

Foreword

David M. Shapiro, Emily McCormick & Annie Prossnitz[†]

These pages are the product of the first law review symposium in five years on solitary confinement, a topic that inspires rich discussion in courtrooms, universities, prisons, legislatures, and even the Vatican.¹ The *Northwestern University Law Review*'s 2019 Symposium, "Rethinking Solitary Confinement," brought together preeminent legal scholars and national experts on solitary confinement to foster interdisciplinary engagement on the subject.

In 2018, Justice Sotomayor likened solitary confinement to a "penal tomb."² Many other jurists have recently joined the chorus, expressing grave

[†] David Shapiro is a Clinical Associate Professor of Law at Northwestern Pritzker School of Law and Director of Appellate Litigation at the Roderick and Solange MacArthur Justice Center. Emily McCormick was the Symposium Editor for Volume 114 of the *Northwestern University Law Review*. Annie Prossnitz was the Editor-in-Chief of Volume 114.

¹ For discussion of solitary confinement in judicial opinions, see *infra* notes 2–3. For scholarship on solitary confinement, see TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 21 (2017); Elizabeth Alexander, "This Experiment, So Fatal": Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement, 5 U.C. IRVINE L. REV. 1, 13 (2015); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 742 (2015); Mariam Hinds & John Butler, *Solitary Confinement: Can the Courts Get Inmates out of the Hole?*, 11 STAN. J. C.R. & C.L. 331, 334 (2015); Michael B. Mushlin, "I Am Opposed to This Procedure": How Kafka's In the Penal Colony Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons, 93 OR. L. REV. 571, 606–07 (2015); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89, 91–92 (2015); Deema Nagib, Note, *Jail Isolation After Kingsley: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood*, 85 FORDHAM L. REV. 2915, 2918 (2017); Eleanor Umphres, Note, *Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL ETHICS 1057, 1058–59 (2017). For discussion of solitary confinement protests among prisoners, see, for example, Joe Watson, *Prisoners Protest Solitary Confinement at Illinois Facility*, PRISON LEGAL NEWS (June 3, 2016), <https://www.prisonlegalnews.org/news/2016/jun/3/prisoners-protest-solitary-confinement-illinois-facility/> [<https://perma.cc/FY78-3E5V>]. For legislative reform and policy change, see, for example, THE ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT

Francis: Solitary Confinement Is Torture, ACLU OHIO (Nov. 12, 2014), <https://www.acluohio.org/archives/blog-posts/solitary-confinement-is-torture> [<https://perma.cc/7GFW-HB9J>].

² *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., statement respecting denial of certiorari).

concerns about long-term human isolation.³ Meanwhile, ever-mounting evidence shows that solitary confinement can induce and exacerbate severe mental illness, provoke self-mutilation and suicide, and cause the brain to literally shrink in physical size.⁴

Solitary confinement is known by many names—supermax prisons, disciplinary segregation, Special Housing Units (SHUs), Special Management Units (SMUs), and Administrative Segregation Units (ASUs or Ad-Seg), to list just a few. But regardless of the name used, solitary confinement generally refers to the practice of keeping inmates alone in a cell, in conditions designed to sharply curtail human interaction, for twenty-two to twenty-four hours a day.⁵ Isolation cells in Illinois’s Stateville Correctional Center typify solitary confinement quarters: small chambers with “gray walls, a solid steel door, no window, no clock, and a light that [i]s kept on twenty-four hours a day.”⁶

In addition to the social isolation, sensory deprivation, and physical harms inflicted by solitary confinement, extreme isolation also causes significant mental and psychological injuries. They include: “negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, and rage, paranoia, hopelessness, lethargy, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.”⁷ While solitary confinement cells house 2% to 8% of the American prison population, they account for almost half of all inmate suicides.⁸

³ *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 567–68 (3d Cir. 2017) (noting that both “psychological damage” and “[p]hysical harm” can result from solitary confinement, including “high rates of suicide and self-mutilation” as well as “more general physical deterioration”); *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (describing “the horrors of solitary confinement”); *Kervin v. Barnes*, 787 F.3d 833, 837 (7th Cir. 2015) (emphasizing the “serious psychological consequences of such quasi-solitary imprisonment”); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (“Prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate’s mind even after he is resocialized.”).

⁴ See Jules Lobel & Huda Akil, *Law & Neuroscience: The Case of Solitary Confinement*, 147 *DAEDALUS* 61, 69–70 (2018).

⁵ VALERIE KIEBALA & SAL RODRIGUEZ, *SOLITARY WATCH, FAQ: SOLITARY CONFINEMENT IN THE UNITED STATES I* (2018).

⁶ Atul Gawande, *Hellhole*, *NEW YORKER* (Mar. 23, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole> [<https://perma.cc/5SC9-9JRN>].

⁷ Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *CRIME & DELINQ.* 124, 130–31 (2003) (citations omitted).

