

AFTER IMPRISONMENT

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AFTER SOLITARY CONFINEMENT: A NEW ERA OF PUNISHMENT?

Keramet Reiter

ABSTRACT

While the steep increases in rates of incarceration seen in the United States in the late twentieth century have begun to level out, one form of incarceration has seen more drastic reductions in rates of use in the 2010s: long-term solitary confinement. Across the United States, prisons that once isolated prisoners for decades at a time stand hauntingly empty. The solitary confinement reform movement provides an important lens for examining what happens when an entrenched punitive practice faces widespread and sustained criticism and reveals the multiple paradigms through which reform operates – through politics, litigation, or charismatic leadership.

Keywords: Solitary confinement; prison; reform; penal populism; legal adversarialism; charisma

On January 25, 2016, then-President Barack Obama published an op-ed in the *Washington Post* announcing the adoption of a Justice Department recommendation to ban solitary confinement in two important cases throughout the federal prison system: “for juveniles” and “as a response to low level infractions” (Obama, 2016). A December 2016 report, coproduced by the Association of State Correctional Administrators and the Arthur Liman Public Interest Program at Yale Law School, found that this attention to and reduction in the use of solitary confinement was systemic and sustained across the United States: between 2014 and 2016, the population of prisoners in solitary confinement across the United States had fallen by more than 20% (ASCA-Liman, 2014, 2016).¹ What happened to solitary confinement? How did a systemic, established, litigation-resistant practice incur such seemingly sudden condemnation

and undergo such seemingly abrupt discontinuation (Reiter, 2012; Rubin & Reiter, 2018)?

A macrolevel perspective suggests that the reduction in support for and use of solitary confinement happened as part of a more systemic turn away from the harsh sentencing and extreme punishment policies of late twentieth and early twenty-first century US politics. As solitary confinement use declined, US incarceration rates stabilized (and in some cases even fell) for the first time in decades, and states and the federal government considered and enacted reforms to shorten sentences, provide alternatives to incarceration, and mitigate the collateral consequences of mass incarceration. Aviram (2015) has suggested that economics and a new “cheap on crime” mentality drove this turn. Others see politics as driving the turn (Gottschalk, 2015; Simon, 2015). And still others argue that voters are just more aware of the costs and limited benefits of mass incarceration (Frost & Clear, 2013). Reductions in solitary confinement use, though, have been more consistent and dramatic than even the turn away from mass incarceration.

I have argued elsewhere that solitary confinement, as the deepest end of mass incarceration, provides an important case study for understanding, and even magnifying, the origins and mechanisms of punitivity (Reiter, 2016a; see also Zimring & Hawkins, 2004). I argue here that, as scholars speculate about the turn away from mass incarceration, hypothesizing about and imagining, as in this very volume, the parameters of a time “after imprisonment,” solitary confinement is again a key point of analysis for understanding the origins and mechanisms of the turn away from mass incarceration. The reform movement around solitary confinement, then, provides an important lens for examining what happens when an entrenched punitive practice faces widespread and sustained criticism, how reform agendas spread, and the surprising forms of resistance that can percolate just below the surface within closed institutions, where prison staff have nearly unchecked discretion to implement state-level reform mandates.

This chapter first describes the trajectory of reforms since 2011, laying out a descriptive framework of the scope and scale of reforms. The chapter then analyzes three specific state-level case studies of different reform trajectories. Both Barker (2009) and Campbell and Schoenfeld (2013, p. 1384) have argued for the value of state-based case studies in understanding “widespread transformation of the penal order.” Drawing on archival and legal documents, media reports, oral history interviews, and ethnographic observations, this chapter likewise focuses on case studies of three states, which dramatically reduced their long-term solitary confinement populations in the 2010s: Illinois, California, and Washington. Each state is representative of a different mechanism of transformation or reform. In Illinois, reform happened through interest-based political lobbying. In California, reform happened through adversarial litigation. And in Washington, reform happened through charismatic leadership.

Two questions run through this analysis: how has solitary confinement use actually been reduced, and how sustainable are these reforms? The recent attention to solitary confinement, and especially the state-level efforts to curb its use,

is a key point of analysis for understanding the individual, institutional, and structural barriers to systemic attempts to decrease punitivity.

