

PUNISHMENT IN PRISON: CONSTITUTING THE “NORMAL” AND THE “ATYPICAL” IN SOLITARY AND OTHER FORMS OF CONFINEMENT

Judith Resnik, Hirsu Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler

ABSTRACT—What aspects of human liberty does incarceration impinge? A remarkable group of Black and white prisoners, most of whom had little formal education and no resources, raised that question in the 1960s and 1970s. Incarcerated individuals asked judges for relief from corporal punishment; radical food deprivations; strip cells; solitary confinement in dark cells; prohibitions on bringing these claims to courts, on religious observance, and on receiving reading materials; and from transfers to long-term isolation and to higher security levels.

Judges concluded that some facets of prison that were once ordinary features of incarceration, such as racial segregation, rampant violence, and filth, violated the Constitution. Today, even as implementation is erratic and at times abysmal, correctional departments no longer claim they have unfettered authority to do what they want inside prisons walls. And, even as the courts have continued to tolerate the punishment of solitary confinement in the last decade, a few lower courts have held unconstitutional the profound sensory deprivations such isolation has entailed.

Prisoners have also sought procedural protections to constrain arbitrary decision-making about placements in solitary confinement and transfers to adverse settings. In response, the Supreme Court has required that, to state a Fourteenth Amendment claim that their liberty had been infringed, prisoners have to demonstrate that a specific practice imposed an “atypical” and “significant hardship.”

What is typical in prisons? What are the sources of knowledge and the baselines used by Justices to decide? How did isolation come to be seen as an ordinary incident of prison life? We answer these questions through analyzing debates in both the U.S. Supreme Court and lower courts about what deprivations in prison are “normal.” After excavating the conflicts within the Court about the kinds of liberty interests prisoners retained, we

mined hundreds of lower court opinions to learn how judges determine when constrictions on human movement meet the test of atypicality and hardship. By documenting the high tolerance many federal judges have for periods of isolation lasting months, years, and decades, we demonstrate the central role judges play in constructing the “normal” of prisons.

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I. LOSING LIBERTY

Incarceration limits individuals’ liberty. How much individual liberty dims with incarceration has been the subject of debate for the last sixty years. The issue emerged in courts when prisoners sought to and succeeded in circumscribing what had been the unfettered discretion of prison officials, who had unilaterally controlled all aspects of their lives.

Once prisoners convinced judges that the U.S. Constitution did not stop at the prison gate,¹ they raised a host of questions. If being sent to prison *is*

¹ Justice Thurgood Marshall’s phrase was that “a prisoner does not shed his basic constitutional rights at the prison gate.” *Wolff v. McDonnell*, 418 U.S. 539, 580–81 (1974) (Marshall, J., concurring in part and dissenting in part), discussed *infra* notes 314–358 and accompanying text.

the punishment, who decides what happens to people once inside? Are there conditions and forms of in-prison punishment that are unconstitutional? How relevant (if at all) are the intentions of officials to punish prisoners? Does the frequency of a challenged practice, be it commonplace or unusual, have a bearing on its legality? And, if making comparative judgments between free people and among people differently incarcerated, how are the referents and baselines chosen?

To explicate the boundaries of licit punishment, Justices had to develop the contours of the constitutional rights allegedly infringed, as they wrote about liberty, property, religious freedom, speech, and equality. Justices addressed the sources of constitutional protections and whether the fact of incarceration altered the contours of rights of prisoners. Members of the Court debated whether such rights were inalienable and predated the Constitution, were protected by it, or depended on enactments in federal and state law. Those analyses in turn were framed by judicial concern about how much deference to accord to state and federal actors and about the numbers of claims that could be filed, given the myriad of practices in prison and the large population of people subjected to control.

In this Essay, written for a symposium on solitary confinement, we explore the stakes—for the incarcerated, for courts, and for the body politic—of judicial engagement with in-prison punishments. We show how, over the course of sixty years, courts came to reject the filth, squalor, violence, and racial discrimination that were once commonplace in prisons, and yet developed and applied the idea that some radical deprivations—solitary confinement included—were so “normal” in prisons as not to be subject to much judicial oversight.

In Part II, we begin where prison law did, in the 1960s and 1970s when federal judges moved away from complete deference to prison officials (a “hands off” approach) and began to assess the constitutionality of in-prison treatment. The civil rights movement of the 1960s produced pressures for law (at national and local levels and in legislatures and courts) to recognize that governments disproportionately policed, incarcerated, and oppressed poor people and especially those of color.

Litigation in the 1960s and 1970s from across the country details the horrific treatment that had once been “ordinary in prison.”² We place that

² Using Westlaw, we entered the following search string: “prison! OR inmate OR incarcerat! OR imprison! OR confinement OR custody.” We limited the search to decisions from 1960 to 1970, and included each federal circuit, so as to identify decisions from around the country. In order to select cases that addressed violations of prisoner rights, we narrowed the search based on three key numbers: Prisons, Constitutional Law, and Civil Rights. Under these parameters, we found 2,381 reported cases that we culled by a variety of means to focus on in-prison conditions.

phrase in quotes to underscore that the constitutive elements of prison are the result of decisions, rather than of a preexisting, natural kind. We also document how prisoners pressed courts and how judges contributed to de-normalizing many practices that once were common. Relying on various parts of the Constitution, prisoners succeeded in taking some sanctions out of officials' repertoire and in gaining authority at times to defend against claims that their behavior warranted additional in-prison punishment. For example, predicated on the Eighth Amendment, lower courts banned whippings and putting people into dungeons.³ Relying on the Fourteenth Amendment, the U.S. Supreme Court concluded that prison officials could not take away earned "good-time credits" and prolong the time spent incarcerated without providing prisoners with opportunities to contest charges.⁴

Examining the first two decades of prison law clarifies the relationship between solitary confinement cases and system-wide conditions challenges. We trace how individual decisions finding unconstitutional the degrading treatment accorded to people in solitary confinement (some of whom were held in single dark cells and others in groups crammed for days into small, filthy cells) came to be seen as unconstitutional for incarcerated people in general population. Even as many prisons remain miserable and frightening today, as mandates for safety and health are far from implemented,⁵ and as solitary confinement is commonplace, conditions in many facilities improved somewhat.

That "somewhat" is a critical caveat also addressed in Part III, which analyzes the limits of the initial victories. This account of decades of prison litigation makes plain that whether taking a self-described deferential or an engaged role, courts are always central in structuring the conditions under which incarcerated individuals live.

By the late 1970s and into the 1980s, appellate courts reversed lower courts that sought not only to stop the filth, violence, and lack of sanitation, health care, and adequate food, but also the treatment of people as objects to be "warehoused," rather than as individuals in need of human interaction,

³ See *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). Then-Judge Harry Blackmun wrote the opinion for the Eighth Circuit. *Id.* at 572.

⁴ *Wolff*, 418 U.S. at 555–58, discussed *infra* notes 315–358 and accompanying text.

⁵ See, e.g., Complaint, *Lang v. Taylor*, No. 4:20-cv-00030 (N.D. Miss. Feb. 25, 2020); Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html> [<https://perma.cc/TL5M-UNW7>]; Rick Rojas, *More Slayings at Parchman as Mississippi Confronts Prison Crisis*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/parchman-mississippi-prison-deaths.html> [<https://perma.cc/T2TD-AK6Z>].

stimulation, varied activities, and autonomy.⁶ Cutbacks came through a variety of doctrines, and we focus on two that are central to the expansive use of solitary confinement.

In 1981, the Court concluded that double-celling was not a punishment that the Constitution prohibited.⁷ By licensing intense social density and the lack of personal privacy entailed in cramming more people into cells designed for one,⁸ the Court constitutionalized overcrowding.⁹ Normalization of that practice means that, rather than governments paying the cost of unbridled policing and prosecution policies, people in detention suffer from hyper-density and a lack of services. The tragic consequences have become all the more vivid in the wake of COVID-19, which emerged as we wrote. Overcrowded facilities came to be used as a justification for reliance on solitary confinement, which a 2005 Supreme Court decision tolerated as a permissible response, as it characterized prisons as fearsome places in which gangs imperiled security.¹⁰ As of 2020, solitary confinement remains a feature of almost all prison systems in the United States.

In Part III, we turn to empirical work on the aspect of incarcerated people's lives—solitary confinement—that is at the center of this Symposium. We summarize the data on the numbers of people held in isolation. Since 2013, national surveys have analyzed the policies governing solitary confinement and the numbers held in isolation.¹¹ Thus, we know that,

⁶ See, e.g., *Laaman v. Helgemoe*, 437 F. Supp. 269, 306, 325–31 (D.N.H. 1977). The court underscored the harms of warehousing, even if adequate on some dimensions, and ruled the conditions of confinement unconstitutional. *Id.* at 307, 315–31.

⁷ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁸ *Id.* at 349–50.

⁹ Some overcrowding remained actionable. See *Brown v. Plata*, 563 U.S. 493, 545 (2011).

¹⁰ Justice Anthony Kennedy, writing for a unanimous Court, invoked the “brutal reality of prison gangs, . . . [c]landestine, organized, fueled by race-based hostility, and committed to fear and violence.” *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005), discussed *infra* notes 56, 230, 472, 528 and accompanying text.

¹¹ See ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/asca_limn_2018_restrictive_housing_released_oct_2018.pdf [https://perma.cc/W6SG-ZD7B] [hereinafter ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING] (authors include Judith Resnik, Anna VanCleave, Kristen Bell, Alexandra Harrington, Greg Conyers, Catherine McCarthy, Jenny Tumas, and Annie Wang). This report was one of a series of research projects coauthored by the Association of State Correctional Administrators (ASCA) and The Arthur Liman Center for Public Interest Law at Yale Law School and has created a longitudinal, nationwide database. For other reports, see ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN PUB. INTEREST PROGRAM AT YALE LAW SCH., AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS (2016), <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic>.

as of the fall of 2017, more than 61,000 people were held in solitary confinement, defined as spending an average of twenty-two hours per day or more in isolation cells for fifteen days or more;¹² some 3,700 had been in such settings for three years or more.¹³ In this Part, we also sketch accounts from some of the people who have lived in solitary confinement¹⁴ and from social and health scientists aggregating data to evaluate the impact.

Part IV probes the doctrine governing the rights of the people placed in solitary confinement, and that law is embedded in a larger set of cases governing in-prison discipline, transfers, and administration. A small number of opinions directly evaluate solitary confinement under the Eighth Amendment. Many more decisions address the question of whether prisoners are entitled to processes to protect them from arbitrary placement in solitary confinement. In this Part, we excavate debates within the Court about prisoners' liberty and then provide the analysis of their application in the lower courts. We undertook an ambitious project to mine the case law spawned by the directive that lower courts assess when prisons impose an "atypical and significant hardship." We identified more than 9,000 decisions, both reported and unreported, that were issued between 1995 and 2019, in which that phrase appeared with "solitary confinement" and variations such as "special housing unit."¹⁵ We culled that set to analyze across the circuits the governing doctrine and application.

pdf [<https://perma.cc/GH6E-KQEV>] [hereinafter ASCA/LIMAN 2016 AIMING TO REDUCE TIME-IN-CELL]; ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN PUB. INTEREST PROGRAM AT YALE LAW SCH., RETHINKING "DEATH ROW": VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH (2016), https://law.yale.edu/sites/default/files/documents/pdf/Liman/deathrow_reportfinal.pdf [<https://perma.cc/MA7E-QLBD>] [hereinafter ASCA/LIMAN 2016 RETHINKING "DEATH ROW"]; ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN PUB. INTEREST PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015), https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_combined_-web_august_2015.pdf [<https://perma.cc/GM4V-3RYE>] [hereinafter ASCA/LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION] (authors include Sarah Baumgartel, Corey Guilmette, Johanna Kalb, Diana Li, Josh Nuni, Devon Porter, Judith Resnik, Camille Camp, and George Camp).

¹² ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, at 10.

¹³ *Id.* at 14.

¹⁴ See generally ALBERT WOODFOX WITH LESLIE GEORGE, SOLITARY (2019); Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J.F. 222 (2016).

¹⁵ Using Westlaw, we entered the following search string: adv: (atypical! /s significant!) AND ("solitary confinement" OR "segregated confinement" OR "adseg" OR "keeplock" OR "special housing unit" OR "SHU" OR "restrictive housing" OR "administrative segregation" OR "protective"). We limited the search to decisions from January 1, 1995 through September 1, 2019. This search produced 9,350 decisions. Of these, 8,571 were district court decisions (414 reported, 8,157 unreported). Circuit court decisions accounted for 779 (207 reported, 572 unreported). We then did a purposeful sampling to find governing circuit law. A repeated search by the *Northwestern University Law Review* in 2020 found

A preview of our findings is in order. First, these decisions reflect how much federal judges have taken for granted profound human isolation as “incident” to “normal” confinement and how little they have seen themselves obliged to intervene.¹⁶ Second, this raft of cases demonstrates the variation about what has been held to be “atypical” in different circuits, on different panels, and at different times. While a few opinions consider isolation for 101 days or 305 days as markers of constitutional deprivations, many rulings have concluded that four, or eight, or ten, or more than twenty years do not constitute a liberty problem.¹⁷

Third, as for selections of baselines for comparative assessments of impact of solitary confinement, no decisions looked to how people outside prison move about in their daily lives or use their bodies. These rulings also do not rely on professional standards or statutes that regulate either the amount of space that people need or the use of solitary confinement. Moreover, unlike the decisions under the Eighth Amendment, most procedural due process opinions do not discuss the studies of the harms of solitary confinement. Rather, some decisions used the treatment of people in general population (often without details of the governing rules) as a baseline, while others focused on the control exerted in high-security facilities or over people held in solitary confinement. Fourth, judges generally credited prison defendants’ views of the challenged practices or offered their own opinions about what was “normally incident” to life in prison. Fifth, factors differently weighted include in-cell conditions (including infestation by “vermin” and reductions in food)¹⁸ and the impact

slightly different numbers, with 9,275 total cases, of which 8,513 were district court decisions (396 reported, 8,117 not reported) and 760 circuit court decisions, of which 199 were reported and 561 not. As we discuss *infra* note 480, not all cases make it into the group that are reported or unreported. We provided the numbers (and their variation when the search was run months later) to underscore the hundreds of times judges are asked to consider isolation as a punishment and how they have responded.

¹⁶ Work focused on solitary confinement in particular prison systems includes MICHELLE SHAMES & PHILIP DESGRANGES, N.Y. CIVIL LIBERTIES UNION, TRAPPED INSIDE: THE PAST, PRESENT, AND FUTURE OF SOLITARY CONFINEMENT IN NEW YORK (2019), <https://www.nyclu.org/en/publications/trapped-inside-past-present-and-future-solitary-confinement-new-york> [<https://perma.cc/F9E5-EPUY>], and ACLU OF TEX., A SOLITARY FAILURE: THE WASTE, COST, AND HARM OF SOLITARY CONFINEMENT IN TEXAS (2015), <https://www.aclutx.org/en/report/a-solitary-failure> [<https://perma.cc/5W2K-7EFG>]. Efforts to generate reforms are documented in ALISON SHAMES, JESSA WILCOX & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES (2015), https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf [<https://perma.cc/32SU-5UVL>]. For more reports on future directions of prison reform, see ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, and RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, VERA INST. OF JUSTICE, REIMAGINING PRISON (2018), <https://www.vera.org/reimagining-prison-web-report> [<https://perma.cc/4SXZ-PG4W>].

¹⁷ Discussion of all of the cases can be found *infra* Section III.B.3.

¹⁸ *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997).

of solitary confinement on the prospect of future release. Sixth, many opinions did not parse whether an “atypical and significant hardship” entailed two independent and necessary assessments or whether one factor—such as the length of time spent or gross conditions—could suffice to meet both prongs.

Part IV pulls together our analyses of six decades of litigation on prison conditions, of solitary confinement data, and of case law to underscore that judges—and the law they make—are always present in prisons. Judges have helped to turn the lack of sanitation, health care, and safety into unconstitutionality, although such conditions persist in many systems. And, even as the Court’s doctrine sought to circumscribe judges’ involvement through according a good deal of deference to prison officials, these constitutional adjudications serve as guidelines for the system of criminal law enforcement. If double-celling is licit, then prosecutors have license to seek to send more people to confinement. If hearings are required before decisions, then prison officials have to try to provide them.

In short, the Supreme Court’s effort to limit judicial involvement by framing tests of deference does not extricate constitutional law from prisons, but instantiates its relevance. What courts condone or decry are central parts of the engine making practices “normal” or “atypical” in prisons today.

II. PRISON, SQUALOR, AND THE FEDERAL COURTS

A. Shaping a Jurisprudence of Constitutional Punishment’s Boundaries

In the second half of the twentieth century, when courts began to address prisoners’ claims of unconstitutional treatment, they were also considering challenges to sentences imposed by legislatures, such as the death penalty, mandatory minimum sentences, and the conversion of unpaid fines into jail time. Although the law of sentencing is often addressed as a category discrete from the law of prisoners’ rights, both kinds of claims require courts to consider the same question: what constrains the sovereign power to punish? In response, courts generated legal theories on the boundaries of licit punishment that entailed assessments of the forms of imposition on liberty that conviction licensed.

Of course, judges are never solo actors. Litigation about the death penalty and prisoners’ rights was part of the civil rights movement, which propelled a reconceptualization of the relationship between the federal government (courts included) and many state institutions. In the 1950s and 1960s, as sentenced and convicted people were pressing judges to respond to particular instantiations of punishment, legislatures and the Executive Branch were calling for the reconstruction of policies and practices to

interrupt racial discrimination and multiple forms of subordination. Federal funding flowed to law enforcement, including for initiatives for correctional officials to improve their facilities and training.¹⁹

Further, because one vector for reform was courts, Congress helped provide some of the means to use them. In 1976, Congress authorized successful plaintiffs in civil rights cases to be paid attorneys' fees by losing defendants, such as prison systems.²⁰ In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), which authorized the U.S. Department of Justice to investigate conditions in state institutions housing juveniles, individuals with mental and physical disabilities, detainees, and prisoners.²¹

Judges in turn grappled with the problems prisoners presented by drawing on reform projects (such as standard setting) of professional organizations of lawyers and of correctional experts. The common law and constitutional traditions of analysis prompted judges to search for metrics by which to assess punishment practices, both in and out of prison. In rulings on the death penalty, on the conversion of fines into prison time, on mandatory minimum sentences, and on conditions in prisons, courts weighed the justifications for a particular punishment or administrative action against their evaluation of the harms entailed.

Borrowing from the social sciences of penology and criminology, Justices sought to identify the "penological purposes" that legitimated particular sanctions. Justices invoked ideas of deterrence, incapacitation, retribution, and rehabilitation as well as administrative convenience, community and institutional safety, and expense.²² Many Justices described themselves as taking these concerns into account as they assessed whether a particular sanction was excessively severe or disproportionate, entailed the unnecessary infliction of pain, failed to reflect the decency of the social

¹⁹ The Law Enforcement Assistance Administration (LEAA) was established in 1968. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 34 U.S.C. §§ 10101–60501 (2012)). The agency was abolished in 1982. *Records of the Law Enforcement Assistance Administration [LEAA]*, NAT'L ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/423.html> [<https://perma.cc/7EH9-3AZT>].

²⁰ Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2012)). The first Supreme Court interpretation of that Act came in 1978 in *Hutto v. Finney*, related to the class action Arkansas prison-reform litigation. See *infra* notes 88–89 and corresponding text.

²¹ Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended in scattered sections of 42 U.S.C. (2012)).

²² The history of that approach and its limits are discussed in Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365 (2020) [hereinafter Resnik, *(Un)Constitutional Punishments*].

order, or undermined values such as equality, liberty, religious freedom, and dignity.

In their discussions, judges paid little attention to the distinctions that occupied punishment theorists who explained the tensions among punishment's different aims and impacts. Judges did not often delineate among purposes, principles, and constraints; tease out means from ends; or require empirical bases to make causal claims. Rather, in both the constitutional decisions on sentencing and on in-prison punishments, courts proffered a laundry list of what they deemed to be legitimate state goals and, in general, permitted both legislative and executive punishment structures to stand.

B. In-Prison Punishment

In the United States, legislators have routinely endowed judges with authority to impose sentences, as well as leeway in determining whether to send people to prison and, if so, for how long. Furthermore, prison administrators have been given a great deal of discretion. While some state statutes had included directions, such as requiring “hard labor,” spending time in solitary confinement, and limiting food to bread and water,²³ many of those statutes are no longer on the books. On occasion, judges who impose sentences call for specific assistance (such as drug treatment), but generally they do not specify what form confinement should take. Thus, most of the

²³ Some state statutes impose solitary confinement as a part of a prison sentence. A few statutes do so only for people sentenced for capital crimes. *See, e.g.*, IDAHO CODE ANN. § 19-2705 (West 2020) (“Whenever a person is under death warrant, . . . the warden of the prison in which the person is incarcerated shall keep the condemned person in solitary confinement until execution.”); S.D. CODIFIED LAWS § 23A-27A-31.1 (2020). Other statutes apply to persons sentenced for a range of offenses. *See, e.g.*, DEL. CODE ANN. tit. 11, § 3902 (West 2020) (“In every case of sentence to imprisonment for a term exceeding 3 months, the court may by the sentence direct that a certain portion of the term of imprisonment, not exceeding 3 months, shall be in solitary confinement; and any person so sentenced shall not be allowed to work during that portion of the term of imprisonment.”); WASH. REV. CODE ANN. § 10.64.060 (West 2020) (“In every case where imprisonment in the penitentiary is awarded against any convict . . . he or she may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.”). A few states had statutes that authorized courts to impose a restricted bread and water diet along with a prison sentence. For example, a Minnesota statute from the first part of the twentieth century authorized a city court to sentence a person guilty of violating a city ordinance, bylaw, or regulation with “imprisonment . . . not exceeding thirty days . . . [and a diet of] bread and water.” MASON’S MINN. STAT. c. 9, ch. IV, § 32 (1927). Other “bread and water” statutes included NEB. REV. STAT. § 28-715 (1929); OHIO REV. CODE ANN. § 13415 (1926); PA. CONS. STAT. § 20253 (1920); S.D. CODIFIED LAWS § 3-673 (1910); WIS. STAT. § 53.10 (1945).

decision-making about the contours of confinement come from the people who run prisons.

Those people have created hyper-regulated environments. A wide array of behavior can trigger a host of sanctions. Some prison rules address conduct (such as assaults and thefts) that would be the basis for criminal charges against perpetrators, whether incarcerated or not. Atop that internal criminal code, prison authorities then add hundreds of other regulations, some codified and others imposed by staff members.

Animated by concerns about safety, exploitation, and control, in-prison rules address clothing, hair, possessions, movement, sex, speech, and activities.²⁴ Many edicts are stated at a level of generality that would, if in a criminal code, be unenforceable as unconstitutionally vague, overbroad, or impermissibly intrusive on human autonomy. For example, in 1972, Nebraska's rules ranged from prohibiting "escape" and "mutiny, riot, or insurrection" to banning "[p]ossession of any negotiable item, such as stamps or mon[ey]," or referring to other incarcerated individuals "either in writing or orally, by any other than his correct name, or commonly used name in good taste," and failing to address "officers and staff" by their "titles."²⁵

In addition, prison systems give staff authority to punish "conduct which disrupts or interferes with the security or orderly running of the institution."²⁶ Further, officials generally have power over the assignment of individuals to different levels of security and kinds of facilities. When classifying and ordering transfers, prison officials sometimes denote their acts as administrative and other times as disciplinary, and always as responsive to the demands of managing a complex group of people.

²⁴ See, e.g., CAL. CODE REGS. tit. 15, § 3062(a) (2013) ("[a]n inmate's hair and facial hair shall be . . . neatly styled[] and groomed . . ."); OR. ADMIN. R. 291-105-0015(4)(r)(B) (2020) (prohibiting participation in a petition drive without authorization); N.D. DEP'T OF CORR. & REHAB., FACILITY HANDBOOK 35 (2018) (prohibiting three-way calls, conference calls, and 1-800 calls); N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCCS INMATES 8 (2019) (prohibiting incarcerated people from receiving more than two "food packages" a month in the mail).

²⁵ *McDonnell v. Wolff*, 342 F. Supp. 616, 644–645 (D. Neb. 1972), *aff'd in part, rev'd in part*, 483 F.2d 1059 (8th Cir. 1973), *aff'd in part, rev'd in part sub nom. Wolff v. McDonnell*, 418 U.S. 539 (1974). As discussed *infra* notes 316–317, the district court ordered restoration of good time for people who had lost it for reasons such as "cussing a guard." *Id.*

²⁶ This phrasing comes from the Federal Bureau of Prison's rules, in effect in 1975 and appended to the amicus brief of Solicitor General Bork. Brief for the United States as Amicus Curiae at 27, *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (Nos. 74-1187 & 74-1194), 1975 WL 173645, at *55 [hereinafter Brief for the United States as Amicus Curiae, *Baxter v. Palmigiano*]. As of 2020, conduct that "disrupts or interferes with the security or orderly running of the institution" remained prohibited. See 28 C.F.R. § 541.3.

What are the boundaries on these broad powers? If the model of government sanctions comes from its treatment of people outside prison, then the Constitution's protections against "cruel and unusual punishments" and its safeguards of liberty under the Fifth, Sixth, and Fourteenth Amendments apply. Individuals would be entitled to familiar procedural rights including notice, an opportunity to contest and present evidence, insulation from self-incrimination, at times lawyers, and decisions by people understood as able to be impartial. Other constitutional guarantees of free expression, religious opportunities, and equal protection also could come into focus. In short, once courts recognized that the Constitution applied somehow to prisons, judges had to decide whether any in-prison punishments violated the Eighth Amendment and the relevance of other facets of the Constitution.

C. Race, Poverty, and Constitutional Authority over Criminal Law Enforcement

The impetus for constitutional engagement with prisons came from convicted individuals and from prisoners who, despite hundreds of rebuffs, persisted over decades in arguing that law protected them. A series of Supreme Court decisions, beginning in 1958, paved the way for lower federal courts to hear prisoners' claims. The key legal predicates were shifts in the interpretation of the Eighth Amendment and about federal judicial authority for claims alleging that state actors had violated individuals' civil rights.

The Supreme Court's reading of the Eighth Amendment came through two rulings, one addressing an individual prosecuted in the federal system and a second brought by a person convicted in the state system. In 1958 in *Trop v. Dulles*, the Court held unconstitutional a federal statute that imposed the punishment of denationalization.²⁷ Chief Justice Earl Warren's plurality opinion explained that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."²⁸ In 1962, the Court held in *Robinson v. California* that the Eighth Amendment's prohibition on cruel and unusual punishments applied to the states and ruled unconstitutional a California statute criminalizing the status of addiction.²⁹

These substantive Eighth Amendment rulings interacted with the Court's recognition that prisoners—like other civil rights claimants—have

²⁷ 356 U.S. 86, 101–03 (1958).

²⁸ *Id.* at 101.

²⁹ 370 U.S. 660, 667 (1962). For further discussion of incorporation of the Eighth Amendment, see Resnik, (*Un*)*Constitutional Punishments*, *supra* note 22, at 370–71.

rights of access to the federal courts. In 1961, *Monroe v. Pape* held that individuals could invoke 42 U.S.C. § 1983, enacted in the nineteenth century in the aftermath of the Civil War, to seek federal court relief when alleging that state officials acted under “color of state law” and violated their civil rights. The Court concluded that individuals could pursue such claims whether or not those actions were authorized by state law and whether or not state courts had reviewed the challenged conduct.³⁰ In *Cooper v. Pate*, decided in 1964, the Court applied the precept of *Monroe* to Illinois prison officials alleged to have prevented Thomas Cooper from purchasing “religious publications . . . disseminated by the Black Muslim Movement.”³¹ Prisoners could come to federal court when prison staff, acting “under color of state law,” had violated their constitutional rights.

As Thomas Cooper’s claim reflected, in-prison racial discrimination framed the Warren Court’s initial encounters with prisoners’ rights.³² Race was at the core of *Washington v. Lee*, the first prisoner class action to reach the Supreme Court. Alabama had long had statutes that made it illegal for “white and colored convicts to be chained together or to be allowed to sleep together.”³³ In 1966, a group of “one white and five Negro citizens,”³⁴ on behalf of all Alabama prisoners, challenged their segregation.³⁵ The Honorable Frank Johnson, writing for a three-judge court, held that the

³⁰ *Monroe v. Pape*, 365 U.S. 167, 184–87 (1961).

³¹ See 324 F.2d 165, 166 (7th Cir. 1963). Cooper argued that while other prisoners could “obtain the King James and Revised versions of the Bible,” he was not able to have a copy of the Quran. *Id.* at 166. The district court dismissed the case, and Cooper proceeded without counsel on appeal. *Id.* at 165–66. The record included the statement of the warden, Joseph F. Ragen, that Cooper was “always surrounded by . . . [a] hundred to 150 inmates, (mostly colored and Mexican),” and the warden worried about losing control of the prison. *Id.* The Seventh Circuit concluded that Illinois could “suppress movements that would otherwise be constitutionally protected” if violence was a “reasonably likely consequence.” *Id.* at 166–67. In a per curiam decision, the U.S. Supreme Court ruled that “the complaint stated a cause of action and it was error to dismiss it.” *Cooper v. Pate*, 378 U.S. 546, 546 (1964). The Court cited cases from the Second and Fourth Circuits that had recognized religious rights of Muslims. See, e.g., *Pierce v. LaVallee*, 293 F.2d 233, 236 (2d Cir. 1961); *Sewell v. Pegelow*, 291 F.2d 196, 197–98 (4th Cir. 1961).

³² Prisoners asserted the mix of race and religious discrimination in *Cooper*, and the Court used the template of race discrimination in *Cruz v. Beto*, 405 U.S. 319 (1972), in responding to an allegation that Cruz was subject to discrimination on the basis of his Buddhist religion. The interaction between racial and religious discrimination is vivid in a variety of prison and other cases.

³³ ALA. CODE tit. 45, § 52 (1958) (repealed 1975); see *Washington v. Lee*, 263 F. Supp. 327, 331 n.4 (M.D. Ala. 1966).

³⁴ The group was composed of Caliph Washington, Hosea L. Williams, Julia Allen (for her minor incarcerated son, Willie), Agnes Beavers (for her minor son, Cecil McCargo), Johnnie Coleman, and Thomas E. Houck, who described themselves as such and who were represented by the ACLU and NAACP Legal Defense Fund. See *Washington*, 263 F. Supp. at 327–28.

³⁵ *Washington*, 263 F. Supp. 327; Complaint, *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (No. 2350-N).

discrimination violated the Fourteenth Amendment and ordered desegregation.³⁶ In 1968, the Supreme Court affirmed in a brief per curiam opinion.³⁷

D. Prisoners Protesting Strip Cells and Slime

The Supreme Court's decisions prompted some lower court judges to entertain prisoners' civil rights claims, and several rulings found practices unconstitutional.³⁸ Yet doing so entailed rejecting arguments by states that

³⁶ *Washington*, 263 F. Supp. at 333. The court required the Commissioner to take "necessary and appropriate steps to effect complete desegregation" within six months of the "honor farms," youth centers, and prison hospitals, and provided more time for desegregation of higher security facilities. The caveat was that in "some isolated instances," prison security and discipline could require "segregation of the races for a limited period." *Id.* at 331–33. See generally Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665 (2020) [hereinafter Resnik, *Puzzles of Prisoners and Rights*]; Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 37–40 (2009).

³⁷ *Lee v. Washington*, 390 U.S. 333 (1968). Memoranda in the archives of the papers of Chief Justice Warren and of Justices Abe Fortas, Potter Stewart, and Byron White reflect what the concurring opinion stated: that some of the Justices were concerned about desegregation in the context of prisons. Letter from Justice Hugo Black to Justice Byron White (Nov. 13, 1967), in Earl Warren Papers, MSS52258, Box 650, File 11 (housed at the Sterling Memorial Library, Manuscripts and Archives, Yale University); Letter from T.M. to Justice Byron White (Nov. 14, 1967), in Potter Stewart Papers, MS 1367, Box 228, File 2524 (housed at the Sterling Memorial Library, Manuscripts and Archives, Yale University); Memorandum from T.M. to the Conference (Nov. 16, 1967), in Earl Warren Papers, MSS52258, Box 650, Opinions—Per Curiam (housed at the Sterling Memorial Library, Manuscripts and Archives, Yale University); Letter from Justice Hugo Black to Justice Byron White (Feb. 5, 1968), in Earl Warren Papers, MSS52258, Box 650, File 11 (housed at the Sterling Memorial Library, Manuscripts and Archives, Yale University). The Court's brief per curiam opinion stated in part:

This appeal challenges a decree of a three-judge District Court declaring that certain Alabama statutes violate the Fourteenth Amendment to the extent that they require segregation of the races in prisons and jails, and establishing a schedule for desegregation of these institutions. . . . [T]he specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline, but we do not so read the "Order, Judgment and Decree" of the District Court, which when read as a whole we find unexceptionable.

Lee, 390 U.S. at 333–34. Justice Hugo Black, joined by Justices John Marshall Harlan and Stewart, wrote in the concurrence that they wanted to

make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.

Id. at 334 (Black, J., Harlan, J., and Stewart, J., concurring).

³⁸ Examples spanning the country include *Pierce v. LaVallee*, 293 F.2d 233, 235–36 (2d Cir. 1961); *Sewell v. Pegelow*, 291 F.2d 196, 198 (4th Cir. 1961); *United States ex rel. Clegggett v. Pate*, 229 F. Supp. 818, 822 (N.D. Ill. 1964); *Talley v. Stephens*, 247 F. Supp. 683, 691 (E.D. Ark. 1965); *Washington*, 263 F. Supp. at 333; *Edwards v. Duncan*, 355 F.2d 993, 994–95 (4th Cir. 1966); *Johnson v. Avery*, 252 F. Supp.

federal courts had no role to play because prisoners had no constitutional rights to assert.

To help readers in the twenty-first century realize the kinds of conditions correctional officials around the United States once defended, we draw on the experiences of three prisoners: Robert Jordan, William Fulwood, and Lawrence William Wright. Held in California, the District of Columbia, and New York, each told federal judges about the brutal conditions to which they were subjected. These pioneering prisoners succeeded in the 1960s in persuading courts to acknowledge that constitutional law required prison officials to make changes.

California prison authorities put Robert Jordan into what they called a “strip cell” in the California Correctional Training Facility in Soledad.³⁹ Unrepresented, Jordan submitted a variety of papers to the federal court in the Northern District of California, including a “Motion and Petition for

783, 787 (M.D. Tenn. 1966), *rev'd*, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969); Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674, 683 (N.D. Cal. 1966); Wilson v. Kelley, 294 F. Supp. 1005, 1013 (N.D. Ga. 1968); Jackson v. Bishop, 404 F.2d 571, 580–81 (8th Cir. 1968); Sostre v. Rockefeller, 312 F. Supp. 863, 888–89 (S.D.N.Y. 1970), *aff'd in part, rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Hancock v. Avery, 301 F. Supp. 786, 792 (M.D. Tenn. 1969); Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970); Sostre v. McGinnis, 442 F.2d at 203–204. A genealogy of how prisoners in one jurisdiction built on the efforts of prisoners in another in a series of cases decided between 1966 and 1974 comes from Resnik, *Puzzles of Prisoners and Rights*, *supra* note 36.

³⁹ See Complaint, Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44786) [hereinafter Complaint in *Jordan v. Fitzharris*]. According to newspaper sources, Robert Charles Jordan Jr. was born in 1939 and was twenty-seven years old when he filed the strip cell case. He had been convicted at age nineteen of assault and held in prison thereafter. See *Soledad Prison Goes on Trial Tomorrow*, SANTA CRUZ SENTINEL, Aug. 8, 1966, at 4. That report stated that Jordan had been “disciplined 65 times” since his incarceration, and that most of the charges involved assaults or threats of assault. *Id.*; see also *Soledad Prisoner to Serve Time Elsewhere*, OAKLAND TRIB., Aug. 19, 1966, at 17. In April and June of 2020, we received answers to letters that we had sent to Mr. Jordan, who remains as of this writing incarcerated in a California prison (on file with authors). He said that part of what animated his filings in the 1960s was that prison authorities had denied the humanity of prisoners. In this correspondence, Mr. Jordan described himself as a self-taught paralegal who watched the changes on the U.S. Supreme Court and in the lower courts, was in relationship with other litigants bringing structural cases, and was self-conscious about and engaged in what he understood to be a legal and political battle for rights and authority. He explained that when filing the lawsuit, he was affiliated with the “black nationalist” movement, and he noted as well that he appreciated his appointed lawyer’s contributions.

In addition to the strip cell case, Mr. Jordan filed lawsuits against the prison system on other occasions, including a challenge to the failure to provide confidential exchanges between prisoners and their attorneys. He won. See *In re Jordan*, 526 P.2d 523, 527 (Cal. 1974); *In re Jordan*, 500 P.2d 873, 879–80 (Cal. 1972); see also Philip Hager, *Privacy of Inmates’ Letters to Lawyers Upheld by Court*, L.A. TIMES, Sept. 16, 1972, at 31. As far as records reflect, he brought other cases and remains, as of January 2020, incarcerated. See, e.g., Jordan v. Greenan, No. 1:99-cv-05093-REC-SMS-P, 2006 U.S. Dist. LEXIS 8298 (E.D. Cal. Mar. 3, 2006); People v. Jordan, No. B153586, 2002 Cal. App. Unpub. LEXIS 6278 (Ct. App. July 9, 2002); Jordan v. Rowland, 24 F.3d 247 (9th Cir. 1994).