⁸ Bennion, *supra* note 1, at 757.

Speakers brought a wide range of expertise to the Symposium—legal, correctional, personal, historical, medical, and psychological. In his keynote address, Senator Dick Durbin, the sponsor of federal legislation that would limit solitary confinement,⁹ reflected on two solitary survivors who testified before Congress. Senator Durbin quoted Damon Thibodeaux, who spent fifteen years in solitary confinement:

“More than anything solitary confinement is an existence without hope. I do not condone what those who have killed and committed other serious offenses have done. But I also don’t condone what we do to them when we put them in solitary for years on end and treat them as sub-human. We’re better than that. As a civilized society, we should be better than that.” Mr. Thibodeaux was right then—he’s still right.¹⁰

Following opening remarks by Dean Kimberly A. Yuracko, speakers included: former prisoners who survived solitary confinement (Brian Nelson and Albert Woodfox), legal scholars who study incarceration and the Eighth Amendment (Sharon Dolovich, Jules Lobel, Judith Resnik, and John Stinneford), medical and psychological experts (Craig Haney and Brie Williams), the head of a state correctional system (Leann Bertsch), and advocates working to limit, if not eliminate, prolonged solitary confinement (Amy Fettig, Maggie Filler, Daniel Greenfield, Alan Mills, Laura Rovner, and Margo Schlanger).

The contents of this issue reflect the interdisciplinary character of the convening. The issue begins with three histories of solitary confinement: an English and early American legal history of constraints on punishments that resembled solitary confinement in their level of severity; a judicial history in which courts sanctioned the practice even as they struck down other harsh and harmful prison conditions, and a social and political history of its rapid spread during the tough on crime era. First, Professor John Stinneford offers an originalist critique of administrative discretion over prolonged isolation in *Is Solitary Confinement a Punishment?*¹¹ From English and American legal history, including the U.S. Supreme Court decision *In re Medley*,¹² Professor Stinneford derives the rule that a prison condition amounts to a punishment if it: (1) was “historically used as a heightened form of punishment” or (2) “inflict[s] substantial suffering beyond what is normally imposed by a prison sentence.”¹³ He contends that solitary confinement is

⁹ Solitary Confinement Reform Act, S. 719, 116th Cong. (2019).

¹⁰ Senator Dick Durbin, Keynote Address at the *Northwestern University Law Review* Symposium, “Rethinking Solitary Confinement” (Nov. 8, 2019) [hereinafter Senator Durbin Keynote Address].

¹¹ John Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9 (2020).

¹² 134 U.S. 160 (1890).

¹³ Stinneford, *supra* note 11, at 15.

sufficiently harmful to meet the second prong of this disjunctive test and thus to qualify as punishment. This conclusion strikes at the premise that a prison sentence alone authorizes a prison official to impose solitary confinement as a matter of administrative discretion. On the contrary, solitary confinement is an additional punishment superadded to the fact of incarceration. A panoply of constitutional protections that restrict the government's power to punish therefore apply to solitary confinement.

In *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*,¹⁴ Professor Judith Resnik and her coauthors explore the stakes—for the incarcerated, for courts, and for the body politic—of judicial engagement with in-prison punishments. They show that over the span of sixty years, the federal judiciary came to reject filth, squalor, violence, and racial discrimination as unconstitutional prison conditions, even though these features of incarceration were commonplace. But the courts also accepted other harsh deprivations, solitary confinement among them, as “normal” in the prison environment, and consequently insulated them from judicial review. Through data collected from more than 9,000 lower court decisions, Professor Resnik and her coauthors show that while solitary confinement may be “normal” in U.S. prisons, courts and prison administrators alike have a key role to play in curtailing the practice.

In *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America's Prisons*,¹⁵ Professor Jules Lobel considers a common explanation for the rise of isolation in the 1980s and 1990s: in the main, increasing prison violence drove the expansion of solitary confinement. Contrary to this thesis, Professor Lobel contends that solitary confinement flourished in large measure because it offered a tool of social control as prison officials confronted growing ranks of “rebellious prisoners—often, but not exclusively, African-American—who had organized protests and disobedient conduct in American prisons from the 1960s to the 1980s.”¹⁶ As American corrections barreled toward mass isolation, alternatives for high-security incarceration *without* extreme isolation piled up on the wayside. But these models have new relevance

¹⁴ Judith Resnik, Hirsā Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the “Normal” and the “Atypical” in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45 (2020).

¹⁵ Jules Lobel, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America's Prisons*, 115 NW. U. L. REV. 159 (2020).

¹⁶ *Id.* at 159.

today as corrections reformers take steps to curtail prolonged solitary confinement.