GENEALOGY OF REFORM

Although the practice of imprisonment in long-term solitary confinement had faced – and overcome – moments of critique in the 1890s, 1970s, and 1990s, to name just a few historical pressure points (Reiter, 2018; Rubin & Reiter, 2018), the practice remained relatively invisible in the late twentieth and early twenty-first centuries (Reiter, 2016a). In July of 2011, however, thousands of prisoners across the state of California refused food, for more than three weeks, in solidarity with prisoners in long-term solitary confinement, who coordinated the hunger strike to protest the conditions and durations of their confinement. The *Los Angeles Times*, *New York Times*, and *Washington Post* covered the hunger strike; Amnesty International and the United Nations Special Rapporteur on Torture condemned the conditions at Pelican Bay (Reiter, 2014, pp. 579–581). Solitary confinement reform suddenly took center stage on the national agendas of organizations like the American Civil Liberties Union and on the international agendas of organizations like the United Nations. Long-term solitary confinement and its discontents had (re)entered American public consciousness.

The sudden attention to and criticism of solitary confinement was, however, a long-time in the making. To focus on the California hunger strike as a singular provocation would be to elide a multifaceted reform effort percolating in and outside of prisons in both the United States and Europe. Historians of criminal justice reform have a tendency to identify singular moments in time that represent dramatic shifts in thinking.² However, a growing body of criminological work has documented how often criminal justice innovation and reform starts at the local level (Barker, 2009; Campbell, 2011; Gilmore, 2007; Lynch, 2010; Schept, 2013; Schoenfeld, 2010), frequently occurring simultaneously across multiple localities, occasionally giving the mistaken impression of a coordinated, or national movement. Not only does criminal justice innovation happen at the local level, but also it often results from contingent contestation (Cheliotis, 2017; Goodman, Page, & Phelps, 2017; Rubin & Phelps, 2017). For instance, Goodman et al. (2017) argue for an agonistic perspective of criminal justice as a constant struggle among competing, but coexisting, ideologies, rather than a pendulum swinging back and forth between retribution and rehabilitation; this perspective captures the challenges of understanding the sudden attention to solitary confinement reform. The hunger strike at Pelican Bay did not represent a pendulum swing away from retributive solitary and toward rehabilitative reform; rather it represented a moment when “friction among those with a stake in punishment [...] escalate[d] to seismic events [...] pushing one perspective,” in this case solitary confinement reform, “to the fore” (Goodman, Page, & Phelps, 2015).

Friction around modern iterations of solitary confinement, in supermax prisons, has existed since at least the mid-1980s. In particular, the American Friends Service Committee (AFSC), a Quaker organization founded in 1917, which has always maintained a robust and radical prison reform agenda, had been paying

close attention to modern uses of long-term solitary confinement since at least 1986. In the 1980s, AFSC offices began receiving letters from prisoners detailing the increasingly harsh conditions in increasingly long-term solitary confinement, or “control units,” as the AFSC called these newly minted facilities (Kerness & Lewey, 2014). In 1993, these control unit prisons had a brief moment in the spotlight: *Sixty Minutes* aired an exposé focused on the horrific conditions and abuses in California’s Pelican Bay Security Housing Unit (SHU), one of the newest and biggest of the prisons the AFSC had dubbed as “control units” (Reiter, 2016a). Just one year after that exposé, in 1994, the AFSC and affiliates founded the National Campaign to Stop Control Unit Prisons (NCSCUP; Kerness & Lewey, 2014). And in 1995, a judge in Northern California ordered improvements to the conditions in the Pelican Bay SHU: Judge Henderson ordered better training for staff, initiated regular monitoring by outsiders, and ruled that seriously mentally ill prisoners could not be housed in the Pelican Bay SHU (*Madrid vs Gomez*, 1995; Reiter, 2012). He did not, however, hold that either the conditions or the durations of confinement in the SHU were per se unconstitutional.

After the *Sixty Minutes* exposé and the *Madrid* case, solitary confinement, and the attention to control units and supermaxes, faded into obscurity. Far left radicals, like the AFSC and local organizations in California, including California Prison Focus and Justice Now, continued to criticize conditions in solitary confinement and to work to gather information about these institutions. In 1997 and 1998, the AFSC conducted one of the early surveys of conditions in these new control unit, or supermax, prisons (Weinstein, Donner, Burton-Rose, & Starger, 1997) and collaborated with a prisoners’ rights organizations in California to publish the *Survivors’ Manual* (1998/2012) “by and for people living in control units.” (The manual has remained relevant and in demand; it is now in its fifth edition.)