Appointment of Counsel” and a detailed complaint.⁴⁰ He alleged that, naked and cold, he spent twelve days in the dark in a space measuring six by eight feet.⁴¹ The concrete enclosure had no light and no furnishings; the toilet could only be flushed from the outside.⁴² Jordan provided graphic details:

The floors and walls of the cell were also encrusted and filthy with the body and urinary wastes of the previous occupants who evidently and obviously placed them there deliberately. It was impossible to avoid bodily contact. Plaintiff hand and body (being naked) were continually coming into contact with filthy wastes and again no possible chance of washing or cleansing his hands, face or body was given plaintiff and he was forced to eat and handle his food with his hands contaminated with other human beings['] filth and urinary wastes.⁴³

Seeking protection under law⁴⁴ Jordan argued that these conditions violated federal and state law because they constituted “1. Cruel and Unusual Punishment; 2. Cruel and Wilful Inhumanities and Atrocities; 3. Violations of Federal Constitutional and Civil Rights; 4. Denial and refusal of the Equal Protection of the Laws; 5. Physical injury, harm and loss; [and] 6. Criminal Conspiracy and Prejudicial Discrimination.”⁴⁵

Such degradation was not unique to California. William Fulwood, held at Lorton Reformatory and thereafter in the District of Columbia’s jail, alleged that he had been put into solitary confinement because he was a Black Muslim leader.⁴⁶ When federal judge Burnita Matthews (the first woman to sit on the federal district courts) concluded in 1962 that the discriminatory

⁴⁰ Motion & Petition for Appointment of Legal Counsel, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44309); Petition for Writ of Habeas Corpus, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44786).

⁴¹ *Jordan*, 257 F. Supp. at 676.

⁴² *Id.* At the hearing, a psychiatrist testified that the cell was not totally dark because “a slight seepage of light” existed. *Id.* at 682.

⁴³ Complaint in *Jordan v. Fitzharris*, *supra* note 39, at 10; *see also* Trial Transcript at 368–422, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (Nos. 44309 & 44786).

⁴⁴ Complaint in *Jordan v. Fitzharris*, *supra* note 39, at 6.

⁴⁵ *Id.*

⁴⁶ Fulwood filed a writ for mandamus or habeas corpus; he alleged that he was prevented from practicing his religion because he could not join religious services or receive materials and that he was discriminated against because of his religion by being prevented from corresponding with the leader of his faith. Fulwood also alleged that prison officials interfered with access to his lawyer. *See Fulwood v. Clemmer*, 206 F. Supp. 370, 372–78 (D.D.C. 1962). This decision came two years before *Cooper v. Pate*, which held that prisoners could bring civil rights claims. *See* 378 U.S. 546 (1964). Online genealogical databases provide some information about Fulwood, who was born in 1933. He had been sentenced to two to eight years for robbery. Press coverage of the litigation included the headline “Black Muslim Denies Hate of Whites Taught” for a story by Phil Thomas published in April 7, 1962 in D.C.’s *Evening Star*.

retaliation was unconstitutional, she described the space in which he spent thirteen days:

[That] cell . . . is approximately eight feet by twelve feet, with a stone floor and stone walls on three sides. There is no window, so that no natural light enters the cell, and the single artificial light is controlled from outside the cell. There is no bed; a mattress is placed on the floor at ten o'clock at night and taken out at six o'clock in the morning. The toilet has no top and in most cases is not flushable from inside the cell. There is no wash basin.⁴⁷

The judge further explained that a prisoner was “allowed no reading matter, no exercise, no visitors, no mail unless of an emergency nature, and only occasionally a shave and shower For breakfast he usually receives some dry cereal and water, and for lunch and dinner some potatoes and a vegetable or two with bread and water.”⁴⁸

⁴⁷ *Fulwood*, 206 F. Supp. at 378. Judge Matthews was nominated by President Harry Truman in 1949. See Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. TIMES (Apr. 28, 1988), <https://www.nytimes.com/1988/04/28/obituaries/burnita-s-matthews-dies-at-93-first-woman-on-us-trial-courts.html> [<https://perma.cc/QY8Z-GDKH>]. A daughter of the owner of a plantation in Mississippi, Judge Matthews pursued law when many barriers for women to do so existed. See Kathanne W. Greene, *Burnita Shelton Matthews: Suffragist, Feminist, and Judicial Pioneer*, MISS. HIST. NOW (Aug. 2017), <http://mshistorynow.mdah.state.ms.us/articles/417/burnita-shelton-matthews-suffragist-feminist-judicial-pioneer> [<https://perma.cc/3XDN-5HZX>]. Judge Matthews selected a high-profile lawyer, E. Barrett Prettyman, Jr., to represent Fulwood. Prettyman was the son of a judge on the D.C. Circuit after whom the U.S. federal courthouse in D.C. is named. Between 1953 and 1955, Prettyman, Jr. clerked on the U.S. Supreme Court for Justices Robert Jackson, Felix Frankfurter, and Harlan in a period during which the Court issued its unanimous ruling in *Brown v. Board of Education*. In his oral history, Prettyman, Jr. explained that the court had asked him to represent

a gentleman named William Fulwood, who was a Black Muslim at the District of Columbia Jail, and this was now in the very early stages of the Muslim movement among African-Americans. He had recently become a Muslim, and he was attempting to have possession of the Koran and to wear Muslim medals and so forth, and the prison authorities denied him that right. We had extensive hearings before Judge Burnita Matthews, who was a female judge from Mississippi, and she held, I believe for the first time in this country, that indeed Muslims have the right to practice their religion, to carry their medals, to have the Koran and so forth, in prison, and she entered an order to the prison authorities to that effect. And that, of course, has had wide-ranging repercussions since.

Interview by Robert H. Kapp, Historical Soc’y of the D.C. Circuit Court, with E. Barrett Prettyman, Jr., in Washington, D.C. (Oct. 3, 1996), available at https://dcchs.org/sb_pdf/interview-5-e-barrett-prettyman/ [<https://perma.cc/8UDX-AZQ4>]; see also Sam Roberts, *E. Barrett Prettyman Jr., Lawyer Who Fortified Desegregation Ruling, Dies at 91*, N.Y. TIMES (Nov. 8, 2016), <http://nytimes.com/2016/11/09/us/e-barrett-prettyman-jr-lawyer-who-fortified-desegregation-ruling-dies-at-91.html> [<https://perma.cc/38ZS-6FW2>]; *Legends in the Law: E. Barrett Prettyman*, D.C. BAR (Apr./May 1997), <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/legend-prettyman.cfm> [<https://perma.cc/2KE5-3X2H>].

⁴⁸ *Fulwood*, 206 F. Supp. at 378. Thereafter, prison officials transferred Fulwood to the D.C. Jail where Fulwood was put into a “Special Treatment Unit,” then in a special “control cell,” and back to the

The experiences of Jordan and Fulwood were paralleled by those of Lawrence William Wright, confined at Clinton State Prison, a maximum-security facility in upstate New York. The district court, dismissing the complaint in 1966, bemoaned the “flood” of prisoners’ claims imposing a “burden” on federal courts for allegations within the discretion of prison officials.⁴⁹ Reversing, the Second Circuit quoted Wright’s description:

[T]he said solitary confinement cell wherein plaintiff was placed [for 54 days] was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days [elsewhere said to be 11 days] until he was given a thin pair of underwear to put on; . . . denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils . . . compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day . . . therefore . . . [in] subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself . . .⁵⁰

When called upon to defend these lawsuits, state officials often argued that, as a matter of federalism and separation of powers, they alone had the authority to determine the metes and bounds of in-prison practices. Prison officials asserted that federal courts had nothing to say to them. For example, when seeking to have the complaint dismissed in *Jordan v. Fitzharris*, California contended that Jordan’s “general allegations” were “insufficient

Special Treatment Unit for months, where he was under a myriad of restrictions. In all, he was out of “general inmate population” for more than two years. *Id.* at 378–79.

⁴⁹ See *Wright v. McMann*, 257 F. Supp. 739, 740 (N.D.N.Y. 1966), *rev’d*, 387 F.2d 519, 521 (2d Cir. 1967). That judge, Stephen Brennan, who was appointed by President Truman and served as the Chief Judge of the Northern District from the late 1940s until 1963, opined: “This is one of the continuous flood of applications by state prisoners which seek some form of relief, from the federal courts, apparently occasioned by the expanded concept of an individual’s constitutional rights as delineated in recent authoritative decisions. That the vast majority of such applications are without merit does not relieve the court from the burden imposed.” *Id.*

⁵⁰ *Wright v. McMann*, 387 F.2d 519, 521 (2d Cir. 1967) (quoting Wright’s pro se complaint, finding him to have stated a claim and remanding for further proceedings). On appeal, Wright was listed as “pro se,” and an attorney, Betty D. Friedlander, was also listed as appearing for him. *Id.* at 520. As the Second Circuit noted, Wright was serving an indeterminate sentence after a 1963 conviction “for certain sexual offenses.” *Id.* at 521 n.1. Wright, born in 1939, is white and as of the winter of 2020, was listed as having been convicted thereafter and incarcerated in the New York prison system.

to state a claim for relief under the Civil Rights Act”⁵¹ because no federal cause of action existed to challenge prison conditions.⁵²

Reduced to its essentials, these allegations merely mean that plaintiff does not agree with the defendant as to the degree of custody required to maintain proper control and discipline over him [T]he practice of placing unruly or dangerous prisoners [in strip cells] . . . is accepted penological practice in the prison systems of both the federal government and the state’s.⁵³

In addition, arguing the merits, officials generally claimed that their sanctions served the penological purposes of maintaining control and deterring misbehavior. Again, *Jordan* provides an example. California argued that it needed strip cells to contain disruptive prisoners. As the judge explained, California’s officials had argued that “the use of the ‘strip’ or ‘quiet’ cell is warranted in eliminating so-called ‘incorrigible’ inmates from the rest of the inmates in the institution; that fighting, physical violence, throwing objects, vile, abusive and threatening language and epithets, sometimes coupled with overt conduct, call for stringent, strong and protective measures.”⁵⁴

That defense of “correctional need” was not idiosyncratic but was repeated in other cases in the 1960s and thereafter. In the Seventh Circuit’s 1963 decision in *Cooper v. Pate* (subsequently reversed by the U.S. Supreme Court), Illinois contended that punishing Thomas Cooper and cutting off access to religious materials was justified because the Black Muslim movement used the “façade” of religion to cloak its true aim: to “overthrow . . . the white race.”⁵⁵ More than forty years later, in 2005, Ohio asserted in *Wilkinson v. Austin* that solitary confinement was a necessary tool of prison management.⁵⁶

In the cases brought by *Jordan*, *Fulwood*, and *Wright*, the states lost, and each ruling garnered attention because it was pathbreaking. *Jordan v. Fitzharris* again is illustrative. According to the press, the Honorable George Harris convened a hearing “for the first time in federal history” at the California state prison to take testimony from several other prisoners who

⁵¹ Memorandum in Support of Motion to Dismiss at 6, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44786).

⁵² See Return to Order to Show Cause & Points & Authorities in Opposition to Petition for Writ of Habeas Corpus at 2, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44309).

⁵³ Memorandum in Support of Motion to Dismiss, *supra* note 51, at 7–8 (citations omitted).

⁵⁴ *Jordan v. Fitzharris*, 257 F. Supp. 674, 679–80 (N.D. Cal. 1966).

⁵⁵ 324 F.2d 165, 166 (7th Cir. 1963), *rev’d*, 378 U.S. 546, 546 (1964) (paraphrasing the Attorney General of Illinois).

⁵⁶ See Reply Brief for Petitioners at 16, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495).

had been in strip cells.⁵⁷ Rather than defer to the State’s claims that federal courts had no jurisdiction or that strip cells were useful modes of control for disruptive prisoners, Chief Judge Harris prohibited that treatment, which he described as not what a “beast” or a human should have to endure.⁵⁸

Chief Judge Harris found that the State had not given Jordan the “essentials for survival” such as “water and food and . . . basic sanitation”⁵⁹ and concluded that “[r]equiring man or beast to live, eat and sleep under the degrading conditions . . . does violence to elemental concepts of decency.”⁶⁰ Because prison authorities had “abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature,” the court had to “intervene promptly—to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.”⁶¹ In addition to “regular change of bedding, clothing, bathing and feeding,” the judge ruled that:

The punitive segregation section and all the cells in it should be evenly heated and adequately lighted and ventilated. Artificial ventilation is usually necessary. . . . Toilets which the occupant of the cell cannot flush need constant supervision by the officer. Wholly dark cells should not be used and if there is a solid door on the cell, it should be so designed that it does not exclude all light.⁶²

⁵⁷ *Soledad Prison Goes on Trial Tomorrow*, *supra* note 39, at 4. The judge appointed a San Francisco lawyer, Charles B. Cohler, to represent Jordan. See Tom Hall, *Soledad ‘Strip Cells’ Shock Federal Judge*, S.F. EXAMINER, Sept. 6, 1966, at 1; *Jordan*, 257 F. Supp. at 675.

⁵⁸ See *Jordan*, 257 F. Supp. at 680. Jordan’s first federal lawsuit was dismissed on August 12, 1965 based on the view that he had not exhausted his state remedies. The California Supreme Court denied his petition on October 7, 1965. See Resubmission for Petition for a Writ of Habeas Corpus, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 43983); Petition for Writ of Habeas Corpus, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (No. 44786). He then submitted his petition in federal court on October 14, 1965, and the decision on the merits was rendered on September 6, 1966.

⁵⁹ *Jordan*, 257 F. Supp. at 682.

⁶⁰ *Id.* at 680. The judge’s citations included *Trop v. Dulles*, as well as the Supreme Court’s rulings in *Robinson v. California*, *Monroe v. Pape*, and *Cooper v. Pate*, all discussed *supra* notes 27–32 and accompanying text.

⁶¹ *Jordan*, 257 F. Supp. at 680.

⁶² *Id.* at 683–84. The *Oakland Tribune* reported that California transferred Jordan out of that facility. See *Soledad Prisoner to Serve Term Elsewhere*, *supra* note 39, at 17; see also *Jordan Is Moved to Quentin*, CALIFORNIAN, Sept. 9, 1966, at 1. Newspapers also reported that California officials stated after the ruling that they planned to continue to use strip cells. See Jack Welter, *Strip Cells Defended by McGee*, S.F. EXAMINER, Sept. 7, 1966, at 1. Prisoners were not to stay more than twenty-nine days unless the Director of Corrections permitted it, and the official invoked in the headline, Richmond McGee, defended the cells as “humane.” *Id.* at 6. “We don’t use the dark dungeons or handcuff them and hang them to the wall as they once did in Folsom.” *Id.*

Chief Judge Harris's revulsion at the lack of bedding, clothing, sanitation, hygiene, light, and ventilation was echoed by the Second Circuit in *Wright v. McMann*⁶³ and by the D.C. district court in *Fulwood v. Clemmer*,⁶⁴ as well as by other courts.⁶⁵

⁶³ See 387 F.2d 519, 526–27 (2d Cir. 1967). The court cited *Trop v. Dulles* among other cases and quoted Chief Judge Harris's discussion in *Jordan* about California's breach of "elemental concepts of decency." *Id.* at 526 n.16. On remand, another federal district court judge, James Thomas Foley, who was appointed by President Truman and served as the Chief Judge of the District from 1963 to 1980, held that New York's treatment of Wright violated the Eighth Amendment. *Wright v. McMann*, 321 F. Supp. 127, 138–41 (N.D.N.Y. 1970), *aff'd in part, modified in part, and rev'd in part*, 460 F.2d 126 (2d Cir. 1972).

Wright had sought \$10,000 in damages; the district court awarded \$1,500 in compensation, and that smaller amount was justified in part because of a lack of medical and other records. *Id.* at 144. Wright's case had been consolidated with claims by Robert Mosher. The district court held that Mosher's rights were violated by the five-month placement in solitary confinement because he had not signed a "safety sheet" stating he had read the prison's rules. Relying in part on testimony by James Bennett, the former Director of the Federal Bureau of Prisons, the district court held that punishment was disproportionate and restored the good-time credits lost. *Id.* at 146. Thereafter, the district court issued an unreported order directing New York State not to use segregation until it promulgated new rules to be sure the cells "safeguard[ed] the health of occupants, that heat and ventilation were sufficient, that nudity could not be enforced solely as a disciplinary measure," and that unannounced inspections were necessary. See *Wright*, 460 F.2d at 128; see also *N.Y. State Prison Reforms Ordered by Federal Judge*, TIMES REC., Aug. 4, 1970, at 10.

Thereafter, and citing the 1972 en banc decision of *Sostre v. McGinnis* (discussed *infra*), the Second Circuit reversed the case. See *Wright*, 460 F.2d at 130. The court reversed the injunction on rulemaking and use of solitary confinement while it upheld the relief accorded the individuals, including Judge Foley's award to Wright of \$1,500 in damages for the thirty-two days spent in "inhuman solitary confinement." Judge J. Edward Lumbard, writing for the Second Circuit, cited the court's first 1967 ruling in *Wright v. McMann* as he made plain that the conditions the court had described as "foul" and "inhumane" were clearly "unconstitutional." *Id.* at 135; see also *Dannemora Convict Gets \$1,500 Award*, TIMES REC., Mar. 17, 1972, at 23. The Second Circuit also objected to strip cells in *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972), which involved their use in Connecticut. The court concluded that putting individuals in these dark cells violated "the human dignity" of prisoners, as it also noted the potential harm to their mental health. *Id.* at 978. We explain more about the law of the Second Circuit in our discussion of *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd in part, rev'd in part sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *infra* notes 191–195, which also reference the 1972 *Wright* decision.

⁶⁴ 206 F. Supp. 370, 378–79 (D.D.C. 1962). Press reports described the holding as the "first time the sect" was recognized as a religion. See *Black Muslim Faith Ruled a Religion*, RICHMOND TIMES-DISPATCH, July 4, 1962, at 4.

⁶⁵ See, e.g., *Hancock v. Avery*, 301 F. Supp. 786, 789 (M.D. Tenn. 1969). As the district judge described it, Tennessee prison officials had forced Don Lee Hancock "to remain in the dry cell without any means of cleaning his hands, body or teeth. He is denied the use of soap, towel, toilet paper, and other hygienic materials. No means have been provided which would enable him to clean any part of his body at anytime." *Id.* Citing the 1967 decision in *Wright v. McMann* and the 1965 ruling in *Jordan v. Fitzharris*, the court held that the conditions were cruel and unusual punishment. *Id.* at 792 n.2. Thereafter, the prisoners sought damages; the district court held that because Tennessee had "eliminated the dry cell and complied with its order," no relief was appropriate. That ruling was affirmed. See *Hancock v. Avery*, 452 F.2d 1214 (6th Cir. 1972). A district judge in Pennsylvania found unconstitutional the placement of prisoners for 2.5 days in a six-by-nine-foot cell that had no functioning toilets, toilet paper, soap, or light.

Such victories should not be overstated. During the same era, several federal courts rejected similar cases that challenged conditions such as solitary confinement in “dry cells” that lacked running water, placement naked in cold cells, and days without baths. In the words of one district court, such claims did not have a “constitutional dimension.”⁶⁶ Other courts did not find unconstitutional the practice of putting prisoners on thirty days of bread and water or other punitive deprivations of food and water and lack of access to medical care.⁶⁷ And even when judges recognized claims of medical care and access to the courts, some jurists also described the deference due to prison officials. As one court wrote, “The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment.”⁶⁸

The judges who did reject some forms of degradation provided various accounts of the legal basis to do so. Their opinions did not focus on whether strip cells and isolation were used regularly or were “unusual.” Indeed, as the states argued and reported decisions reflected, what these prisoners experienced was horrifyingly commonplace. Rather, the lower court opinions often cited Chief Justice Warren’s 1958 discussion of “decency” in *Trop v. Dulles*, which, as one commentator put it in 1973, was central to the “emerging rights of the confined.”⁶⁹ Illustrative is Chief Judge Harris’s assessment in *Jordan v. Fitzharris* that the strip cell was shocking in light of “developing concepts of elemental decency.”⁷⁰ That opinion, like others, invoked the concept of proportionality—that the Constitution did not permit a prisoner to be “unreasonably punished for the infraction of a rule,” and, therefore, a “punishment out of proportion to the violation may bring it

See *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff’d*, 435 F.2d 1255 (3d Cir. 1970); see also *Austin v. Harris*, 226 F. Supp. 304, 308–09 (W.D. Mo. 1964) (noting that “petitioner’s allegations” that he has a “long-standing case of bone arthritis” for which his repeated requests for medical attention were denied “are sufficient to require further investigation”).

⁶⁶ See *Roberts v. Peppersack*, 256 F. Supp. 415, 431 (D. Md. 1966), *cert. denied* 389 U.S. 877 (1967). That district court ruled that twenty-seven hours in solitary and another sixteen days in “semi-segregation” were “milder” than the conditions found unconstitutional in *Fulwood*. *Id.* Likewise, in 1962, a district court in Colorado held that Theodore Charles Ruark and Charles Willard Ferguson had not stated a claim when they alleged that they were held for fifty-two hours without food, water, or toilet paper. See *Ruark v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962). The Third Circuit also rejected a proposed class action that challenged New Jersey’s use of dry cells. See *Ford v. Bd. of Managers of N.J. State Prison*, 407 F.2d 937, 938 (3d Cir. 1969).

⁶⁷ See e.g., *Novak v. Beto*, 453 F.2d 661, 668, 671 (5th Cir. 1971).

⁶⁸ *Edwards v. Duncan*, 355 F.2d 993, 994 (4th Cir. 1966).

⁶⁹ See William S. McAninch, *Penal Incarceration and Cruel and Unusual Punishment*, 25 S.C. L. REV. 579, 602 (1973).

⁷⁰ 257 F. Supp. 674, 679 (N.D. Cal. 1966); see also *Jackson v. Bishop*, 404 F.2d 571, 578–79 (8th Cir. 1968).

within the bar against unreasonable punishments.”⁷¹ Sometimes courts also raised concerns that in-prison treatment did not comport with the pursuit of any legitimate penological purpose.⁷²

E. Scaling Up: Prison Systems’ Unconstitutional Conditions

In 1970, with the infusion of resources from court-appointed lawyers and under the umbrella of the 1966 revisions to the federal class action rule, the scale shifted from individual to system-wide litigation. Many commentators have provided detailed accounts that analyze specific jurisdictions as well as decades of case law on prison conditions.⁷³ Here, we focus on the relationship between the rulings on strip and solitary cells and class action litigation about conditions in general population, so as to document the links. What was held impermissible in individual cases was likewise ruled unconstitutional system-wide.

A federal judge in Arkansas—J. Smith Henley—was the first in the country’s history to conclude that an entire “prison system” constituted cruel and unusual punishment.⁷⁴ Two years later, Chief Judge William Keady, sitting in a federal court in Mississippi, held that the state’s Parchman Farm had housing units “unfit for human habitation under any modern concept of decency.”⁷⁵ In 1976, Judge Frank Johnson (who, as discussed, in 1966 held Alabama’s segregation of prisoners unconstitutional) concluded that conditions in Alabama’s prisons violated the Eighth Amendment. By 1987,

⁷¹ Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962). The court held that factors relevant to proportionality included the placement in “solitary confinement; his subsequent solitary confinement for the maximum period for exercising a right to which he was clearly entitled; his detention for six months in a special treatment cell; [and] his exclusion for more than two years from the general prison population.” *Id.*

⁷² A summary of the law in the early 1970s also described the lower court cases as inquiring into whether a practice “shock[ed] the general conscience.” See McAninch, *supra* note 69, at 584.

⁷³ See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 30–34 (1998); LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999).

⁷⁴ The first decision was *Holt v. Sarver (Holt I)*, 300 F. Supp. 825 (E.D. Ark. 1969). The decision on the system-wide class action was *Holt v. Sarver (Holt II)*, 309 F. Supp. 362 (E.D. Ark. 1970). Thereafter, the litigation was before the Eighth Circuit and the district court and, in 1978, the Supreme Court approved implementation efforts. See *Hutto v. Finney*, 437 U.S. 678, 681–85 (1978).

⁷⁵ *Gates v. Collier*, 349 F. Supp. 881, 887 (N.D. Miss. 1972), *aff’d*, 489 F.2d 298 (5th Cir. 1973), *and aff’d*, 501 F.2d 1291 (5th Cir. 1974), *and amended by* 390 F. Supp. 482 (N.D. Miss. 1975), *aff’d*, 525 F.2d 965 (5th Cir. 1976), *and supplemented by* 423 F. Supp. 732 (N.D. Miss. 1976), *aff’d and remanded*, 548 F.2d 1241 (5th Cir. 1977). For a detailed account of Mississippi’s racist and brutal treatment of prisoners, see DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

more than thirty state prison systems were in litigation about constitutional violations.⁷⁶

The parallels between individual challenges detailing the filth and degradation in strip and solitary cells and these system-wide cases can be seen from Judge Johnson’s 1976 findings of fact. Alabama prisons were “horrendously overcrowded,” “filthy,” understaffed, and unsafe institutions, in which “rampant violence” was “widespread.”⁷⁷ Windows were “broken and unscreened,” permitting in mosquitoes and flies.⁷⁸ “Old and filthy cotton mattresses,” he wrote, led to “the spread of contagious diseases and body lice.”⁷⁹ Heat and ventilation were inadequate, as were the electrical systems; the “exposed wiring pose[d] a constant danger to the inmates, and insufficient lighting result[ed] in eye strain and fatigue.”⁸⁰ In one area, where more than 200 men were housed, there was “one functioning toilet.”⁸¹ The court described that as punishment, prisoners were locked into an unstaffed building, fed one meal a day, and rarely permitted showers.⁸²

Before turning to the decades that followed, we need to leap forward to the present to underscore the misery that remains—including in systems such as Alabama, where litigation is ongoing. In April of 2019, the U.S. Department of Justice wrote to Alabama’s governor to report it had concluded that “conditions at Alabama’s prisons violate[d] the Eighth Amendment” by failing to protect against “prisoner-on-prisoner violence” and sexual abuse, and that the unsafe conditions were “exacerbated by

⁷⁶ Elizabeth Alexander, *Prisoners’ Lawyers Face Critical Issues*, 13 J. NAT’L PRISON PROJECT 22, 24 (1987).

⁷⁷ See *Pugh v. Locke*, 406 F. Supp. 318, 322–26 (M.D. Ala. 1976), *aff’d and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part, judgment rev’d in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). Painfully graphic detail comes from Matthew Meyers, who worked for the ACLU on *James v. Wallace*. He described going to Draper Correctional Center and finding “dozens upon dozens of old, helpless men, many in wheelchairs, incontinent or bedridden, unable to care for themselves and jammed into squalid, dilapidated living quarters which could only be described as a human death trap.” He then found the “doghouse,” a “concrete building with no windows and a solid front door with eight cells, each about the size of a small door. This windowless concrete building and the cells in it had no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers.” No guards were in, and cells had five to six prisoners, put there for violating minor rules like “talking back” to a guard. Matthew L. Myers, *12 Years After James v. Wallace*, 13 J. NAT’L PRISON PROJECT 8, 8–9 (1987).

⁷⁸ *Pugh*, 406 F. Supp. at 323.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 327.

serious deficiencies in staffing and supervision and overcrowding.”⁸³ On January 31, 2020, the *New York Times* reported that twenty-nine people had died due to “suicides, stabbings, and other preventable deaths” in 2019 in those facilities,⁸⁴ and in February of 2020, prisoners’ families brought civil rights actions alleging that the failures to provide care had resulted in the deaths of four prisoners.⁸⁵

Another example comes from a January 2020 order by a district judge in Rhode Island who concluded that the State had in the mid-1990s “unilaterally and substantively” changed its rules for prison classification and discipline, despite a 1974 decree detailing the procedures; the court ordered the Department of Corrections to comply with the decree it had ignored.⁸⁶ And yet a third example of contemporary horrors is from Mississippi’s Parchman Farm, where twenty-four deaths occurred between December 29, 2019 and March 4, 2020, more than double the average rate in previous years.⁸⁷

These accounts of the evolution and some of the impact of legal doctrine show courts’ dependence on those whose behavior they aim to change. The gap between judicial order and prisoners’ experiences spans the decades of litigation, which returns us to the 1970s, when the U.S. Supreme

⁸³ Letter from Eric S. Dreiband, Assistant Att’y Gen., Civil Rights Div., Louis V. Franklin, Sr., U.S. Att’y, M.D. Ala., Jay E. Town, U.S. Att’y, N.D. Ala., Richard W. Moore, U.S. Att’y, S.D. Ala., to Kay Ivey, Governor of Ala. (Apr. 2, 2019), available at <https://www.justice.gov/opa/press-release/file/1150276/download> [<https://perma.cc/9PHB-LMRC>]. The attached investigation was replete with horrific discussion of stabbings, beatings, sexual violence, and deaths. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. ATTORNEYS’ OFFICES FOR THE NORTHERN, MIDDLE, AND SOUTHERN DIST. OF ALA., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN 13 (2019), <https://www.justice.gov/crt/case-document/file/1149971/download> [<https://perma.cc/SVE4-NPEE>].

⁸⁴ Katie Benner, *Plans for Alabama’s Deadly Prisons ‘Won’t Fix the Horrors,’* N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alabama-prisons.html> [<https://perma.cc/HS5Q-6J7L>]. The inadequate responses and safekeeping of people with mental illness is chronicled in *Briggs v. Dunn*, 367 F. Supp. 3d 1340 (M.D. Ala. 2019).

⁸⁵ Complaint, *Head v. Dunn*, No. 2:20-cv-132 (M.D. Ala. Feb. 24, 2020).

⁸⁶ *Paiva v. R.I. Dep’t of Corr.*, No. 17-MC-14-JJM-LDA, 2020 WL 430062 (D.R.I. Jan. 28, 2020).

⁸⁷ Lici Beveridge, *Mississippi Prison Crisis: 23rd, 24th Inmate Deaths Reported Since Late December*, MISS. CLARION LEDGER (Mar. 4, 2020, 9:37 AM), <https://www.clarionledger.com/story/news/local/2020/03/04/23rd-mississippi-inmate-death-since-dec-29-reported/4951406002/> [<https://perma.cc/77XV-C8CG>].

In 2020, a group of prisoners filed a new class action, Complaint, *Lang v. Taylor*, No. 4:20-cv-30 (N.D. Miss. Feb. 25, 2020), that alleged “Parchman has been understaffed and underfunded for decades. As a result, prisoners endure abhorrent conditions, abuse and constant violence, inadequate health care and mental health care, and overuse of isolation. The conditions of confinement at Parchman are so barbaric, the deprivation of health and mental health care so extreme, and the defects in security so severe, that the people confined at Parchman live a miserable and hopeless existence confronted daily by imminent risk of substantial harm in violation of their rights under the U.S. Constitution.” *Id.* at 3.

Court reviewed eight years of recalcitrance by the Arkansas corrections department. Rejecting arguments that the judge had exceeded his powers when ordering a thirty-day cap on the length of time a person could spend in solitary cells, the Court sustained Chief Judge Henley's decision.⁸⁸ Further, interpreting the federal statute authorizing attorneys' fees and the Eleventh Amendment, the majority upheld a fee award against the State.⁸⁹

We have thus far focused on unsafe facilities, deprivations of food, light, and medical care, and discrimination. In addition, several lower courts concluded that the profound lack of activity, often called "idleness," that was commonplace in many prison systems was too destructive to permit. In his 1970 ruling on Arkansas prisoners' class action, Chief Judge Henley commented that the "absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation."⁹⁰ In 1976, Judge Frank Johnson concluded that a prison system "cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration."⁹¹ In 1977, Judge Hugh Henry Bownes invoked both of those decisions as he identified "[i]dleness and boredom" as sources of "debilitation" and held the conditions in New Hampshire unconstitutional.⁹²

But as the task of constructing constitutional punishment practices loomed large, appellate judges pushed back. They rejected efforts to afford prisoners opportunities for stimulation and activity, even as they licensed holding ever larger numbers of people in prison. One such rule was announced by the Fifth Circuit when, in 1977, it overturned aspects of the remedies that Judge Johnson had required in Alabama.⁹³ The Fifth Circuit stated that:

If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some

⁸⁸ *Hutto v. Finney*, 437 U.S. 678, 685–88 (1978).

⁸⁹ *Id.* at 699.

⁹⁰ *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970).

⁹¹ *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976).

⁹² *Laaman v. Helgemoe*, 437 F. Supp. 269, 317 (D.N.H. 1977).

⁹³ *See Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).

person may think is needed to avoid mental, physical, and emotional deterioration.⁹⁴

Four years later, a majority on the Supreme Court echoed the Fifth Circuit's disparaging characterization ("every amenity") of the obligation to provide activities. When addressing the legality of double-celling in 1981 in *Rhodes v. Chapman*, the majority diminished the impact of the resulting intense physical contact and lack of any personal privacy by labeling the result "discomfort."⁹⁵

Before recounting what was *lost* by the Court's condoning double-celling, we need to underscore what had been *won* since Robert Jordan, William Fulwood, and Lawrence William Wright brought their lawsuits. A group of Black and white prisoners, most of whom had little formal education and no resources, transformed American law by persuading federal judges to regulate some aspects of in-prison punishment. Incarcerated individuals, writing about the details of their degradation, sought relief from corporal punishment; radical food deprivations; strip cells; solitary confinement in dark cells; prohibitions on access to courts, on religious observance, and on reading materials; transfers to higher levels of security in and out of the same prison; and more.

Those victories were reflected in 1980, when Ohio sought (and obtained) Supreme Court review of lower court orders that had banned double-celling. Ohio's petition for certiorari stated that double-celling did not "deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety."⁹⁶ Although the State challenged the lower courts' prohibition on the placement of people for long terms in small, double cells, Ohio acknowledged that the Constitution *did* require it to provide what states a decade earlier had argued they had *no* legal obligation to do. Thus, only fourteen years after California prison officials claimed in *Jordan v. Fitzharris* that the U.S. Constitution had no role in prisons, states routinely *conceded* that the Constitution applied to

⁹⁴ *Id.* at 291. In *Newman*, the Fifth Circuit reviewed and narrowed the scope of U.S. District Court Judge Frank Johnson's structural injunction that mandated sweeping changes to the Alabama prison system. The Fifth Circuit upheld Judge Johnson's order to ameliorate the conditions in Alabama's overcrowded "solitary confinement" scheme but ruled that the district court exceeded its authority in mandating rehabilitative and site-specific changes to carceral design. *Id.* at 288-91.

⁹⁵ See 452 U.S. 337, 349 (1981).

⁹⁶ Petition for Writ of Certiorari at 1, *Rhodes v. Chapman*, 452 U.S. 337 (1981) (No. 80-332) (filed Sept. 2, 1980). The State's phrasing is close to but not identical to what the U.S. Supreme Court had read the Eighth Amendment to require—"adequate food, clothing, shelter, and medical care." See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

their treatment of prisoners, even as they contested whether a particular action was unlawful.⁹⁷

Ohio succeeded in persuading the U.S. Supreme Court that it could put two people in a cell built for one. The pivotal decision by Justice Lewis F. Powell in 1981 in *Rhodes v. Chapman* summarized the Court's law on prison conditions as it constricted it. For the majority, Justice Powell wrote that the Eighth Amendment aimed to prevent "the wanton and unnecessary infliction of pain" through punishments that were "grossly disproportionate to the severity of the crime," or that "deprive inmates of the minimal civilized measure of life's necessities."⁹⁸ Citing the Court's 1976 decision in *Estelle v. Gamble*, which held that prisons could not be deliberately indifferent to known medical needs,⁹⁹ Justice Powell also explained that "unnecessary and wanton" pain was not limited to the "physically barbarous."¹⁰⁰ Practices that were "totally without penological justification,"¹⁰¹ such as "deliberate indifference to serious medical needs," violated the Eighth Amendment.¹⁰² Thus, the Eighth Amendment made it unconstitutional to deprive people of clothing, sufficient food, medical care, heat, minimal physical exercise, and sanitation, and required some level of protection from violence.

Where did the social density and forced intimacy of overcrowding fit? The graphic, gross conditions in the 1960s and 1970s cases could make double-celling sound somewhat benign. But "wet" prison cells, which are common in U.S. construction patterns, usually include open toilets and sinks. As a result, double-celling means that a person has no secluded space in which to use a toilet. Further, whether newly constructed (as was Ohio's prison) or old, densely populated prisons increase the risk of violence and disease and put a great deal of stress on people and on services from programs and health care to security.¹⁰³

These factors prompted the lower courts in *Rhodes v. Chapman* to conclude that the Constitution did not permit Ohio to house 2,300 people in a facility designed for 1,620 prisoners¹⁰⁴ when the result was that double-celled individuals shared sixty-three square feet.¹⁰⁵ As a benchmark, the trial

⁹⁷ See, e.g., Brief of Petitioners, *Rhodes v. Chapman*, 452 U.S. 337 (1981) (No. 80-332).

⁹⁸ *Rhodes*, 452 U.S. at 347.

⁹⁹ 429 U.S. 97, 104 (1976).

¹⁰⁰ *Rhodes*, 452 U.S. at 346.

¹⁰¹ *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

¹⁰² See *Estelle*, 429 U.S. at 104.

¹⁰³ *Chapman v. Rhodes*, 434 F. Supp. 1007, 1014-18 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

¹⁰⁴ *Id.* at 1020.

