

## MAKING THE CASE FOR ABOLITION: WHY LEGISLATION RESTRICTING SOLITARY CONFINEMENT IS NOT ENOUGH

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### I. INTRODUCTION

An area the size of a parking spot. Nearly twenty-four hours spent alone, day after day. No one calls or visits. There are no magazines or books to read; there is no television to watch. For the lucky ones, a small window allows a few rays of natural light to sneak in. These are just a few of the conditions of solitary confinement experienced by thousands of prisoners in the United States. They often do not know how long their sentence will last—sometimes a few days, sometimes a few years. Some do not even know the reasons why they were put there in the first place.

Throughout the seventeenth and eighteenth centuries, the United States sparsely used solitary confinement, and by 1890, the Supreme Court was already commenting on the negative effects of the practice.<sup>1</sup> While this inspired a period of harsh criticism of solitary confinement and expansion of inmates' access to the courts, the Supreme Court declined to declare the practice *per se* unconstitutional.<sup>2</sup> The dawn of the “new age” of solitary confinement, defined by harsher conditions and more frequent use, is often tied to an incident at Illinois' Marion State Penitentiary, where two inmates violently murdered two guards in separate instances on the same day in 1983.<sup>3</sup> The subsequent facility-

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<sup>1</sup> Brooke Shelby Biggs, *Solitary Confinement: A Brief History*, MOTHER JONES (Mar. 3, 2009), <https://www.motherjones.com/politics/2009/03/solitary-confinement-brief-natural-history/>.

<sup>2</sup> 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, 1621 (2018). Cf. *Davis v. Ayala*, 576 U.S. 257, 289-90 (2015) (Kennedy, J., concurring in denial of cert.) (“In a case that presented the issue [of the constitutionality of solitary confinement], the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”).

<sup>3</sup> Melanie Campbell, *Vulnerable and Inadequately Protected: Solitary Confinement, Individuals with Mental Illness, and the Laws that Fail to Protect*, 264 HOFSTRA L. REV. 268-69 (2016).

wide solitary confinement at Marion State lasted twenty-three years.<sup>4</sup> The “Marion Model”—characterized by “long-term, oftentimes indefinite, disciplinary segregation in which inmates are placed in virtually total isolation and severely restricted in their movements”—has remained standard in correctional facilities for nearly three decades.<sup>5</sup>

The tide of public opinion has since shifted and more advocacy for the complete abolition of solitary confinement exists today.<sup>6</sup> Some states have responded to this shift and have begun to impose legislative limits and guidelines on the use of solitary confinement.<sup>7</sup> New Jersey joined these states by passing the Isolated Confinement Restriction Act (“the Act”) in July 2019.<sup>8</sup> Some even hail the Act as the most progressive piece of legislation limiting the use of solitary confinement in the country.<sup>9</sup> While the Act is an important step towards meaningful limitations on solitary confinement in New Jersey, some of its provisions are seriously flawed. Using the Act as an example, this Comment seeks to demonstrate how even solitary confinement legislation that imposes restrictions on the practice are overshadowed by exceptions that will ultimately result in the continued misuse of the practice.

Part I will provide a background on solitary confinement, as well as the physical and psychological effects it inflicts on inmates. Part II will

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<sup>4</sup> Sarah Childress & Michelle Mizner, “Lock It Down”: How Solitary Started in the U.S., PBS FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/lock-it-down-how-solitary-started-in-the-u-s/>.

<sup>5</sup> Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 14 (2012).

<sup>6</sup> See N.Y. CAMPAIGN FOR ALTS. TO ISOLATED CONFINEMENT, <http://nycaic.org/> (last visited Jan. 17, 2021); TOGETHER TO END SOLITARY, <http://www.togethertoendsolitary.org/> (last visited Jan. 17, 2021); UNLOCK THE BOX, <https://www.unlocktheboxcampaign.org/> (last visited Jan. 17, 2021).

<sup>7</sup> Eli Hager & Gerald Rich, *Shifting Away From Solitary*, THE MARSHALL PROJECT (Dec. 23, 2014), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary> (discussing the various legislative and administrative reforms to solitary confinement across the states in 2014); *State Legislation: Examples*, NAT’L RELIGIOUS CAMPAIGN AGAINST TORTURE, <http://www.nrnat.org/torture-in-us-prisons/join-a-state-campaign/state-legislation-examples> (last visited Jan. 17, 2021) (providing examples of state legislation that seeks to restrict the use of solitary confinement); Anne Teigen, *States That Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 29, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx>.