The next year, the National Institute of Corrections, a division of the US Department of Justice, published an *Overview of Supermax Prisons*, another attempt at comprehensively surveying and analyzing the new facilities cropping up across the country with “the express purpose of incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff, or other inmates” (Riveland, 1999). By this time, however, control units, or supermaxes, were largely a criminological curiosity, to be studied by government bureaucrats and academics, and critiqued by far-left radicals.

In addition to the National Institute of Corrections report, academics continued to query the rationality of long-term solitary confinement and to document its many detrimental consequences: for mental health (Grassian, 2006; Haney, 2003; Haney & Lynch, 1997; Kupers, 1999; Lovell, 2008), for staff working in the units (Rhodes, 2004; Wynn & Szatrowski, 2004, pp. 520–522), for institutional functioning (Toch, 2007; Zimring & Hawkins, 2004), and for recidivism (Lovell, Johnson, & Cain, 2007; Mears & Bales, 2009; Pizarro, Zgoba, & Haugebrook, 2014). Nonetheless, supermaxes attracted hardly any attention in the mainstream press between the early 1990s and 2011.

Still, throughout the 2000s, advocacy organizations around the world continued to investigate uses of solitary confinement, document prisoners’ experiences in these conditions, and exert pressure on individual prison systems to mitigate

these restrictive conditions of confinement. For instance, Human Rights Watch published a series of reports documenting the abuses taking place in supermax prisons across the United States, including *Red Onion State Prison* about a Virginia supermax (Fellner, 1999); *Cold Storage* about an Indiana supermax (Fellner & Mariner, 2000); *Out of Sight*, which provided an overview of supermax confinement (Fellner, 2000); and *Ill Equipped*, which focused in particular on mentally ill prisoners in solitary confinement (Abramsky & Fellner, 2003). In 2007, the International Trauma Psychology Symposium released the “Istanbul Statement on the Use and Effects of Solitary Confinement,” which called for minimizing the practice and prohibiting it for: mentally ill prisoners, prisoners under 18, and prisoners with life or death sentences (Ayan et al., 2007). Peter Scharff Smith, then the Head of Research for the Danish Institute for Human Rights, wrote the forward to the Statement; he had himself been intimately involved in pressuring the Danish government to reduce its reliance on solitary confinement, especially in pretrial contexts (Smith, 2017). In 2008, Sharon Shalev, who also participated in the Istanbul Conference, released the *Sourcebook on Solitary Confinement*, published through the London School of Economics, synthesizing global knowledge on the topic. The UN Special Rapporteur on Torture also incorporated the *Istanbul Statement* into a report on the use of solitary confinement internationally (Nowak, 2008).

Meanwhile, in the United States, community advocates persisted in pressuring local and state jurisdictions to reform solitary confinement practices. In 2005, the [Vera Institute of Justice](#), a nonprofit think tank based in New York and focused on criminal justice issues, convened the “Commission on Safety and Abuse in US Prisons,” which held a series of four hearings “to identify and recommend solutions to the most serious challenges facing America’s jails and prisons” (Vera Institute of Justice, 2018). One of the three pillars of conditions of confinement reform ultimately recommended in the Commission Report, *Confronting Confinement*, was limiting segregation use (Gibbons & Katzenbach, 2006).

In Illinois, in 2007, a coalition of artists, current and formerly incarcerated people, and their families joined together to form the Tamms Year Ten Campaign, named for the tenth anniversary of the opening of the Tamms Supermax in Illinois, with the goal of closing down the supermax facility (Carr, 2013). The campaign integrated legislative lobbying efforts with cultural awareness-raising campaigns, including “Photo Requests from Solitary,” where artists outside of prison promised to fulfill requests for any image made by solitarily confined prisoners. The resulting images became part of a touring art exhibit (Solitary Watch, ND).

In 2009, journalists James Ridgeway and Jean Casella founded Solitary Watch, an independent, online news source focused on covering solitary confinement in the United States. It received funding from the Langeloth Foundation, a private organization based in New York that had long funded public health-related advocacy work but moved into funding solitary confinement-related advocacy work in the 2010s.