¹⁰⁵ *Id.* at 1021.

court had cited the American Correctional Association's 1977 manual, which recommended at least sixty to eighty feet of living quarters for each prisoner.¹⁰⁶ In contrast, Justice Powell discounted that standard as "an aspiration toward an ideal environment for long-term confinement."¹⁰⁷ Moreover, he appeared to justify the "discomfort" of Ohio's double-celling by commenting that the prison housed "persons convicted of serious crimes."¹⁰⁸ In dissent, Justice Thurgood Marshall countered that most of the Supreme Court's windows were larger than the space allotted per person in double cells.¹⁰⁹

¹⁰⁶ *Id.* That court had sourced the standards to the "American Correctional Institution." See AM. CORR. ASS'N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 27 (1977). Other proposed space guidelines of that era included the Model Act for the Protection of Rights of Prisoners (fifty square feet).

The Supreme Court used the proper name of the American Correctional Association. See *Rhodes*, 452 U.S. at 343 n.7. The Supreme Court also referred to the Crime and Delinquency's Model Act for the Protection of Rights of Prisoners, which advises fifty square feet of living quarters. *Id.*

¹⁰⁷ *Id.* at 349. The Court had, by then, also upheld double-celling for pretrial detainees. See *Bell v. Wolfish*, 441 U.S. 520, 520 (1979). The trial judge in *Chapman v. Rhodes* had distinguished that ruling on the grounds that such conditions were short-term, as contrasted with the years that people held in the prison would have to spend in such density. See 434 F. Supp. at 1019–21.

¹⁰⁸ *Rhodes*, 452 U.S. at 349.

¹⁰⁹ *Id.* at 371 (Marshall, J., dissenting). In other countries, views closer to the dissent have prevailed. For example, in 2017, the Supreme Court of Israel ruled that within eighteen months of its judgment, the state had to provide "every prisoner and detainee" with a living space of 4.5 square meters (or 48.4 square feet), including a shower and lavatory and 4 meters (or 43 square feet) in dry cells that lacked running water. HCJ 1892/14 Ass'n for Civil Rights in Isr. v. Minister of Pub. Sec. (unpublished) ¶ 123(A) (June 13, 2017) (Isr.). Those standards were drawn from regulations that called for that allotment of space. *Id.* ¶ 3.

The decision gave the authorities eighteen months to become compliant with the 4–4.5-meter requirement and nine months to meet the 3-meter requirement. *Id.* ¶ 123(b). Implementation questions are discussed in Lila Margalit, *Room for Optimism? Israeli Supreme Court Presses for Implementation of Ruling on Inmates' Right to Personal Space*, LAWFARE (June 7, 2018, 9:00 AM), <https://www.lawfareblog.com/room-optimism-israeli-supreme-court-presses-implementation-ruling-inmates-right-personal-space> [<https://perma.cc/N24F-M44T>].

In terms of transnational standards, the Council of Europe's Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted that shaping minimum standards was complex given variation in the type of facility and the length of stay. Nonetheless, CPT had in the 1990s developed what it termed a "rule of thumb" of a *minimum* of 6 square meters (64.6 square feet) for a "single-occupancy" cell and 4 square meters (43 square feet) per person for a "multiple-occupancy cell," which also should have a "fully-partitioned sanitary facility" and, if housing more than two people, should be larger. See CPT/Inf (2015) 44, ¶¶ 6, 9, 10, 14, 15 (Strasbourg, Dec. 15, 2015), available at <https://webcache.googleusercontent.com/search?q=cache:XXMm-ZllsyAJ:https://rm.coe.int/1680698462+&cd=1&hl=en&ct=clnk&gl=us> [<https://perma.cc/W2D7-B3XG>]. Also noted were that some countries afforded more space of 7.5–9.5 square meters (or about 80–102 square feet). *Id.* ¶ 12. Further, a "desirable standard" for multiple-occupancy cells would be at least 10 square meters for two people plus a "sanitary annexe." *Id.* ¶ 16.

In terms of enforcement, the European Court of Human Rights has a long list of cases against many countries found to be in violations of individuals' rights not to be subjected to "inhuman or degrading treatment," as provided by Article 3 of the European Convention on Human Rights. A recent decision

Rhodes is foundational to the circumscription of the Eighth Amendment, and *Rhodes* is likewise the key to the expansive use of incarceration. By declining to enforce rules reflecting architectural, correctional, and health guidelines about the space individuals need, the opinion enabled states to prosecute more people without internalizing the costs of confinement through providing appropriate physical facilities. The individuals who were packed in and the communities from which they were taken bore the costs instead. A massive number of people in detention was a harm that had attracted widespread concern before COVID-19, and since the pandemic, the injuries—disproportionately borne by people of color—have become all the more vivid.

1. *Expanding the Capacity for and the Reliance on Isolation*

Before delving into more of the legal principles judges crafted to govern in-prison punishments, we need to sketch the parameters and impact of the contemporary uses of solitary confinement, which can be found throughout the United States. As discussed at the outset, more than 60,000 people were, as of 2017, in isolation and more than 3,700 people had been there for three years or longer.

The use of solitary confinement goes back centuries. In nineteenth-century America, its virtues were extolled by officials who ran facilities in Pennsylvania and upstate New York, where “cellular” housing put people into deep isolation that proponents thought would lead to revelation and redemption.¹¹⁰ But within short order, the harms from deprivation of human contact became evident, and the generic deployment of silence and solitude was rejected. In the century that followed, the social science disciplines emerged including criminology and penology, which led to the professionalization of corrections. Newly minted experts embraced the metaphor of “disease” for crime, as they commended individualization, classification, and indeterminate sentences to provide “cures” through work, education, and religion.

Nonetheless, solitary confinement remained, no longer as a mode for redemption but as a sanction. The rationales for placement varied. Some

involved prisoners having less than 3 square meters (32.3 square feet) to 4 square meters (43.1 square feet) and a lack of privacy when using toilets. See *J.M.B. & Others v. France*, No. 9671/15 Eur. Ct. H.R., at 3 (Jan. 30, 2020), available at <http://hudoc.echr.coe.int/eng?i=002-12702> [<https://perma.cc/R867-PBG5>]; *Factsheet, Detention Conditions and Treatment of Prisoners*, EUR. COURT OF HUM. RTS. (Feb. 2020), https://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf [<https://perma.cc/QP35-6LYT>].

¹¹⁰ See Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604, 1605, 1613–18 (2018).

statutes authorized solitary confinement as part of the prison sentence.¹¹¹ In addition, prison officials used solitary confinement as a punishment for in-prison behavior and as a mode of control for individuals perceived to be difficult. Further, prison officials explained solitary confinement as a form of protection to shield individuals from within-prison dangers.

When prosecutorial and policing efforts became more intensive and prison populations expanded in the 1980s, so did the use of solitary confinement, both within prisons and through building Supermax facilities specially designed to impose profound isolation on people.¹¹² Thirty years of data from Kansas provide one exemplar. Before that state expanded its prisons in the 1970s, 13% of its prisoners spent thirty days or more in solitary.¹¹³ Between 1987 and 1992, more than 40% had, with even higher percentages in the subpopulations of people of color, who also were held in isolation for longer periods of time.¹¹⁴ Evidence of the widespread contemporary use of solitary confinement comes from reports coauthored by the Association of State Correctional Administrators (ASCA)¹¹⁵ and The Arthur Liman Center for Public Interest Law at Yale Law School. These monographs provide nationwide data on what correctional officials term “restrictive housing”—separating prisoners from the general population based on a variety of rationales, including protection and punishment.

The first report, *Administrative Segregation, Degrees of Isolation, and Incarceration*, published in 2013, reviewed policies from forty-seven jurisdictions. This meta-analysis concluded that the criteria for placement in isolation were broad, and prison officers at many levels had a great deal of discretion to identify individuals as a “threat” to the “orderly operation of the institution.”¹¹⁶ As a result, putting a person into segregation was relatively

¹¹¹ *Id.* at 1619–21. One example comes from a 1913 Nebraska statute, which provided for a “[j]udgement to fix term of imprisonment and period of solitary confinement.” NEB. REV. STAT. § 9140-565 (1913).

¹¹² Rubin & Reiter, *supra* note 110, at 1622–25. See generally KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

¹¹³ Ryan T. Sakoda & Jessica T. Simes, *Solitary Confinement and the U.S. Prison Boom*, CRIM. JUST. POL’Y REV. (Dec. 29, 2019), <https://journals.sagepub.com/doi/10.1177/0887403419895315> [<https://perma.cc/K9BE-S4EK>].

¹¹⁴ *Id.*

¹¹⁵ ASCA changed its name in 2019 to the Correctional Leaders Association (CLA). See CORR. LEADERS ASS’N, <https://www.asca.net/> [<https://perma.cc/2V3E-STNK>].

¹¹⁶ See HOPE METCALF, JAMELIA MORGAN, SAMUEL OLIKER-FRIEDLAND, JUDITH RESNIK, JULIA SPIEGEL, HARAN TAE, ALYSSA WORK & BRIAN HOLBROOK, ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES 5–8 (2013). Policies included in the analysis were Federal Bureau of Prisons, 28 C.F.R.

easy. In contrast, few policies at the time focused on how individuals could be released and the obligations of prison staff to reduce degrees of isolation.

The next goal was to learn the impact of such rules by finding out how many people were held for what period of time. ASCA/Liman sent detailed surveys to the directors of the prison systems of the fifty states, the District of Columbia, and the Federal Bureau of Prisons (FBOP), as well as some large jail systems.¹¹⁷ Given the many terms for solitary confinement, ASCA/Liman provided a definition by seeking to learn how many people were held inside cells for an average of twenty-two hours or more per day for more than fifteen continuous days.¹¹⁸

Based on self-reported data collected from thirty-four jurisdictions, then housing about three-quarters of the national prison population, the 2015 report, *Time-in-Cell*, estimated that 80,000 to 100,000 prisoners of the 1.5 million incarcerated people were held in solitary confinement.¹¹⁹ The 2016 report, *Aiming to Reduce Time-in-Cell*, identified almost 68,000 people held in isolation.¹²⁰

The 2018 report relied on submissions from prison systems from the fall of 2017. As reflected in Figure 1, below, the forty-three prison systems responding held 80.6% of the U.S. prison population and reported that 49,197 individuals—4.5% of the people in their custody—were in restrictive housing.¹²¹ Across all the reporting jurisdictions, the median percentage of the population held in restrictive housing was 4.2%; the average was 4.6%.¹²² The percentage of prisoners in restrictive housing ranged from under 1% to 19%.¹²³ Extrapolating from these numbers to include jurisdictions that did not provide data, ASCA/Liman estimated that some 61,000 individuals were

§ 541.21 (2012), CAL. CODE REGS. tit. 15, § 3335(a), FLA. ADMIN. CODE r. 33-602.220(c)(3)(g), and NEB. ADMIN. REG. 201.05(V)(A). *Id.*

¹¹⁷ ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, at 153. An example of the 2017–2018 survey can be found in Appendix A of that report.

¹¹⁸ *Id.* at 8 n.20. The definition of restrictive housing used in the ASCA/Liman surveys varied. In 2014, the focus was on thirty days; thereafter, the survey defined restrictive housing as “separating prisoners from the general population and holding them in their cells for 22 hours per day or more for 15 or more continuous days.” *Id.* at 8 (internal quotation marks omitted). In the 2018 report and the 2020 report (forthcoming, as of this writing), the definition continued to rely on the metric of fifteen days or more but used the term “an average of 22 hours” in cell rather than measuring each day of twenty-two hours in a cell. *Id.* Based on the responses, the questions were refined to enable more accurate information.

¹¹⁹ ASCA/LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION, *supra* note 11, at 10.

¹²⁰ ASCA/LIMAN 2016 AIMING TO REDUCE TIME-IN-CELL, *supra* note 11, at 20.

¹²¹ ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, at 10, 12 tbl.1, 13 tbl.1.

¹²² *Id.* at 11.

¹²³ *Id.* at 12 tbl.1, 13 tbl.1.

in isolation in prisons in the fall of 2017.¹²⁴ Below, we have reproduced some of the figures that summarize aspects of the survey data.

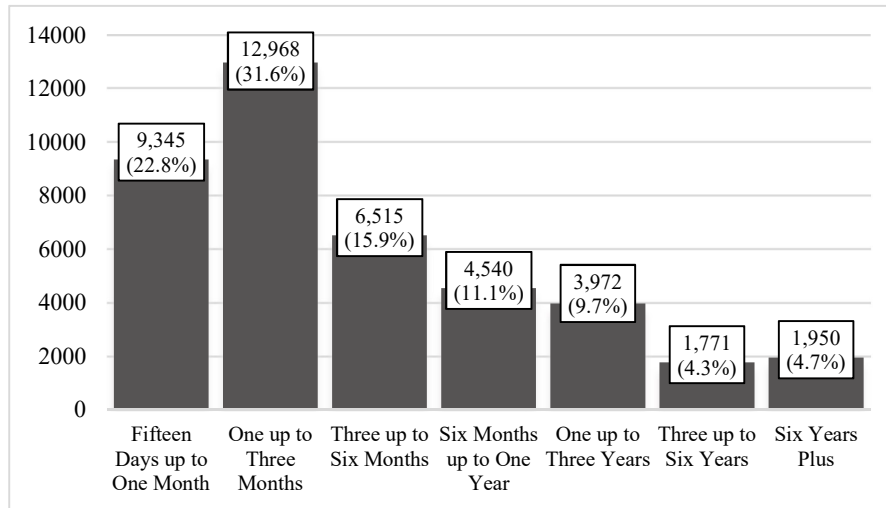
FIGURE 1: NUMBER AND PERCENTAGE OF PRISON POPULATION IN RESTRICTIVE HOUSING AS OF THE FALL OF 2017 (N=43)¹²⁵

Total in Custody	1,087,671
Total in Restrictive Housing	49,197 (4.5%)
Range	0.1% to 19%
Median	4.2%
Average	4.6%

One data point collected in the surveys is the number of people held in isolation, and another is the length of time spent there. Getting that information is difficult, in part, because not all prison systems have tracked or published that information. As Figure 2 below reflects, thirty-six jurisdictions responded in 2017 to questions about duration and reported that most people were held in segregation for a year or less. Twenty-five jurisdictions counted more than 3,700 individuals who were held for more than three years. Almost 2,000 of those individuals had been in isolation for more than six years.

¹²⁴ *Id.* at 10.

¹²⁵ *Id.* at 11, 12 tbl.1, 13 tbl.1.

FIGURE 2: PRISONERS IN RESTRICTIVE HOUSING IN 2016 BY LENGTH OF TIME (N=36)¹²⁶

Demographics of the population held in solitary has been another subject of inquiry. The surveys have sought to understand the relevance of gender, race and ethnicity, and age of individuals held in solitary confinement. As Figure 3 shows, men were much more likely than women to be in solitary confinement.¹²⁷ Figure 4 details that Black men comprised a greater percentage of the restrictive housing population than of the total custodial population. Figure 5 reflects that Black women were yet a larger percentage of the restrictive housing population than of the general population.

¹²⁶ The original chart appears in *id.* at 14 fig.3 (reproduced with the permission of the authors).

¹²⁷ *Id.* at 17.

FIGURE 3: PERCENT OF TOTAL POPULATION IN RESTRICTIVE HOUSING BY GENDER¹²⁸

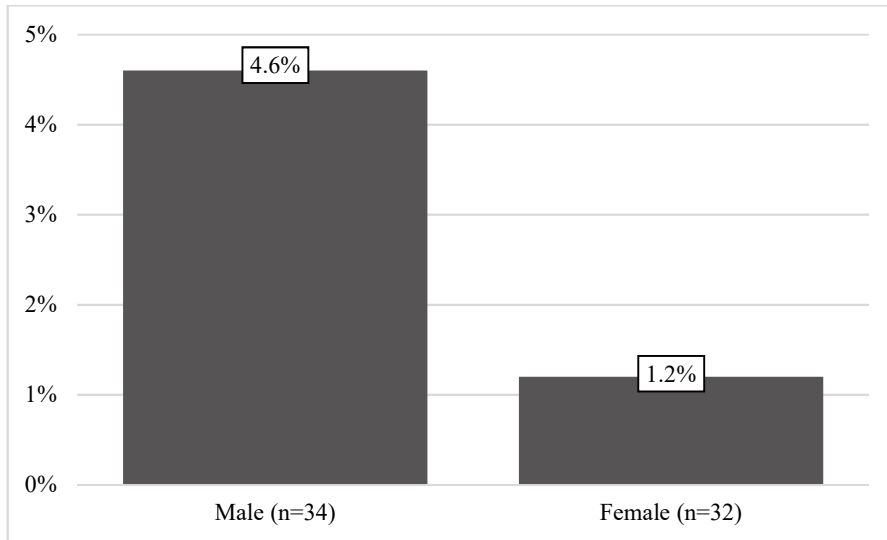
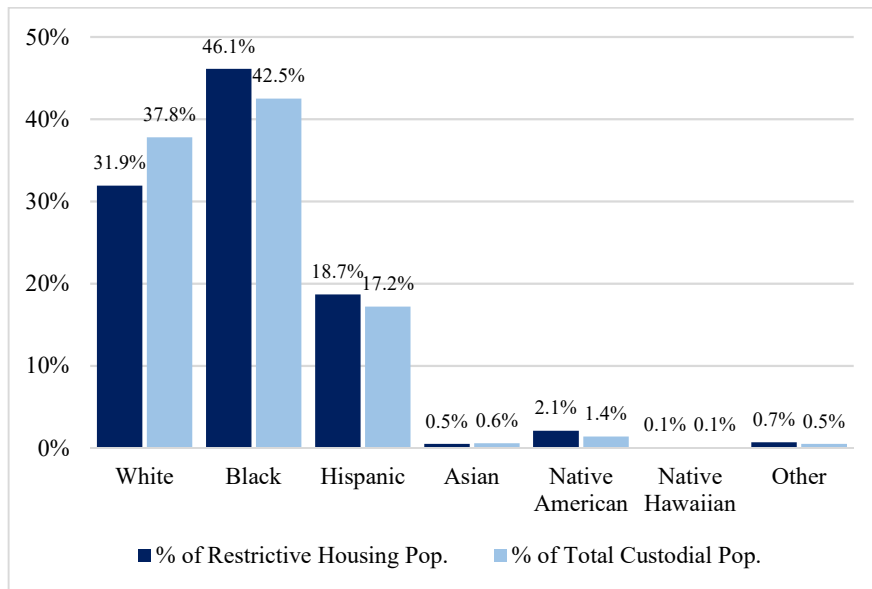


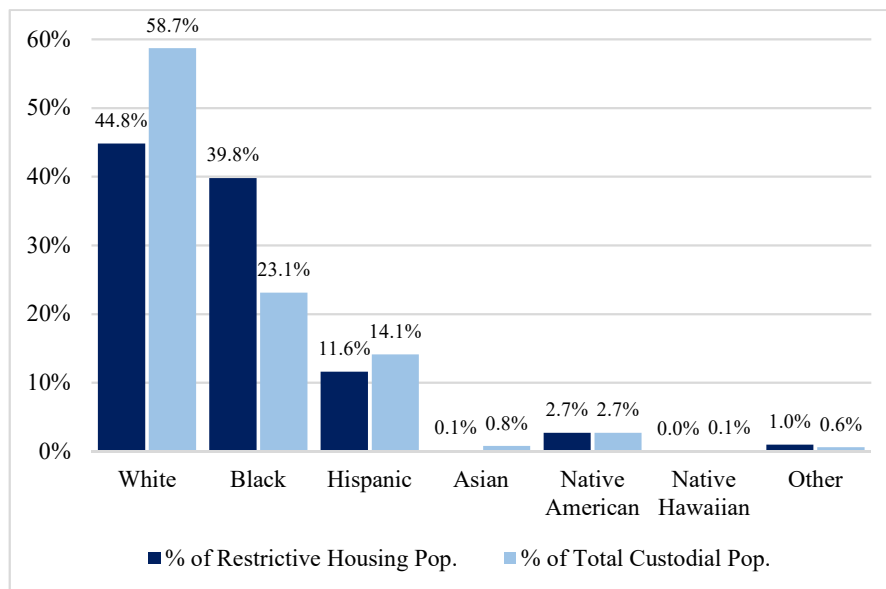
FIGURE 4: RACIAL AND ETHNIC COMPOSITION OF MALE PRISONERS IN TOTAL CUSTODIAL POPULATION AND IN RESTRICTIVE HOUSING POPULATION (N=33)¹²⁹



¹²⁸ The original chart appears in *id.* at 17 fig.4 (reproduced with the permission of the authors).

¹²⁹ The original chart appears in *id.* at 23 fig.9 (reproduced with the permission of the authors).

FIGURE 5: RACIAL AND ETHNIC COMPOSITION OF FEMALE PRISONERS IN TOTAL CUSTODIAL POPULATION AND IN RESTRICTIVE HOUSING POPULATION (N=32)¹³⁰



A substantial number of people, whom prison systems categorize under their varying definitions of “serious mental illness,”¹³¹ were, as of 2017, held in restrictive housing. Given the range in scope and detail, a person could be classified as seriously mentally ill in one jurisdiction but not in another. Thus, rather than scaling the information, ASCA/Liman

¹³⁰ The original chart appears in *id.* at 23 fig.10 (reproduced with the permission of the authors).

¹³¹ The report included an appendix providing definitions from all the responding jurisdictions. For example, Alabama defined “Serious Mental Illness” (SMI) to be “[p]sychotic disorders, bipolar disorders, and major depressive disorders; any diagnosed mental disorder currently associated with serious impairment in psychological, cognitive, or behavioral function that substantially interferes with the person’s ability to meet the demands of living and requires an individualized treatment plan by a qualified mental health provider.” Alaska reported that “Mental Illness is an organic mental or emotional impairment that reduces an individual’s exercise of conscious control over the individual’s actions and reduces an individual’s ability to perceive reality, to reason or understand.” Arizona responded that SMI was “ADC Mental Health Technical Manual, 06/18/2015 Defined: Those who according to a licensed mental health clinician or provider possess: 1) A qualifying mental health diagnosis as indicated on the SMI determination form, and 2) A severe functional impairment directly relating to their mental illness.” In Arkansas, the definition was: “Serious Mental Illness-Psychotic, Bipolar and Major Depressive Disorders and any other diagnosed mental disorder (excluding substance use disorders) associated with serious behavioral impairment as evidenced by examples of acute decompensation, self-injurious behaviors, and mental health emergencies that require an individualized treatment plan by a qualified mental health professional.” *Id.* at 184. Definitions from the other responding states can be found at *id.* at 184–95.

provided tables by jurisdiction and tallied the numbers provided. As of the fall of 2017, more than 4,200 people with serious mental illness were in restrictive housing.

FIGURE 6: MALE PRISONERS WITH SERIOUS MENTAL ILLNESS (SMI, VARIOUSLY DEFINED)¹³² IN RESTRICTIVE HOUSING (RH) (N=33)

	Total Custodial Pop.	Custodial Pop. with SMI	% Custodial Pop.	Pop. with SMI	% with SMI in RH
Alabama	20,282	1,064	5.30%	248	23.30%
Arizona	38,117	1,559	4.10%	284	18.20%
Arkansas	14,561	397	2.70%	21	5.30%
Colorado	16,624	1,234	7.40%	1	0.10%
Connecticut	13,182	28	0.20%	3	10.70%
Delaware	4,100	354	8.60%	3	0.90%
Illinois	39,767	3,998	10.10%	356	8.90%
Indiana	23,847	4,762	20.00%	567	11.90%
Iowa	7,578	1,009	13.30%	24	2.40%
Kansas	8,999	2,677	29.70%	43	1.61%
Kentucky	20,427	386	1.90%	66	17.10%
Louisiana	32,953	2,113	6.40%	417	19.70%
Massachusetts	8,459	608	7.20%	10	1.60%
Mississippi	12,038	61	0.50%	10	16.40%
Missouri	29,675	3,768	12.70%	703	18.70%
Nebraska	4,762	192	4.00%	50	26%
New Jersey	18,594	208	1.10%	1	0.50%
New Mexico	6,306	36	0.60%	23	63.90%
New York	48,407	2,420	5.00%	47	1.90%
North Carolina	34,326	385	1.10%	27	7.00%
North Dakota	1,606	345	21.50%	5	1.50%

¹³² The original table appears in *id.* at 48 tbl.15 (reproduced with the permission of the authors).

Ohio	45,796	3,477	7.60%	150	4.30%
Oklahoma	23,816	7,011	29.40%	615	8.80%
Oregon	13,302	812	6.10%	112	13.80%
Pennsylvania	44,300	3,691	8.30%	0	0.00%
Rhode Island	2,722	140	5.10%	16	11.40%
South Dakota	3,402	111	3.30%	12	10.80%
Tennessee ¹³³	20,214			98	
Texas ¹³⁴	133,229	1,440	1.10%	0	0.00%
Utah	5,822	199	3.40%	11	5.50%
Washington	15,744	1,628	10.30%	99	6.10%
Wisconsin	21,050	1,654	7.90%	90	5.40%
Wyoming	1,894	204	10.80%	41	20.10%
Total	735,901	47,971	6.1% (median)	4,153	7.9% (median)

FIGURE 7: FEMALE PRISONERS WITH SERIOUS MENTAL ILLNESS (SMI, VARIOUSLY DEFINED) IN RESTRICTIVE HOUSING (RH) (N = 31)¹³⁵

	Total Custodial Pop.	Custodial Pop. with SMI	% Custodial Pop. with SMI	Pop. with SMI	% Pop. with SMI
Alabama	1,310	86	6.60%	1	1.20%
Arizona	4,029	313	7.80%	14	4.50%
Arkansas	1,344	2	0.10%	0	0.00%
Colorado	1,673	497	29.70%	0	0.00%
Connecticut	955	8	0.80%	0	0.00%
Delaware	233	64	27.50%	0	0.00%

¹³³ The ASCA/Liman 2018 report, *Reforming Restrictive Housing*, indicated that “Tennessee reported 505 prisoners with serious mental illness in its total custodial population. This number is not included in [the table] because it is not known how many of the 505 prisoners are female and how many are male.” *Id.* at 116 n.79.

¹³⁴ Texas had informed the researchers that it did “not define ‘serious mental illness.’” Its numbers reflect prisoners who were “on an inpatient mental health caseload.” *Id.* at 116 n.80.

¹³⁵ The original table appears in *id.* at 49 tbl.16 (reproduced with the permission of the authors).

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Illinois	2,410	619	25.70%	24	3.90%
Indiana	2,470	954	38.60%	36	3.80%
Iowa	705	167	23.70%	3	1.80%
Kansas	897	525	58.50%	0	0.00%
Kentucky	3,139	163	5.19%	8	4.90%
Massachusetts	588	46	7.82%	0	0.00%
Missouri	3,529	1,102	31.20%	48	4.40%
Nebraska	416	71	17.10%	4	5.60%
New Jersey	774	24	3.10%	0	0.00%
New Mexico	741	9	1.20%	0	0.00%
New York	2,357	188	8.00%	3	1.60%
North Carolina	2,933	80	2.70%	2	2.50%
North Dakota	224	37	16.50%	0	0.00%
Ohio	4,158	1,113	26.80%	10	0.90%
Oklahoma	3,079	2,086	67.70%	14	0.70%
Oregon	1,272	168	13.20%	11	6.60%
Pennsylvania	2,620	529	20.20%	0	0.00%
Rhode Island	130	9	6.90%	0	0.00%
South Dakota	525	40	7.60%	1	2.50%
Tennessee	1,946			1	
Texas	12,180	84	0.70%	0	0.00%
Utah	471	21	4.50%	0	0.00%
Washington	1,302	193	14.80%	0	0.00%
Wisconsin	1,539	414	26.90%	19	4.60%
Wyoming	260	64	24.60%	2	3.10%
Total	60,209	9,676	13.20% (median)	201	0.80% (median)

The 2018 report compared the responses of the forty prison systems that answered the ASCA/Liman surveys in both 2015 and 2017. During that time, several prison systems initiated policy reforms to limit the use of solitary

confinement.¹³⁶ The jurisdictions' self-reported data on the numbers may be evidence of the impact of these policy reforms, as the total number was down somewhat even though the changes were not uniform across the jurisdictions.

In those forty systems, 56,000 people had been placed in restrictive housing in 2015. The number of prisoners reported in restrictive housing decreased in 2017 by almost 9,500 to 47,000 people.¹³⁷ The percentage of individuals in isolation decreased from 5.0% to 4.4%.¹³⁸ In more than two dozen states, the numbers of people in restrictive housing decreased.¹³⁹ In eleven states, the numbers went up.¹⁴⁰ In thirty-one jurisdictions responding to questions about length of time in both 2015 and 2017, the number of individuals in restrictive housing for three months or less increased.¹⁴¹ The number of people in isolation for longer than three months decreased. The decreases were greatest for time periods longer than six months.¹⁴²

2. *Experiencing Isolation*

The efforts to document and quantify the ways in which solitary confinement is used by prison staff are paralleled by efforts to assess the effects on individuals held for long periods of time in isolation. In some ways, such inquiries seem unnecessary because humans are “social beings,”

¹³⁶ See ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, at 67–81; ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES (2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_limn_2018_workingtolimit.pdf [<https://perma.cc/J4VV-VPN6>].

¹³⁷ ASCA/LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 11, at 95.

¹³⁸ *Id.*

¹³⁹ *Id.* at 151 n.427 (“Those 28 jurisdictions, starting with the largest decrease in percentage points, were Utah (from 14.0% to 4.7%); Delaware (from 8.8% to 0.8%); New Mexico (from 9.0% to 4.2%); Nebraska (from 11.0% to 6.3%); Tennessee (from 8.8% to 5.3%); New York (from 8.5% to 5.3%); Illinois (from 4.8% to 2.2%); North Dakota (from 3.0% to 0.4%); Wyoming (from 6.2% to 3.8%); Alabama (from 5.7% to 4.0%); New Jersey (from 6.7% to 5.2%); South Carolina (from 5.1% to 3.7%); Kansas (from 5.9% to 4.6%); Colorado (from 1.2% to 0.1%); Maryland (from 7.5% to 6.5%); Georgia (from 6.8% to 5.8%); North Carolina (from 4.0% to 3.0%); Texas (from 3.9% to 2.9%); Iowa (from 3.0% to 2.0%); Kentucky (from 4.2% to 3.4%); Michigan (from 3.1% to 2.3%); Idaho (from 5.0% to 4.3%); South Dakota (from 3.0% to 2.3%); Oklahoma (from 5.6% to 5.1%); Wisconsin (from 3.7% to 3.2%); Pennsylvania (from 3.4% to 3.2%); Ohio (from 2.7% to 2.6%); and Hawaii (from 0.5% to 0.4%).”).

¹⁴⁰ *Id.* at 6; *see also id.* at 151 n.429 (“Those 12 jurisdictions, starting with the largest increase in percentage points, were Louisiana (from 14.5% to 19.0%); Mississippi (from 1.0% to 4.1%); Montana (from 3.5% to 6.4%); Missouri (from 6.3% to 9.0%); Massachusetts (from 2.3% to 4.9%); Oregon (from 4.3% to 6.4%); Connecticut (from 0.8% to 2.3%); Alaska (from 7.2% to 8.6%); Indiana (from 5.9% to 6.6%); Washington (from 1.7% to 2.3%); Arizona (from 6.0% to 6.5%); and FBOP (from 4.7% to 5.2%).”).

¹⁴¹ *Id.* at 6.

¹⁴² *Id.* at 100.

and solitary confinement is so obviously harmful.¹⁴³ Indeed, the injuries from a lack of meaningful human interaction have been apparent for hundreds of years. Seeing how disabling solitary was, prison officials in the nineteenth century abandoned the forms of that regime that had been used in Auburn, New York and in the Eastern Penitentiary in Pennsylvania.¹⁴⁴ Moreover, individuals subjected to solitary have chronicled their profound suffering, including disorientation, a loss of depth perception, and thoughts of suicide.¹⁴⁵

The then-nascent correctional establishment recognized solitary's harms, and those views made their way in 1890 into U.S. Supreme Court case law. The Court discussed the oppressiveness of isolation when holding that Colorado's solitary confinement of James Medley violated the Ex Post Facto Clause because the statute mandating solitary confinement for capital offenders had been enacted after Medley's conviction of a capital offense.¹⁴⁶ In recounting the "very interesting history" of solitary confinement, the Court borrowed from an encyclopedia article citing punishment theorists Cesare Beccaria and Jeremy Bentham and the work of the International Penitentiary Commission (founded in 1872).¹⁴⁷ The Court wrote that isolation put some prisoners into a "semi-fatuous" condition and rendered others "insane."¹⁴⁸ More than a century later, other Justices acknowledged that long-term isolation could cause "madness."¹⁴⁹

Given that intuitive revulsion at the deprivations of "meaningful human contact and social interaction, the enforced idleness and inactivity, [and] the

¹⁴³ See Jules Lobel & Peter Scharff Smith, *Solitary Confinement—From Extreme Isolation to Prison Reform*, in SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM 1, 1–2 (Jules Lobel & Peter Scharff Smith eds., 2020) [hereinafter SOLITARY CONFINEMENT].

¹⁴⁴ Peter Scharff Smith, *Solitary Confinement—Effects and Practices from the Nineteenth Century Until Today*, in SOLITARY CONFINEMENT, *supra* note 143, at 33–37.

¹⁴⁵ See, e.g., WOODFOX, *supra* note 14; Betts, *supra* note 14; Robert King, Dolores Canales, Jack Morris & Armondo Sosa, *Sharing Experiences of Solitary Confinement—Prisoners and Staff*, in SOLITARY CONFINEMENT, *supra* note 143, at 243–245. King reported on how, during his twenty-nine years in solitary confinement in Angola, Louisiana, he had trouble with depth perception and that, thereafter, he continued to struggle with "differentiating long distances and special relationships." *Id.* at 244; see also Huda Akil, *The Brain in Isolation: A Neuroscientist's Perspective on Solitary Confinement*, in SOLITARY CONFINEMENT, *supra* note 143, at 204–05.

¹⁴⁶ *In re Medley*, 134 U.S. 160 (1890).

¹⁴⁷ *Id.* at 167. The Court cited (with an incorrect volume number) to *Prison and Prison Discipline*, in XIV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 6–16 (George Ripley & Charles A. Dana eds., 1875). That article provided accounts of the history and current state of modern "[p]enitentiary science." *Id.* at 6–7.

¹⁴⁸ *Medley*, 134 U.S. at 168.

¹⁴⁹ *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring); see also *infra* note 235 (discussing Justice Breyer's analyses in *Glossip v. Gross* and subsequent cases).

oppressive security and surveillance,”¹⁵⁰ one question is why courts have not banned the practice, when, in the 1960s and 1970s, they outlawed whipping, strip cells, and radical food deprivations. Partial answers come from how the Court’s own doctrine contributed to arguments from the correctional establishment about their need to have solitary confinement as a punishment. Hyper-isolation traveled with hyper-density, which the Supreme Court licensed in 1981 in *Rhodes v. Chapman*. The percentage of people held in solitary confinement increased with prison expansion and overcrowding.¹⁵¹

Thereafter, the Supreme Court relied on the practices of prison officials as evidence of what was “normal” in prison and as a metric of what was legal. Justices acceded to prison officials’ arguments about the need for discretion to use a range of “management tools,” including transfers to restrictive forms of confinement. Furthermore, judicial toleration of solitary confinement relates to other prison practices which courts have tolerated. As we discussed, while upholding bans on filth and violence for all segments of prison populations, appellate courts rejected efforts by lower courts to stop the enforced idleness in general populations.¹⁵² Solitary confinement is the extreme example of how prisons deplete individuals by failing to provide meaningful social interactions and activities.¹⁵³

In short, as of this writing, more than lived experiences and human insights are needed for constitutional law to reject solitary confinement outright. Therefore, before turning to how courts in the last decades have responded to solitary confinement, we provide a brief synopsis of some of the research on isolation’s destructiveness.

Many social scientists and trained health professionals have formulated research paradigms, interviewed individuals in solitary, and analyzed correctional data in an effort to determine what isolated confinement means for the people who experience it and the institutions that impose it. Some studies have also explored whether solitary confinement has the utilities that its proponents have claimed: reducing violence among prisoners and staff

¹⁵⁰ Craig Haney, *Solitary Confinement, Loneliness, and Psychological Harm*, in SOLITARY CONFINEMENT, *supra* note 143, at 129–30 [hereinafter Haney, *Loneliness*].

¹⁵¹ Sakoda & Simes, *supra* note 113.

¹⁵² One example comes from Judge Johnson’s efforts to do so, which were limited by the Fifth Circuit. See *Pugh v. Locke*, 406 F. Supp. 318, 323–26 (M.D. Ala. 1976), *aff’d in part, rev’d in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part, judgment rev’d in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978).

¹⁵³ See generally Judith Resnik, *Not Isolating Isolation*, in SOLITARY CONFINEMENT, *supra* note 143, at 89–115.

and enhancing safety.¹⁵⁴ This avenue of research is salient for those interested in “evidence-based” practices and for litigation in which governing doctrine requires courts to consider whether punishment serves legitimate penological purposes.

Identifying the specific effects of solitary confinement is made complex given the myriad ways in which prisons constrain individual autonomy and the challenges people encounter before incarceration.¹⁵⁵ The hurdles for scientists include cataloguing, distinguishing, and measuring variables such as different degrees and durations of isolation, the level of staffing and the skills of correctional officers, health resources, activities made available and used, budgets, the opportunities and conditions for those not in solitary confinement, cell design, the facility itself, and the density and kinds of individuals housed within both segregated and general populations.