<sup>8</sup> Isolated Confinement Restriction Act, N.J. STAT. ANN. §§ 30:4-82.5 – 30:4-92.11 (2019).

<sup>9</sup> Catherine Kim, *Solitary Confinement Isn’t Effective. That’s Why New Jersey Passed a Law to Restrict It*, VOX, (July 11, 2019), <https://www.vox.com/policy-and-politics/2019/7/10/20681343/solitary-confinement-new-jersey>.

discuss the relevant provisions of the New Jersey Isolated Confinement Act, with a focus on the restrictions on the use of solitary confinement, and exceptions for its use. Part III analyzes the argument in favor of abolition of solitary confinement. By using the Act as a model, this section seeks to establish how legislation that carves out various exceptions cancel out the restrictions set, such that solitary confinement can continue to be overused and misused.

## II. BACKGROUND: WHAT IS SOLITARY CONFINEMENT?

Solitary confinement is the practice used by correctional facilities to restrict the movement, privileges, and social interactions of inmates.<sup>10</sup> Although the exact conditions vary by institution, there are three basic elements of solitary confinement: voluntary or involuntary removal from the general inmate population, placement in a locked room or cell, and confinement to a cell for over twenty-two hours per day.<sup>11</sup> The cells are approximately eighty square feet, typically containing only a bunk bed, sink, and toilet.<sup>12</sup> An inmate in solitary has only brief encounters with others, which can be as limited as an employee sliding a food tray through the door.<sup>13</sup> Inmates eat alone and are granted around five hours of exercise per week, always alone and typically in a small cage.<sup>14</sup> Visitation, phone, possession of personal property, and activity privileges are limited as well.<sup>15</sup> Confinement can last anywhere from a few days to years on end.<sup>16</sup>

Solitary confinement goes by many names, varying by state, jurisdiction, and even facility. Other aliases for this practice include disciplinary housing, supermax, Secure/Special Housing Unit (“SHU”), maximum security, lockdown, administrative close supervision, room

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<sup>10</sup> *Solitary Confinement (Isolation): Definition*, NAT’L COMM’N ON CORR. HEALTH CARE, <https://www.ncchc.org/solitary-confinement> (last visited Jan. 17, 2021).

<sup>11</sup> U.S. DEP’T. OF JUSTICE, REPORT AND RECOMMENDATION CONCERNING THE USE OF RESTRICTIVE HOUSING 3 (Jan. 2016), <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing>.

<sup>12</sup> MATEO GASPAROTTO, ET. AL., ACLU, SILENT INJUSTICE: SOLITARY CONFINEMENT IN VIRGINIA 15 (2018).

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

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

<sup>15</sup> *Id.*

<sup>16</sup> See Sam Roberts, *Thomas Silverstein, Killer and Most Isolated Inmate, Dies at 67*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/obituaries/thomas-silverstein-dead.html> (reporting on Thomas Silverstein, the inmate allegedly held in solitary confinement for the longest time in the United States. He has been in solitary for 32 years.).

confinement, or restricted engagement.<sup>17</sup> Aside from “solitary confinement,” it is most commonly referred to as isolation or isolated confinement, as well as segregation or segregated confinement. Opposition to the practice of solitary confinement is largely based on the physical and psychological harms it inflicts on inmates. The practice nonetheless remains widespread in correctional facilities.

