISONERS, Rule 23.2.9, available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf) [hereinafter ABA STANDARDS].

- Ban the placement of incarcerated persons with physical disabilities into solitary confinement, except in rare and exceptional cases, for a short duration, and only where the prisoner “poses a credible continuing and serious threat to the security of others or to the prisoner’s own safety.”<sup>413</sup>
- Require state corrections entities to report on the numbers of incarcerated persons with physical disabilities held in solitary in each facility within the state and the nature of their disabilities.
- Collect and monitor data on the provision of accommodations to persons with physical disabilities in solitary confinement, including but not limited to the rates of removal/refusal of accommodations, use of uncertified interpreters or other prisoners, and the rates of denial for accommodations due to cost, etc.

## B. *Model Policies and Procedures*

### 1. General Principles

- Placements into solitary confinement must not last longer than 15 days at a time.<sup>414</sup>
- Solitary confinement must only be used in rare and exceptional cases, for a short duration, and only where the prisoner “poses a credible continuing and serious threat to the security of others or to the prisoner’s own safety[.]”<sup>415</sup> All placement decisions must be reviewed by an independent authority within 48 hours of placement.
- Vulnerable populations must be expressly excluded from solitary confinement, including youth, pregnant women, persons with psychiatric disabilities, and persons whose mental or physical disabilities will be exacerbated by placement into solitary. If placed in solitary confinement, these vulnerable populations should be consistently monitored for deterioration in physical and mental health, and diverted from solitary confinement and provided with appropriate medical or mental health treatment where deterioration occurs.
- All placement decisions must be supported with specific and concrete justifications that are supported by objective evidence.

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413. *Id.*

414. Placement into solitary confinement should last no longer than 15 days. *See, e.g.,* Nelson Mandela Rule 44 (stating that “Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.”).

415. ABA STANDARDS, *supra* note 412, at Rule 23.2.9.

## 2. General Principles regarding Incarcerated Persons with Physical Disabilities

- Solitary confinement must be “prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such” placement.<sup>416</sup>
- Incarcerated persons with physical disabilities should never be placed into solitary confinement because the facility lacks accessible cells for people with physical disabilities, or for protective custody purposes, such as after reporting sexual assault.
- Reasonable accommodations must be provided to all incarcerated persons with physical disabilities who are held in solitary confinement. These accommodations are necessary to ensure equal access to all programs, services, and activities that are available to non-disabled prisoners.

## 3. Process Prior to Placement

- All prisoners must receive adequate and meaningful process prior to placement into solitary confinement. All placement decisions should be evaluated by a multi-disciplinary team that includes custody staff, medical personnel, mental health professionals, and the Warden or Deputy Warden. Officials in charge of reviewing placement decisions must have objective, written evidence of reasons justifying placements into solitary. Adequate and meaningful process includes:
  - Notice of the reasons for placement into solitary confinement, including the evidence used in making the placement decision. Notice should be written and provided in a format that is accessible to all persons, including those with sensory disabilities. Ensuring that decisions are accessible includes providing qualified sign language interpreters to deaf persons who sign and who are placed into solitary, or require providing materials in Braille, large text, or audio formats;
  - A hearing before a neutral arbiter whereby the prisoner can offer evidence, present and confront witnesses, where doing so would not pose a substantial threat to the safety and security of the prisoner, other prisoners, or the facility. The hearing must include accommodations (i.e. auxiliary aids and services) to ensure effective communications with prisoners with sensory disabilities and must be housed in a location that can be accessed by prisoners with mobility-related disabilities.

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416. Nelson Mandela Rule 45(2).

- An opportunity to appeal all placement decisions to a neutral arbiter. The appeals process must be provided in a format that is accessible to prisoners with sensory disabilities; and
- Periodic review of all placement decisions by the Warden, or designated official, with recommendations from the multi-disciplinary team, for all placements that exceed the 15-day limit. Review should occur every 14 days. The purpose of periodic review is to ensure that the reasons justifying placement remain, and that housing the prisoner in a less restrictive setting would not avoid the risks to the prisoner's personal safety, and the safety and security of other prisoners, staff, and the facility.
- Prisoners must be afforded a process to progress out of solitary confinement and acquire access to programming and increased privileges. This process should include clear and specific criteria for progressing to less restrictive housing. Prisoners should be afforded increased privileges as they progress from solitary and into less restrictive housing. The policies governing progression out of solitary must be provided in accessible formats to all persons with sensory disabilities.

#### 4. Disciplinary Segregation

- Prisoners should be placed into solitary confinement only where there is a "poses a credible continuing and serious threat"<sup>417</sup> to safety and security, and only where other sanctions (including the removal of certain privileges for a limited period of time) are not appropriate.
- Prisoners must be afforded the opportunity to appeal all convictions to a neutral arbiter. The appeals process must be provided in a format that is accessible to prisoners with sensory disabilities.
- Disciplinary segregation should not extend beyond a brief period—i.e. not more than 15 days. Segregation beyond a brief period should be imposed only in cases where the prisoner "poses a credible continuing and serious threat."<sup>418</sup>
- Placement into disciplinary segregation should occur only after a disciplinary hearing whereby the prisoner is presented with the nature of, and evidence supporting, the charges, be permitted to offer evidence, and present and confront witnesses, where doing so would not pose a substantial threat to the safety and security of the prisoner, other prisoners, or the facility. All information provided at the disciplinary hearing must be in an accessible format.