Moreover, even as the people entering prison are diverse, they share demographics and documented needs. Compared to the population at large, a disproportionate number are people of color. Many people enter prison with health problems, limited income, and low levels of education. For example, one profile of some 230,000 people released from North Carolina’s prisons between 2000 and 2015 identified almost 70% who had substance abuse problems, at least 12% in need of mental health support, and 65% who had not completed high school.¹⁵⁶ In a 2020 encyclopedic overview focused on incarcerated women, the U.S. Civil Rights Commission found they were likely to have suffered many forms of trauma and more likely than men to be the primary caregivers for their households.¹⁵⁷

Between the range of people and of situations, a few commentators argue that the “purported negative physiological and psychological effects”

¹⁵⁴ For some researchers, the answer is clearly no. *See, e.g.*, Homer Venters, *Mythbusting Solitary Confinement in Jail*, in SOLITARY CONFINEMENT, *supra* note 143, at 178–79 [hereinafter Venters, *Mythbusting*].

¹⁵⁵ An analysis of the research challenges comes from Brie Williams & Cyrus Ahalt, *First Do No Harm: Applying the Harms-to-Benefits Patient Safety Framework to Solitary Confinement*, in SOLITARY CONFINEMENT, *supra* note 143, at 158 [hereinafter Williams & Ahalt, *First Do No Harm*].

¹⁵⁶ Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan E. Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN, Oct. 2019, at 4, available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350> [https://perma.cc/LLA9-LJDF] [hereinafter Brinkley-Rubinstein et al., *Mortality After Release*].

¹⁵⁷ *See* U.S. COMM’N ON CIVIL RIGHTS, WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS 3–4 (2020), <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf> [https://perma.cc/G26J-YQJN].

have been overstated.¹⁵⁸ In the main, however, most experts in this arena agree that deprivations of sociability have brutal effects.¹⁵⁹ One summary concluded that solitary confinement caused “a wide range of harmful psychological effects, including increases in negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.”¹⁶⁰ Moreover, to adjust to long-term isolation, individuals developed what would otherwise be pathological behaviors, making a return to human sociability difficult.¹⁶¹ This form of “social death” resulted in grief and loneliness.¹⁶²

One focus of these studies has been the impact of sensory deprivation, when an individual is limited to a small space for long periods of time and given no variation of experiences.¹⁶³ Another area of study is on the effects of banning human interaction and touch.¹⁶⁴ A 1983 study found that profoundly isolated prisoners became hypersensitive to external stimuli and developed difficulties with concentration and memory.¹⁶⁵ Some also experienced visual and aural hallucinations.¹⁶⁶ Later research, based on self-

¹⁵⁸ See Robert D. Morgan, Ryan M. Labrecque, Paul Gendreau, Taylor R. Ramler & Briann Olafsson, *Questioning Solitary Confinement: Is Administrative Segregation as Bad as Alleged?*, CORRECTIONS TODAY, Sept./Oct. 2017, at 18, 19.

¹⁵⁹ See Manfred Nowak (Special Rapporteur of the Human Rights Council), *Interim Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/63/175, at 22 (July 28, 2008); *Soledad Prison Goes on Trial Tomorrow*, *supra* note 39, at 4.

¹⁶⁰ Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997); see also Haney, *Loneliness*, *supra* note 150, at 132–33; Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211 (2020).

¹⁶¹ Haney, *Loneliness*, *supra* note 150, at 138–39.

¹⁶² *Id.* at 140.

¹⁶³ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 294 (2018) [hereinafter Haney, *Restricting*]; see also *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 75 (2012) (statement of Dr. Craig Haney).

¹⁶⁴ Haney, *Restricting*, *supra* note 163, at 297–98; see also Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 371–75 (2018) [hereinafter Haney, *Psychological Effects*].

¹⁶⁵ Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1452–53 (1983) [hereinafter Grassian, *Psychopathological*].

¹⁶⁶ *Id.* at 1452.

reports and on interviews, found similar effects.¹⁶⁷ This body of work argues that an “isolation syndrome” can be identified.¹⁶⁸

Another effort analyzed data from 2004 of mentally ill prisoners held in solitary confinement in New York prisons. That research reported that more than “half (53%) of the inmates with mental illness . . . interviewed in disciplinary lockdown reported previous suicide attempts” and “40% reported committing an act of self-harm during their current incarceration.”¹⁶⁹ An observational study of individuals detained in New York City’s jails between 2010 and 2013 found that “acts of self-harm were strongly associated with assignment of inmates to solitary confinement. Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm.”¹⁷⁰ Moreover, the populations exposed to solitary confinement in this analysis were disproportionately people of color, as has been evident in other studies as well.¹⁷¹

To measure physical effects, one study of individuals held in isolation in Pelican Bay, California compared 283 people in general population with 343 people in the isolation of the “special housing unit” (SHU), as well as 315 people held for at least ten years in general population and 246 individuals in the SHU.¹⁷² After controlling for age and other health conditions, the study concluded that hypertension was more prevalent in the

¹⁶⁷ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 347–54 (2006) [hereinafter Grassian, *Psychiatric*]; Haney, *Psychological Effects*, *supra* note 164, at 371–74.

¹⁶⁸ Grassian, *Psychopathological*, *supra* note 165, at 1453. One summary, presented in a 2016 amicus filing to the U.S. Supreme Court, came from health care experts. See Brief of Amici Curiae Professors & Practitioners of Psychiatry & Psychology in Support of Petitioner, *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 319 (2015) (No. 15-31). These experts argued that “while mentally ill prisoners are particularly susceptible to these harms, solitary confinement affects even psychologically resilient individuals,” putting all prisoners “at significant risk of severe psychological harm.” *Id.* at 6.

¹⁶⁹ CORR. ASS’N OF N.Y., MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS 3, 59 (2004), <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c4f6d9642bfc11a842e8e97/1548709275093/2004+Mental+Healthcare+in+New+Yorks+Prisons.pdf> [<https://perma.cc/Q8A7-K8E8>].

¹⁷⁰ Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014). That study had considered 244,600 incarcerations, of which more than 7% had been exposed to solitary confinement. See Venters, *Mythbusting*, *supra* note 154, at 173–75.

¹⁷¹ *Id.* at 176–77; see also Sakoda & Simes, *supra* note 113; *supra* note 11 and accompanying text.

¹⁷² See Louise Hawkey, *Social Isolation, Loneliness, and Health*, in SOLITARY CONFINEMENT, *supra* note 143, at 190.

SHU population, and by a significant margin.¹⁷³ SHU prisoners were therefore “set on a trajectory toward early onset cardiovascular disease and mortality.”¹⁷⁴

These results reflect the relationship between social bonds, activities, and health.¹⁷⁵ Stress, as well as environments lacking stimulation and natural light, have been demonstrated to have deleterious health effects.¹⁷⁶ By 2020, health care experts, relying on the U.S. Food and Drug Administration metric of “harms-to-benefits” for medications and medical devices, concluded that solitary confinement was “inappropriate for use with humans.”¹⁷⁷ Part of that analysis drew on research that high rates of solitary confinement did not predict lower institutional violence.¹⁷⁸ Furthermore, prison staff working in such environments had higher rates of household violence, ill health, and suicide than other staff.¹⁷⁹

Research has also explored what happens to individuals held in solitary confinement who are later released. One study evaluated people incarcerated between 2000 and 2015 in North Carolina.¹⁸⁰ Individuals who had been placed in solitary were “24% more likely to die in the first year after release . . . [and] also 127% more likely to die of an opioid overdose in the first [two] weeks after release” compared with incarcerated people who had not been placed in solitary.¹⁸¹

Some researchers have questioned the strength of conclusions that solitary is debilitating. They point to the variety of variables affecting

¹⁷³ See *id.* at 191. In general population, about 18% had hypertension; in the SHU, more than 48% did. *Id.*

¹⁷⁴ *Id.* at 196.

¹⁷⁵ See generally Laura Fratiglioni, Stephanie Paillard-Borg & Bengt Winblad, *An Active and Socially Integrated Lifestyle in Late Life Might Protect Against Dementia*, 3 LANCET NEUROLOGY 343 (2004); Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 204–07 (2019) (citing DANIEL SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* 27 (2d ed. 2012)).

¹⁷⁶ Akil, *supra* note 145, at 206–10. Animal studies have provided evidence of the physiological effects of isolation. See Michael J. Zigmond & Richard Jay Smeyne, *Use of Animals to Study the Neurobiological Effects of Isolation*, in SOLITARY CONFINEMENT, *supra* note 143, at 221–36.

¹⁷⁷ Williams & Ahalt, *First Do No Harm*, *supra* note 155, at 159, 163.

¹⁷⁸ *Id.* at 164.

¹⁷⁹ *Id.* at 165.

¹⁸⁰ Brinkley-Rubinstein et al., *Mortality After Release*, *supra* note 156, at 1.

¹⁸¹ *Id.* at 1. Another recent study of Danish prisoners showed an association between time spent in solitary confinement and increased recidivism and unemployment after release. See Christopher Wildeman & Lars Højsgaard Andersen, *Long-Term Consequences of Being Placed in Disciplinary Segregation*, 58 CRIMINOLOGY 423 (2020). But this study could not show that isolation *caused* these effects, since its analysis did not rule out the possible role of unobserved factors that might differentiate prisoners who experienced isolation from those who had not. See *id.* at 449.

incarcerated individuals and the challenges of comparisons. One article that termed itself a meta-analysis concluded that research had not established that all individuals were harmed by isolation, and indeed that some were “unchanged” or improved.¹⁸² In response, researchers whose work had been criticized argued that the article failed to conform to the standards of a meta-analysis because it conflated studies of different kinds and duration.¹⁸³ That debate echoes a central theme of this Essay, which is the role that baselines play. Given the profound alteration of “normal” behavior in solitary confinement and the many constraints imposed on incarcerated people held in high-security and other prisons, researchers seeking to identify the effects in sets of individuals have to determine which subsets of free and detained people to assess to compare their illness and well-being and that of individuals in solitary confinement.

III. THE LAW OF SOLITARY CONFINEMENT: EIGHTH AMENDMENT PROHIBITIONS AND FOURTEENTH AMENDMENT BUFFERS AGAINST ARBITRARY PLACEMENTS

We turn then to the “law” of solitary confinement, as we begin with Eighth Amendment rulings and then turn to Fourteenth Amendment law focused on due process protections. Before delving into the distinct lines of doctrine, the continuities merit comment. When assessing constitutionality, Justices created evaluative tools that implicitly or explicitly compare prisons’ strictures to the free world. The governing frameworks include whether officials provided the “minimal civilized measure of life’s necessities,”¹⁸⁴ deliberately caused “the wanton and unnecessary infliction of pain,”¹⁸⁵ or imposed an “atypical and significant hardship”¹⁸⁶ as distinguished

¹⁸² Morgan et al., *Questioning Solitary Confinement*, *supra* note 158, at 20; *see also* Robert D. Morgan, Paul Gendreau, Paula Smith, Andrew L. Gray, Ryan M. Labrecque, Nina MacLean, Stephanie A. Van Horn, Angelea D. Bolanos, Ashley B. Batastini & Jeremy F. Mills, *Quantitative Syntheses of the Effects of Administrative Segregation on Inmates’ Well-Being*, 22 PSYCH. PUB. POL’Y & L. 439 (2016); MAUREEN L. O’KEEFE, KELLI J. KLEBE, ALYSHA STUCKER, KRISTIN STURM & WILLIAM LEGGETT, ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION, at viii–ix (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf> [<https://perma.cc/9VN3-NAHC>]. The O’Keefe group concluded that individuals held in administrative segregation did not deteriorate compared to a control group of similar prisoners who were not held in segregation. This study analyzed deterioration via looking at reports by prison clinicians and staff and prisoners of anxiety, cognitive impairment, depression-hopelessness, hostility-anger control, hypersensitivity, psychosis, somatization, and withdrawal-alienation. O’KEEFE ET AL., *supra*, at ii.

¹⁸³ *See, e.g.*, Haney, *Psychological Effects*, *supra* note 164, at 375–401.

¹⁸⁴ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹⁸⁵ *Id.*

¹⁸⁶ *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

from what were within “normal limits,” “ordinary incidents of prison life,” or “expected” in prisons.¹⁸⁷ Other formulations reference the inherent liberty and dignity of individuals¹⁸⁸ and insist on the obligations of social orders to be decent and respect the dignity of all persons, incarcerated or not.¹⁸⁹

Aspects of these tests appear to rely on empirical questions about the on-the-ground, lived experiences of free and incarcerated people and of the practices of prison administrators. At times, judges referenced manuals and standards shaped by professionals to inform their views of what prisons legally had to provide. But often, judges asserted without explication or verification that particular practices were “normal” or “ordinary” or “incident” to incarceration. At some junctures, forms of deprivation struck judges as grotesque and hence, impermissible, while courts held that other practices required constitutionally constrained decision-making or were up to the discretion of prison staff. That mix came to be assimilated into a set of activities understood to constitute “prison.”

A. *On the Merits Impermissible, or Not*

1. *Prohibitions Collapse: Condoning Solitary Confinement in the 1970s and 1980s*

In 1970, the Honorable Constance Baker Motley, the first Black woman to sit on the U.S. federal courts,¹⁹⁰ held unconstitutional the placement of Martin Sostre in solitary confinement for more than fifteen days.¹⁹¹ Decades before the wave of social science research sketched above, Judge Motley found that, as a matter of fact, lengthy punitive segregation was “physically harsh, destructive of morale, . . . needlessly degrading, and dangerous to the maintenance of sanity.”¹⁹² She held that, as a matter of law, the prison system had unconstitutionally retaliated against Sostre for winning recognition of his constitutional rights to practice his Muslim faith.¹⁹³

¹⁸⁷ *Id.* at 478, 483, 485.

¹⁸⁸ *See* Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting, joined by Brennan, J. and Marshall, J.).

¹⁸⁹ *See* Trop v. Dulles, 356 U.S. 86, 101–03 (1958).

¹⁹⁰ *Constance Baker Motley: Judiciary’s Unsung Rights Hero*, U.S. COURTS (Feb. 20, 2020), <https://www.uscourts.gov/news/2020/02/20/constance-baker-motley-judiciarys-unsung-rights-hero> [<https://perma.cc/76QX-2WMB>]; *see also* CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW (1998).

¹⁹¹ *Sostre v. Rockefeller*, 312 F. Supp. 863, 889 (S.D.N.Y. 1970), *aff’d in part, rev’d in part sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied sub nom.* *Sostre v. Oswald*, 404 U.S. 1049 (1972), *and cert. denied sub nom.* *Oswald v. Sostre*, 405 U.S. 978 (1972).

¹⁹² *Id.* at 868.

¹⁹³ *Id.* at 869.

The district court awarded damages and put the fifteen-day cap in place. (In 2015, international rules on the treatment of prisoners used the same benchmark and called for prohibiting any isolation beyond that time.¹⁹⁴) Further, Judge Motley concluded that prison officials could return Sostre to solitary confinement only if they found, after a hearing, that he had committed serious offenses.¹⁹⁵ Given that such placement could result in a risk of loss of “good time,” a lawyer was also required. Judge Motley awarded some \$13,000 in compensatory and punitive damages to be paid by the prison officials, whom she found acted in bad faith.¹⁹⁶

The Second Circuit agreed that prison officials had unconstitutionally retaliated but disagreed about the constraints on solitary that Judge Motley had ordered.¹⁹⁷ Describing the conditions in solitary as “harsher” than those of general population, the en banc ruling called them neither “unendurable or subhuman or cruel and inhuman in a constitutional sense.”¹⁹⁸ Moreover, “[f]or a federal court . . . to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state’s free political and administrative processes . . . [even if] to us the choice may seem unsound or *personally* repugnant.”¹⁹⁹

The Second Circuit was not alone in deferring to prison officials, who argued that solitary confinement was an important part of their in-prison disciplinary repertoire. Examples come not only from that era,²⁰⁰ but also in the decades that followed. Yet a few decisions concluded that particular conditions of segregation could be unconstitutional. Examples included filthy, crowded cells²⁰¹ and long-term solitary confinement.²⁰² On occasion,

¹⁹⁴ See G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), at 16–17 (Dec. 17, 2015) [hereinafter Nelson Mandela Rules].

¹⁹⁵ *Sostre*, 312 F. Supp. at 889.

¹⁹⁶ *Id.* at 886–87.

¹⁹⁷ *Sostre v. McGinnis*, 442 F.2d 178, 204 (2d Cir. 1971).

¹⁹⁸ *Id.* at 186.

¹⁹⁹ *Id.* at 191.

²⁰⁰ See, e.g., *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971); *Roberts v. Peppersack*, 256 F. Supp. 415, 430–31 (D. Md. 1966).

²⁰¹ *Furtado v. Bishop*, 604 F.2d 80, 88 (1st Cir. 1979) (citing *Hutto v. Finney*, 437 U.S. 678, 685 (1978)).

²⁰² See, e.g., *Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971). That decision, following the Fifth Circuit’s remand that the complaint had been improperly dismissed, see 435 F.2d 125 (5th Cir. 1970), involved Billy Sinclair, a well-known prisoner advocate imprisoned in Angola. The district court held that long-term confinement of death row prisoners in cells for all but fifteen minutes per day without opportunity for regular outdoor exercise constituted cruel and unusual punishment. *Sinclair*, 331 F. Supp. at 1131. A few years later, the Third Circuit also recognized the cognizability of solitary confinement claims. See *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972). The circuit remanded with instructions to consider the prisoners’ claims that their confinement in punitive or administrative segregation constituted

judges found that the penalty of segregation was arbitrary and disproportionate to the alleged misconduct and violated either the Eighth Amendment or substantive due process.²⁰³

Insight into what could have happened comes from “A Model Act to Provide for the Protection of Rights of Prisoners,” put forth in 1972 by a committee of the National Council on Crime and Delinquency. As the organization’s title suggests, it sought to ameliorate conditions in prisons and responses to crime in general and did so through a series of standard-setting publications.²⁰⁴ The subcommittee on the model act included the Director of the Federal Bureau of Prisons, correctional staff at prisons in Pennsylvania and Illinois, a state court judge, and academics. Its staff counsel, Sol Rubin, wrote one of the first casebooks on the law of prisons.²⁰⁵

The group aimed to have legislatures adopt its model act to provide “minimum standards” to protect prisoners’ rights. The act stated that prisoners ought to have adequate food, medical care, sanitation, space, and protection from violence. Prohibited was “inhumane treatment,” including corporal punishment, and confining prisoners in solitary “for punishment.”²⁰⁶ While the model act did not define solitary, it did call upon the “highest ranking officer on duty” to be responsible for leaving a person in solitary for more than an hour and that doctors had to consider placements of more than two days.²⁰⁷ Critics argued the act served the interests of correctional officials

cruel and unusual punishment because they were not permitted out of their cells and were deprived of personal belongings and of visits. *Id.* at 187. The Fourth Circuit also ruled that long-term isolation could be unconstitutional. *See Sweet v. S.C. Dep’t of Corr.*, 529 F.2d 854 (4th Cir. 1975). The court held that a “restriction of two exercise periods of one hour” per week could constitute cruel and unusual punishment when plaintiff’s segregated confinement had “extended already over a period of years” and was “likely to extend indefinitely.” *Id.* at 866.

²⁰³ In 1973, for example, a judge concluded that while segregation for sixteen months or more in the “control unit” in the federal facility at Marion was not per se an Eighth Amendment violation, evidence was sufficient that the confinement of thirty-six prisoners in that setting was disproportionate, or left open the possibility of such claims. *See Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973); *see also Hardwick v. Ault*, 447 F. Supp. 116, 125–27 (M.D. Ga. 1978); *Wilwording v. Swenson*, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *Chapman v. Kleindienst*, 507 F.2d 1246, 1252 (7th Cir. 1974); *Black v. Warden, U.S. Penitentiary*, 467 F.2d 202, 203–04 (10th Cir. 1972).

²⁰⁴ NAT’L COUNCIL ON CRIME & DELINQUENCY, AN ACT TO PROVIDE FOR MINIMUM STANDARDS FOR THE PROTECTION OF RIGHTS OF PRISONERS (1972) [hereinafter NCCD MODEL PRISONERS’ RIGHTS ACT]; *see also Sol Rubin, Introduction: A Model Act for the Protection of Rights of Prisoners*, 1973 WASH. U. L.Q. 553; James A. Jablonski, *Controlling Discretionary Power in Prison Organizations: A Review of the Model Act*, 1973 WASH. U. L.Q. 563.

²⁰⁵ *See Rubin, supra note 204*, at 553 n.3; SOL RUBIN, HENRY WEIHOFEN, GEORGE EDWARDS & SIMON ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 617–18 (1963). As the book’s front-page states, this project was endorsed by of the National Council on Crime and Delinquency.

²⁰⁶ NCCD MODEL PRISONERS’ RIGHTS ACT, *supra note 204*, at § 1.

²⁰⁷ *Id.*

more than prisoners and gave as examples the failure to address isolation for reasons often couched as “administrative.”²⁰⁸ Yet the model act could have been one route to building limits on solitary confinement, as was the lower court case law sketched above, which could have expanded as the prisoners’ rights movement developed.²⁰⁹ Instead, as we detail below, the Supreme Court led a retrenchment as it circumscribed its rulings on both the Eighth Amendment and on the application of the Due Process Clause’s procedural protections.

In some of these opinions, judges justified profound isolation as an appropriate response. Illustrative is a 1988 decision by federal appellate judge Richard Posner, writing for the Seventh Circuit; he deployed the kind of utilitarian calculus for which, as a founder of law and economics, he is famous. In permitting the profound isolation in the federal Supermax in Marion, Illinois to continue,²¹⁰ Judge Posner posited that prisoners who had “no expectation of ever being released from prison and are in no danger of being executed” could not “be deterred by threat of punishment from trying to kill and maim the inmates and guards who displease them.”²¹¹

This conclusion came from one of a series of cases upholding the “permanent lockdown” (in which all persons were held in isolation) that the federal government put in place in 1983 in its Marion facility after the murder of eleven individuals in the prison. As Judge Posner put it five years later, “‘only’ 3 murders” had been committed since the permanent lockdown; armed assaults by prisoners also declined from 115 to 34.²¹² Judge Posner argued that the real beneficiaries of the total lockdown were prisoners, who had been the “principal victims.”²¹³ On his account, Marion reflected—albeit “in a weird way”—the “aspirations to a humane criminal justice system” that forbade “murderous inmates” from being executed or “beat senseless by outraged guards.”²¹⁴ If the highly restrictive conditions in Marion “‘opened up’ . . . the lives and safety of the inmates and guards would be in grave jeopardy.”²¹⁵

²⁰⁸ See, e.g., Fred Cohen, *In Search of a Model Act for Prisoners’ Rights*, 1973 WASH. U. L.Q. 621, 632.

²⁰⁹ See James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts, 1960-80*, 2 CRIME & JUST. 429 (1980).

²¹⁰ *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988).

²¹¹ *Id.* at 166.

²¹² *Id.* at 165.

²¹³ See *id.*

²¹⁴ *Id.* at 166.

²¹⁵ *Id.*

2. *Ruling Out “Ruin”: Questioning Solitary Confinement in the 1990s and Thereafter*

Judge Motley and Judge Posner had conflicting metrics for the constitutionality of profound isolation. Judge Motley found it impermissibly debilitating while Judge Posner thought it a viable route to a kind of safety in prisons. The research that we have outlined substantiates Judge Motley’s views of the harms. Moreover, Judge Posner’s claims of solitary-as-safety are undermined by assessments comparing rates of violence in general and solitary populations and its toll on both prisoners and staff.²¹⁶ In the decades since Judge Posner wrote, new challenges to solitary confinement argued that its harms were akin to deprivations of medical care, adequate food, and heat, and therefore was an impermissible punishment.

The kinds of deprivations the Court has held prohibited are sometimes summarized as “life’s necessities.” But that category does not explain *why* states have to provide them when imposing punishment. One way to illuminate the underlying proposition is that this body of law implicitly recognizes that governments cannot, as part of their sanctioning powers, set out to “ruin” people. The term “ruin” was invoked in a 2019 decision, *Timbs v. Indiana*, which held that the Eighth Amendment’s prohibition on excessive fines applied to the states.²¹⁷ Both the majority and concurring opinions explained that the Constitution’s ban on excessive fines was predicated on the view that governments ought not to use punishment to ruin a person economically.²¹⁸ In his concurrence, Justice Clarence Thomas discussed the history of the Excessive Fines Clause, imported at the Founding from England, which he explained aimed to ensure that the state “should not deprive a wrongdoer of his livelihood”;²¹⁹ governments’ sanctioning power ought not to result in “the ruin of the criminal.”²²⁰

An open question is whether this holding will affect the widespread imposition of monetary sanctions in the criminal and administrative

²¹⁶ See generally Cyrus Ahalt, Colette S. Peters, Heidi Steward & Brie A. Williams, *Transforming Prison Culture to Improve Correctional Staff Wellness and Outcomes for Adults in Custody “The Oregon Way”: A Partnership Between the Oregon Department of Corrections and the University of California’s Correctional Culture Change Program*, 8 *ADVANCING CORRECTIONS J.* 130 (2019); Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 *BEHAV. SCI. & L.* 307 (2005); Venters, *Mythbusting*, *supra* note 154.

²¹⁷ 139 S. Ct. 682 (2019).

²¹⁸ *Id.* at 687–88; *id.* at 697–98 (Thomas, J., concurring in judgment).

²¹⁹ *Id.* at 693 (Thomas, J., concurring in judgment) (quoting *United States v. Bajakajian*, 524 U.S. 321, 335 (1998)). In quoting *Bajakajian*, Justice Thomas referenced the majority opinion that he authored.

²²⁰ *Id.* at 694 (quoting 2 *THE HISTORY OF ENGLAND UNDER THE HOUSE OF STUART, INCLUDING THE COMMONWEALTH* 801 (1840)).

contexts.²²¹ Another is how to square historic protections with what today are seen as the “barbaric” punishments that England imposed, such as execution for many kinds of crimes, as well as branding and banishment to colonies.²²² Some commentators of that era proffered utilitarian rationales for the incongruity that governments could end a person’s life yet not “ruin” a person economically. One justification proffered was that doing otherwise would create perverse incentives, as a minor offense might leave a person in a “worse Condition” than committing a capital crime.²²³ Another was that ruining people imposed harms on communities. As Benjamin Franklin explained, taking the property that was “necessary to a Man” was not what the “Welfare of the Publick” demanded.²²⁴

Leaving a person in a “worse Condition” by forms of deprivations in prison is likewise dysfunctional, as most incarcerated people leave prison. But more than utility was at work when the common law duty of safekeeping of prisoners became a constitutional obligation to provide “life’s necessities.” The political theory recognizing the equality and dignity of all persons in a democratic order helped to propel the courts to accord prisoners’ status as rights-holders. Courts have come to insist that democratic governments must be purposeful in their punishments. The list of punishment’s licit aims—rehabilitation, deterrence, incapacitation, retribution, economic conservation of resources, and community safety—are not served by purposefully debilitating individuals, no more than they are served by withholding necessary medical care. Moreover, the prisoners’ rights law of the second half of the twentieth century has added to these purposes that had been formulated long before the second half of the twentieth century: punishments have to respect the equality of persons and preserve certain aspects of their liberty and dignity.²²⁵

²²¹ See Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 YALE L.J.F. 415 (2020); Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 YALE L.J.F. 430 (2020).

²²² As John H. Langbein pointed out to me, branding had its utilities. In an era without accessible records, branding marked people as having avoided hanging one time, and therefore ineligible for rescue a second time. See Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 54 n.6 (1983). See generally John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35 (1976).

²²³ Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 864–65 (2013) (quoting 1 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II, at xi (S. Emlyn ed., 3d ed. 1742)).

²²⁴ *Id.* at 869 (quoting Letter from Benjamin Franklin to Robert Morris (Dec. 25, 1783), in BENJAMIN FRANKLIN: WRITINGS 1079, 1082 (1987)).

²²⁵ See Resnik, *(Un)Constitutional Punishments*, *supra* note 22.

These ideas are reflected in the 1995 decision that held unconstitutional the placement of seriously mentally ill people (but not others) in solitary confinement.²²⁶ Judge Thelton Henderson explained that “mental health is a need as essential to a meaningful human existence as other basic physical demands our bodies may make for shelter, warmth or sanitation.”²²⁷ Concluding that the Eighth Amendment did not protect prisoners from “some psychological effects from incarceration or segregation,”²²⁸ Judge Henderson ruled that “if the particular conditions of segregation . . . inflict[ed] a serious mental illness, greatly exacerbate[d] mental illness, or deprive[d] inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.”²²⁹

The research of the last decades raises questions about the viability of that line-drawing and, indeed, of sharp distinctions between harms to one’s brain as contrasted to one’s body. In 2005, Justice Anthony Kennedy authored the *Wilkinson v. Austin* decision that condoned solitary confinement, even as it required a modicum of process for certain forms of isolation.²³⁰ A decade later, in 2015, he argued that placing people into isolation would cause many to become seriously mentally ill. Joining in the rejection of a habeas petition in *Davis v. Ayala*,²³¹ Justice Kennedy explained that the petitioner, Hector Ayala, who had been sentenced to death in 1989, had likely been held for decades “in a windowless cell no larger than a typical parking spot for 23 hours a day . . . [and] allowed little or no opportunity for conversation or interaction with anyone.”²³² To underscore his views of the injuries imposed, Justice Kennedy posited that sentencing judges warn defendants that “during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.”²³³ Justice Kennedy then added that the “judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”²³⁴

²²⁶ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

²²⁷ *Id.* at 1261.

²²⁸ *Id.* at 1264.

²²⁹ *Id.*

²³⁰ *See* 545 U.S. 209 (2005).

²³¹ 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 2210.

Soon thereafter, other Justices discussed the ruinous injuries of isolation as they questioned its constitutionality. Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, echoed Justice Kennedy's concerns in a dissent that argued the unconstitutionality of the death penalty. Justice Breyer noted the "numerous deleterious harms"²³⁵ that could "cause prisoners to experience 'anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations.'"²³⁶ In 2019, Justice Sonia Sotomayor likewise invoked the image of a "penal tomb" when pointing to the constitutional infirmities of solitary confinement.²³⁷

Yet some members of the Court have distanced themselves from this approach and from evaluating Eighth Amendment questions through the lens of "evolving standards of decency."²³⁸ In 2015, responding to Justice Kennedy's critique of solitary confinement, Justice Thomas argued that the focus should be on the individuals murdered; he wrote that "the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest."²³⁹ Moreover, Justice Thomas has disavowed the application of the Eighth Amendment to prisons, and he is one of several Justices who have raised objections to class-wide relief in prison-conditions litigation.²⁴⁰

Furthermore, in 2019, when interpreting the Cruel and Unusual Punishments Clause in *Bucklew v. Precythe*, a five-person majority permitted use of a method of execution that would be brutally painful. Writing for the majority, Justice Neil Gorsuch embraced a historical approach that looked to the Founding Era and the punishments then in common usage as examples of what were *not* "cruel and unusual

²³⁵ *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting, joined by Ginsburg, J.) (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130 (2003); Grassian, *Psychiatric*, *supra* note 167, at 331).

²³⁶ *Id.* at 2765. Justice Breyer continued to raise the problem of solitary in subsequent cases, again as dissents from executions. *See, e.g.*, *Jordan v. Mississippi*, 138 S. Ct. 2567, 2568 (2018) (Breyer, J., dissenting); *Ruiz v. Texas*, 137 S. Ct. 1246, 1246–47 (2017) (Breyer, J., dissenting).

²³⁷ Justice Sotomayor wrote: "A punishment need not leave physical scars to be cruel and unusual. . . . Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in 'near-total isolation' from the living world . . . in what comes perilously close to a penal tomb." *Apodaca v. Raemisch*, 139 S. Ct. 5, 6, 10 (2018) (statement of Sotomayor, J., respecting the denial of certiorari). She also cited the 2014 ASCA/Liman data. *Id.* at 8 n.7.

²³⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958), as invoked many times thereafter by the Supreme Court and lower federal courts.

²³⁹ *Davis*, 135 S. Ct. at 2210 (Thomas, J., concurring).

²⁴⁰ *See Brown v. Plata*, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 565 (Alito, J., dissenting, joined by Roberts, C.J.).

punishments.”²⁴¹ He provided details of aggressively brutal practices which the Court appeared to put outside the reach of the Eighth Amendment. Only the dissent by Justice Breyer on behalf of four argued that the Eighth Amendment was not a “static prohibition” but banned “gruesome punishments,” whether used at the Founding or not, that entail “excessive suffering.”²⁴²

3. *Outlawing (Again) Some Forms of Solitary Confinement*

In the last decade, prisoners again challenged solitary confinement, and several lawsuits ended with settlements that required reductions of isolation. In addition, a few lower courts concluded that certain forms of solitary confinement did violate the Eighth Amendment. In this wave of lawsuits, in which some solitary conditions are no longer laden with filth, the focus has been on the harms of isolation itself. The challenges have produced a mix of opinions and settlements that intersected with administrative revisions of policies (some of which are detailed in the ASCA/Liman reports), legislative initiatives, and political action that aims to “stop solitary.”²⁴³

As a result, in some jurisdictions, the formal criteria and procedures by which people are put into solitary confinement have changed, the duration of time spent in-cell reduced, and some out-of-cell activities required.²⁴⁴ Even as conflicts exist about whether genuine change is taking place or whether solitary is being reconstituted under other names,²⁴⁵ the debates have

²⁴¹ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). For an argument that prolonged solitary confinement has not remained in common usage, see John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9 (2020); see also John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008). As our account of the case law over the last decades suggests, whether solitary went out of common usage depends on how both solitary and common usage are defined. What is new are dedicated “Supermax” facilities.

²⁴² *Bucklew*, 139 S. Ct. at 1144 (Breyer, J., dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.).

²⁴³ See, e.g., Andalusia Knoll, *The National StopMax Campaign Conference*, LEFT TURN, <http://www.leftturn.org/national-stopmax-campaign-conference> [<https://perma.cc/ST76-P8LV>]; *We Can Stop Solitary*, ACLU, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary> [<https://perma.cc/GZ3M-T8VJ>].

²⁴⁴ CTR. FOR CONSTITUTIONAL RIGHTS, SUMMARY OF *ASHKER V. GOVERNOR OF CALIFORNIA* SETTLEMENT TERMS (2015), <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf> [<https://perma.cc/8TVY-WYXW>] (settlement limiting the duration of solitary confinement and changing the process of placement in solitary confinement from status-based, e.g., based on gang affiliation, to behavior-based); *Westefer v. Snyder*, 725 F. Supp. 2d 735, 741–42 (S.D. Ill. 2010) (changing the process by which individuals could be transferred to solitary confinement and enhancing the privileges available to people in solitary confinement).

²⁴⁵ See Plaintiffs-Appellees’ Answering Brief on Appeal, *Ashker v. Brown*, No. 18-16427 (9th Cir. May 31, 2019) [hereinafter Plaintiffs-Appellees’ Answering Brief on Appeal, *Ashker v. Brown*].

shifted away from the fierce defenses of earlier decades when correctional professionals were insistent on the desirability of using solitary confinement to acknowledge by prison authorities of the need to limit its use.

In this body of law, references are sometimes made to “evolving standards of decency,” which provided the framework for much of the 1970s case law.²⁴⁶ More often, judges determine that solitary confinement’s impact constitutes what the 1976 Supreme Court held in *Estelle v. Gamble* to be “deliberate indifference to serious medical needs,”²⁴⁷ and/or what the Court in *Rhodes v. Chapman* termed deprivation of “the minimal civilized measure of life’s necessities,” or imposition of “the wanton and unnecessary infliction of pain” and, for some in-prison punishments, “grossly disproportionate” sanctions in light of “the severity of the crime.”²⁴⁸ Judges have not yet invoked the anti-ruination explanation we flagged above, even while aspects of their law stand for that proposition. Indeed, Eighth Amendment rulings that call for an inquiry into both the objective and subjective intent of prison officials seek to determine what administrators could reasonably have known about the harms inflicted.²⁴⁹

A few details of some settlements show the kinds of constraints agreed upon. A first example comes from Pelican Bay, where in 1995 Judge Henderson had prohibited solitary confinement for seriously mentally ill people but not for others.²⁵⁰ Prisoners again were in the forefront as their hunger strike brought national attention to the extensive use of profound isolation.²⁵¹ In 2015, in *Ashker v. Governor of California*, the federal court approved a class-wide settlement that required the reduction by hundreds of

²⁴⁶ See, e.g., Order Denying Defendants’ Motion to Dismiss, & Alternatively, Motion for a More Definite Statement at 9, G.H. v. Marstiller, No. 4:19-cv-00431-MW/CAS (N.D. Fla. Dec. 6, 2019). That court denied motions to dismiss the class action brought on behalf of children held by the State in solitary confinement. *Id.*

²⁴⁷ 429 U.S. 97, 104 (1976).

²⁴⁸ 452 U.S. 337, 347 (1981). See generally Coppola, *supra* note 175.

²⁴⁹ See, e.g., Farmer v. Brennan, 511 U.S. 825, 843–44 (1994); Wilson v. Seiter, 501 U.S. 294, 309 (1991); Helling v. McKinney, 509 U.S. 25, 35 (1993). Whether the doctrine always requires subjective indicia is explored by Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 428–36 (2018).