A. *Physical Effects of Solitary Confinement*

While solitary confinement in and of itself may be used as punishment, the very nature of the isolation tends to include the loss of various other privileges. This can include partial or total restrictions of exercise, restricted diet, as well as limited access to other activities.<sup>18</sup> Physically immature juveniles entering prison are uniquely vulnerable to inadequate exercise and nutrition and tend to experience stunted growth.<sup>19</sup> Many juvenile inmates also reported experiencing weight and hair loss while in solitary, and some female juveniles even reported a cessation of menstruation.<sup>20</sup> Some solitary confinement restriction laws have sought to ensure that restricted diets will not be used as an additional means of punishment against an inmate already held in solitary, but opinions regarding restrictions on exercise and other activities vary.<sup>21</sup> Studies have also found solitary confinement to be as strong of a risk factor for mortality and morbidity as smoking, obesity, high blood pressure, and living a sedentary lifestyle.<sup>22</sup>

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<sup>17</sup> GASPAROTTO, *supra* note 12, at 4 n.1; Brielle Basso, *Solitary Confinement Reform Act: A Blueprint For Restricted Use of Solitary Confinement of Juveniles Across the States*, 48 SETON HALL L. REV. 1603 (2018).

<sup>18</sup> Basso, *supra* note 17, at 1604-5.

<sup>19</sup> Basso, *supra* note 17, at 1604-5.

<sup>20</sup> Basso, *supra* note 17, at 1604-5.

<sup>21</sup> *Compare Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (explaining how then-Judge Kennedy wrote a unanimous opinion for the Ninth Circuit arguing that “it was cruel and unusual punishment for a prisoner to be confined for a period of years without the opportunity to go outside except for occasional court appearances, attorney interviews, and hospital appointments.”), and *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5, (2018) (Sotomayor, J., concurring in denial of cert.) (“[O]ur Constitution does not permit such a total deprivation [of exercise] in the absence of a particularly compelling interest” but admitting that the factual record and legal analysis of the lower courts as to the presence or absence of a compelling interest was insufficient), with *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2018).

<sup>22</sup> Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 755 (2015).

*B. Psychological Effects of Solitary Confinement*

Perhaps the greatest risk of harm resulting from solitary confinement is the severe psychological harm that can be inflicted. It is well-documented that a period of solitary confinement can inflict distress on the mental health of an inmate—including those who may not have had a prior history of mental illness.<sup>23</sup> Inmates subjected to solitary have a shockingly high likelihood of engaging in self-harm, suicide attempts, and suicide.<sup>24</sup> Across correctional facilities, nearly half of successful suicides occur in solitary confinement units.<sup>25</sup>

Common psychiatric symptoms reported by solitary confinement inmates include anxiety, depression, illusions and hallucinations, panic attacks, paranoia, difficulty concentrating, memory and impulse control, and “intrusive obsessional (and often violent) thoughts.”<sup>26</sup> During his testimony to the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights, Professor Craig Haney, Ph.D., confirmed these symptoms—and many more, such as anger, aggression, and even rage, chronic insomnia and cognitive dysfunction.<sup>27</sup> The very nature of solitary confinement—isolation, stressful environment, and restricted social interactions and activities—makes it difficult to withstand, even for inmates without pre-existing mental health conditions.<sup>28</sup> The effects that solitary confinement has on inmates already suffering from mental illness and developmental disabilities are thus even more likely to “deepen into something more permanent and disabling.”<sup>29</sup>

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<sup>23</sup> See Rosalind Dillon, *Banning Solitary for Prisoners with Mental Illness: The Blurred Line Between Physical and Psychological Harm*, 14 NW. J. L. & SOC. POL’Y 265, 277 (Jan. 1, 2019); Tamar Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 11-15 (2015); see also *Davis v. Ayala*, 135 S. Ct. 2187, 2208-10 (2015) (Kennedy, J., concurring in denial of cert.) (noting that the “common side effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors.”) (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL’Y 325 (2006)).

<sup>24</sup> See Craig Haney, *Restricting Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 290 (2018); see also *Palakovic v. Wetzel*, 854 F.3d 209, 217 (3d Cir. 2017) (noting that in 2011, the State Correctional Institution-Cresson reported that 80% of documented suicides occurred in solitary confinement units).

<sup>25</sup> Dillon, *supra* note 23, at 277.

<sup>26</sup> Dillon, *supra* note 23, at 274-75.

<sup>27</sup> *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 20-22 (2012) (statement of Craig Haney, Professor, University of California, Santa Cruz).

<sup>28</sup> Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49. CRIME & DELINQUENCY, 124, 142 (Jan. 2003).