In 2010, the Vera Institute, building on its Commission on Safety and Abuse initiative, launched the Segregation Reduction Project to work with state

departments of corrections to evaluate their use of solitary confinement and to make recommendations for reducing its use. The project, now the Safe Alternatives to Segregation Initiative, is ongoing and has involved collaborations with nine state prison systems and two city jail systems (Vera Institute of Justice, ND). In June of 2011, just one month before the hunger strikes in California, the American Civil Liberties Union launched their “Stop Solitary” Campaign (Ridgeway & Casella, 2011).

In sum, the 2011 hunger strikes in California were just one of a number of high-profile advocacy campaigns percolating across the United States. They marked a tipping point, however, after which solitary confinement attracted more mainstream media attention, high-level legal interrogation, and political pressure for reform. Beyond the national news coverage of the California hunger strikes in both 2011 and again in 2013, when California prisoners coordinated a larger (more than 30,000 prisoners) and longer (more than six weeks) hunger strike, state and federal legislators turned the spotlight on solitary confinement. California legislators held hearings to examine state solitary confinement practices in February and October of 2013.

A year earlier, in June of 2012, US Senator Dick Durbin (a Democrat from Illinois) held the “first-ever Congressional hearing on solitary confinement,” accepting live and written testimony from academics, correctional officials, and former prisoners (Durbin, 2012). Though Durbin is a Democrat, solitary confinement reform attracted bipartisan support, including a scathing condemnation of the practice penned by conservative columnist George F. Will. Will summed up his *Washington Post* op-ed with a call to action: “Americans should be roused against this by decency – and prudence” (Will, 2013). Will’s was not a lone voice either. In a recent article surveying the attention to solitary confinement research in the American Bar Association’s *Criminal Justice* journal, Drogin and Williams (2016, p. 31) noted that “the *New York Times* published more than 30 articles touching on this topic in the first half of 2016 alone.”

In March, and again in August of 2013, solitary confinement got a different kind of national attention, when two different prisoners released directly from long-term solitary confinement went on killing sprees: Evan Ebel in Colorado and Nikko Jenkins in Nebraska (Banda, 2013; Fuchs, 2013; Greene, 2013). Each event could easily have engendered a backlash, and a retrenchment of solitary confinement as a practice: the crimes might have been interpreted as evidence that solitary confinement really targets the worst-of-the-worst prisoners, who can be managed only through total isolation. Instead, the press and correctional officials alike interpreted the killers’ actions as evidence of the irrationality of solitary confinement: it makes people more dangerous, and most of those people will eventually be released from prison, so better practices were (and are) desperately needed.

After Evan Ebel murdered the then-Secretary of the Colorado Department of Corrections, the new Secretary continued the state’s commitment to solitary confinement reform, even spending 24 hours in a solitary cell, and then writing about his experience in the *New York Times*, in a strategic effort to raise awareness about the harshness of solitary conditions and ongoing need for reform

(Raemisch, 2014). Greg Mercantel, head of the New Mexico Department of Corrections, also spent a night in solitary confinement and spoke publicly about his experiences in national news media (e.g., Linticum, 2014; Ultimate Undercover, 2014). Raemisch and Mercantel joined a growing community of correctional officials initiating their own reforms to solitary confinement practices, including in North Dakota (Slater, 2017) and in Washington state (Neyfakh, 2015).

Various American professional associations echoed these political and administrative critiques, condemning solitary confinement: the American Public Health Association (2014) identified solitary confinement as a serious public health issue; the American Medical Association (2014) demanded limitations on the use of solitary confinement in juvenile facilities; an article in the *Journal of the American Academy of Psychiatry and Law* encouraged psychiatrists to “Join the Call to Abolish Solitary Confinement” (Appelbaum, 2016); and the American Bar Association discouraged the widespread use of the practice in testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights (Susman, 2014).

The US Supreme Court even chimed in. In 2014, US Supreme Court Justice Kennedy, known for his reliance on international human rights standards, especially in criminal cases, wrote an unusual concurrence in a death penalty case. Kennedy agreed with the decision to uphold the death sentence imposed on California state prisoner Hector Ayala, but he wrote a separate opinion to condemn the conditions of Ayala’s incarceration: long-term solitary confinement. Kennedy explicitly invited a challenge to such practices (*Davis vs Ayala*, 2015).