²⁵⁰ Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

²⁵¹ Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance Within the Structural Constraints of a US Supermax Prison*, 113 S. ATLANTIC Q. 579 (2014). This political action garnered widespread public attention. See, e.g., Jennifer Medina, *Hunger Strike by California Inmates, Already Large, Is Expected to Be Long*, N.Y. TIMES (July 10, 2013), <https://www.nytimes.com/2013/07/11/us/hunger-strike-by-california-inmates-already-large-is-expected-to-be-a-long-one.html> [<https://perma.cc/RS89-9MXR>]; Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAG. (Feb. 21, 2014), <https://nymag.com/news/features/solitary-secure-housing-units-2014-2/> [<https://perma.cc/HL7Z-TTXX>].

the number of people held in isolation and changes in the conditions for those who remained.²⁵² Behavior, rather than being assumed to belong to “security threat groups” (gangs), was to be the predicate for placement. As a result, about 2,000 individuals were to be moved to general population, as were individuals who had spent more than ten years in solitary confinement.²⁵³ Furthermore, placements were not to be indefinite, and the State was to provide step-down programs and social contact.²⁵⁴

System-wide settlements in New York, Arizona, and Pennsylvania have sought to limit the legitimate predicates for placement in solitary confinement.²⁵⁵ The New York case began in 2011, when unrepresented prisoners protested the imposition of long-term solitary confinement.²⁵⁶ In the 2016 settlement of what had by then become the class action of *Peoples v. Annucci*, New York agreed to change the offenses that resulted in solitary confinement, to cap the time spent, to create alternative programs for prisoners with special needs, and to end the “Loaf”—a baked tasteless food that had been used as a punishment.²⁵⁷

Implementation of these settlements has been uneven, as reflected in the *Ashker* class’s 2019 return to court; their lawyers alleged that many individuals were held in the functional equivalent of the SHU under another

²⁵² Settlement Agreement, *Ashker v. Governor of Cal.*, No. C 09-05796 CW (N.D. Cal. Aug. 31, 2015) [hereinafter Settlement Agreement, *Ashker v. Governor of Cal.*].

The settlement limited duration of solitary confinement and changed the process of placement in solitary confinement from status-based (e.g., based on gang affiliation) to infraction-based. Conflict over implementation remains. See Plaintiffs-Appellees’ Answering Brief on Appeal, *Ashker v. Brown*, *supra* note 245; Marisa Endicott, *A 2015 Case Was Supposed to Overhaul California’s Solitary Confinement. The Reality Is Much More Complicated*, MOTHER JONES (Feb. 13, 2019), <https://www.motherjones.com/crime-justice/2019/02/california-ashker-brown-solitary-confinement-status-appeal/> [<https://perma.cc/KP5S-QMC5>].

²⁵³ Settlement Agreement, *Ashker v. Governor of Cal.*, *supra* note 252; see also Paige St. John, *California Agrees to Move Thousands of Inmates out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015, 8:09 PM), <https://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html> [<https://perma.cc/T92Z-LMMQ>].

²⁵⁴ Settlement Agreement, *Ashker v. Governor of Cal.*, *supra* note 252, at 10, 11.

²⁵⁵ See, e.g., *Peoples v. Annucci*, 180 F. Supp. 3d 294 (S.D.N.Y. 2016); *Davis v. Baldwin*, No. 3:16-cv-00600, 2017 WL 951406 (S.D. Ill. 2017); *Parsons v. Ryan*, No. 16-17282 (9th Cir. 2018); *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. 2015); *infra* notes 262–266 and accompanying text.

²⁵⁶ *Annucci*, 180 F. Supp. 3d at 296.

²⁵⁷ *Id.* at 301–02. For example, the basis of two class members’ three-year sentences to solitary confinement was possession of prohibited documents. Under the settlement, this infraction could result in no more than “thirty days of confinement to one’s own cell, not a SHU.” *Id.* at 301.

name and that monitoring with court oversight remained necessary.²⁵⁸ As in California, concerns emerged in New York following the *Annucci v. Peoples* settlement; some commentators believe that many people remained in solitary confinement under another name (“keeplock”) in which people were held continuously in their own cells rather than moved to a segregated unit. In 2019, the New York Civil Liberties Union (NYCLU) reported that “40,000 solitary confinement sanctions were given in 2018,” and 6,000 sanctions “were served directly after a previous” penalty (“back-to-backs”).²⁵⁹ NYCLU argued that, while the settlement had reduced the number of SHU sanctions by 2,400, the state had increased its keeplock sanctions by 3,100.²⁶⁰ What was needed, NYCLU argued, was enactment of the “HALT Act” to limit solitary confinement to fifteen days, to require time out of cell, and to prohibit putting into isolation individuals under age twenty-one or over fifty-five or persons with a “diagnosed mental health challenge.”²⁶¹

Ashker and *Peoples* exemplify resolutions on behalf of all persons in a system’s solitary confinement. Several other cases address subpopulations, such as individuals with distinct health challenges, juveniles, or individuals subject to capital sentences. Two lawsuits involving prisoners in Pennsylvania are illustrative. A 2015 settlement responded to *Disability Rights Network of Pennsylvania v. Wetzel*, which alleged that the State’s Department of Corrections kept people with serious mental illness and other disabilities in solitary confinement, that they cycled in and out, and that such treatment led to their deterioration.²⁶² The agreement barred the Department of Corrections from using solitary confinement for individuals with disabilities (except in narrowly defined circumstances); ruled out placements based on acts of self-harm; created protections against repeat assignments; and, for individuals held in “secure residential treatment units,” required that the prisoners had twenty hours out-of-cell time per week—of which half was structured—and that such individuals not remain in these units longer than thirty days.²⁶³ Another consent agreement, *Reid v. Wetzel*, responded to claims on behalf of individuals with capital sentences whom Pennsylvania

²⁵⁸ Plaintiffs-Appellees’ Answering Brief on Appeal, *Ashker v. Brown*, *supra* note 245; Order Granting Motion to Extend Settlement Agreement, *Ashker v. Baker*, No. 09-cv-05796-CW (N.D. Cal. Jan. 25, 2019).

²⁵⁹ SHAMES & DESGRANGES, *supra* note 16, at 1.

²⁶⁰ *Id.* at 9.

²⁶¹ *Id.* at 10, 22.

²⁶² See Complaint at 18, *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. Mar. 11, 2013).

²⁶³ For additional terms of the settlement, see Settlement Agreement & General Release, *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015).

had held in solitary confinement. In November 2019, Pennsylvania agreed to provide at least 42.5 hours of out-of-cell time per week²⁶⁴ and accord these prisoners the same “rights and privileges” for phone calls and contact visits that were available in general population.²⁶⁵ The settlement agreement was finalized in April 2020.²⁶⁶

In addition to consent decrees, a few published opinions since 2016 have held specific forms of solitary confinement unconstitutional or found that the solitary confinement of certain individuals violated the Americans with Disabilities Act, the Religious Land Use and Institutionalized Persons ACT (RLUIPA), or the Free Exercise Clause.²⁶⁷ A leading example of an Eighth Amendment ruling comes from a 2019 Fourth Circuit decision, *Porter v. Clarke*, which addressed conditions on Virginia’s death row.²⁶⁸ Individuals had spent years “alone, in a small . . . cell” with “no access to congregate religious, educational, or social programming.”²⁶⁹ Relying on evidence that such long-term solitary confinement posed “an objective risk of serious psychological and emotional harm to inmates,”²⁷⁰ the district court

²⁶⁴ Settlement Agreement at 13, *Reid v. Wetzel*, No. 18-cv-00176-JEJ (M.D. Pa. Nov. 12, 2019) [hereinafter Settlement Agreement, *Reid v. Wetzel*]. For the complaint, filed in January 2018 by the ACLU, Abolitionist Law Center, and pro bono counsel, see Class Action Complaint for Declaratory & Injunctive Relief, *Reid v. Wetzel*, No. 1:18-cv-00176-JEJ (M.D. Pa. Jan. 25, 2018).

²⁶⁵ See Settlement Agreement, *Reid v. Wetzel*, *supra* note 264, at 10.

²⁶⁶ Memorandum & Order, *Reid v. Wetzel*, No. 1:18-cv-00176-JEJ (M.D. Pa. Apr. 9, 2020).

²⁶⁷ See, e.g., *Greenhill v. Clarke*, 944 F.3d 243, 251–52 (4th Cir. 2019). Alfonza Greenhill, initially appearing without an attorney, argued that because Virginia had placed him in solitary confinement and would not let him join in watching the televised Friday Muslim prayer services, the State was preventing him from observing his religion. Further, he argued that the state “grooming” rules prevented him from having the beard his religion counseled. The appellate court reversed the lower court’s dismissal and remanded to consider whether Virginia could establish that its bar on television access for the services was “in furtherance of a compelling government interest” and “the least restrictive means of furthering that compelling government interest,” as well as met First Amendment obligations. *Id.* (quoting criteria from the statute and the case law).

²⁶⁸ 923 F.3d 348, 353–57 (4th Cir. 2019), *as amended* (May 6, 2019), *reh’g en banc denied* (Jul. 26, 2019); see also Mary Marshall, *The Promise of Porter? Porter v. Clarke and Its Potential Impact on Solitary Confinement Litigation*, 120 COLUM. L. REV. F. 67 (2020).

²⁶⁹ *Porter*, 923 F.3d at 357. That the prison did not call it solitary was not conclusive given these conditions. *Id.* at 359–60.

²⁷⁰ *Id.* at 356–57 (citing to expert reports submitted by plaintiffs, written by Dr. Mark Cunningham and Dr. Michael Hendricks, as well as a leading survey of the literature on solitary confinement that concluded “there is *not a single published study* of solitary or supermax-like confinement [for more than 10 days] . . . that failed to result in negative psychological effects”). The Fourth Circuit also cited the Third Circuit, which, after analyzing the “robust body of scientific research on the effects of solitary confinement,” held that there is a “scientific consensus” that solitary confinement “is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term . . . damage.” *Id.* at 357 (citing *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 566–67 (3d Cir. 2017), *cert. denied sub nom. Walker v. Farnan*, 138 S. Ct. 357 (2017), and *cert. denied sub nom.*

held, and the Fourth Circuit affirmed, that the conditions violated the Eighth Amendment.²⁷¹ As the Fourth Circuit put it, putting individuals into this form of solitary confinement “posed a substantial risk of serious psychological and emotional harm” and “State Defendants were deliberately indifferent to that risk.”²⁷²

The remedy was to ease the restrictiveness.²⁷³ The district court ordered the end of confinement for twenty-three hours alone in a cell and the ban on contact visitation and communal recreation.²⁷⁴ Instead, Virginia prison authorities were to create policies “relating to cell time, visitation, and recreation that defendants, in their professional expertise, believe satisfy both the Eighth Amendment and the prison’s need for security.”²⁷⁵ By the time of the appeal, prison officials argued that the case was moot because they had complied with the injunctive requirements.²⁷⁶ Rejecting that proposition based on “a cognizable danger of recurrent violation,” the Fourth Circuit upheld the injunction.²⁷⁷

A few other lower court decisions have likewise found conditions unconstitutional. A 2016 district court ruling, *Johnson v. Wetzel*, responded to Arthur Johnson, whom the Pennsylvania Department of Corrections had isolated for thirty-six years²⁷⁸ in a continuously lit sixty-eight-square-foot cell, where he was held twenty-three to twenty-four hours a day.²⁷⁹ The district court determined that Johnson’s confinement constituted an “objectively ‘serious’ deprivation of life’s basic needs or a ‘substantial risk of serious harm’ to his or her health” and that prison officials knew “well the risks inherent in prolonged isolation,” and then ordered Johnson’s release

Williams v. Wetzel, 138 S. Ct. 357 (2017); see also, e.g., *Grissom v. Roberts*, 902 F.3d 1162, 1176–77 (10th Cir. 2018) (Lucero, J., concurring in the judgment) (reviewing academic literature and determining that “solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill” and that “[t]hese harms, which are persistent and may become permanent, become more severe the longer a person is exposed to solitary confinement”).

²⁷¹ *Porter*, 923 F.3d at 364.

²⁷² *Id.* at 368.

²⁷³ See *Porter v. Clarke*, 290 F. Supp. 3d 518, 537–38 (E.D. Va. 2018), *aff’d*, 923 F.3d 348 (4th Cir. 2019), *as amended* (May 6, 2019). The court imposed an injunction that, in accordance with the Prison Litigation Reform Act, was to be reevaluated after two years. *Id.*

²⁷⁴ *Id.* at 537.

²⁷⁵ *Id.*

²⁷⁶ *Porter*, 923 F.3d at 364–65.

²⁷⁷ *Id.* at 365.

²⁷⁸ 209 F. Supp. 3d 766, 774–75 (M.D. Pa. 2016).

²⁷⁹ *Id.* The one hour of permitted exercise took place in a nine-by-twenty-foot cage that had no equipment. *Id.* at 777.

from solitary confinement.²⁸⁰ The judge commented that, after thirty-six years, “Mr. Johnson deserves the opportunity to shake hands with someone other than his attorneys.”²⁸¹

In 2019, rulings in Virginia and Connecticut likewise identified Eighth Amendment violations. At issue in *Reyes v. Clarke* was Virginia’s treatment of prisoners in its Red Onion Prison where Nicolas Reyes was held.²⁸² The district court rejected efforts to dismiss the case because, both objectively and subjectively, prison authorities knew of the harms from long-term confinement in a cell “roughly half the size of a parking space,” with no natural light, constant artificial light, and the “nearly absolute” lack of social contact.²⁸³

In *Reynolds v. Arnone*,²⁸⁴ lawyers for Richard Reynolds, held in Connecticut’s prisons, told the court that since 1995 he “has spent nearly every moment of his life alone” in a cell with “almost no natural light.”²⁸⁵ By 2018, Connecticut was providing no more than six hours a week of fresh air, subject to limits for institutional needs or weather.²⁸⁶ No meaningful interpersonal contact was permitted, and such isolation was to continue “for the rest of his life.”²⁸⁷

The district judge concluded that Reynolds had established “both an objective element—that the prison officials’ transgression was ‘sufficiently serious’—and a subjective element—that the official acted, or omitted to act, with a ‘sufficiently culpable state of mind,’ *i.e.*, with ‘deliberate indifference to inmate health or safety.’”²⁸⁸ The district court granted summary judgment; the court concluded that that Reynolds had established that his confinement violated the Eighth Amendment as well as Fourteenth Amendment due

²⁸⁰ See *id.* at 776–82.

²⁸¹ *Id.* at 782. Thereafter, the State settled with Johnson for \$325,000 (including attorney’s fees) and an agreement that he would not be returned to solitary confinement on the basis of his prior record. *Settlement in Lawsuit That Ended 37-Year Solitary Confinement*, ABOLITIONIST L. CTR. (Dec. 21, 2017), <https://abolitionistlawcenter.org/tag/johnson-v-wetzel/> [<https://perma.cc/RJ4Q-U3NB>].

²⁸² No. 3:18-cv-611, 2019 WL 4044316, at *6–7 (E.D. Va. Aug. 27, 2019).

²⁸³ *Id.* at *6–7, *15–18.

²⁸⁴ Ruling on Defendants’ Motion for Stay Pending Appeal, *Reynolds v. Arnone*, No. 3:13-cv-1465-SRU (D. Conn. Oct. 16, 2019).

²⁸⁵ Brief of Plaintiff-Appellee at 1, *Reynolds v. Arnone*, No. 19-2858 (2d Cir. Feb. 20, 2020).

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.* at 3

²⁸⁸ *Reynolds v. Arnone*, 402 F. Supp 3d 3, 15–16 (D. Conn. 2019) (citing *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The judge linked the objective prong (deprivations of “basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety” as well as “extreme social isolation”) to violations of “contemporary standards of decency.” *Id.* at 16 (quoting *Helling v. McKinney*, 509 U.S. 25, 32 (1993)).

process protections. In addition, the court determined that the 2012 statute requiring his confinement in such profoundly limiting circumstances constituted an illegal bill of attainder.²⁸⁹

B. Line-Drawing: The Quest to Distinguish Among In-Prison Punishments

Even as a few lower courts have mandated, as we outlined above, an end to certain forms of isolation, other judges are refusing to require procedural protections for people placed in solitary confinement. In contrast to that small body of Eighth Amendment law, a large number of cases address whether procedural protections are required under the Fourteenth Amendment when a person is placed in solitary confinement. And, unlike the appreciation in the Eighth Amendment decisions of the harms that flow from the radical limits on human movement, many Fourteenth Amendment opinions take for granted long-term profound isolation as so normal an incident of prison life that no judicial oversight is needed.

These decisions turn on questions posed at the outset of this Essay about whether prison officials have unfettered authority to impose different degrees of constraint on individual movement. Critical scholarship sometimes argues that lawyers focus unduly on process, which distracts from concerns about justice.²⁹⁰ Yet the filings by incarcerated people reflect fear of both unfair decisions and unjust treatment. Repeatedly, prisoners have reached out to find buffers—including but not limited to procedural protections—to constrain the unilateral power of prison officials. Many of these efforts have now been rejected, as the Court's majority developed the mantra that, given incarceration, a host of radical incursions on human functioning were "normally expected."²⁹¹

1. Liberty's Sources and Life in Incarceration

We turn now to disagreements among the Court's Justices about liberty's sources, the kinds of constraints reasonably imposed by virtue of confinement, the function of process, and the role of courts in protecting people from punishment through transfers and segregation. As we detail below, Justices John Paul Stevens, William Brennan, and Marshall viewed

²⁸⁹ *Id.* at 25. The district court concluded that Reynolds had a protected liberty interest in freedom from extreme social isolation and was deprived of his due process rights. *Id.* at 30. Further, the court held that Reynolds's conditions of confinement violated his rights under the Equal Protection Clause. *Id.* at 33–34. The injunction to reduce the degree of isolation imposed has been stayed pending appeal.

²⁹⁰ Now-classic statements of such concerns come from William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990), and Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOK. L. REV. 861 (1990).

²⁹¹ *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

human liberty as an “unalienable right[]” which lawful incarceration did not extinguish.²⁹² For others—Justice Byron White at times and Chief Justice William Rehnquist always—imprisonment ended most forms of liberty. Liberty interests were extinguished but aspects of liberty could derive from federal or state law if creating entitlements that provided opportunities such as statutory good-time and structured rules on when disciplinary sanctions would be imposed.²⁹³

Because Chief Justice Rehnquist, appointed in 1971, has been central to shaping the case law that today frames solitary confinement, his background assumptions merit analysis.²⁹⁴ Generally hostile to constitutional evolution, which he decried in a 1976 essay entitled *The Notion of a Living Constitution*,²⁹⁵ Chief Justice Rehnquist railed against an expanding role for the federal judiciary, the “litigation explosion,” and, specifically, filings by prisoners.²⁹⁶ Further, he repeatedly evidenced lack of concern for the vulnerability of prisoners. Illustrative is his choice to pluck from obscurity a 1973 Third Circuit ruling, *Russell v. Bodner*, which he accused of lowering the “stature” of the United States Constitution and of the federal courts.²⁹⁷ The appellate court had reversed the dismissal of what Chief Justice Rehnquist characterized as “a claim by a prison inmate against a prison guard for allegedly stealing a carton of the inmate’s cigarettes.”²⁹⁸

But reading the Third Circuit’s per curiam decision tells a different story.²⁹⁹ Proceeding without a lawyer, Herman Russell alleged that Joseph Bodner, a guard at a state prison in Pittsburgh, Pennsylvania, had entered his cell and taken some of his food; after Russell protested, Bodner told Russell that he would “prove” he could do whatever he wanted.³⁰⁰ Russell alleged that Bodner then came into his cell and stole several packages of cigarettes.

²⁹² *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

²⁹³ *See, e.g., id.* at 225–26 (majority opinion) (Justice White distinguishing transfers from loss of good-time credit); *Hewitt v. Helms*, 459 U.S. 460, 470–71 (1983) (Chief Justice Rehnquist finding that state statutes that set forth the procedures for confining a prisoner to administrative segregation did create a liberty interest).

²⁹⁴ *See generally* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

²⁹⁵ *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976).

²⁹⁶ *See* William H. Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787, 787–89 (1974).

²⁹⁷ William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 9–10 & n.28 (1984).

²⁹⁸ *Id.* at 9–10 (citing *Russell v. Bodner*, 489 F.2d 280 (3d Cir. 1973)).

²⁹⁹ Judge Arlin Adams concurred but argued that the injury was *de minimis* and doubted whether federal courts ought to be concerned with such issues. *Russell*, 489 F.2d at 281–82 (Adams, J., concurring).

³⁰⁰ *Id.* at 281 (majority opinion).

After requests to the warden were unavailing, Russell filed suit, and the Third Circuit reversed the dismissal of the complaint because the “misuse of power” under color of state law was actionable. Chief Justice Rehnquist’s belittling of Russell’s fears was matched in other writings, such as when he chose the phrase “austere” to describe the profound isolation of solitary confinement.³⁰¹

Moreover, Chief Justice Rehnquist’s indifference to prison terrors is likewise vivid in arenas outside the prisoners’ rights canon. Illustrative is his majority decision in *United States v. Bailey*³⁰² addressing the interpretation of the federal statute that prohibited “escapes or attempts to escape from the custody of the Attorney General.”³⁰³ The defendants—Clifford Bailey, Ronald Cooley, and Ralph Walker—asserted that they did not have specific intent to escape from the D.C. Jail but rather acted under duress because guards frequently set fires, beat them, and withheld needed medical care; they wanted to argue to the jury that they had left the jail to save themselves.³⁰⁴ Writing for the D.C. Circuit, Judge J. Skelly Wright called for a new trial because the lower court had not given proper jury instructions and excluded relevant evidence.³⁰⁵

Chief Justice Rehnquist wrote the opinion that resurrected the conviction. As he explained, the D.C. Circuit had interpreted the “confinement” of the federal statute to encompass “only the ‘normal aspects’ of punishment prescribed by our legal system”; when prisoners aim “to avoid ‘non-confinement’ conditions such as beatings or homosexual attacks,” they would not have the requisite intent for a conviction.³⁰⁶ But the prisoners not only left, Chief Justice Rehnquist stated—they stayed away. To be entitled to the instruction on duress, they would have to have provided “evidence justifying . . . continued absence,” which they had not.³⁰⁷ Absent a showing

³⁰¹ *Hewitt v. Helms*, 459 U.S. 460, 466–67 (1983). Chief Justice Rehnquist wrote: “Respondent argues, rather weakly, that the Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters.” *Id.*

³⁰² 444 U.S. 394 (1980).

³⁰³ 18 U.S.C. § 751(a) (1976). This phrase is still in use in the most recent version of § 751(a).

³⁰⁴ *United States v. Bailey*, 585 F.2d 1087, 1091 (D.C. Cir. 1978), *rev’d*, 444 U.S. 394 (1980). Bailey and Cooley asserted that they were beaten; Walker said his codefendants forced him to leave because he had epileptic seizures and could not get care. *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Bailey*, 444 U.S. at 401.

³⁰⁷ *Id.* at 412.

“of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force,” no instruction was required.³⁰⁸

These propositions prompted Justice Harry Blackmun, joined by Justice Brennan, to counter that the majority’s “technical legalism” and “pious pronouncements” were about an “ideal world” where prisons were “truly places for humane and rehabilitative treatment.”³⁰⁹ But in this one, where every appellate court learned “almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality,” this “stark truth”³¹⁰ ought not to require people to “return forthwith to the hell that obviously exceeds the normal deprivations of prison life and that compelled their leaving in the first instance.”³¹¹

Justice Blackmun further detailed that the record included “the brutalization of inmates,” beatings with “slapjacks, blackjacks, and flashlights,” and rapes; in his view, punishment could not flow when “society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions.”³¹² As his dissent in *Bailey* made plain, Justice Blackmun, who as an appellate judge had written the 1968 Eighth Circuit decision that banned whippings in Arkansas prisons, understood the chaotic violence that was routine in some prison systems.³¹³

Yet the records in many cases presented the appearance that, given regulations and written procedures, prisons were full of law—which some judges equated with being *lawful*. Prison officials often recounted their detailed regulations and their statistics about the thousands of hearings they conducted related to discipline. One can almost hear some Justices saying: “What more do ‘they’ want?” Yet the records are also evidence of the *lawlessness* of prisons in that exercises of power by staff repeatedly resulted in stunningly substantial punishments for minor violations of any of the many rules each prison had. Thus, one can hear other Justices explaining: “What ‘they’ want is a real opportunity to stop unbounded authority and unfair treatment.”

³⁰⁸ *Id.* at 415.

³⁰⁹ *Id.* at 419, 420 (Blackmun, J., dissenting, joined by Brennan, J.). Justice Marshall did not participate, *id.* at 417 (Marshall, J., taking no part in the consideration or decision), and Justice Stevens concurred only on the grounds that the evidence presented by the defendants did not suffice for the defense, but that all must be concerned about the prison conditions, *id.* at 417–19 (Stevens, J., concurring).

³¹⁰ *Id.* at 420 (Blackmun, J., dissenting).

³¹¹ *Id.*

³¹² *Id.* at 421–22.

³¹³ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). Justice Blackmun, however, shifted in the decade after and joined majorities deferring to prison administrators’ discretion on transfers as well as administrative and disciplinary confinement. *See infra* notes 407–410, 449–450 and accompanying text.

a. *In or out of prison*

The Supreme Court's approach to procedural protections for solitary confinement is predicated on a series of due process opinions beginning in 1974 with *Wolff v. McDonnell*, the first case exploring the process due for in-prison punishments. At issue then was the penalty system when a prisoner engaged in "flagrant or serious" misconduct; the Court required Nebraska prison officials to hold hearings before taking away prisoners' good-time credits.³¹⁴ The class action had begun with challenges to various rules at the Nebraska Penal and Correctional Complex; the prisoners alleged officials censored mail, limited access to legal services, retaliated against "writ writers," and imposed discipline unfairly.³¹⁵

The district court generally agreed, as it identified prisoners losing good time for "messing up the count up, cussing a guard, bringing a sandwich into the shop," as well as for fighting and organizing protests.³¹⁶ Concluding that "fundamental due process is a right of all persons, including inmates," the lower court noted the limited approach the Eighth Circuit had taken to the process due; the court therefore limited their order to compliance with Nebraska's rules and called for the restoration of good time for some of the prisoners who lost it for activities outside the grounds proscribed by Nebraska's statute.³¹⁷

On appeal, the Eighth Circuit expanded the mandate for procedural protections by requiring the procedures, then called the "*Morrissey-Scarpelli* procedures," based on the two cases in which the Supreme Court had prescribed that protections be afforded when the government wanted to revoke probation or parole.³¹⁸ The appellate court, relying on the district court opinion, reasoned that, just as sending people to prison based on violations of the rules for conditional releases, in-prison punishments could entail "substantial" and "serious" penalties "such as incarceration in a dry cell or solitary confinement" and the loss of good time.³¹⁹ Given the impact on both

³¹⁴ See *Wolff v. McDonnell*, 418 U.S. 539, 547, 557–58 (1974).

³¹⁵ See *McDonnell v. Wolff*, 342 F. Supp. 616, 617, 619–20, 622, 626–28 (D. Neb. 1972), *aff'd in part, rev'd in part*, 483 F.2d 1059 (8th Cir. 1973), *aff'd in part, rev'd in part*, 418 U.S. 539 (1974). The appellate court affirmed the lower court holding unconstitutional the prison searches of outgoing legal mail and some of the restrictions on law library access. *McDonnell*, 483 F.2d at 1066–67. In the Supreme Court, the focus was on the rules for discipline. See *Wolff*, 418 U.S. at 542.

³¹⁶ *McDonnell*, 342 F. Supp. at 628 (internal quotation marks omitted).

³¹⁷ *Id.* at 627–28. The appellate court affirmed the expungement of records, and the Supreme Court rejected the "retroactivity" of the procedural rights. See *Wolff*, 418 U.S. at 573.

³¹⁸ *McDonnell*, 483 F.2d at 1062–63; *Wolff*, 418 U.S. at 560; see also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

³¹⁹ See *McDonnell*, 483 F.2d at 1063–64; *McDonnell*, 342 F. Supp. at 627–28.

the nature and duration of confinement, the State had to provide in-person hearings with cross-examination and confrontation.³²⁰ Specifics, including whether to add lawyers, were reserved for the trial court after more fact-finding.³²¹

The “primary issue” at the Supreme Court was the process due for in-prison discipline.³²² The litigants and amici presented radically different pictures of the nature of prisons, the impact of discipline, the procedures already in place, and the potential contributions or risks of making counsel and cross-examination available. Several amici filings on behalf of the prisoners discussed the hopes of incarcerated people for accuracy and fairness and the utility of lawyers and witnesses at prison hearings.³²³ The National Council on Crime and Delinquency reminded the Court of the findings of the New York State Commission that investigated the 1971 uprising at Attica, which detailed how debilitating prison conditions were and how arbitrary the power exercised by guards was.³²⁴ The National Council wrote about prisoners’ isolation, their fear of “injustice” at the hands of “poorly trained[] and poorly educated” staff, and the importance of using

³²⁰ *McDonnell*, 483 F.2d at 1062–63. The cases that required hearings before a person was incarcerated for violating parole or probation were *Morrissey*, 408 U.S. 471, and *Scarpelli*, 411 U.S. 778, and as discussed above, the Court declined to import the full set of procedures it had proscribed in those contexts for in-prison discipline.

³²¹ *McDonnell*, 483 F.2d at 1063–64. Rejecting the request for rehearing en banc, the court added that it had only required legal counsel when, as in *Scarpelli*, doing so was required for “fundamental fairness.” *Id.* at 1067. The appellate court affirmed other aspects of the rulings on censorship, mail, and legal assistance, and remanded for more information on some issues. *Id.* at 1064–67.

³²² *Wolff*, 418 U.S. at 580 (Marshall, J., concurring in part and dissenting in part). The Court also revised the lower court rulings on how prison officials can control prisoners’ mail; the Court held that Nebraska could require lawyers to identify the letters as privileged and that staff could open mail in front of the prisoner to ensure no contraband was inside but that staff could not read the contents. The Court affirmed the Eighth Circuit’s remand to ensure that access to legal assistance—including from other prisoners and for civil rights as well as habeas corpus petitions—was required. *Id.* at 576–79 (majority opinion).

³²³ See, e.g., Brief of Inmates of the District of Columbia Correctional Complex at Lorton, Virginia, Amici Curiae at 4–15, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 185775, at *4–15. Quoting one prison official, the brief noted that most of the time the accused prisoner knew who had leveled accusations against him. *Id.* at *12.

³²⁴ Brief of the National Council on Crime & Delinquency as *Amicus Curiae* at 3–5, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 185767, *3–5 [hereinafter Brief of the National Council on Crime & Delinquency as *Amicus Curiae*, *Wolff v. McDonnell*]; N.Y. STATE SPECIAL COMM’N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 2, 3–6, 74, 95–98 (1972).

disciplinary hearings as one way to lower tensions, express respect, and foster reintegration into the social order.³²⁵

The litigants also referenced the American Bar Association's Survey of Prison Disciplinary Practices and Procedures, which depicted "the collective judgment of correctional administrators, judges, lawyers, prisoners, and others about the appropriate balance of interests."³²⁶ That survey reported that most states had written policies setting forth disciplinary procedures; included were obligations to provide notice, opportunities to present evidence, an impartial tribunal, and written decisions with some review.³²⁷ Further, thirty-nine states reported that some "counsel-substitute" could assist prisoners; thirty-one permitted prisoners to confront "accusing witnesses"; and twenty-eight permitted "cross-examination of adverse witnesses."³²⁸ Moreover, a Department of Justice Corrections Commission had, in 1973, provided standards that reflected that "[c]orrectional systems on their own initiative" had created procedures for discipline that incorporated "substantial portions of the recognized elements of administration agency due process."³²⁹

A very different account came from the United States through then-Solicitor General Robert Bork, who both joined the oral argument and filed an amicus brief warning against the procedures the appellate court had mandated.³³⁰ While committed to "accurate fact-finding in the context of

³²⁵ Brief of the National Council on Crime & Delinquency as *Amicus Curiae*, *Wolff v. McDonnell*, *supra* note 324, at 3–4, 9–11, 14–16, 21–26; *see also* Brief of the Legal Aid Society of New York, *Amicus Curiae* at 2, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 185769, at *2.

³²⁶ *See, e.g.*, Brief for the Respondent at 14, 26 n.22, 27 n.24, 28 nn.25 & 27, 30 nn.29–30, app. at 7a, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 185771, at *14, *26 n.22, *27 n.24, *28 nn.25 & 27, *30 nn.29–30 [hereinafter Brief for the Respondent, *Wolff v. McDonnell*]. The ABA report was issued before *Wolff* was decided and then revised to include an "analysis" of its impact. *See* Melvin T. Axilbund, *Preface*, in RES. CTR. ON CORR. LAW & LEGAL SERVS., AM. BAR ASS'N, SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES: WITH AN ANALYSIS OF THE IMPACT OF *WOLFF V. MCDONNELL* (1974); Brief for the Respondent, *Wolff v. McDonnell*, *supra*, app. at 4a–6a.

³²⁷ Brief for the Respondent, *Wolff v. McDonnell*, *supra* note 326, app. at 11a.

³²⁸ *Id.*

³²⁹ *Id.* at 30 & n.31 (citing DEP'T OF JUSTICE CORR. COMM'N, CORRECTIONS 52 (1973)).

³³⁰ Brief for the United States as *Amicus Curiae* at 5, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 185774, at *5 [hereinafter Brief for the United States as *Amicus Curiae*, *Wolff v. McDonnell*]; Transcript of Oral Argument of Robert H. Bork for the United States, as *Amicus Curiae*, Supporting Petitioner at 11, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679). California also filed a brief urging the Court to limit the Eighth Circuit decision *See* Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae* at 3, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679) [hereinafter Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae*, *Wolff v. McDonnell*]. California argued that prison authorities ought to be required to provide "minimum standards," and that a fair process included "a fact finding system based upon an investigation by an independent officer, notice and opportunity to be heard before an impartial tribunal, the right to

prison disciplinary proceedings,” he asserted that “the unique conditions of the prison environment and the nature of the interests served by the disciplinary process in that environment” meant that the Court ought not to apply its rules for parole and probation revocation, even if “there may be a slightly increased risk of factual mistakes in a few cases.”³³¹

The U.S. government opined that “the impact of prison discipline on the individual, although not unimportant to him, is almost invariably far less grave than the consequences of a criminal conviction or of revocation of parole or probation.”³³² Discipline altered prisoners’ liberty but “only marginally—and often only briefly.”³³³ Because prisons were often “tense and volatile,” the brief reported that prison officials thought “that testimonial confrontations between an inmate and staff members or other inmates can be dangerous and are to be avoided whenever possible.”³³⁴ In short, “substantial governmental interests and needs” were to trump the risks to prisoners of a less fair process.³³⁵

Justice White’s majority opinion reflected those concerns even as it used Cold War Era terminology to insist that no “iron curtain” separated prisons from the Constitution.³³⁶ While “[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen,” it did so to accommodate institutional needs; prisoners retained many constitutional rights, including the guarantees of the Due Process Clause.³³⁷ The Court held that, given that the State had created a system of good-time credits and authorized officials to take away time earned for specified serious misconduct, due process protections were required to buffer against arbitrary retraction.³³⁸

As we analyze below, *Wolff*’s approach was cabined in later years. But at the time, the Court’s procedural requirements applied to both the loss of good time and the sanction of solitary confinement, which the Court described to include either the “usual ‘disciplinary cell,’ with privileges severely limited, for as long as necessary, or . . . a ‘dry cell,’ which, unlike

present evidence, to receive written findings . . . and [a] speedy . . . review” and state court oversight for “arbitrary or capricious action,” but no “right to counsel [or] to cross-examine.” *Id.* at 2–3.

³³¹ Brief for the United States as Amicus Curiae, *Wolff v. McDonnell*, *supra* note 330, at 11.

³³² *Id.*

³³³ *Id.* at 7.

³³⁴ *Id.*

³³⁵ *Id.* at 11.

³³⁶ *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

³³⁷ *Id.*

³³⁸ *Id.* at 558.

regular cells, contains no sink or toilet.”³³⁹ The Court bundled those two punishments together and contrasted them with the “imposition of lesser penalties such as the loss of privileges.”³⁴⁰

That reference to “privileges” reflected that the Court’s discussion was not clear about the sources of prisoners’ liberty or about when process would be required. The majority’s formulation, quoted above, could mean that prisoners, as humans, have liberty protected by the Due Process Clause, or, alternatively, that if either the Constitution or state law created specified entitlements, the Constitution required procedural fairness. Moreover, the opinion also referenced the Court’s other discussions of state-imposed losses of property and liberty as it then insisted that “protection of the individual against arbitrary action” was the core concern of the Fourteenth Amendment’s Due Process Clause.³⁴¹

Justice Marshall’s partial dissent endorsed the first reading, as he described his agreement with the majority’s “holding that the interest of inmates in freedom from imposition of serious discipline is a ‘liberty’ entitled to due process protection.”³⁴² Likewise, Justice William Douglas, concurring in the result but dissenting in part, explained that incarceration did not “render one a nonperson whose rights are subject to the whim of the prison administration”; he argued that prisoners ought to have the right to call and cross-examine witnesses during disciplinary hearings that could send them to solitary and cut their good time.³⁴³

³³⁹ *Id.* at 552 n.9.

³⁴⁰ *Id.* at 571 n.19. As Justice White explained,

Although the complaint put at issue the procedures employed with respect to the deprivation of good time, under the Nebraska system, the same procedures are employed where disciplinary confinement is imposed. The deprivation of good time and imposition of “solitary” confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today’s decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.

Id.

³⁴¹ *Id.* at 557–58.

³⁴² *Id.* at 581 (Marshall, J., concurring in part and dissenting in part).

³⁴³ *See id.* at 593–94 (Douglas, J., dissenting in part and concurring in the result in part).