Professors Stinneford, Resnik, and Lobel each combine, in different ways, their historical analysis with the premise that prolonged inmate isolation can be not only unpleasant and undesirable, but harmful, indeed ruinous. In *The Science of Solitary: Expanding the Harmfulness Narrative*,¹⁷ Professor Craig Haney defends that premise against a small number of dissenters who dismiss the effects as unproven, repeat the mantra “more research is needed,” or consider the harm minimal or fleeting. The evidence specific to solitary confinement is compelling and conclusive in itself, Professor Haney argues, but it also represents only a subset of a much larger scientific literature that proves the adverse consequences of analogous experiences: “[W]hat we know about the negative psychological effects of prison isolation is situated in a much larger scientific literature about the harmfulness of social isolation, loneliness, and social exclusion in society more generally.”¹⁸ Moreover, the damage inflicted by solitary confinement is severe and persistent, with some of the dire harms manifesting most clearly and strongly after release from isolation. These harms can include permanent incapacitation of the ability to form human connections.

The final three Essays discuss advocacy strategies for curtailing solitary confinement. First, in *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act’s Physical Injury Requirement in Solitary Confinement Cases*,¹⁹ Maggie Filler and Daniel Greenfield examine a provision of the Prison Litigation Reform Act (PLRA) that often poses an obstacle to solitary confinement litigation: the “physical injury” requirement applicable to claims for monetary damages. This rule, purportedly conceived to weed out frivolous lawsuits while allowing meritorious claims to proceed to court, frequently slams the courthouse door on litigants seeking redress for barbaric conditions of confinement. Filler and Greenfield put forward an interpretation of the PLRA’s physical injury requirement that aligns both with Congress’s intent to squelch litigation over trivial injuries and with the scientific consensus on the physiological toll of isolation. By offering strategies for proving physical injury caused by solitary confinement and challenging the mental injury versus physical injury dichotomy, Filler and

¹⁷ Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211 (2020).

¹⁸ *Id.* at 221.

¹⁹ Maggie Filler & Daniel Greenfield, *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act’s Physical Injury Requirement in Solitary Confinement Cases*, 115 NW. U. L. REV. 257 (2020).

Greenfield provide a framework for litigating meritorious damages claims for unconstitutional and abusive solitary confinement.

Professor Margo Schlanger turns to a debate over models for change in *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*.²⁰ Maximalists warn that an incrementalist approach to eliminating solitary confinement for particular populations normalizes its use for certain prisoners, namely those who are less vulnerable. On the other hand, incrementalists argue that gradual reform is more effective in reducing the number of prisoners in solitary confinement: Only when the number of prisoners in solitary has decreased can officials focus on abolishing the practice. Professor Schlanger grounds this debate in case studies of solitary reform in Massachusetts, where incrementalist reform has proven successful, and in Indiana, where it has been less so. Ultimately, she concludes that incrementalist reform is likely the most promising path toward solitary confinement abolition. Not only do incremental reforms grow “reform capacity and credibility,” but the alleged need for prisoner isolation “is undermined by every day that passes without incident for a person who was previously said to need solitary confinement.”²¹

In *How Do We Reach a National Tipping Point in the Campaign to Stop Solitary?*,²² Amy Fettig analyzes why this moment is ripe for solitary reform. Examining several harrowing cases of solitary confinement’s consequences, including those of her own clients, she lays out the human rights crisis this practice has wrought. However, hope for reform remains. Fettig attributes this prospect to the strategic, sustained advocacy of solitary survivors and civil rights lawyers. The movement to stop solitary has also grown through international human rights standards, governmental allies, and an emerging public awareness fostered by media coverage. Yet, to truly realize solitary reform, Fettig contends that we need further public mobilization, research into alternative practices, and greater prison oversight. Only then will we reach the national tipping point we have been inching toward for the past ten years.

This issue concludes with a Consensus Statement born of another interdisciplinary conference, the Santa Cruz Summit in May 2018.²³ This Summit brought together international experts on solitary confinement to

²⁰ Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273 (2020).

²¹ *Id.* at 309.

²² Amy Fettig, *How Do We Reach a National Tipping Point in the Campaign to Stop Solitary?*, 115 NW. U. L. REV. 311 (2020).

²³ *Consensus Statement from the Santa Cruz Summit on Solitary Confinement and Health*, 115 NW. U. L. REV. 335 (2020).

review and discuss current knowledge on the broad effects of the practice and its current scientific, correctional, and human rights status. Summit participants also discussed the ethical principles that should govern its use and identified the most important directions for reform. The Summit resulted in a set of guiding principles to advance solitary confinement reform both in the United States and internationally. As many Summit participants were also Symposium speakers, we conclude our issue with the Consensus Statement to reflect our hope that this issue may serve as a handbook for legal community members engaged in solitary confinement reform efforts. We view the Statement as an embodiment of Senator Durbin’s sentiment: “[W]ith persistence and hard work, [we] can move forward” on solitary confinement reform.²⁴

²⁴ See Senator Durbin Keynote Address, *supra* note 10.