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417. ABA STANDARDS, *supra* note 421, at Rule 23.2.9.

418. *Id.*

- Under no circumstances should a prisoner with sensory disabilities (hearing, sight, speech) be disciplined for failure to respond to a command that the prisoner is unable to comprehend via the communication method used. For example, disciplining a deaf or hard of hearing prisoner for failing to respond to an audio alarm or alert, disciplining a blind or low vision prisoner for failing to respond to a visual alarm, or alert, or disciplining persons with speech disabilities for failing to orally respond to a command, should not be permitted.

## 5. Protective Custody

- Prisoners who are separated from general population for protective reasons must not be placed into solitary confinement. At a minimum, these prisoners should be held in the least restrictive conditions possible to ensure their safety while also maximizing their out-of-cell time, and access to meaningful social interaction and constructive activity.
- Privileges such as telephone use, visitation, and commissary access, must not be removed for prisoners placed in protective custody.

## 6. Conditions

- Accessible cells must be provided in housing units for all security levels. At a minimum, the law requests that three percent—but no fewer than one cell—must be designed to accommodate wheelchair users.<sup>419</sup>
- Under no circumstances should a prisoner with a physical disability be denied access to reasonable accommodations as a form of punishment.
- No prisoner should be denied access to durable medical equipment or assistive devices while in isolation for an indefinite period of time. If the removal of durable medical equipment or an assistive device would exacerbate the prisoner's disability, then the assistive device is necessary and removal should be avoided unless in exceptional circumstances and then only for a limited period of time. Corrections staff should presume that a prisoner can safely possess his or her assistive device unless the prisoner has misused the assistive device in the past. If there is a reason to believe that the prisoner will pose a threat to himself or others with the assistive device, then the prisoner should be placed under continuous watch when the device is in his possession.<sup>420</sup>

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419. 2010 ADA Standards for Accessible Design, *supra* note 411.

420. I am indebted to Miranda Tait for her ideas on this policy formulation.



- Absent specific, concrete, and objective evidence that providing such a device would pose a credible and serious risk to the prisoner's own safety, other inmates, staff, or the safety and security of the institution, assistive devices should be provided to prisoners in solitary confinement where requested. The denial of accommodations for security reasons should last no longer than necessary to prevent the threats to safety and security that justify the placement into solitary confinement, and must be supported by specific and concrete evidence. Any denials must be approved in writing by the Warden or another high-level official of the facility.
- Decisions denying requests for accommodations, or removing accommodations previously provided, must be in writing, in accessible formats, and must be made with input from medical professionals and ADA Coordinators, where necessary, and submitted to the Warden or another ranking official for final approval.
- Factors to consider when determining whether the requested assistive device or medical equipment poses a threat to the safety of persons and the security of the facility:
  - The need for the accommodation;
  - Whether the accommodation is necessary;
  - Whether the prisoner's disability would be exacerbated by the removal of the assistive device;
  - Whether the prison accommodation was previously provided to the prisoner in general population, or less restrictive housing;
  - Whether the prisoner's accommodation was previously determined to be appropriate by staff at another correctional facility within the state's jurisdiction;
  - The prisoner's custody level;
  - The specific circumstances justifying placement into solitary confinement;
  - The likelihood that the prisoner may use the assistive device to cause physical harm; and
  - Whether a temporary removal of the device would address the safety and security concerns.
- Prisoners must be afforded out-of-cell time and access to individual programming, group programming, recreation time, outdoor exercise time, face-to-face interaction with corrections, medical, mental health staff, visitation, telephone calls, radio, correspondence, reading materials, and commissary. Where these privileges are provided, accommodations must be made for persons with physical disabilities to ensure that access is at least commensurate with non-disabled persons.

- Accessible programming means removing structural barriers that obstruct physical access to locations where programs and services are housed (e.g., uneven floors, narrow doorways, uneven pavement, etc.), or moving programming to an accessible location. It also includes providing accommodations to facilitate effective communications (e.g., videophones, video relay services, sign language interpreters, audio text for blind or low vision prisoners, visual alerts for deaf and hard of hearing prisoners, etc.) so that persons with physical disabilities can participate in programs and services offered at the facility.
- Prisoners should not be subjected to extreme isolation and total sensory deprivation. Prisoners should not be placed in housing that subjects them to complete auditory isolation (e.g., sound proof cells) and a total lack of visual stimuli (e.g. complete darkness, limited access to natural light, and/or 24-hours access to white light, etc.).