What Justice White did make clear was that prisoners had no constitutional right to good time itself, which instead was a creature of state law. Because Nebraska both provided for it and limited the grounds for its withdrawal, process was due.³⁴⁴ However, Justice White commented that the accommodations to both sides were not “graven in stone,” and that the door was open to “further consideration” as changing circumstances warranted.³⁴⁵

Whatever his theory of liberty’s sources and thoughts about future cases, Justice White’s *Wolff* opinion distinguished the “grievous loss” of losing the status of parolee or probationer from the loss of good time, which was not the “same immediate disaster” and might not “work any change in the conditions of his liberty.”³⁴⁶ Furthermore, drawing on the picture presented by state and federal governments, Justice White deemed cross-examination and confrontation too risky because prisoners “may have little regard for the safety of others,” and an “unwritten code . . . exhorts inmates not to inform on a fellow prisoner.”³⁴⁷ Countering arguments that hearings could lower tensions and build collaboration, he invoked the “incorrigible,” manipulative prisoner, the “personal antagonism[s]” that put “personal safety” at risk, and rejected “encasing the disciplinary procedures in an inflexible constitutional straightjacket”³⁴⁸ or imposing “unduly crippling constitutional impediments.”³⁴⁹

Hence, the Court selected a few of the *Morrissey v. Brewer* procedures, including advance written notice (in this context, at least twenty-four hours) of the charges, an opportunity to speak and present witnesses, and a written statement of reasons for the sanction.³⁵⁰ But unlike the *Morrissey-Scarpelli* rules, the Court licensed prison staff to bar evidentiary presentations if they believed that doing so would “create a risk of reprisal or undermine authority” or be “unduly hazardous to institutional safety.”³⁵¹ Moreover, prisoners were not entitled to lawyers, but prisoners with limited abilities were to have access to aid from staff or from other prisoners.³⁵²

³⁴⁴ *Id.* at 557 (majority opinion).

³⁴⁵ *Id.* at 571–72.

³⁴⁶ *Id.* at 560–61 (internal quotation marks omitted).

³⁴⁷ *Id.* at 562.

³⁴⁸ *Id.* at 562–63.

³⁴⁹ *Id.* at 566–67.

³⁵⁰ *Id.* at 564–66.

³⁵¹ *Id.* at 566.

³⁵² *Id.* at 570.

Instead of using Justice White's terms of "straitjacket[s]" and "crippling" constitutionalization,³⁵³ the dissenters presented a picture of prisoners in need of protection and cited evidence that the proposed procedures were feasible. Justice Marshall, joined by Justice Brennan, argued that the Court's packet of procedures had hollowed out the "essential" components of a defense: the right to present evidence, have witnesses testify, and confront and cross-examine others.³⁵⁴ Citing the American Bar Association survey of prison discipline proceedings, Justice Marshall argued that the use in many jurisdictions of cross-examination countered the Nebraska authorities' "speculative fears."³⁵⁵ Justice Douglas wrote separately and provided a brief history of the inhumanity to prisoners, invoked the 1970 *Holt v. Sarver* conclusion that an "entire prison system" in Arkansas was so "inhumane" as to violate the Eighth Amendment,³⁵⁶ and identified the "unchecked power of prison administrators" as the "central evil" that was the "problem that due process" procedures were to "cure."³⁵⁷ Given the "threat of any substantial deprivation of liberty . . . such as solitary confinement," a "full hearing with all the due process safeguards" was required.³⁵⁸

Within a year, Justice White wrote again for the Court in *Baxter v. Palmigiano* to inscribe *Wolff's* mandates as the "reasonable accommodation between the interests of the inmates and the needs of the institution."³⁵⁹ The United States again provided an amicus filing, arguing against "any particular set of inflexible rules."³⁶⁰ The case raised the question of whether the hearing officers could draw adverse inferences from a prisoner's declining to speak. Nicholas Palmigiano, held in a Rhode Island prison, relied on the Fifth Amendment when, as advised to do so by his counsel-substitute, he stayed silent in a disciplinary hearing.³⁶¹ The majority did not

³⁵³ *Id.* at 563, 566.

³⁵⁴ *Id.* at 581–83 (Marshall, J., concurring in part and dissenting in part, joined by Brennan, J.).

³⁵⁵ *Id.* at 589.

³⁵⁶ *Id.* at 599 (Douglas, J., dissenting in part and concurring in the result in part).

³⁵⁷ *Id.* at 596–99 (citations omitted).

³⁵⁸ *Id.* at 594.

³⁵⁹ 425 U.S. 308, 324 (1976) (quoting *Wolff*, 418 U.S. at 572).

³⁶⁰ Brief for the United States as Amicus Curiae, *Baxter v. Palmigiano*, *supra* note 26, at *2–3.

³⁶¹ *Baxter*, 425 U.S. at 312–13. The Court heard the case along with *Enomoto v. Clutchette*, *id.* at 308, a California case that had not been certified but which the district court improperly treated as a class action and which had been brought by John Wesley Clutchette and George L. Jackson to require California to revamp its disciplinary system at San Quentin. *Id.* at 310–11 & n.1. By the time the Supreme Court heard the case, the named plaintiffs' claims had been mooted. *Id.* at 310 n.1. Clutchette had been paroled, and Jackson (the author of *Soledad Brothers* who, in 1971, was to be tried on charges of murdering a prison guard) was killed in the prison yard. *Id.* See generally GEORGE L. JACKSON, BLOOD

bar the staff from using his silence against him; further, it reiterated that no rights to counsel existed in prison disciplinary hearings, prison officials retained discretion to permit confrontation and cross-examination, and adverse inferences could be drawn when prisoners declined to testify.³⁶²

Justice White had not addressed the underlying liberty interests,³⁶³ which was the centerpiece of the objections by Justices Brennan and Marshall, who again concurred in part and dissented, with Justice Brennan writing this time for them both. Justice Brennan explained that the only evidence against Palmigiano came from written reports by the staff who filed the charges; after Palmigiano's silence and a five-minute deliberation, the prison authorities sent him to thirty days in punitive segregation.³⁶⁴ Instead, because liberty remained vital despite incarceration, the Court's law on the privilege outside of prison ought to have been applied and no adverse inferences drawn from a person's silence.³⁶⁵

Even with these limits, *Wolff* is one of several decisions that imposed affirmative obligations on prison officials and made certain practices "normal" artifacts of incarceration. Before the decision, as the ABA reported, most prison systems had policies that called for some form of process when imposing certain punishments. Since the ruling, all systems must provide process when seeking to change the length of incarceration by taking away good time. The volume of hearings both before and after *Wolff* also provides a window into the breadth of regulation governing prisoners' behavior. The government's amicus brief in *Wolff* cited data from the Federal Bureau of Prisons which, in 1973, housed more than 23,000 prisoners and had conducted some "19,000 misconduct hearings."³⁶⁶ (The brief did not report what percentage resulted in prisoners being acquitted of the charges.) California also filed an amicus that argued against cross-examination and

IN MY EYE (1990). An intervenor, Alejandro R. Ferrel, was stipulated as a named party and his individual case proceeded. *Baxter*, 425 U.S. at 310 n.1.

³⁶² *Id.* at 315–16, 321–22. The Court returned to the question of *Miranda* rights for the incarcerated in *Maryland v. Shatzer*, 559 U.S. 98, 112–13 (2010), and in *Howes v. Fields*, 565 U.S. 499, 511 (2012), each exploring what "in custody" meant for the incarcerated. In *Howes*, Justice Samuel Alito for the majority concluded that the "ordinary restrictions of prison life, while no doubt unpleasant, are expected" and did not involve the compulsion of being taken to a police station. *Id.* at 511 (citing *Shatzer*, 559 U.S. at 103).

³⁶³ In the discussion of the case coming from the Ninth Circuit, the majority said that the record did not make clear "the degree of 'liberty' at stake in loss of privileges" that was requisite to determining what process was due, and hence its order could not stand. *Baxter*, 425 U.S. at 323.

³⁶⁴ *Id.* at 332 n.6 (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.).

³⁶⁵ *See id.* at 334–35.

³⁶⁶ Brief for the United States as Amicus Curiae, *Wolff v. McDonnell*, *supra* note 330, at *2–3.

counsel in disciplinary hearings and reported that in 1973 its prisons “averaged over 50 disciplinary hearings every day of the year.”³⁶⁷

More than fifty years later, statistics provided by Oregon painted a comparable picture of a huge number of hearings conducted annually. In 2018, Oregon incarcerated more than 14,000 people and had a dedicated group of hearing officers charged with overseeing in-prison disciplinary hearings.³⁶⁸ The state concluded that in approximately 13% of the more than 10,000 disciplinary hearings it conducted, hearing officers dismissed the charges against the prisoner.³⁶⁹

b. The adverse impacts of transfers

In the years after *Wolff*, Justice White’s limited approach to prisoners’ liberty hardened as the Court’s membership shifted along with national politics, in which popular officials championed being “tough on crime.”³⁷⁰ More Justices evidenced anxiety about prisons and too many prisoner filings, demonstrated minimal concern about racial discrimination, and evidenced no appreciation for the experiences of incarcerated individuals. As Linda Greenhouse and Michael Graetz explained, “Equality took a backseat to other values” under the Burger Court, which prized “the prerogatives of states and localities . . . the efficiencies of the criminal justice system . . . [and] rolling back the rights revolution” of the Warren Court.³⁷¹ The result was that the Supreme Court reshaped its doctrine to conclude that conviction and incarceration extinguished most of an individual’s liberty interests.³⁷²

Soon after *Wolff*, the Supreme Court addressed decisions by prison officials to transfer incarcerated individuals from one facility to another. The issue was framed through two cases involving prisoners caught up in unrest at facilities in New York and Massachusetts. The uprising at Attica Prison in

³⁶⁷ Brief of Evelle J. Younger, Attorney General of the State of California, Amicus Curiae, *Wolff v. McDonnell*, *supra* note 330, at 10 n.9.

³⁶⁸ Telephone Interview with Melissa D. Nofziger, Assistant Inspector Gen. for Hearings, Or. Dep’t of Corr. (Nov. 15, 2019); E-mail from Melissa D. Nofziger, Assistant Inspector Gen. for Hearings, Or. Dep’t of Corr., to Judith Resnik, Arthur Liman Professor of Law, Yale Law Sch. (Nov. 18, 2019, 11:05 AM PST) (on file with authors).

³⁶⁹ Telephone Interview with Melissa D. Nofziger, *supra* note 368; E-mail from Melissa D. Nofziger, *supra* note 368.

³⁷⁰ *See generally* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016).

³⁷¹ MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 341 (2016).

³⁷² *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

upstate New York took place in September 1971.³⁷³ Within the year, prison officials at Attica removed Rodney Haymes from his job at the prison law library. Two days after Haymes had helped eighty-two prisoners circulate a document that was addressed to a federal judge and that protested his removal, New York transferred him to Clinton Correctional Facility hundreds of miles further from his home in Buffalo.³⁷⁴

Chief Judge Irving Kaufman, writing for the Second Circuit, catalogued the impact of the transfer. Clinton was “several hundred miles farther away from Haymes’s home in Buffalo,”³⁷⁵ which meant being far from family and his lawyer, and the loss of educational and other programs underway. Further, a “real hardship” came from “being shuttled from one institution to another,” even if both were labeled maximum security.³⁷⁶ On arrival, individuals were put into administrative segregation (a form of solitary confinement) and upon release were in a new and complex environment; moreover, the process of transfer could result in a deprivation of healthcare and medications.³⁷⁷

Given the risk of being punished “at the whim of those charged” to control their confinement, the court concluded that prisoners merited protection.³⁷⁸ Reversing the trial court’s rejection of Haymes’s pro se complaint was proper because “[w]hen harsh treatment is meted to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling.”³⁷⁹ The Second Circuit remanded for fact-finding on whether the transfer was punitive and on the impact of the transfer.³⁸⁰

The First Circuit issued a parallel ruling in 1975; prison officials at a medium-security facility, the Massachusetts Correctional Institution at Norfolk, transferred Arthur Fano and five other prisoners to a maximum-security facility. The prompt for reclassification was “unrest,” which

³⁷³ N.Y. STATE SPECIAL COMM’N ON ATTICA, *supra* note 324, at xi.

³⁷⁴ United States *ex rel.* Haymes v. Montanye, 505 F.2d 977, 977–78, 982 (2d Cir. 1974), *rev’d judgment sub nom.* Montanye v. Haymes, 427 U.S. 236 (1976). The document stated that individuals were “deprived of legal assistance” because of the removal of Haymes and another prisoner, and as a result, “constitutional rights to adequate access to the courts” were violated. *Montanye*, 427 U.S. 236, 237 & n.1 (1976). Prison officials took the document. *Id.* at 238.

³⁷⁵ *Haymes*, 505 F.2d at 978.

³⁷⁶ *Id.* at 981–82.

³⁷⁷ *Id.* at 982.

³⁷⁸ *Id.* at 977, 981.

³⁷⁹ *Id.* at 980–82. The Second Circuit did not address the access-to-courts issue. *Id.* at 982.

³⁸⁰ *See id.*; *Montanye v. Haymes*, 427 U.S. 236, 240 (1976).

included a series of fires at Norfolk.³⁸¹ The basis for the transfer decision was information from informants that had not been disclosed to the prisoners at their reclassification hearings.³⁸² As the First Circuit explained, whether the decision was termed “classification” for institutional order or “discipline” imposed as punishment, the impact was the same.³⁸³ At the higher level facility, the conditions were “substantially more adverse” in terms of programs, furloughs, and effects on parole.³⁸⁴

What was the process due? The First Circuit had already ruled that interstate transfers required procedural protections.³⁸⁵ In *Fano v. Meachum*, the First Circuit also concluded that the intrastate transfers imposed “a significant modification of the overall conditions of confinement” that affected prisoners’ liberty and therefore required procedural protection.³⁸⁶ At least a summary of the basis for the decision had to be provided, as well as adequate notice of the charges leveled.³⁸⁷

Before the Supreme Court, the two cases (heard together in April of 1976) intersected with an ongoing debate in the Court about whether due process protections were required in a variety of circumstances, such as when state officials make decisions relating to school children,³⁸⁸ to state employees,³⁸⁹ to beneficiaries of benefit programs,³⁹⁰ and to holders of state licenses,³⁹¹ as well as to prisoners. The predicate insight that some process was due stemmed from a 1964 article by Charles Reich, who identified how government power both created forms of property—through the provision of licenses, contracts, benefits, and franchises—and made holders of this “new property” vulnerable to arbitrary state power.³⁹² Justice Brennan embraced those ideas in the Court’s 1970 decision *Goldberg v. Kelly*, which recognized

³⁸¹ *Fano v. Meachum*, 520 F.2d 374, 376, 377 & n.3 (1st Cir. 1975).

³⁸² *Id.* at 376.

³⁸³ *Id.* at 376 n.2.

³⁸⁴ *Id.* at 378 (quoting *Fano v. Meachum*, 387 F. Supp. 664, 667 (D. Mass. 1975)).

³⁸⁵ See *Gomes v. Travisono*, 490 F.2d 1209, 1211, 1215–16 (1st Cir. 1973). In 1983, the U.S. Supreme Court concluded that the Constitution does not protect prisoners from interstate transfers even when a person was sent from Hawaii to California. See *Olim v. Wakinekona*, 461 U.S. 238, 248 (1983).

³⁸⁶ 520 F.2d at 378–79.

³⁸⁷ *Id.* at 379–80.

³⁸⁸ *Goss v. Lopez*, 419 U.S. 565, 567 (1975).

³⁸⁹ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 566–69 (1972).

³⁹⁰ *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

³⁹¹ *Bell v. Burson*, 402 U.S. 535, 535–37 (1971). The Court held that the State of Georgia could not deprive someone of their driver’s license and vehicle registration before providing an opportunity to determine “whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.” *Id.* at 542–43.

³⁹² Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733, 783–84, 787 (1964).

the “grievous loss” that termination of welfare benefits entailed and held that, prior to termination of benefits, governments had to provide due process protections including an in-person oral hearing.³⁹³

But two months before the hearings in the prison transfer cases, the Court had retreated from its approach in *Goldberg*. In February 1976, when addressing the termination of disability benefits in *Mathews v. Eldridge*, the Court held that post-termination hearings sufficed.³⁹⁴ Justice Powell’s majority opinion in *Mathews* shifted the focus away from the experiences and the impact of decisions on those affected (their “grievous loss”) and onto the interests of governments in conserving costs when making decisions. The majority did not address the mandate from Congress that administrators treat like cases similarly, nor concerns about the need to respect the dignity of individuals in their encounters with the state.³⁹⁵

In *Mathews*, the U.S. government had conceded that disability benefits were a statutory entitlement and that some process was due. In contrast, in the arguments held on April 21, 1976 in *Haymes* and in *Meachum*, New York and Massachusetts, joined by California and the federal government, contended that no “liberty” or “property” interests existed when they moved prisoners to higher security settings and hence that officials had no constitutional obligation to provide any process at all.³⁹⁶ As Solicitor General Robert Bork’s amicus briefs in both *Montanye v. Haymes* and *Meachum v. Fano* argued, the decisions made by the Federal Bureau of Prisons relating

³⁹³ 397 U.S. at 263 (citation omitted). The history of the litigation and its impact on constitutional, administrative, and property law are discussed in MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973*, at 99–118 (1993), and Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in *CIVIL PROCEDURE STORIES* 473–508 (Kevin M. Clermont ed., 2d ed. 2008) [hereinafter Resnik, *The Story of Goldberg*], and in legions of other books and articles.

³⁹⁴ 424 U.S. at 349.

³⁹⁵ See Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 42–45, 54 (1976).

³⁹⁶ Brief for the United States as Amicus Curiae, *Meachum v. Fano*, 427 U.S. 215 (1976) (No. 75-252), 1976 WL 181738, at *3–11 [hereinafter Brief for U.S. in *Meachum*]; Brief of the State of California Amicus Curiae in Support of Petitioners, *Montanye v. Haymes*, 427 U.S. 236 (1976) (No. 74-520), 1975 WL 173435, at *3 [hereinafter Brief of California in *Montanye*]; Brief for the United States as Amicus Curiae, *Montanye v. Haymes*, 427 U.S. 236 (No. 74-520), 1975 WL 173434, at *7–14 [hereinafter Brief for U.S. in *Montanye*].

to the placement or transfers of the 16,529 individuals committed in fiscal year 1975 to federal custody³⁹⁷ were “completely discretionary.”³⁹⁸

California, which reported that it had transferred more than 30,000 men between fiscal years 1974 and 1975,³⁹⁹ likewise argued that the federal Constitution had no role to play. The State asserted that the transfer of prisoners was “a critical component in the achievement of the objectives of the correctional system.”⁴⁰⁰ Such movement was “not solely a means for achieving the most economic utilization of available facilities and staff [but also] a process [to achieve] the dual objectives of security and rehabilitation.”⁴⁰¹ California further argued that when “the needs and desires of a particular inmate” were in tension with the “welfare and security of the correctional system as a whole,” correctional staff ought to be tasked with making the “difficult” determination of how to best accommodate conflicting objectives.⁴⁰²

Yet the State’s own materials acknowledged what the lower courts in *Haymes* and *Meachum* had understood: prison authorities had the power to make the experience much worse, and constraints on staff authority were needed. One subpart of California’s regulation, which the State put before the Supreme Court, was labeled “Fairness Procedures.”⁴⁰³ The obligation to provide fair process was, under California’s rules, triggered when the State sought to impose what it termed a “Substantial Adverse Effect,” defined to include the “[t]ransfer to another institution for the purpose of providing more restrictive custody,” as well as increasing custody levels and placement in a “security housing unit.”⁴⁰⁴

The oral argument and notes from the Supreme Court Justices’ papers reveal the anxiety occasioned by the potential impact of the proposition that the Constitution required fair hearings for transfers. The Justices offered

³⁹⁷ Brief for U.S. in *Montanye*, *supra* note 396, at *1–4 (arguing that the outcome of the case would have a “substantial impact” on the procedures used to assign, classify, and transfer people in federal custody); *see also* Brief for U.S. in *Meachum*, *supra* note 396, at *2–3 (arguing that the interest in the case is similar to that presented in the United States’ amicus curiae brief in *Montanye* and adding that the questions raised in *Meachum* about transferring custody level was of special interest to the United States given that the Federal Bureau of Prisons relies on custody level for classification and transfer).

³⁹⁸ Brief for U.S. in *Montanye*, *supra* note 396, at *10; Brief for U.S. in *Meachum*, *supra* note 396, at *13.

³⁹⁹ Brief of California in *Montanye*, *supra* note 396, at *1.

⁴⁰⁰ *Id.* at *2.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.* app. at *2a.

⁴⁰⁴ *Id.* app. at *3a. The rules also authorized actions on “a temporary emergency basis when necessary without prior notification.” *Id.*

hypotheticals that ignored the State’s punitive intent (on which the Second Circuit had focused) and the impact of transfer (central to the analysis of the First Circuit). Instead, the Justices imagined prisoners complaining about what the Justices evidently thought were not important aspects of confinement; these Justices imagined lower court judges unable or unwilling to differentiate among forms of injury.

Then-Justice Rehnquist posited: “Supposing the man stays at Walpole, but they’ve had a bad time at Walpole, so [prison officials] decide that instead of getting one hour’s exercise in the afternoon, you’re only going to get half an hour, you’re only going to get two meals a day, the whole population.”⁴⁰⁵ In conference, Chief Justice Warren Burger used the example of whether “any move—even from a cell on south side of prison to north side” would suffice as an impingement on liberty requiring a due process hearing.⁴⁰⁶

A typed memorandum from Justice Blackmun (and written before the argument on April 13, 1976) provided a fuller account of his concerns about the extent of judicial oversight of prison officials’ decisions. Justice Blackmun explained that when he was on the Eighth Circuit, he had initially assumed that “the administration of a prison was the state’s business” but that he had come to recognize that prisoners had constitutional rights “to be safe, to be free of cruel and unusual punishment, to be fed and the like.”⁴⁰⁷ (Justice Blackmun’s memo did not mention that he had authored the landmark decision of *Bishop v. Jackson*, holding in 1968 that whipping of prisoners by Arkansas prison staff was unconstitutional.⁴⁰⁸)

Justice Blackmun said he found “it exceedingly difficult to draw lines between original placement in a custodial atmosphere and secondary placement. If the one is the decision for the prison administrator,” the second would be too, even if a transfer was “somewhat punitive in nature.”⁴⁰⁹ However, “there is a limit;” if a transfer affected “rehabilitation or parole,” then “some kind of minimal due process procedurally is due.”⁴¹⁰ Yet despite

⁴⁰⁵ Transcript of Oral Argument at 41, *Meachum v. Fano*, 427 U.S. 215 (1976) (No. 75-252) [hereinafter *Meachum v. Fano* Oral Argument].

⁴⁰⁶ Lewis F. Powell, Jr. Papers, Box 427/Folder 16-17, at 27, available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1768&context=casefiles> [<https://perma.cc/32ZK-MNG6>].

⁴⁰⁷ Harry Blackmun Papers, *Meachum v. Fano* file, at 9 (housed at the Library of Congress) (photocopy on file with authors).

⁴⁰⁸ 404 F.2d. 571, 579 (8th Cir. 1968).

⁴⁰⁹ Harry Blackmun Papers, *supra* note 407, at 9–10.

⁴¹⁰ *Id.* at 10.

those concerns, Justice Blackmun joined the two majority opinions that imposed no limits on correctional officials' authority over prison transfers.

Both decisions, filed in June 1976, were written by Justice White, and both reversed the judgments below. In *Montanye v. Haymes*, the Court held that while "state law" or the Constitution could provide "some right or justifiable expectation,"⁴¹¹ "no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State."⁴¹² *Meachum v. Fano* explained that even as "life in one prison" could be "much more disagreeable than in another," those differences did not suffice to implicate Fourteenth Amendment liberty interests, nor did "any [other] substantial deprivation imposed by prison authorities."⁴¹³

Why? The Court answered with a Delphic reference to practices it deemed to be "normally incident to a criminal conviction"⁴¹⁴ and created the formulation: "As long as the conditions or degree of confinement . . . [do not exceed those normally incident to a criminal conviction and are] not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."⁴¹⁵

Justice Stevens, joined by Justices Brennan and Marshall, dissented in both cases.⁴¹⁶ Their disagreement centered not on the State's needs but on people's liberty. In *Meachum*, Justice Stevens wrote that the majority had described liberty as stemming either from the Constitution or from state law.⁴¹⁷ Justice Stevens countered that "[i]f a man were a creature of the State,

⁴¹¹ 427 U.S. 236, 242 (1976).

⁴¹² *Id.*; see also *Meachum v. Fano*, 427 U.S. 215, 224–25 (1976). Although some of the Court's case law had acknowledged the role played by individuals' "expectations" in entitlement theory, the Court came to require finding sources in positive law, such as statutes. Later, the Court held that even when state statutes or regulations recognized prisoners' interests, such as in visits, state provisions did not necessarily create interests that required federal due process protections before their infringement. See *Kentucky v. Thompson*, 490 U.S. 454 (1989). See generally Thomas C. Grey, *Procedural Fairness and Substantive Rights*, in 18 *NOMOS: DUE PROCESS* 182 (J. Roland Pennock & John W. Chapman eds., 1977); Reich, *supra* note 392; Resnik, *The Story of Goldberg*, *supra* note 393.

⁴¹³ 427 U.S. at 225. The majority distinguished *Wolff v. McDonnell* as predicated on state-based statutory rights to good time, which generated the liberty interest that required due process protections. *Id.* at 225–26.

⁴¹⁴ Letter from Chief Justice Rehnquist to Justice White (June 3, 1967) (on file with authors).

⁴¹⁵ *Montanye*, 427 U.S. at 242. Justice Stevens (joined by Justices Brennan and Marshall) dissented; he argued that the pro se complaint had also alleged a claim of punishment for helping individuals communicate with courts and that, under liberal pleading rules, the decision should be remanded to the district court. *Id.* at 244–45 (Stevens, J., dissenting).

⁴¹⁶ *Id.*; *Meachum*, 427 U.S. at 229–35 (Stevens, J., dissenting).

⁴¹⁷ *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting).

the analysis would be correct.”⁴¹⁸ He disagreed. The Constitution was not the *source* of “individual liberty,” which was “one of the cardinal unalienable rights,” but rather of its *protection* against government infringement.⁴¹⁹ He reiterated what he had said in a 1973 Seventh Circuit decision, that “[l]iberty’ and ‘custody’ are not mutually exclusive concepts.”⁴²⁰ If, however, prisoners’ protected interests were “no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases.”⁴²¹ Instead, prisoners retained “an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* Some commentators attribute Justice Stevens’s concerns for individuals in conflict with the state to his and his family’s work history. After the Depression, some of his relatives were accused of embezzling funds to deal with debts from a hotel they had owned in Chicago. His father’s conviction was overturned by the Illinois State Supreme Court. *People v. Stevens*, 193 N.E. 154, 156, 160 (Ill. 1934). Further, in 1969 Justice Stevens gained public attention when he was the chief investigator into corruption at the Illinois Supreme Court, from which two justices resigned. See Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205, 215–19 (2010).

⁴²⁰ *Meachum*, 427 U.S. at 232 (citing *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973)). His Seventh Circuit opinion in *Twomey* cites *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973), *modified on reh’g en banc*, 494 F.2d 85 (7th Cir. 1974). However, in *Morales*, Justice (then Judge) Stevens was in dissent from a March 1973 Seventh Circuit decision reversing a district court injunction against limits on correspondence between a prisoner and his sister-in-law. *Id.* at 1344 (Stevens, J., dissenting). The majority decision, explaining that “[t]he Constitution provides no clear answer to federal courts seeking to determine the civil rights of state prisoners,” cited the texts of the Thirteenth and Fourteenth Amendments, cordoning off rights for those who are “duly convicted,” as well as explicating a growing body of commentary and law on “prisoners’ rights.” *Id.* at 1337–39 (majority opinion) (emphasis omitted). While courts ought to be “hesitant” to be involved in daily operations, they could not “abdicate [their] responsibilities” to “determine the constitutional rights of a convicted person.” *Id.* at 1342. Because the lower court had looked to a “compelling state interest,” rather than a “rational relationship,” for the restriction, the injunction could not stand. *Id.* at 1343–44. In contrast, Justice Stevens found that abridgement of First Amendment rights requires “a heavier burden of justification.” *Id.* at 1348 (Stevens, J., dissenting). The en banc decision permitted the injunction that had been in effect to remain, pending remand for more fact-finding given the passage of time. *Morales v. Schmidt*, 494 F.2d 85, 87 (7th Cir. 1974) (en banc). Justice Stevens, joined by two others, concurred to explain the burden on the state to limit communication. *Id.* at 87–88 (Stevens, J., concurring).

The case from which Justice Stevens took the quoted sentence was *United States ex rel. Miller v. Twomey*, 479 F.2d at 712. *Twomey*—issued in May of 1973, two months after Stevens’s initial dissent in *Morales*—considered the disciplinary rules in Illinois’s prisons. Unrepresented prisoners alleged loss of good time and placement in solitary confinement for an array of offenses, including fifteen days in isolation for “sending a letter to an ex-inmate in an illegal way.” *Id.* at 703, 706. Justice Stevens read the Court’s *Morrissey* decision to mean “that due process precede any substantial deprivation of the liberty of persons in custody.” *Id.* at 713. His opinion recognized the “sufficient contrast between the privileges associated with membership in the general prison population and the severe restraints resulting from ‘segregation’” and concluded that “prolonged segregated confinement” constituted a “grievous loss” for which some procedural protections were required, albeit not always a hearing before isolation nor all the *Morrissey* processes. *Id.* at 717–18 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

⁴²¹ *Meachum*, 427 U.S. at 233 (Stevens, J. dissenting).

Constitution may never ignore.”⁴²² When prisoners suffered a “grievous loss,” which included placement in solitary confinement or transfers to “equally disparate conditions between one physical facility and another,” protection from arbitrary decisions should have been required.⁴²³

c. Segregation through administrative placements, discipline, and exile

In the years thereafter, the Court selected cases through which it continued to narrow prisoners’ opportunities to have buffers against decisions that made more adverse the conditions of their confinement. The Court took up transfers to out-of-state prisons and placement into isolation falling under two labels—“administrative segregation,” which is justified on managerial needs and could be a way station (pending decisions on discipline or classification) or could be the basis for a long stay in solitary confinement, and “disciplinary segregation,” which frankly imposes isolation as a punishment. That distinction was often irrelevant in practice. As the State Bar of Michigan’s Prisons and Corrections Committee told the Court in 1982, whether called “administrative confinement” or “administrative segregation,” what was “involved . . . is being placed in the ‘hole.’”⁴²⁴ Furthermore, by 1972, the corrections profession had commended prisons hold hearings before “[s]evere penalties, such as forfeiture of good time or extended confinement in punitive segregation” were imposed.⁴²⁵

Reflecting both prisoners’ experiences and standards promulgated by the American Corrections Association, lower courts identified prisoners’ liberty interests in avoiding more adverse confinement and required some process.⁴²⁶ In contrast, the Supreme Court—in majority decisions often written by Chief Justice Rehnquist—repeatedly reversed as the majority stiffened its commitment to incarceration eradicating most of prisoners’ liberty interests.⁴²⁷ Thus, even as the Court has recognized that prisoners

⁴²² *Id.*

⁴²³ *Id.* at 234–35. Justice Stevens noted that individuals whom Massachusetts had transferred had suffered such losses, including a reduction in income and separation from a counselor. *Id.* at 235 n.8.

⁴²⁴ Brief for the State Bar of Michigan, Prisons & Corrections Committee as Amicus Curiae Supporting Affirmance, *Hewitt v. Helms*, 459 U.S. 460 (1983) (No. 81-638), 1982 WL 608431, at *6 n.1.

⁴²⁵ Brief of the Petitioners at 29, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (No. 73-679), 1974 WL 187450, at *29 (citing ASS’N OF STATE CORR. ADM’RS, UNIFORM CORRECTIONAL POLICIES AND PROCEDURES 12–15 (1972)).

⁴²⁶ *See, e.g.*, *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1993), *rev’d sub nom.* *Sandin v. Conner*, 515 U.S. 472 (1995); *Helms v. Hewitt*, 655 F.2d 487 (3d Cir. 1981); *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981).

⁴²⁷ *See, e.g.*, *Sandin*, 515 U.S. 472; *Hewitt v. Helms*, 459 U.S. 460 (1983); *Olim v. Wakinekona*, 461 U.S. 238 (1983).

retained some kinds of liberty (such as the right to marry⁴²⁸), the Court ruled that protection against being shipped thousands of miles away from one's home or placed in twenty-four-hour-a-day isolation for weeks and months on end did not survive incarceration. This sequence of decisions generated the current test for procedural protections for people placed in solitary confinement.

The events undergirding the next key Supreme Court decision took place in 1978, when Pennsylvania prison officials put Aaron Helms in fifty-one days of "restrictive custody status"; Helms alleged that the State had not complied with its own regulations or what the Constitution then required.⁴²⁹ At oral argument, Helms's attorney described the confinement as "almost 24 hours a day" with "between five and ten minutes" for exercise a few times a week, "virtually nonexistent" access to showers for almost two months, and no access to any activities.⁴³⁰ The prompt for such isolation was a "general disturbance," and the question was what role, if any, Helms had played.⁴³¹ The State took the position that it had no obligation to provide any process for what it termed an administrative decision to confine Helms pending an investigation.⁴³²

As the Third Circuit, writing in 1981, then understood Supreme Court precedent, liberty could be predicated on state statutes or regulations, such as those that delineated the conditions for welfare benefits, tenured employment, and good-time credits.⁴³³ In addition, albeit "less easily defined," liberty could come from the Constitution or, if a "natural right," be protected by the Constitution.⁴³⁴ And, in this case, Pennsylvania had regulations that set forth the criteria for transfers into administrative segregation.⁴³⁵ Given the "important rights" at stake, and the fact that the

⁴²⁸ See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987).

⁴²⁹ *Helms*, 655 F.2d at 489, 491.

⁴³⁰ Transcript of Oral Argument at 21, 26, *Hewitt v. Helms*, 459 U.S. 460 (1983) (No. 81-638); see also *Hewitt*, 459 U.S. at 467 n.4; *id.* at 480 n.1 (Stevens, J., dissenting).

⁴³¹ *Helms*, 655 F.2d at 489–91. The appellate court noted the "tensions and strains" and "intense personal antagonisms" of prison life, and that information from an "unidentified informant" could result in a decision of guilt based on "trumped up charges." *Id.* at 502.

⁴³² *Id.* at 496–97.

⁴³³ *Id.* at 493.

⁴³⁴ *Id.* at 493–94 (citing *Vitek v. Jones*, 445 U.S. 480, 488 (1980)). *Vitek* was about the transfer of a prisoner to a mental hospital, and the Court focused on the "grievous loss" and "stigma[]" of such a change. 445 U.S. at 488.

⁴³⁵ The State had argued that the regulations were "guidelines" that aimed to "promote some uniformity" among the various state institutions and accountability for wardens, and that if such guidance became the predicate for "time-consuming, expensive and inefficient procedures," the State might repeal

State had created rules that conferred a “protectable liberty interest,” *Wolff v. McDonnell*’s procedural protections applied; moreover, a “conviction” could not rest solely on “a hearsay report of an unidentified informant[.]”⁴³⁶

In 1983, Chief Justice Rehnquist wrote for the Court to protect the “discretionary authority” of correctional officials to manage their institutions by delineating a “limited range of interests” that fell under the Fourteenth Amendment’s protection.⁴³⁷ Prisoners had what he labeled “basic liberty interests” and therefore were only protected from the states imposing conditions or degrees of confinement that went beyond the prisoner’s sentence.⁴³⁸ A “significant modification in conditions,” even when a “grievous loss,” did not fall within the “basic liberty” retained, and hence no “judicial oversight” was required, not even when a person was put in “less amenable and more restrictive quarters for nonpunitive reasons.”⁴³⁹

But, because Pennsylvania had rules detailing the criteria for transfers into administrative segregation, Helms had a “protected liberty interest in remaining in the general prison population.”⁴⁴⁰ Therefore, the Constitution required procedural protection. Nonetheless, no more process was due than what Helms had received. As Chief Justice Rehnquist put it, Helms “was merely transferred from one extremely restricted environment to an even more confined situation,” and the State was concerned about institutional safety.⁴⁴¹ Therefore, the “informal, nonadversary evidentiary review” which Pennsylvania provided sufficed.⁴⁴²

them. Brief for Petitioners, *Hewitt v. Helms*, 459 U.S. 460 (1983) (No. 81-638), 1982 WL 608424, at *17.

Pennsylvania’s regulations were an artifact of a consent decree in *Imprisoned Citizens Union v. Shapp*. See Consent Decree at 2–4, *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893 (E.D. Pa. 1978) (Nos. 70-3054, 71-513, 71-1006 & 70-2545) (on file with authors). Litigation in that case also resulted in a 1978 ruling that, while “grim and cheerless,” conditions in the nine cells on “Death row” at Graterford Prison did not violate the Eighth Amendment, but three maximum security cells, known as the “Glass Cage[s],” at Huntingdon did, as they were “dark, dirty,” and “a serious threat to the physical and mental well-being” of anyone held there. See *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893, 897–98 (E.D. Pa. 1978). As discussed *supra* note 264, the 2019 settlement in *Reid v. Wetzel* required altering conditions for people serving capital sentences in Pennsylvania. A 1998 decision terminating the consent decree under the Prison Litigation Reform Act discussed the settlement’s amendments in 1983 addressing prisoner “misconduct proceedings.” See *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 592, 594–95 (E.D. Pa. 1998).