Then, in 2015, the National Institute of Justice hosted a conference on solitary confinement (newly dubbed “restrictive housing”) and issued a funding call for more research about multiple aspects of the practice. On the date of the NIJ conference, the Bureau of Justice Statistics issued the first-ever national-level report evaluating “restrictive housing” use across the United States, in prisons and jails (Beck, 2015; US Department of Justice, 2016). Just one year later, in 2016, then-President Obama responded to Justice Kennedy’s call, initiating regulations to ban solitary confinement for federal juvenile prisoners and to limit solitary confinement for adult prisoners (Obama, 2016).

Critiques of solitary confinement have hardly been confined to domestic forums in the United States. Shortly after the California hunger strikes, the UN Special Rapporteur on Torture established a formal definition of “prolonged solitary confinement,” as a period of “more than 15 days,” which the Special Rapporteur described as presumptively “cruel, inhuman or degrading treatment” (Méndez, 2011, p. 9). The next year, Amnesty International (2012) released *The Edge of Endurance*, a report condemning California’s Pelican Bay Security Housing Unit for violating international human rights standards; two years later, Amnesty released a similar report condemning conditions at the US federal supermax facility. This international attention to US solitary confinement practices reflected further friction in Europe, where anti-solitary confinement sentiments also seemed to be gaining traction. The European Court of Human Rights criticized US solitary confinement policies in 2012, in *Ahmad vs*

the United Kingdom. Ahmad, who was facing extradition from the United Kingdom to the United States as an alleged terrorist, sought preclusion of his extradition because, he said, if extradited, he would be held in the US federal supermax in Florence, Colorado, where the conditions of extended solitary confinement, according to Amnesty International and the UN Special Rapporteur on Torture, constituted cruel, inhuman, and degrading treatment. The European Court of Human Rights ultimately ruled that Ahmad could be extradited, but not without a careful and critical review of US supermax policies and practices.

Just a few years later, in 2015, however, the High Court of Ireland, “respectfully disagreeing” with the *Ahmad* Court’s findings of the cruelty of conditions in US supermax prisons, refused to extradite an alleged terrorist to the United States (*Attorney General vs Damache*, 2015). The United Nations General Assembly implicitly agreed with the *Damache* Court later that year, when it unanimously adopted the Mandela Rules, a revision to the 1957 Standard Minimum Rules for the Treatment of Prisoners. The revised standards prohibit both indefinite and prolonged solitary confinement, defined as any period “in excess of 15 consecutive days” (United Nations, 2015, rules 43 and 44). The standards seem to have ongoing traction in Europe: in 2016, in *Breivik vs State*, Norway’s Oslo District Court found that the lack of human contact imposed on Anders Breivik (who killed 77 people in a car bomb detonation and shooting spree in 2011) constituted cruel and degrading treatment and required mitigation (Henley, 2016).

In sum, leading jurists in Europe and the United States have pointedly attacked the practice of solitary confinement in recent years. Prison administrators have initiated their own reforms from within institutions. Elected officials have held hearings to examine the practice of solitary confinement and proposed legislation and policy to reform it. In parallel with the hunger strikes in California, community activists, lawyers, and politicians alike pushed reform agendas around solitary and kept the practice in local, national, and even international news.

Although the hunger strikes in California magnetized national and international media attention, the broader reform efforts described here – across the United States and Europe – grew out of a much longer history of criticisms of solitary confinement, especially in its modern iterations in control units, supermax prisons, and restrictive housing. These criticisms simmered persistently between the 1980s and 2010s, simultaneously within radical anti-prison advocacy communities and within dispassionate academic communities. Radical revolutionary (or, in this case, abolitionist) strains of advocacy coexisted with less radical reformist strains, as they continue to do in the debate over the ethicality and practicality of solitary confinement. This coexistence of revolutionary and reformist values is exactly as social movements scholars would predict (Walder, 2009) and as prison reform scholars have documented in prior movements (e.g., Mathiesen, 1974/2014).

Exactly what made the hunger strikes possible in California in 2011, or why the simmering attention to solitary confinement essentially boiled over in the