<sup>29</sup> *Id.*; see also *Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr.*, No. 1:08-cv-01317, 2012 U.S. Dist. LEXIS 182974 \*41 (S.D. Ind., Dec. 31, 2012) (“[Psychological] pain produces suffering, and a delay in treating [it] can reduce the

### III. A LEGISLATIVE “SOLUTION:” A BACKGROUND ON NEW JERSEY’S SOLITARY CONFINEMENT RESTRICTION ACT

The open question of the legality of solitary confinement has essentially left this issue to the states, which has resulted in varying success. The most recent piece of legislation is New Jersey’s Isolated Confinement Restriction Act, which was signed by Governor Phil Murphy on July 11, 2019.<sup>30</sup> This law has since been hailed as the “most progressive” piece of solitary confinement restricting legislation.<sup>31</sup> The passage of the Act and its accompanying praise begs the question: can solitary confinement even be meaningfully restricted? This Comment seeks to answer that question in the negative by using the Act to demonstrate that even “progressive,” well-intended legislation cannot justify the use of solitary confinement, except in a narrow set of clearly defined emergencies.

To provide background, the following sections will briefly discuss the relevant provisions of the Act. Part A discusses the two types of restrictions placed on the use of solitary confinement in New Jersey correctional facilities. Part B discusses the Act’s exceptions that delineate the circumstances under which a correctional facility may place an inmate in solitary confinement. Part C provides an overview of the Act’s provisions on staff training, as well as the appeals processes available to inmates placed into solitary confinement.

#### A. *The Act’s Restrictions*

##### 1. General Restrictions: When and for how long may an inmate be placed in solitary confinement?

One of the most important provisions of a solitary confinement restriction law is the law’s definition of solitary confinement because it describes the conditions and maximum duration of confinement permitted. The Act defines solitary confinement as the:

confinement of an inmate in a correctional facility, pursuant to disciplinary, administrative, protective, investigative, medical, or other classification, in a cell or similarly confined holding or living space, alone or with other inmates, for

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chances of a mentally ill prisoner achieving or re-establishing an optimal level of functioning.”).

<sup>30</sup> Isolated Confinement Restriction Act, A. 314, 218th Leg. (N.J. 2019).

<sup>31</sup> Kim, *supra* note 9.

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approximately [twenty] hours or more per day in a state correctional facility or twenty-two hours or more per day in a county correctional facility, with severely restricted activity, movement, and social interaction.<sup>32</sup>

In addition to New Jersey's twenty to twenty-two hour limit set in the definition, the Act also prohibits more than twenty consecutive days of solitary confinement or more than thirty days over a sixty-day period.<sup>33</sup> It is worth noting, however, that when the New Jersey Legislature first attempted to pass a solitary confinement restriction bill in 2016, the proposed limit was fifteen consecutive days or twenty days in a sixty-day period.<sup>34</sup> This first attempt passed in the legislature but was vetoed by then-Governor Chris Christie.<sup>35</sup> Although the United Nations Special Rapporteur on Torture declared that any period of solitary confinement longer than fifteen days constituted torture, Colorado is the only state to institute such a limitation.<sup>36</sup>

The Act also sets general requirements governing when an inmate may be placed in solitary confinement, placing the burden of proof on the correctional facility to show: (a) a reasonable cause for the placement, (b) substantial risk of harm to the inmate or others, (c) specific evidence as a basis for the need, and (d) that there were no feasible alternatives to alleviate the potential harm.<sup>37</sup>

## 2. Purpose-based Restrictions: Administrative and Disciplinary Segregation

There are generally two forms of solitary confinement—disciplinary and non-disciplinary segregation.<sup>38</sup> Disciplinary segregation refers to the violation of a specific rule by an inmate and a determinate period of placement in solitary confinement as

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<sup>32</sup> Isolated Confinement Restriction Act, N.J. STAT. ANN. § 30.4-82.7 (2019).

<sup>33</sup> N.J. STAT. ANN. § 30.4:82.8(a)(9).

<sup>34</sup> See Isolated Confinement Restriction Act, A. 547, 217th Leg. (N.J. 2016); Stephanie Wykstra, *The Case Against Solitary Confinement*, Vox (Apr. 17, 2019) <https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform> (noting that Colorado is the only state to have implemented the fifteen-day U.N. standard).

<sup>35</sup> Kim, *supra* note 9.