⁴³⁶ *Helms*, 655 F.2d at 494, 503.

⁴³⁷ *Hewitt v. Helms*, 459 U.S. 460, 466–67 (1983).

⁴³⁸ *Id.* at 467–68.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 469–72.

⁴⁴¹ *Id.* at 472–73.

⁴⁴² *Id.* at 476.

The four concurring Justices demurred on the majority's account of liberty's parameters and the process due. Justice Blackmun described a "residuum of liberty" that prisoners possessed, beyond what positive state law provided.⁴⁴³ However, because the transfer was within what he styled "the normal limits or range," that liberty was not infringed.⁴⁴⁴ Yet, given that state law had created a liberty interest, Pennsylvania's procedures did not adequately protect it. Justice Stevens, joined by Justices Marshall, Brennan, and Blackmun (on process), agreed on the procedural failures but had a different theory of liberty that was not tied to state law. Justice Stevens insisted that the Court in *Wolff* had recognized liberty rights independent of the Constitution and reiterated, and quoted, his view in *Meachum* that liberty predated the Constitution.⁴⁴⁵ Citing Ronald Dworkin's discussion of John Stuart Mill and the significance of "independence," Justice Stevens pointed to the "grievous change in a prisoner's status," in that Helm was placed in "grossly more onerous" conditions when he was held in solitary confinement.⁴⁴⁶

Two years later, the question returned to the Court when Hawaii transferred Delbert Wakinekona to a prison in California.⁴⁴⁷ The number of government amici protesting the Ninth Circuit's decision that required process attested to the anxiety of the correctional establishment about losing its unilateral authority to move people.⁴⁴⁸ The majority, in a decision by Justice Blackmun, responded by holding that neither the U.S. Constitution nor state regulations recognized Wakinekona's liberty in incarceration within his home state, and therefore no process was due.⁴⁴⁹

Although fewer than 3% of Hawaii's prisoners were moved out of state in 1979, Justice Blackmun invoked the concept of the "normal" as he quoted *Meachum* to describe transfers anywhere in the state or country as "within the normal limits or range of custody" that flowed from convictions.⁴⁵⁰ In

⁴⁴³ *Id.* at 478 (Blackmun, J., concurring in part and dissenting in part).

⁴⁴⁴ *Id.* (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

⁴⁴⁵ *Id.* at 479, 482–83 (Stevens, J., dissenting) (quoting *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting)).

⁴⁴⁶ *Id.* at 484–88 (internal quotation marks omitted).

⁴⁴⁷ *Olim v. Wakinekona*, 461 U.S. 238, 240 (1983).

⁴⁴⁸ *See id.* at 246–47. Amicus briefs were filed by attorneys general for two dozen states. *See, e.g.*, Amicus Brief of the Commonwealth of Massachusetts & Sister States, *Olim v. Wakinekona*, 461 U.S. 238 (1983) (No. 81-1581); Brief of the States of Alaska et al. in Support of Petitioners, Amici Curiae, *Olim v. Wakinekona*, 461 U.S. 238 (1983) (No. 81-1581).

⁴⁴⁹ *Wakinekona*, 461 U.S. at 251.

⁴⁵⁰ *Id.* at 247 (quoting *Meachum*, 427 U.S. at 225). The data on the number of people transferred outside Hawaii were provided in Justice Marshall's dissent. *Id.* at 254 (Marshall, J., dissenting).

dissent, Justice Marshall, joined by Justices Brennan and Stevens, again argued that prisoners' liberty was not an artifact of the Constitution but protected by it. Justice Marshall protested the "banish[ment]" of Wakinekona, who, "possibly [for] the rest of his life," would be separated by "nearly 2,500 miles of ocean" from family and friends.⁴⁵¹

Whatever the ambiguities about the punitive intent or impact of transfers that governments sometimes characterized as "administrative" rather than punitive, in 1995 the Court directly addressed prisoners' rights to process when states aimed to punish them with transfer. At issue was the thirty-day solitary confinement of Demont Conner, another Hawaii prisoner. According to the Petition for Writ of Certiorari filed by state officials, Conner was stopped in 1987 and strip searched when he left his cell to attend a program area.⁴⁵² One officer "asked him to step back, bend over and with both hands spread his buttocks . . . [to] check for contraband in the rectal area to which [Conner] said 'Fuck!' in an angry tone of voice."⁴⁵³ Conner asked the officer, "Why are you harassing me?"⁴⁵⁴ Prison officials responded by cancelling what they described as Conner's "privilege of religious counselling"⁴⁵⁵ and, after an abbreviated hearing based on the record with no witnesses testifying, sending Conner into isolation.⁴⁵⁶

Conner challenged the underlying treatment and the discipline, and the Ninth Circuit agreed that Hawaii provided constitutionally insufficient process when it disciplined Conner and denied him access to the law library or other forms of legal assistance. Conner could therefore pursue his claims "that he was punished for praying aloud in Arabic with a fellow inmate."⁴⁵⁷

⁴⁵¹ *Id.* at 252–53.

⁴⁵² Petition for Writ of Certiorari at 7, *Sandin v. Conner*, 515 U.S. 472 (1995) (No. 93-1911).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Sandin*, 515 U.S. at 475–76, 488. Conner was charged in a prison disciplinary proceeding "with 'high misconduct' for using physical interference to impair a correctional function, and 'low moderate misconduct' for using abusive or obscene language and for harassing employees." *Id.* at 475. Conner was present at the hearing and contested all charges, but no prison staff testified at the hearing and the committee relied entirely on the officers' written statements. Conner was not permitted to call staff witnesses. *Id.* at 488 (Ginsburg, J., dissenting).

⁴⁵⁷ *Conner v. Sakai*, 994 F.2d 1408, 1410 (9th Cir. 1993), *opinion amended and superseded*, 15 F.3d 1463 (9th Cir. 1993), *rev'd sub nom. Sandin v. Conner*, 515 U.S. 472 (1995), *and amended in part, vacated in part*, 61 F.3d 751 (9th Cir. 1995).

The Supreme Court granted review to address whether and what process was due when prison officials disciplined prisoners.⁴⁵⁸

Once again, the Justices' questions at oral argument offered hypotheticals far afield from what the record reflected had happened to Conner. For example, Justice Sandra Day O'Connor asked if prisoners could invoke the Due Process Clause "when the prison decides somebody's too much of a risk to have a tray with a hot lunch" and gets a "sack lunch" instead,⁴⁵⁹ or whether "not allowing prisoners to watch violent television programs" would be "stuff" that prisoners would bring to federal court.⁴⁶⁰

The oral argument forecast the result. For the majority, Chief Justice Rehnquist stepped back from the Court's reading of Pennsylvania's regulations in *Hewitt v. Helms* and held that neither Hawaii prison regulations nor the Due Process Clause "afforded Conner a protected liberty interest" that required procedural protections before placement in disciplinary segregation.⁴⁶¹ Moreover, the Court expressly disavowed the "dicta" Conner had cited: that "freedom from punitive segregation for serious misconduct implicates a liberty interest."⁴⁶²

Rather, the "regime" of disciplinary segregation fell "within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life"⁴⁶³ (whose "normal" expectations were neither defined nor sourced). While the discipline was "punitive," it was not "a dramatic departure from the basic conditions of" the sentence,⁴⁶⁴ and it would not "inevitably affect the duration of his sentence."⁴⁶⁵ Although some ambiguity exists given that the Court referenced state law, its discussion identified a constitutionally protected interest when the three factors (conditions, duration, and effect on release) were combined. As a matter of federal constitutional liberty protections, process was due when prisons imposed an "atypical and significant hardship on the inmate in relation to the

⁴⁵⁸ *Sandin v. Conner*, 513 U.S. 921 (1994) (granting certiorari but "limited to Question 1 presented by the petition"); see Petition for Writ of Certiorari at *1, *Sandin v. Conner*, 515 U.S. 472 (1995) (No. 93-1911).

⁴⁵⁹ Transcript of Oral Argument at 32, *Sandin v. Conner*, 515 U.S. 472 (1995) (No. 93-1911) [hereinafter Transcript of Oral Argument, *Sandin v. Conner*]. Justice Breyer discussed this issue of line-drawing in his dissent, stating that it seemed possible for judges to use their judgment "to separate less significant matters . . . from more significant matters." *Sandin*, 515 U.S. at 500 (Breyer, J., dissenting).

⁴⁶⁰ Transcript of Oral Argument, *Sandin v. Conner*, *supra* note 459, at 33.

⁴⁶¹ *Sandin*, 515 U.S. at 487.

⁴⁶² *Id.* at 485–86 (internal quotation marks omitted).

⁴⁶³ *Id.* at 487.

⁴⁶⁴ *Id.* at 485.

⁴⁶⁵ *Id.* at 487.

ordinary incidents of prison life.”⁴⁶⁶ This formulation has become the basis for hundreds of decisions in the lower courts that, as we discuss below, invoke the “ordinary” as if prison were a natural phenomenon rather than the construction of law.

Again, the dissenters protested. Justice Ginsburg, joined by Justice Stevens, reiterated what Justice Stevens said in *Meachum*—that liberty was not a creature of state or federal law but was protected by the Constitution.⁴⁶⁷ Further, because the majority had provided no “examples” of its “key words” of “atypical and significant hardship,” it left “consumers of the Court’s work at sea.”⁴⁶⁸ Justice Breyer, joined by Justice David Souter, shared Justice Ginsburg’s critiques and pointed to the radical differences between the regime of disciplinary segregation and that of other prisoners in the same prison. Regular prisoners were presumptively out of their cells “for eight hours each day,” while people in solitary spent their “entire time alone . . . [except for] 50 minutes . . . on average for brief exercise and shower[s],” during which they were “constrained by leg irons and waist chains.”⁴⁶⁹ As for the “difficult line-drawing” imposed by the majority’s analysis,⁴⁷⁰ Justice Breyer insisted that lower courts could “separate the unimportant from the potentially significant.”⁴⁷¹

2. *Baselines, Significance, and Typicality*

Sandin v. Conner involved a person placed into isolation for thirty days. A decade after that decision, the Court directly considered long-term solitary confinement in *Wilkinson v. Austin*.⁴⁷² As the unanimous decision written by Justice Kennedy recounted, Ohio’s Supermax could hold more than 500 people indefinitely. By the time the case was before the Supreme Court, the Ohio prisoners’ Eighth Amendment claims had been settled—the focus was on the procedures for placing individuals in solitary rather than the constitutionality of the practice itself.⁴⁷³

⁴⁶⁶ *Id.* at 484.

⁴⁶⁷ *Id.* at 489–90 (Ginsburg, J., dissenting).

⁴⁶⁸ *Id.* at 490 n.2.

⁴⁶⁹ *Id.* at 494 (Breyer, J., dissenting).

⁴⁷⁰ *Id.* at 497.

⁴⁷¹ *Id.* at 500.

⁴⁷² 545 U.S. 209 (2005).

⁴⁷³ *Id.* at 213–14, 218. The Court stated that those claims were “settled in the District Court,” although “[t]he extent to which the settlement resolved the practices that were the subject of the inmates’ Eighth Amendment claim [was] unclear.” *Id.* at 218. The Sixth Circuit reported that the settlement dealt with “Eighth Amendment claims[] related primarily to medical care and the provision of outdoor recreation.” *Austin v. Wilkinson*, 372 F.3d 346, 349 (6th Cir. 2004). The settlement required that Ohio establish policies that barred placement of seriously mentally ill people at the State’s Supermax, improved

When assessing whether any process was due, the Court’s opinion detailed solitary’s horrors, even as it seemed to bolster its legitimacy through discussion of the fearsomeness of incarcerated people and the fragility of prison security. Conditions in Ohio’s Supermax were described as

more restrictive than any other form of incarceration in Ohio [A]lmost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on . . . at all times, . . . and an inmate who attempts to shield the light to sleep is subject to further discipline [The] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone [I]nmates are deprived of almost any environmental or sensory stimuli and of almost all human contact for an indefinite period of time, limited only by an inmate’s sentence.⁴⁷⁴

Nonetheless, according to the Court, “[p]rolonged confinement in Supermax may be the State’s only option for the control of some inmates,”⁴⁷⁵ as it described Ohio’s prisons as “imperiled by the brutal reality of prison gangs[;] . . . [c]landestine, organized, fueled by race-based hostility, and committed to fear and violence.”⁴⁷⁶

Yet the Court also registered some qualms by holding that the Fourteenth Amendment at times required prison officials to ensure the fairness of their decision to put a person into this form of solitary confinement. The Court’s gruesome details of Ohio Supermax’s conditions—where “almost all human contact is prohibited”—coupled with its potentially indefinite duration and negative impact on parole, served to explain that people so confined had a “liberty interest” upon which placement in Supermax infringed.⁴⁷⁷ The Court provided factors—conditions, duration, and impact on sentence length—to consider in determining if procedural protections were needed. But the decision did not clarify whether all those elements had to be present, whether the list was exclusive or could be augmented, how to weigh the factors, the sources of information on which to draw, and what baselines to use for comparisons.

and monitored healthcare, and constructed an outdoor recreation space. *Austin v. Wilkinson*, No. 4:01-CV-71, 2002 WL 32828650, at *1–2 (N.D. Ohio Apr. 5, 2002) (approving settlement agreement).

⁴⁷⁴ *Wilkinson*, 545 U.S. at 214–15.

⁴⁷⁵ *Id.* at 229.

⁴⁷⁶ *Id.* at 227. In contrast, none of the Justices in *Wilkinson* discussed the harms of long-term isolation that health care professionals explained in their amici filing. See Brief of Professors & Practitioners of Psychology & Psychiatry as *Amicus Curiae* in Support of Respondent at 4, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495).

⁴⁷⁷ *Wilkinson*, 545 U.S. at 223–24.

Indeed, noting “the difficulty of locating the appropriate baseline,” Justice Kennedy concluded that the Court did not have to resolve the issue because Ohio’s Supermax imposed “an atypical and significant hardship under any plausible baseline.”⁴⁷⁸ *Wilkinson* thus appeared to recognize a federal liberty interest (predating the Constitution or sourced in it) in being free from almost total sensory deprivation for an indefinite period that could affect the timing of a person’s release from prison.

To summarize more than fifty years of Supreme Court assessments of prison conditions, the Court has classified a series of prison officials’ decisions that impose additional adversity on prisoners as part of incarceration. The current parameters of what prison entails, according to the Court, are first, that transfers are not “atypical and significant hardships,” even though corrections regulations term them “adverse” or “significant,” and lower courts had chronicled their harmful impacts. Second, thirty days in isolation and exercise with irons and chains for a person with an indeterminate sentence, in conditions like the *Sandin* court described for prisoners in Halawa Correctional Facility, was not atypical. Third, per *Wilkinson*, potentially indefinite confinement in Ohio’s Supermax version of isolation, which both undermined opportunities for parole and entailed profound sensory deprivation, was atypical.

Below, we document that, as Justice Ginsburg flagged in her *Sandin* dissent, the Court’s case law left litigants and judges with few markers to direct them when ascribing typicality to some practices and finding others “atypical and significant hardship[s].” The questions are many, yet the troubling result is, to return to Justice Ginsburg’s metaphor, a sea of lower court decisions tolerating profound isolation.

3. *Mining Hundreds of Solitary Confinement Rulings*

To learn how judges have responded to the many questions left open by *Sandin* and *Wilkinson*, we searched case law databases for opinions that assessed claims of solitary confinement and used the phrase “atypical and significant hardship.” An initial pull of cases in the lower federal courts from 1995 (when *Sandin* was decided) until the end of 2019 produced a total of some 9,350 decisions in the Westlaw database.⁴⁷⁹ Caveats are immediately in order, in that neither Westlaw nor Lexis put all district and circuit court

⁴⁷⁸ *Id.* at 223.

⁴⁷⁹ Using Westlaw, we entered the following search string: adv: (atypical! /s significant!) AND (“solitary confinement” OR “segregated confinement” OR “adseg” OR “keeplock” OR “special housing unit” OR “SHU” OR “restrictive housing” OR “administrative segregation” OR “protective”). We limited the search to decisions from January 1, 1995 through September 1, 2019. Those terms generally refer to leaving individuals in small cells for twenty-two or more hours a day.

decisions online, nor were online posting practices uniform across the time period.⁴⁸⁰ The differences in Figures 8a and 8b therefore do not necessarily reflect that certain circuits decided more challenges to solitary confinement than others; the decisions in the database may reflect that circuits have different practices in terms of making cases available online. Thus, Figures 8a and 8b provide a window into this voluminous area of law rather than a definitive account of all cases that were decided during this time period. These numbers are one way to glimpse the hundreds of times that prisoners tried to enlist federal judges to protect them from what they believed were unfairly imposed in-prison punishments.

In Figures 8a and 8b below, we tally the decisions we found online by circuits, the bulk of which were denominated “unreported” (8,157 at the district court and 572 on appeal), as well as the reported cases (414 at the district court and 207 on appeal). Among us, we read all the published appellate court decisions across all circuits as well as a nonrandom sample of unpublished appellate court rulings and a selection of recent lower court decisions to confirm that we had found the relevant decisions in each circuit.

⁴⁸⁰ We contacted both Westlaw and LexisNexis to learn more about their processes for determining which opinions are available in the database. Westlaw informed us that the process is “governed by agreements that we have with the courts,” while Lexis identified user requests, internal organizational guidelines, Shepard’s editors, and competitor benchmarking as the key drivers that shape its process. Emails from Westlaw and LexisNexis to Michael VanderHeijden, Head of Reference & Lecturer in Legal Research, Yale Law Sch. (Apr. 23, 2020) (on file with authors); *see also* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 & n.138 (2007).

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FIGURE 8A: VOLUME OF FEDERAL DISTRICT COURT DECISIONS ADDRESSING ATYPICAL AND SIGNIFICANT HARDSHIPS AND SOLITARY CONFINEMENT BY CIRCUIT, 1995–2019

Circuit	Reported	Unreported	Total
1st	21	90	111
2d	174	1015	1189
3d	39	749	788
4th	21	830	851
5th	10	1171	1181
6th	20	703	723
7th	34	442	476
8th	12	539	551
9th	35	1824	1859
10th	25	369	394
11th	7	413	420
D.C.	16	12	28
All Districts	414	8157	8571

FIGURE 8B: VOLUME OF FEDERAL CIRCUIT COURT DECISIONS ADDRESSING ATYPICAL AND SIGNIFICANT HARDSHIPS AND SOLITARY CONFINEMENT BY CIRCUIT, 1995–2019

Circuit	Reported	Unreported	Total
1st	6	4	10
2d	44	52	96
3d	15	76	91
4th	9	10	19
5th	14	61	75
6th	12	94	106
7th	24	33	57
8th	26	18	44
9th	26	100	126
10th	19	99	118
11th	5	18	23
D.C.	7	7	14
All Circuits	207	572	779

In most of the decisions we read, correctional departments sought dismissal or summary judgment, and many of the rulings were about whether a case can proceed. When assessing the pleadings and limited records, circuits varied considerably in their interpretation of what *Sandin/Wilkinson* instructs them to do. Some opinions treated aspects of the inquiry as questions of fact, while others considered the issues mixed fact and law, or legal issues. Further, some courts either equated atypical with “extreme” or “severe” conditions or imposed the additional requirement that prisoners demonstrate their conditions were “extreme” or “severe.”⁴⁸¹ Moreover, to describe the “law” of a circuit requires another caveat because variation exists over time and by panels.

Central to *Wilkinson* was the potentially indefinite confinement, as distinguished from the presumptively fixed term of thirty days in *Sandin*, for which no process was due. Hence, we tried to trace the duration of confinement in the body of cases we identified. These opinions do not reference empirical research about the impact of isolation on humans, nor do they discuss the frequency and length of time people were placed in solitary either around the country or in particular jurisdictions. These decisions also do not address time frames for isolation set forth in state statutes and regulations or in the standards of professional organizations such as the American Correctional Association and in international provisions.

Such resources are now plentiful. For example, in 2015, after an essay he wrote that described the experience of being held in isolation for about twenty-four hours was published, the Director of the Department of Corrections of Colorado imposed a cap that has since become a state regulation, placing a fifteen-day limit on holding a person in a cell for twenty-two hours or more per day.⁴⁸² In 2018, Massachusetts required that “prisoners held in restrictive housing for a period of more than 60 days” were to be provided with “access to vocational, educational and rehabilitative programs to the maximum extent possible.”⁴⁸³ A 2019 statute in New Jersey prohibited “isolated confinement for more than 20 consecutive days, or for more than 30 days during any 60-day period.”⁴⁸⁴

⁴⁸¹ See, e.g., *Incumaa v. Stirling*, 791 F.3d 517, 531–32 (4th Cir. 2015); *Joseph v. Curtin*, 410 F. App’x 865, 868 (6th Cir. 2010); *Estate of DiMarco v. Wyo. Dep’t of Corr., Div. of Prisons*, 473 F.3d 1334, 1342 (10th Cir. 2007).

⁴⁸² See Colo. Dep’t of Corr., Reg. No. 650-03, at 2 (effective Mar. 15, 2020), available at <https://www.colorado.gov/pacific/cdoc/policies-1> [<https://perma.cc/N4X3-78J2>] (“Restrictive housing may only be imposed as a condition of confinement for up to a maximum of 15 consecutive days.”).

⁴⁸³ MASS. GEN. LAWS ANN. ch. 127, § 39E (West 2018).

⁴⁸⁴ N.J. STAT. ANN. § 30:4-82.8(a)(9) (West 2020). For a compendium of proposed and enacted statutes, see ARIANNA ZOGHI, ALEXANDRA HARRINGTON, JUDITH RESNIK & ANNA VANCLEAVE, THE

National and transnational standards likewise have set benchmarks and, in some instances, have called for the abolition of isolation beyond fifteen days. In Canada, the Ontario Court of Appeal held in 2019 that long term solitary confinement was unconstitutional and approved a fifteen-day cap on placements in solitary.⁴⁸⁵ In 2016, the American Correctional Association adopted new standards for accreditation that labeled confinement lasting more than thirty days “extended restrictive housing,”⁴⁸⁶ and stated that prisoners in extended restrictive housing should be given access to certain services and programs.⁴⁸⁷ In 2015, the U.N. adopted the Nelson Mandela Rules, which sought to prohibit what it termed to be “[p]rolonged solitary confinement,”⁴⁸⁸ defined as lasting more than fifteen days.⁴⁸⁹ In addition, data from the ASCA/Liman surveys identified that 80% of the people held, as of the fall of 2017, spent a year or less in solitary confinement.⁴⁹⁰

Instead of routinely turning to these regulations or other sources, federal courts recount the days, months, or years a person has been confined and

LIMAN CTR. AT YALE LAW SCH., REGULATING RESTRICTIVE HOUSING: STATE AND FEDERAL LEGISLATION ON SOLITARY CONFINEMENT AS OF JULY 1, 2019 (2019), https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf [<https://perma.cc/VPB3-JBDG>].

⁴⁸⁵ The Canadian Press, *Ontario Court of Appeal Rules More than 15 Days in Solitary ‘Cruel and Unusual,’* CBC (Mar. 28, 2019, 7:05 PM), <https://www.cbc.ca/news/canada/toronto/ontario-court-of-appeal-puts-limits-on-solitary-confinement-1.5076169> [<https://perma.cc/LMD9-ZR4H>]. In April 2020, the press reported that the Canadian federal government decided not to pursue an appeal of this decision. See Patrick White, *Canada Abandons Solitary Confinement Appeal to Supreme Court*, GLOBE & MAIL (Apr. 21, 2020), <https://www.theglobeandmail.com/canada/article-canada-abandons-solitary-confinement-appeal-to-supreme-court/> [<https://perma.cc/4Q49-B7Y3>].

⁴⁸⁶ AM. CORR. ASS’N, RESTRICTIVE HOUSING PERFORMANCE BASED STANDARDS 3 (2016), http://www.aca.org/aca_prod_imis/docs/Standards%20And%20Accreditation/RHStandards2016.pdf [<https://perma.cc/EWQ3-SEQA>] [hereinafter ACA STANDARDS].

⁴⁸⁷ See *id.* at 32 (ACA Standard 4-RH-0027 for prisons); *id.* at 62 (ACA Standard 4-ALDF-RH-021 for local detention facilities). The ACA 2016 standards also called for not using restrictive housing for people under age eighteen, *id.* at 39 (ACA Standard 4-RH-0034 for prisons); *id.* at 66 (ACA Standard 4-ALDF-RH-025 for local detention facilities); for pregnant women, *id.* at 38 (ACA Standard 4-RH-0033 for prisons); *id.* at 65 (ACA Standard 4-ALDF-RH-024 for local detention facilities); and for people with “serious mental illness,” *id.* at 36 (ACA Standard 4-RH-0031 for prisons); *id.* at 69 (ACA Standard 4-ALDF-RH-028 for local detention facilities). The standards also called on correctional facilities not to place people in restrictive housing solely based on their gender identity. *Id.* at 40 (ACA Standard 4-RH-0035 for prisons); *id.* at 68 (ACA Standard 4-ALDF-RH-027 for local detention facilities).

⁴⁸⁸ Nelson Mandela Rules, *supra* note 194, at 13. Rule 43 states that “[i]n no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment,” and that both “indefinite” and “prolonged” solitary confinement are “prohibited,” as well as placement in a constantly lit or dark cell, corporal punishment, food and drinking water reductions, collective punishments, punitive chaining and shackling, and prohibiting contact with family as a punishment. *Id.* at 13–14.

⁴⁸⁹ *Id.* at 14 (Rule 44).

⁴⁹⁰ See *supra* Figure 2.

then use underspecified criteria to determine whether that length of time contributes to, represents, or fails to constitute an “atypical and significant hardship.” The opinions demonstrate that federal judges have a high tolerance for permitting individuals to be isolated for years and decades, and most circuits provide little explication of how long is too long.

The Second Circuit has established some time frames through a series of rulings, creating benchmarks of 30, 101, and 305 days. In 1999, in *Sealey v. Giltner*, that court held that placement for 101 days in the Special Housing Unit (SHU) of New York’s Auburn Correctional Facility did not, in and of itself, constitute an atypical and significant hardship requiring procedural protection.⁴⁹¹ Other Second Circuit opinions have since invoked this decision for the standard that “restrictive confinements of less than 101 days do not generally raise a liberty interest warranting due process protection, and thus require proof of conditions more onerous than usual” to warrant procedural protections.⁴⁹²

The Second Circuit has also concluded that an individual who spent 305 days or more in a special housing unit (SHU), under what the court termed “normal SHU conditions,” had spent a period of time that was “a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*.”⁴⁹³ Between 101 and 305 days, the Second

⁴⁹¹ See 197 F.3d 578, 580, 589–90 (2d Cir. 1999).

⁴⁹² *Smith v. Arnone*, 700 F. App’x 55, 56 (2d Cir. 2017) (summary order) (quoting *Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009) (per curiam)). The Second Circuit has generally treated the question of what conditions are more onerous than usual as a factual question for the district court to adjudicate based on “a detailed record.” *Palmer v. Richards*, 364 F.3d 60, 64–65 (2d Cir. 2004) (quoting *Colon v. Howard*, 215 F.3d 227, 232 (2d Cir. 2000)); see also *Davis*, 576 F.3d at 135. The court may have considered the conditions alleged by Samuel Ed Davis to be especially onerous. They included twenty-four-hour confinement in a cell that flooded daily, a mattress containing “body waste,” and other prisoners throwing feces and urine. *Id.* at 134. But the court in that case did not decide whether such conditions qualified as “atypical and significant” because the district court had not developed a factual record detailed enough to determine whether it differed from conditions in the general population or in administrative segregation. *Id.* at 133, 135.

⁴⁹³ *Colon*, 215 F.3d at 231. Armando Colon had spent 305 consecutive days in disciplinary confinement in two New York State prisons, Clinton Correctional Facility and Attica Correctional Facility. *Id.* at 229. In a portion of his *Colon* panel opinion that did not garner a majority, Judge Jon Newman proposed “establishing a bright-line rule that confinement in normal SHU conditions of more than 180 days meets the *Sandin* standard.” *Id.* at 232. He argued that doing so would give guidance to prison officials and limit the need for litigation. *Id.* at 233. Judge John Walker objected, writing that the proposed cutoff was “not arrived at by adjudication but by legislative fiat.” *Id.* at 235 (Walker, J., concurring). *Colon* has since been invoked as setting 305 days as a marker triggering procedural protections. See *Reynoso v. Selsky*, 292 F. App’x 120, 122–23 (2d Cir. 2008) (summary order) (citing *Colon*, 215 F.3d at 231–32).

Circuit has on occasion called for the “development of a detailed record”⁴⁹⁴ that could include “evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations.”⁴⁹⁵

The Second Circuit has also concluded that, in general, spending between 30 and 101 days in solitary confinement is not in and of itself “atypical and significant,” absent evidence that the conditions were worse than what the court called “normal SHU conditions” or “that even relatively brief confinements under normal SHU conditions were, in fact, atypical.”⁴⁹⁶ In such cases, the circuit has sometimes remanded for “a ‘detailed factual record.’”⁴⁹⁷ If a person is confined for less than thirty days—a period the Second Circuit has called “exceedingly short”⁴⁹⁸—then the court has generally affirmed lower courts’ dismissals of due process claims without requiring a “detailed factual record,”⁴⁹⁹ unless some information suggested that a prisoner “endured unusual SHU conditions.”⁵⁰⁰

The inquiry into “unusual SHU conditions” entails some idea of “normal” solitary confinement. In its 2000 decision in *Colon*, the Second Circuit relied on New York State’s prison regulations to conclude that “the normal conditions of SHU confinement in New York”⁵⁰¹ included a person being

placed in a solitary confinement cell, kept in his cell for 23 hours a day, permitted to exercise in the prison yard for one hour a day, limited to two showers a week, and denied various privileges available to general population prisoners, such as the opportunity to work and obtain out-of-cell schooling.

⁴⁹⁴ *Colon*, 215 F.3d at 232; see, e.g., *Welch v. Bartlett*, 196 F.3d 389, 393–95 (2d Cir. 1999); *Brooks v. DiFasi*, 112 F.3d 46, 48–49 (2d Cir. 1997); see also *Reynoso*, 292 F. App’x at 123; *Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir. 2000) (“[W]e have characterized segregative sentences of 125 [to] 288 days as ‘relatively long,’ and thus necessitating ‘specific articulation of . . . factual findings’ before the district court could properly term the confinement atypical or insignificant.” (citations omitted) (alterations omitted)).

⁴⁹⁵ *Colon*, 215 F.3d at 232. When there is no dispute about the relevant facts, the court has remanded to district courts to make “particularized findings.” *Id.*; see also *Welch*, 196 F.3d at 393–95.

⁴⁹⁶ *Davis*, 576 F.3d at 133 (quoting *Palmer*, 364 F.3d at 65). For confinements between 30 and 101 days, district courts must also “conduct a thorough comparison of the alleged conditions of . . . confinement with those of the general population.” *Id.* at 135.

⁴⁹⁷ *Id.* (quoting *Palmer*, 364 F.3d at 65).

⁴⁹⁸ *Palmer*, 364 F.3d at 65–66.

⁴⁹⁹ *Id.* (citing *Hynes v. Squillace*, 143 F.3d 653, 658–59 (2d Cir. 1998) (per curiam), cert. denied, 525 U.S. 907 (1998) (twenty-one days)); see also *Arce v. Walker*, 139 F.3d 329, 335–36 (2d Cir. 1998) (eighteen days); *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996) (per curiam) (twelve days).

⁵⁰⁰ *Palmer*, 364 F.3d at 65–66.

⁵⁰¹ *Colon v. Howard*, 215 F.3d 227, 230 (2d Cir. 2000) (citation omitted).

Visitors were permitted, but the frequency and duration was less than in general population. The number of books allowed in the cell was also limited.⁵⁰²

Those confined for less than 101 days had to demonstrate conditions more severe than the rules provided to establish an atypical and significant hardship.

Some decisions of the Ninth Circuit have also focused on the length of time in isolation. For example, a 2014 decision concluded that twenty-seven months in isolation with “no meaningful review” constituted an atypical and significant hardship.⁵⁰³ A 2020 decision, *Mizzoni v. Nevada*, followed and relied on the duration of confinement—eighteen months—as the linchpin of a liberty interest if, as alleged, that term was “functionally unreviewable.”⁵⁰⁴

Other appellate courts have tolerated periods of isolation calculated not in days or months but in years. For example, the Tenth Circuit has addressed thirteen,⁵⁰⁵ seventeen,⁵⁰⁶ and twenty years⁵⁰⁷ in solitary confinement and has not required procedural protections. Moreover, an indefinite term in solitary, if coupled with “periodic placement reviews,” did not require due process protections.⁵⁰⁸

A parallel approach can be found in two decisions of the Seventh Circuit, which held in 1997 and again in 2003 that “[t]he length of disciplinary segregation does not implicate a federally protected liberty interest even if the period extends for the entire term of incarceration.”⁵⁰⁹ Applying this rule, the court declined to find that liberty interests required due process protections when a prisoner faced a nine-year term in solitary confinement.⁵¹⁰ After the 2005 *Wilkinson* decision, the circuit shifted

⁵⁰² *Id.* (citation omitted).

⁵⁰³ *Brown v. Or. Dep’t of Corr.*, 751 F.3d 983, 987–88 (9th Cir. 2014).

⁵⁰⁴ 795 F. App’x 521, 521–22, (9th Cir. 2020).

⁵⁰⁵ *Rezaq v. Nalley*, 677 F.3d 1001, 1007, 1016 (10th Cir. 2012).

⁵⁰⁶ *Grissom v. Werholtz*, 524 F. App’x 467, 469, 474 (10th Cir. 2013).

⁵⁰⁷ *Grissom v. Roberts*, 902 F.3d 1162, 1166, 1170–72 (10th Cir. 2018).

⁵⁰⁸ *Stallings v. Werholtz*, 492 F. App’x 841, 845–46 (10th Cir. 2012) (“[I]t is not necessary for us to closely review the process at this stage. The availability of periodic reviews merely suggests that the confinement was not indefinite.” (quoting *Rezaq*, 677 F.3d at 1016)). Such placement reviews may take place as infrequently as twice a year. *See Rezaq*, 677 F.3d at 1016.

⁵⁰⁹ *Hernandez v. Hanks*, 65 F. App’x 72, 74 (7th Cir. 2003) (citing *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997)).

⁵¹⁰ At the time of the Seventh Circuit’s decision, Rosalio Hernandez was facing a nine-year term in solitary confinement. The court noted that Hernandez’s prison term was “projected to end in 2054.” *See id.* at 73. Under the *Wagner* rule, Hernandez would therefore have no liberty interest even if he were held in solitary confinement for fifty-six years; Hernandez had already been in solitary for five years when the opinion was published. Thomas “Wagner[] was ordered to serve a year in disciplinary segregation in the Wabash Valley Correctional Institution, in Indiana.” *Wagner*, 128 F.3d at 1174.

somewhat.⁵¹¹ For example, writing that the “Supreme Court’s decisions are helpful in setting out the durational parameters of a prison-segregation due process analysis,” the Seventh Circuit held that 240 days in solitary confinement could be “sufficiently long to implicate a cognizable liberty interest if the conditions of confinement during that period were sufficiently severe.”⁵¹²

Aside from the Second and Ninth Circuits, most appellate cases have not used the length of time alone to constitute an atypical and significant hardship.⁵¹³ For example, in a 1998 (pre-*Wilkinson*) ruling, the Sixth Circuit

⁵¹¹ See, e.g., *Kervin v. Barnes*, 787 F.3d 833 (7th Cir. 2015). In *Kervin*, the court stated that a duration of confinement “considerably shorter” than six months “may, depending on the conditions of confinement and on any additional punishments, establish a violation,” *id.* at 836, and that judges who believe terms of less than six months can never trigger due process “may be unfamiliar with the nature of modern prison segregation and the psychological damage that it can inflict,” *id.* at 837. Shane Kervin was incarcerated at “an Indiana prison.” *Id.* at 834.

⁵¹² *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 694, 697 (7th Cir. 2009).

⁵¹³ Time is assessed in relationship to other factors. In the Eleventh Circuit, for example, a term of less than a year in solitary confinement generally has not qualified unless the conditions of confinement are substantially worse. See, e.g., *Simpkins v. Gulf CI Warden*, No. 16-17386-E, 2017 WL 6034508, at *3 (11th Cir. Apr. 21, 2017); *Mathews v. Moss*, 506 F. App’x 981, 983 (11th Cir. 2013); *Walker v. Grable*, 414 F. App’x 187, 188 (11th Cir. 2011); *Young v. Rios*, 390 F. App’x 982, 983–84 (11th Cir. 2010); *Smith v. Reg’l Dir. of Fla. Dep’t of Corr.*, 368 F. App’x 9, 13 (11th Cir. 2010); *Shaarbay v. Palm Beach Cty. Jail*, 350 F. App’x 359, 361–62 (11th Cir. 2009); *Thomas v. Warner*, 237 F. App’x 435, 438 (11th Cir. 2007).

The court has held that over 100 days in solitary confinement with revoked visiting privileges, curtailed television and library privileges, and a special management meal triggered due process. See *Spaulding v. Woodall*, 551 F. App’x 984, 985–87 (11th Cir. 2014). The court has also found that two years in administrative segregation with no hearings and severe hardships (vermin in the cell, little recreation, and unhygienic shower conditions) may trigger due process. *Quintanilla v. Bryson*, 730 F. App’x 738, 745, 747 (11th Cir. 2018). But the court in an earlier case held that while a “four-year confinement in administrative segregation was lengthy, it did not tip the balance in favor of establishing a liberty interest when weighed against other factors in his case—the conditions of his confinement were generally equivalent to general prison population conditions.” *Morefield v. Smith*, 404 F. App’x 443, 446 (11th Cir. 2010).

Similarly, the Fourth Circuit looks at a combination of duration and specific conditions to determine what constitutes an atypical and significant hardship. Though it has not established a temporal baseline, its opinions have found in certain cases that around six months in administrative segregation does not implicate a protected liberty interest. See *Beverati v. Smith*, 120 F.3d 500, 501–02 (4th Cir. 1997); see also *Martin v. Duffy*, 858 F.3d 239, 253–54 (4th Cir. 2017) (finding that a 110-day stay in segregation did not constitute atypical and significant hardship), *cert. denied sub nom. Duffy v. Martin*, 138 S. Ct. 738 (2018). Nor did a six-year stay in solitary on death row constitute atypical and significant hardship. See *Prieto v. Clarke*, 780 F.3d 245, 247 (4th Cir. 2015). But a twenty-year stay in security detention, combined with severe conditions, did constitute an atypical and significant hardship. See *Incumaa v. Stirling*, 791 F.3d 517, 531 (4th Cir. 2015) (finding that a twenty-year confinement to security detention was “extraordinary in its duration and indefiniteness”).

The District of Columbia Circuit similarly has not found terms of confinement (that were not indefinite) to qualify unless accompanied by a deprivation that is sufficiently severe. See, e.g., *Hatch v.*

held that it was “not ‘atypical’” for a prisoner to be in segregation for 2.5 years when being investigated as a participant in a riot in which a prison guard died. The court concluded that, although that duration was unusually long, the time in segregation did not give rise to a liberty interest because the confinement was “not much different than that experienced by other inmates in segregation.”⁵¹⁴

On occasion, an extraordinary length of time has moved appellate courts to vary from this approach. In 2014, in *Wilkerson v. Goodwin*, the Fifth Circuit concluded that the thirty-nine years that Albert Woodfox spent in solitary confinement at the Louisiana State Penitentiary constituted an atypical and significant hardship.⁵¹⁵ Whether compared “to other inmates in the general population, other inmates in segregated confinement within the Louisiana system as a whole, or other inmates serving life sentences,” Woodfox’s confinement could not “be classified as ‘ordinary’ according to any measure.”⁵¹⁶ But within that circuit, lower courts have not relied on this decision to classify shorter forms of “long-term segregation” as an atypical and substantial hardship.⁵¹⁷

In addition to inter-circuit variation, the case law of some circuits does not permit generalizations. For example, in three unreported per curiam decisions in the Eighth Circuit, the court held that spending four years, twelve years, and thirteen years in segregated confinement qualified as

District of Columbia, 184 F.3d 846, 858 (D.C. Cir. 1999); *Neal v. District of Columbia*, 131 F.3d 172, 175 (D.C. Cir. 1997).

⁵¹⁴ *Jones v. Baker*, 155 F.3d 810, 812–13 (6th Cir. 1998).

⁵¹⁵ 774 F.3d 845, 856 (5th Cir. 2014). Woodfox provides a vivid account of his experiences in his book. See WOODFOX, *supra* note 14.

⁵¹⁶ *Wilkerson*, 774 F.3d at 856 (citation omitted). The Fifth Circuit has rejected other challenges to prolonged confinement. For example, the Fifth Circuit found that Marjan Rroku’s 513-day confinement did not trigger due process concerns because he did not show that it was significantly different from the general population. See *Rroku v. Cole*, 726 F. App’x 201, 202, 205 (5th Cir. 2018). He had alleged that the confinement included “cold, noise, dirt, no showers, no recreation, no law library access, non-stop light, a liquid diet, and improper medical care” that resulted in Rroku’s development of life-threatening and irreversible medical conditions. See *Rroku v. Cole*, No. 1:15-cv-000294, 2016 WL 4821137, at *1 (W.D. La. Aug. 11, 2016).

⁵¹⁷ See *Gray v. King*, No. 3:17-cv-385-CWR-LRA, 2019 WL 3756482, at *2 (S.D. Miss. May 17, 2019). Depriest Gray, held in Central Mississippi Correctional Institution, alleged that he was placed in solitary confinement for a year, which, in addition to isolation, caused him to “los[e] several privileges, including the right to use athletic and recreational facilities”; “to walk around the prison”; “to perform general work detail”; “to access the library”; “have contact visitation”; or “attend worship services allowed to the general population.” *Id.* at *1. Gray also alleged “that for the first two weeks in segregation, he was provided no clothes.” *Id.* The magistrate judge recommended that his complaint, filed pro se, be “dismissed as frivolous.” *Id.* at *2. No party filed objections and the district court adopted the recommendation. See *Gray v. King*, No. 3:17-cv-385-CWR-LLRA, 2019 WL 3754918, at *1 (S.D. Miss. Aug. 8, 2019).

atypical and significant hardships.⁵¹⁸ Yet reported decisions in the same circuit offered the formulation that “administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*.”⁵¹⁹ Indeed, in these decisions, the Eighth Circuit did not focus on the time spent but called instead on a prisoner to identify “some specific difference between his conditions in segregation and the conditions in the general population which amounts to such a hardship.”⁵²⁰

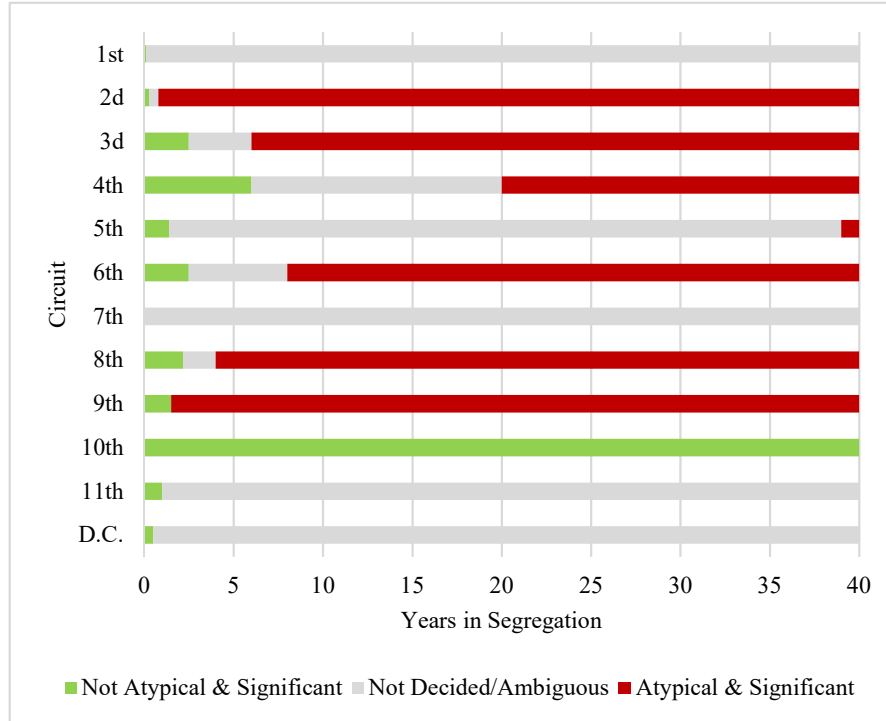
To capture some of the variation, Figure 9 charts the range of time and case law in different circuits. The bars on the left represent durations that each court of appeals has deemed not to be in and of itself an atypical and significant hardship. The bars on the right show the durations that the courts have decided require due process protections. The middle portions denote durations that circuits have not addressed or where the law is ambiguous.

⁵¹⁸ See *Chestang v. Varner Super Max*, 496 F. App'x 684, 686 (8th Cir. 2013) (per curiam) (“almost four years” in either administrative segregation or “the prison’s behavior modification program”); *Williams v. Norris*, 277 F. App'x 647, 648–49 (8th Cir. 2008) (per curiam) (twelve years in administrative segregation); *Herron v. Schriro*, 11 F. App'x 659, 661–62 (8th Cir. 2001) (per curiam) (affirming district court finding, after trial, that more than thirteen years in administrative segregation was an atypical and significant hardship under *Sandin*).

⁵¹⁹ *Portley-El v. Brill*, 288 F.3d 1063, 1065 (8th Cir. 2002).

⁵²⁰ *Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006) (citing *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003)). For example, the court has found that twenty-six months in administrative segregation does not qualify as atypical and significant. See *Rahman X v. Morgan*, 300 F.3d 970, 972 (8th Cir. 2002).

FIGURE 9: VARYING EVALUATIONS OF THE IMPACT OF THE TIME SPENT WHEN CIRCUITS ASSESS ATYPICAL AND SIGNIFICANT HARDSHIPS



Another potential marker under *Sandin* and *Wilkinson* is whether placement in some form of disciplinary confinement has an impact on release from prison by altering a prisoner’s parole eligibility, the ability to accrue good-time credits, or otherwise. Not all circuits regularly focus on this issue; directives to do so come from the Seventh, Ninth, and Tenth Circuits. For example, a 1997 ruling by the Seventh Circuit concluded that a liberty interest existed, and hence that procedural protections were required, if prison discipline “takes the form of prolonging the prisoner’s incarceration,”⁵²¹ such as causing the loss of good-time credits.⁵²²

Similarly, the Ninth Circuit required analysis of “whether the state’s action will invariably affect the duration of the prisoner’s sentence,”⁵²³ along with consideration of the two other *Sandin* factors: “the duration of the

⁵²¹ *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997).

⁵²² *See, e.g., Castro v. Hastings*, 74 F. App’x 607, 610 (7th Cir. 2003).

⁵²³ *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (citations omitted).

condition, and the degree of restraint imposed” along with “whether the challenged condition ‘mirrored those conditions imposed upon inmates in administrative segregation and protective custody.’”⁵²⁴ The Tenth Circuit also called for inquiry into whether “the placement increases the duration of confinement,” along with consideration of whether “the segregation relates to and furthers a legitimate penological interest,” whether “the conditions of placement are extreme,” and whether “the placement is indeterminate.”⁵²⁵ A Third Circuit decision dealt with a case in which parole had been granted but the person had not been released before being placed for thirty-five days in disciplinary segregation; the court reasoned that parole authorities’ discretion meant that no liberty interest existed and that putting that prisoner into solitary confinement did not impose an atypical and significant hardship.⁵²⁶

Circuits differ on whether conditions alone can constitute an atypical and substantial hardship, the impact of conditions in a multifactor test, and what comparisons to make. What happens inside the cells and the contrast to other forms of incarceration were also relevant in *Wilkinson*, which discussed the profound sensory deprivations of Ohio’s Supermax where lights were on 24/7. As we discussed, *Sandin* ignored the different limits on movement and hygiene imposed on people in solitary as contrasted with those in the general population.⁵²⁷ *Wilkinson*, acknowledging the lack of clarity in the case law on baselines, declined to specify what to use.⁵²⁸

In making comparisons, lower courts sometimes looked at conditions in the general population of the prison where the individual was incarcerated. Other decisions relied on the confinement imposed in the most restrictive confinement in the state. For example, in the 2017 Third Circuit decision of *Williams v. Secretary Pennsylvania Department of Corrections*, the court stated that “[t]he terms ‘ordinary’ and ‘routine’ direct us to use a general metric (the general population).”⁵²⁹ The same year, the Fourth Circuit

⁵²⁴ *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 486 (1995)).

⁵²⁵ *Estate of DiMarco v. Wyo. Dep’t of Corr., Div. of Prisons*, 473 F.3d 1334, 1342 (10th Cir. 2007).

⁵²⁶ *Fantone v. Latini*, 780 F.3d 184, 186–87 (3d Cir. 2015).

⁵²⁷ The Court noted in *Sandin* that “[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State’s actions in placing [the defendant] there for 30 days did not work a major disruption in his environment” in holding that “Conner’s discipline in segregated confinement did not present . . . [an] atypical, significant deprivation.” 515 U.S. at 486.

⁵²⁸ In *Wilkinson*, the Court acknowledged inconsistency among the circuits as to “the baseline from which to measure what is atypical and significant” and concluded that it “need not resolve the issue here.” *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

⁵²⁹ 848 F.3d 549, 564 (3d Cir. 2017). An earlier Third Circuit opinion explained that although it had “not conclusively determined the baseline from which to measure what is ‘atypical and significant’ in any particular prison system, and we do not do so here, we are satisfied that [the prisoner] has not

compared conditions of solitary to those of “the general population.”⁵³⁰ Two years earlier, the Fourth Circuit had, in *Incumaa v. Stirling*, used that reference to conclude that Lumumba Incumaa had demonstrated not only that his confinement to a Special Management Unit (SMU) was “extraordinary in its duration and indefiniteness,” but also that the conditions of his confinement in SMU were “severely restrictive and socially isolating.”⁵³¹ In contrast to individuals in general population, Incumaa was held in a small cell for all but approximately ten hours each month; had been subjected to “near-daily cavity and strip searches”; had no opportunity to socialize with other prisoners; and had no access to “educational, vocational, and therapy programs.”⁵³²

Within circuits, comparisons about conditions can also vary. In the Second Circuit, some opinions have required a comparison between a challenged confinement and conditions within the general population, while others compare conditions to those of individuals in administrative and protective segregation, or to people either within the same facility⁵³³ or

demonstrated that he had a liberty interest that defendants could have infringed.” *Fantone*, 780 F.3d at 189.

The *Williams* case sought damages; Craig Williams, a death row prisoner at SCI-Greene, and Shawn T. Walker, a death row prisoner at SCI Graterford, who both had their death row convictions vacated, argued that officials had “violated their Fourteenth Amendment rights to due process by” subjecting them to solitary confinement “without meaningful review of their placements after their death sentences had been vacated.” The Third Circuit affirmed summary judgment for the defendants on the grounds that prison officials were entitled to qualified immunity. Further, the court noted that the circuit had not fixed on a specific baseline. *Williams*, 848 F.3d at 553, 554, 555, 560. As previously noted, the State agreed to reduce the isolation of individuals with capital sentences in the 2020 approval of the class action settlement in *Reid v. Wetzel*. See Settlement Agreement, *Reid v. Wetzel*, *supra* note 264, at 3.

⁵³⁰ *Martin v. Duffy*, 858 F.3d 239, 253 (4th Cir. 2017) (quoting *Incumaa v. Stirling*, 791 F.3d 517, 528–29 (4th Cir. 2015)). Anthony F. Martin, a prisoner of South Carolina’s Perry Correctional Institution, challenged his placement in solitary confinement on the grounds that it had been in retaliation for filing a grievance. *Id.* at 243. The Fourth Circuit concluded that while Martin had “failed to state claims under the Equal Protection and Due Process Clauses,” he had pleaded sufficient facts alleging a First Amendment violation, and that the defendant prison captain was not entitled to qualified immunity. *Id.*

⁵³¹ 791 F.3d at 521, 528, 531–32. Lumumba Kenyatta Incumaa challenged his placement in solitary confinement for over twenty years, first in the Maximum-Security Unit and then, starting in 2005, the Special Management Unit of the South Carolina Department of Corrections. *Id.* at 519, 521.

⁵³² *Id.* at 531. In 2019, a lower court in the Fourth Circuit denied the defendants’ motion to dismiss the plaintiff’s complaint that solitary confinement at Virginia’s Red Onion State Prison both violated the Eighth Amendment, and gave rise to Fourteenth Amendment due process protections. See *supra* notes 282–283 and accompanying text. The “atypical and significant hardship” imposed included a lack of human contact, the use of shackles and restraints, frequent cavity searches, and restrictions on commissary purchases of food, as compared to conditions of prisoners in general population. *Reyes v. Clarke*, No. 3:18-cv-611, 2019 WL 4044316, at *2, *14–23 (E.D. Va. Aug. 27, 2019).

⁵³³ *Davis v. Barrett*, 576 F.3d 129, 133–34 (2d Cir. 2009); see also *Welch v. Bartlett*, 196 F.3d 389, 392–94 (2d Cir. 1999).

statewide.⁵³⁴ Other circuits have used as comparisons the conditions experienced by prisoners held in administrative segregation either where the prisoner was held or where the state could transfer the prisoner. For example, in a 2016 decision, *Aref v. Lynch*, the D.C. Circuit concluded that, in most cases, judges had to assess conditions imposed on similarly situated prisoners placed in that facility in “administrative segregation.”⁵³⁵ Yet, because it was normally expected for prisoners to be transferred to another prison with more restrictive conditions, the conditions at that more restrictive facility could also be used to provide the relevant comparison to the challenged confinement.⁵³⁶

In *Wagner v. Hanks*, a 1997 decision authored by Judge Posner, the Seventh Circuit adopted a baseline of the conditions experienced by prisoners in the “most restrictive” confinement in the state.⁵³⁷ In contrast, in a 2017 case, Judge Posner commented that it could be atypical and significant for “an elderly prisoner convicted of a nonviolent crime such as bank fraud and serving his prison term in a minimum-security prison[] . . . to be sent to a high-security prison for a trivial disciplinary infraction.”⁵³⁸ Further, Judge Posner clarified that less than six months in solitary confinement should not always be considered an insufficient duration for a claim to be stated (“[a] considerably shorter period of segregation may, depending on the conditions of confinement and on any additional punishments, establish a violation”), and suggested that “[j]udges who lean toward such presumption may be unfamiliar with the nature of modern prison segregation and the psychological damage that it can inflict.”⁵³⁹

In addition to duration, conditions, and impact on release, which were the focus of *Wilkinson*, some circuits impose other requirements. The Tenth Circuit has a four-factor test, focused first on whether “the segregation

⁵³⁴ See *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000).

⁵³⁵ 833 F.3d 242, 255 (D.C. Cir. 2016).

⁵³⁶ See *Hatch v. District of Columbia*, 184 F.3d 846, 857–58 (D.C. Cir. 1999). Donald Hatch, a prisoner at the Lorton Correctional Complex, “filed suit against the District of Columbia in the United States District Court” on the grounds that his solitary confinement “violated the Due Process Clause of the U.S. Constitution as well as D.C. regulations governing Lorton.” *Id.* at 848–49.

⁵³⁷ 128 F.3d 1173, 1176–77 (7th Cir. 1997). The Seventh Circuit noted that “[e]very state must have somewhere in its prison system single-person cells in which prisoners are sometimes confined not because they have misbehaved but simply because the prison has no other space, wishes to protect some prisoners from others, wishes to keep prisoners isolated from one another in order to minimize the risk of riots or other disturbances, wishes to prevent the spread of disease, and so forth[.]” and thus these conditions could not be atypical. *See id.* at 1176.

⁵³⁸ *Kervin v. Barnes*, 787 F.3d 833, 836 (7th Cir. 2015).

⁵³⁹ *Id.* at 836–37. Shane Kervin, the plaintiff in the case, received no release, as the Seventh Circuit affirmed the lower court’s dismissal of his suit. *Id.* at 837.

further a legitimate penological interest, such as safety or rehabilitation,” second on whether conditions in confinement are “extreme,” third on the impact of confinement on duration, and fourth on whether placement is “indeterminate.”⁵⁴⁰ In *Rezaq v. Nalley*, for example, Omar Rezaq, Mohammed Saleh, Ibrahim Elgabrowni, and El-Sayyid Nosair had all been convicted of “terrorism-related offenses” and transferred from general population penitentiaries to ADX Florence, the federal system’s highly restrictive prison. The court concluded that the Bureau of Prisons had not violated the prisoners’ due process rights because the transfer did not implicate a liberty interest, even though

[p]risoners housed in the general population unit at ADX spend twenty-three hours a day confined to their cells. The typical cell at ADX measures eighty-seven square feet and contains a bed, desk, sink, toilet, and shower. Inmates take their meals alone in their cells. Although BOP policy provides for ten hours of recreation per week, recreation is frequently cancelled due to staff shortages, mass shakedowns, or adverse weather.⁵⁴¹

Since deciding *Rezaq*, the court has also not found conditions to be “extreme” when prisoners were placed under the more restrictive Special Administrative Measures (SAM) at ADX Florence. Atop the rules detailed above, those prisoners were only to communicate with immediate family members, either by monitored phone calls or noncontact visits, and their legal representatives.⁵⁴²

The Tenth Circuit has applied its extremity test to prisoners held in state as well as federal facilities. Illustrative are decisions related to the confinement of Richard Grissom, incarcerated in Kansas. In 2007, Grissom challenged his decade in an “eight-by-fourteen f[oo]t” cell in which, he alleged, he was kept twenty-three to twenty-four hours a day.⁵⁴³ He reported that the cell was furnished with “a solid concrete bed with a two-inch

⁵⁴⁰ Estate of DiMarco v. Wyo. Dep’t of Corr., Div. of Prisons, 473 F.3d 1334, 1342 (10th Cir. 2007).

⁵⁴¹ *Rezaq v. Nalley*, 677 F.3d 1001, 1004–05 (10th Cir. 2012) (citations omitted). During the course of the litigation, and not as the result of any order from the courts, each of the prisoners was transferred out of ADX Florence, and into the BOP’s “Communication Management Units” at other facilities—“more restrictive than the general population units” within typical federal prisons, but less restrictive than general population at ADX Florence. *Id.* at 1005.

⁵⁴² *Gowadia v. Stearns*, 596 F. App’x 667, 668, 673 (10th Cir. 2014) (internal quotation marks omitted) (noting that while *Rezaq* “dealt with general population prisoners and Gowadia is incarcerated in a specialty unit, he fails to assert that his confinement differs from that of the plaintiffs in *Rezaq*”).

⁵⁴³ *Grissom v. Roberts (Grissom IV)*, 902 F.3d 1162, 1169 (10th Cir. 2018); *Grissom v. Werholtz (Grissom II)*, 524 F. App’x 467, 469–70 (10th Cir. 2013). Our description of Grissom’s conditions comes from the 2018 decision because the Tenth Circuit ruled that his conditions at that time had not become “more severe” since the 2013 decision. See *Grissom IV*, 902 F.3d at 1172.

mattress,”⁵⁴⁴ that lights were “more or less” on all day and all night,⁵⁴⁵ and that the enclosure was “designed to maximize sensory deprivation,” due to its “solid metal doors trimmed with rubber seals” that blocked all sound entering or exiting the cell.⁵⁴⁶ In an unpublished 2013 decision, the Tenth Circuit found that Grissom had not shown he had a protected liberty interest because none of the four factors of its test had been met.⁵⁴⁷ Five years later, and despite an impassioned concurrence that laid out the studies of how injurious profound isolation was and called for the Tenth Circuit to revisit its law,⁵⁴⁸ the majority in 2018 upheld the grant of summary judgment for the correctional staff on the grounds that Grissom could not overcome their qualified immunity; the Tenth Circuit’s earlier decisions did not make such treatment clearly violative of established rights.⁵⁴⁹

Other circuits’ decisions likewise tolerate radically impoverished confinement. In 1997, for example, Brian Beverati and Emil Van Aelst averred that their administrative segregation cells in the Maryland Penitentiary “were infested with vermin; were smeared with human feces and urine; and were flooded with water from a leak in the toilet on the floor above.”⁵⁵⁰ They alleged “they were forced to use their clothing and shampoo to clean the cells”;⁵⁵¹ that the cells were at times “unbearably hot”; that they were released from their cells only “three to four times per week, rather than seven”; and that they received considerably less food than prisoners in general population.⁵⁵² Accepting these allegations as true for purposes of reviewing the district court’s grant of summary judgment for the State, the Fourth Circuit concluded that the conditions “were not so atypical that exposure to them for six months imposed a significant hardship in relation to the ordinary incidents of prison life.”⁵⁵³

⁵⁴⁴ *Id.* at 1169.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ See *Grissom II*, 524 F. App’x at 474–75.

⁵⁴⁸ *Grissom IV*, 902 F.3d at 1175, 1176–77 (Lucero, J., concurring in the judgment). He concluded that it was “important to establish that the prolonged term of solitary confinement before us—twenty consecutive years—based on what appears to be marginal justification, violates the Due Process Clause.” *Id.* at 1175.

⁵⁴⁹ *Id.* at 1172–73, 1175 (majority opinion). The court also rejected Grissom’s claim, in part for briefing failures, that he had been discriminated against as an African American. *Id.* at 1173.

⁵⁵⁰ *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997).

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ *Id.*

The Court of Appeals in the Sixth Circuit was similarly unpersuaded that Michael Powell had been subjected to atypical and substantial hardships in Michigan’s Chippewa Correctional Facility. After the prison found him guilty of possessing a weapon and fighting with another prisoner, it placed Powell in solitary confinement for what became six months.⁵⁵⁴ Powell filed a Section 1983 civil rights claim, seeking compensatory and punitive damages as well as injunctive relief. He alleged that, while in solitary, “he was having suicidal thoughts and trouble sleeping and was losing weight”; that the water in the cell was shut off from “12:00 a.m. [to] 6:30 a.m.” and therefore he could neither “drink water [n]or flush the toilet during this time”; and that, for over a month of his confinement, he “had no working light in his cell.”⁵⁵⁵ The district court granted summary judgment for the State, and the Circuit commented “that most of the deprivations he experienced were not extreme and were no more than temporary inconveniences.”⁵⁵⁶

Yet, in some cases, descriptions of disabling conditions have prompted courts to entertain claims for relief. Exemplary is a decision by the Seventh Circuit, which reversed a grant of summary judgment for the State and held that the district court had wrongly concluded that the prisoner, Nathan Gillis, had no liberty interest in avoiding confinement to his state’s “Behavioral Modification Program.”⁵⁵⁷ That decision began:

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but “nutri-loaf”; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002.⁵⁵⁸

Likewise, in *Serrano v. Francis*, the Ninth Circuit held in 2003 that a placement for almost two months in the SHU gave rise to a liberty interest because

Serrano was denied use of his wheelchair, which he was permitted to use in the general population. Serrano has alleged that he could not take a proper shower; that he could not use the toilet without hoisting himself up by the seat; that he had to crawl into bed by his arms; that he could not partake in outdoor exercise

⁵⁵⁴ Powell v. Washington, 720 F. App’x 222, 226 (6th Cir. 2017).

⁵⁵⁵ *Id.* at 224–25.

⁵⁵⁶ *Id.* at 225, 228. The court affirmed the grant except on the Eighth Amendment claim for inadequate cell lighting because it found the “alleged deprivation of adequate lighting . . . for thirty-five days . . . sufficiently extreme to state an Eighth Amendment claim.” *Id.* at 228–29.

⁵⁵⁷ Gillis v. Litscher, 468 F.3d 488, 489, 495 (7th Cir. 2006).

⁵⁵⁸ *Id.* at 489.

in the yard; and that he was forced to drag himself around a vermin and cockroach-infested floor.⁵⁵⁹

The court stressed that it was “Serrano’s disability” and his placement “in a[] SHU that was not designed for disabled persons” that were key factors.⁵⁶⁰ But because the Ninth Circuit had not decided when a physical disability could generate a liberty interest in avoiding solitary confinement, it affirmed the lower court’s grant of qualified immunity, even though it found “deplorable the conditions under which Serrano was kept.”⁵⁶¹

Through this overview of lower court decisions, we have aimed to provide a sense of what federal judges have considered and sometimes found of concern, but more often condoned, about life in prison in the last two decades.⁵⁶² The descriptions in these cases have parallels to the disturbing degradations of the 1960s. Although people are no longer regularly stripped and the cells are no longer dark, many cells are always lit, and in some of this century’s cases, the dirt and lack of sanitation echoes what California, New York, and D.C. did in the 1960s. Even when cells are clean, people have spent years alone. Mostly, prisoners lose on the “atypical and significant hardship” test. Their wins generally entail reversals of dismissals or of grants of summary judgment and remands for further proceedings to determine if some process is due.⁵⁶³ And, as we said at the outset, the variation among courts on what constitutes an “atypical and significant hardship” is substantial, but the toleration of profound constraints on human movement spans the country.

IV. CONSTRUCTING THE “NORMAL” OF PRISONS

Courts have always been part of the fabric of prisons—from the sentences they issue that send individuals to incarceration, to doctrines that did not recognize prisoners’ status as individuals protected by law, to the more recent constitutional interpretations. In the era of “hands off deference,” the federal courts were present in prisons through their absence, which gave state officials unbounded authority over individuals in their custody. Since the 1960s, when courts acknowledged that the Constitution did not stop at the prison gates, judges have aimed to delineate the boundaries of their work and to leave most decision-making to administrative officials.

⁵⁵⁹ 345 F.3d 1071, 1078 (9th Cir. 2003). Onofre T. Serrano received no remedy, as the court dismissed the due process claim against the State on the grounds of qualified immunity. *Id.* at 1081.

⁵⁶⁰ *Id.* at 1079.

⁵⁶¹ *Id.* at 1081.

⁵⁶² These cases typically include both Eighth and Fourteenth Amendment claims. *See, e.g.*, Grissom v. Roberts, 902 F.3d 1162, 1166–67 (10th Cir. 2018); *Gillis*, 468 F.3d at 489.

⁵⁶³ *See, e.g.*, *Gillis*, 468 F.3d at 495.

Whether focused on “decency,” “liberty,” “dignity,” arbitrariness, “minimal necessities,” “deliberate indifference” to known serious medical needs, or “atypical and significant hardships,” judges affect the lives of prisoners and alter the experiences and practices of correctional officials. In the 1960s and 1970s, judges rejected confinement that ensconced filth and violence. Courts read the Constitution to require sanitation, protection of safety, health care, clothing, bedding, food, and heat for people in and out of solitary confinement. Further, courts banned segregation by race and called for opportunities for religious practices.

Those legal proclamations are far from implemented. Yet, when failures now become vivid, prison officials do not counter—as they once did—that whatever the conditions, their discretion is lawfully paramount.⁵⁶⁴ The decades of case law is part of why prisons became a mandated housing, food, and health care service for more than a million and a half people, even when many prisons are regularly abysmal.⁵⁶⁵ Likewise, a mix of legal mandates and administrative needs have prompted prisons to host thousands of “due process hearings,” and some systems document that, on occasion, prisoners successfully rebut charges of misbehavior.

Atop the detailed accounts of prison squalor in the 1960s and 1970s, we provided comparably dense descriptions of confinement in solitary cells during the last two decades, as courts debated whether such isolation breached either punishment or procedural norms under the Eighth and Fourteenth Amendments. Instead of focusing on when prisons added to punishments through imposing “adverse” conditions or transfers, judges licensed officials to alter in profound ways the quantum of punishment imposed. And, to date, judges and Justices have not united around the proposition that “life’s necessities” include space beyond a tiny cell, social interaction, environmental stimuli, a range of activities, and regular access to natural light. Rather, hundreds of decisions have concluded that months and years in isolation are not “atypical,” and through such pronouncements, judges have helped to make such evisceration of human contact “normal.”

⁵⁶⁴ See, e.g., Jolie McCullough, “*The Stakes Could Not Be Higher*”: *Judge Threatens to Lock Up Texas Prison Officials over Air Conditioning Violation*, TEX. TRIB. (Sept. 6, 2019) <https://www.texastribune.org/2019/09/06/texas-prison-officials-threatened-prison-air-conditioning/> [<https://perma.cc/89FZ-SCLM>] (quoting Judge Ellison of the Southern District of Texas, responding to the Texas prison system’s violation of a court order to place some incarcerated persons in air conditioning by saying, “We ought to have prison officials in prison at the same temperature,” to which the correctional department’s attorney replied, “We hear your message”); *Westefer v. Snyder*, No. 00-162-GPM, 2013 WL 1286971, at *1 (S.D. Ill. Mar. 27, 2013).

⁵⁶⁵ See generally HOMER VENTERS, *LIFE AND DEATH IN RIKERS ISLAND* (2019) (chronicling the failures of health care delivery); see also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <http://prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/38LR-BNTL>].

Yet, in the lower courts, a few decisions recognize that—whether clean or dirty, dark or light—profound isolation is “deliberate indifference” to the human need to interact; that deprivation of these human needs does violate the Constitution; and that putting people into isolation for extended periods of time is both atypical and a significant hardship.

Thus, just as the law shifted in the 1960s and 1970s to de-normalize the violence and filth that *was* prison, law may again be finding intolerable aspects of in-prison treatment. The baseline that courts had selected—that of an incarcerated person—gave rise to inquiries into what was “normally incident” in prisons. Contemporary challenges to solitary confinement aim to replace this metric with a baseline of how people outside of prisons “normally” behave.

And, once again, changes are propelled by the work of prisoners, who interact with social movements, political action, legislation, and litigation contesting claims about what is “normal” for prisons. In January of 2020, for example, advocates proposed a statute in Connecticut, entitled PROTECT—“An Act Promoting Responsible Oversight and Treatment, and Ensuring Correctional Transparency”—that called for eight hours of time out of cells; limiting physical restraints (e.g., chains) to no more than four hours; protecting social relationships; promoting correctional officials’ mental health; creating oversight through an ombudsperson; and shutting down that state’s Supermax.⁵⁶⁶ More than two dozen states have considered various kinds of legislation to regulate solitary confinement and, as of the spring of 2019,⁵⁶⁷ eight have been enacted, including the Massachusetts and New Jersey laws referenced above, as well as legislation pending in California and Tennessee.⁵⁶⁸

Those initiatives are built on concerns from across the political spectrum. Organizations sometimes calling themselves “right on crime” and “smart on crime” mix both moral and fiscal reform agendas often associated with conservative politics.⁵⁶⁹ During the last decades, the American Friends Service Committee aimed to stop Supermax and launched grassroots projects that have, since 2010, continued under the umbrella of a “Stop Solitary”

⁵⁶⁶ PROTECT ACT, STOP SOLITARY: CONN. (2020), <https://www.stopsolitaryct.org/s/PROTECT-Act.pdf> [<https://perma.cc/HK7M-H9T8>]; see also Kelan Lyons, *Advocates Push to Curtail Solitary Confinement in CT Prisons*, CONN. MIRROR (Jan. 23, 2020), <https://ctmirror.org/2020/01/23/advocates-push-to-curtail-solitary-confinement-in-ct-prisons/> [<https://perma.cc/9C8E-67HD>].

⁵⁶⁷ ZOGHI ET AL., *supra* note 484, at 5–27.

⁵⁶⁸ *Id.* at 2, 14, 24.

⁵⁶⁹ See generally DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016).

campaign in a coalition including the ACLU and religious groups against torture.⁵⁷⁰

As described, significant calls for reform have come from prison administrators, who are joining academics in documenting the use of isolation and in condemning its excesses. The Vera Institute and the Urban Institute have offered consultation services to support systems that seek to reduce reliance on solitary confinement.⁵⁷¹ In 2016, the American Correctional Association revised its prison accreditation rules to circumscribe restrictive housing for subpopulations that include people under eighteen, those seeking safety given their sex or gender identity, or people with serious mental illness.⁵⁷² Moreover, the movement to undermine solitary confinement has always been transnational, as reflected in the United Nations Special Rapporteur on Torture's opposition to the practice.⁵⁷³

In sum, this sixty-year span demonstrates that nothing is “normally incident” to life in prison except what human beings impose and the law condones. What has changed both the practices and the law are insights from incarcerated people, sometimes held in “gulag”-like conditions,⁵⁷⁴ and who have long understood that the U.S. Constitution guaranteed them recognition as holders of the same liberty as all other persons.

⁵⁷⁰ See, e.g., Andalusia Knoll, *The National StopMax Campaign Conference*, LEFT TURN, <http://www.leftturn.org/national-stopmax-campaign-conference> [https://perma.cc/ST76-P8LV]; *We Can Stop Solitary*, ACLU, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary> [https://perma.cc/GZ3M-T8VJ].

⁵⁷¹ See LÉON DIGARD, SARA SULLIVAN & ELENA VANKO, VERA INST. OF JUSTICE, *RETHINKING RESTRICTIVE HOUSING: LESSONS FROM FIVE U.S. JAIL AND PRISON SYSTEMS* (2018), <https://www.vera.org/rethinking-restrictive-housing> [https://perma.cc/4TAF-JHRC]; see also URBAN INST., *REQUEST FOR PROPOSALS FOR THE PRISON RESEARCH AND INNOVATION NETWORK 2* (2019), https://www.urban.org/sites/default/files/request_for_proposals_urban_institute_and_arnold_ventures_0.pdf [https://perma.cc/3BGA-LNBF]; Sara Sullivan, *Reducing Segregation*, VERA INST. JUST., <https://www.vera.org/projects/reducing-segregation> [https://perma.cc/QFY5-KQYX].

⁵⁷² See ACA STANDARDS, *supra* note 486, at 36, 39, 40. The American Correctional Association recommends that prisoners younger than eighteen not be placed in restrictive housing and encourages periodic mental health screenings during periods of extended restrictive confinement. AM. CORR. ASS'N, *RESTRICTIVE HOUSING EXPECTED PRACTICES* 34–35, 40 (2018), http://www.aca.org/ACA_Prod_IMIS/ACA_Member/StandardsAccreditation/Standards/Restrictive_Housing_Committee/ACA_Member/Standards_and_Accreditation/Restrictive_Housing_Committee/Restrictive_Housing_Committee.aspx?hkey=458418a3-8c6c-48bb-93e2-b1fcbca482a2 [https://perma.cc/WH4R-5QTH].

⁵⁷³ *Solitary Confinement Should Be Banned in Most Cases*, UN Expert Says, UNITED NATIONS (Oct. 18, 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says> [https://perma.cc/5LNK-DFVC]. See generally Sharon Shalev, *Solitary Confinement Across Borders*, in *SOLITARY CONFINEMENT*, *supra* note 143, at 59–76.

⁵⁷⁴ See *Gillis v. Litscher*, 468 F.3d 488, 489 (7th Cir. 2006).