<sup>36</sup> Wykstra, *supra* note 34; UNITED NATIONS, *Solitary Confinement Should Be Banned in Most Cases*, UN Expert Says, (Oct. 18, 2011) <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>; (noting that the United Nations Special Rapporteur on Torture, Juan E. Méndez, stated solitary confinement lasting more than fifteen days is torture and thus, should be prohibited).

<sup>37</sup> N.J. STAT. ANN. § 30.4:82.8(a)(1).

<sup>38</sup> Samuel Fuller, *Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement*, 19 CHI. J. INT'L L. 102, 106 (2018).

punishment.<sup>39</sup> The Act contains virtually no provisions on disciplinary segregation aside from three conditions to placement pending investigation of an alleged disciplinary offense by an inmate. First, in determining to place an inmate in investigative disciplinary solitary confinement based on the above factors, the Act requires consideration of the seriousness of the alleged offense.<sup>40</sup> The Act states that examples of offenses that would warrant such placement include offenses including violence, escape, or “encouraging others to engage in misconduct.”<sup>41</sup> Second, the Act requires approval from the facility administrator for placement in this alleged emergency situation.<sup>42</sup> By having one individual responsible for this determination, it is clear exactly who would be accountable in the event of misuse. To further limit the possibility of abuse, the Act requires review of placement “within 24 hours [of placement] by a supervisory employee who was not involved in the initial placement.”<sup>43</sup>

Contrarily, the Act does prohibit “non-disciplinary” solitary confinement, which it refers to as “administrative” segregation.<sup>44</sup> Despite this ban on administrative segregation, as well as the reference to it in the Act’s definition of solitary confinement, the Act fails to explicitly define “administrative” or even non-disciplinary solitary confinement.<sup>45</sup> Administrative segregation is typically defined as placement of an individual deemed by officials as a current or future risk to other prisoners or staff.<sup>46</sup>

#### *B. Non-Disciplinary Exceptions*

Despite the Act’s purported ban on administrative segregation, the Act carves out three exceptions permitting its use. First, the Act creates a lockdown exception permitting the facility-wide use of solitary confinement in the event of an emergency.<sup>47</sup> The facility administrator or shift commander makes the determination to commence a lockdown, as well as the determination that the mitigating circumstances no longer

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<sup>39</sup> U.S. DEP’T. OF JUSTICE, *supra* note 11, at 4.

<sup>40</sup> N.J. STAT. ANN. § 30:4-82.9(a)(1).

<sup>41</sup> N.J. STAT. ANN. § 30:4-82.9(a)(1).

<sup>42</sup> N.J. STAT. ANN. § 30:4-82.9(a)(2).

<sup>43</sup> N.J. STAT. ANN. § 30:4-82.9(b).

<sup>44</sup> N.J. STAT. ANN. § 30:4-82.8(a)(2) (“[A]n inmate shall not be placed in isolated confinement for non-disciplinary reasons.”).

<sup>45</sup> N.J. STAT. ANN. § 30:4-82.7.

<sup>46</sup> LIMAN PROGRAM AT YALE LAW SCH., *TIME-IN-CELL: THE LIMAN-ASCA 2014 SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 1* (Aug. 2015).

<sup>47</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1).



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exist and such a lockdown can be lifted.<sup>48</sup> If the lockdown lasts for more than twenty-four hours, the administrator must specify why it was necessary, and why less restrictive alternatives were “insufficient to accomplish the facility’s safety goals.”<sup>49</sup> These justifications must be posted to the Department of Corrections website within fifteen days of the lockdown, and meaningful notice of these reasons must be provided to the Legislature.<sup>50</sup>

Second, the Act permits a protective-custody exception: permitting confinement of an inmate in a cell, or similarly confined holding or living space, when the facility administrator determines it is necessary to protect the inmate or others.<sup>51</sup> Such conditions include a real or perceived threat to the inmate for reasons such as gang affiliation, debts, involvement in or with law enforcement, sexual orientation, or gender identity.<sup>52</sup> Protective custody of an inmate may be voluntary or involuntary.<sup>53</sup>

Voluntary protective custody allows an inmate to give informed, voluntary consent to isolation “when there is reasonable cause to believe that confinement is necessary to prevent reasonably foreseeable harm.”<sup>54</sup> The correctional facility must keep a written record of such requests, and in the event that the facility rejects the request, they bear the burden of establishing their reasons for rejection.<sup>55</sup> The inmate must also be permitted to opt-out of voluntary protective custody by “providing informed, voluntary, written refusal of that status.”<sup>56</sup> The voluntary protective-custody provision comes with three important qualifications to ensure against its misuse. First, the Act requires the correctional facility to attempt a less restrictive form of segregation prior to voluntary solitary confinement, such as a transfer to the general population at another facility or a transfer to special purpose housing for similarly threatened inmates.<sup>57</sup> Such transfers are not required, and consequently, the inmate will be placed in solitary confinement if the facility determines that the security risk is so high “that transferring the

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<sup>48</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1).

<sup>49</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1).

<sup>50</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1).

<sup>51</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4).

<sup>52</sup> U.S. DEP’T OF JUSTICE, *supra* note 11, at 23; *see also, e.g.*, United States v. D.W., 198 F. Supp. 3d 18, 74 (E.D.N.Y. 2016) (“[O]ften, the only means of protection available to vulnerable inmates is separation from the general population.”).

<sup>53</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(a)(b).

<sup>54</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(a).

<sup>55</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(a).

<sup>56</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(e).

<sup>57</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(f).

inmate would be insufficient to ensure the inmate's safety."<sup>58</sup> Further, because voluntary custody entails an inmate requesting segregation—as opposed to punitive segregation—this provision ensures that other restrictions be enacted against such an inmate, such as in their “activities, movement and social interactions,” within the bounds of the needed protection for the inmate or others.<sup>59</sup> Lastly, if the facility attempts to remove the inmate from voluntary protective custody, the inmate must be provided a “timely, fair, and meaningful opportunity to contest the removal.”<sup>60</sup> As for involuntary protective custody, the Act requires *clear and convincing evidence* of the necessity to prevent a reasonably foreseeable harm, as well as evidence that there were no feasible less restrictive alternatives.<sup>61</sup> The Act also permits a medical isolation exception.<sup>62</sup> The Act's definition of “medical isolation” includes the need to “[prevent] the spread of a communicable disease” and for “mental health emergenc[ies].”<sup>63</sup>

### C. Appeals Process for Inmates & Staff Training

Two other important factors necessary for the meaningful restriction of solitary confinement are rules governing the appeals process for inmates to contest placement, and staff training. While the Isolated Confinement Restriction Act sufficiently addresses the latter, the provisions governing appeals are lacking.

Correctional facilities across the country lack clear policies on how inmates may appeal their assignment to solitary confinement, as well as those policies that detail how they can work to exit solitary, such as favorable or unfavorable behavior.<sup>64</sup> The sheer quantity of rules governing prison life alone are obstacles in and of itself for inmates. These rules—including those governing the appeals process for solitary confinement—tend to be scattered, and at times, even contradictory.<sup>65</sup>

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<sup>58</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(f).

<sup>59</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(c).

<sup>60</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(d).

<sup>61</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(b).

<sup>62</sup> N.J. STAT. ANN. § 30:4-82.8(d)(3).

<sup>63</sup> N.J. STAT. ANN. § 30:4-82.7.

<sup>64</sup> LIMAN PROGRAM AT YALE L. SCH. & ASS'N OF ST. CORRECTIONAL ADMIN., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON i, 9 (2015) (“[G]etting into segregation was relatively easy, and few policies focused on how people got out,” nor was it “a focus of the rules.”).

<sup>65</sup> Michelle Ghafar, *Exiting Solitary Confinement: A Survey of State Correctional Policies*, 64 UCLA L. REV. 508, 527-39 (2017) (noting that, in a ten-state survey of correctional facilities, varying rules governing an inmate's ability to exit solitary confinement were found within Departments of Corrections' sections on classification

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Moreover, they tend to be vague and highly discretionary with review processes occurring far too infrequently; New Jersey's Act is demonstrative of this.

Section 30:4-82.8(a)(4) is the appeals provision of the Act, stating that an inmate must be afforded "timely, fair and meaningful opportunities . . . to contest the confinement" within seventy-two hours of placement.<sup>66</sup> The provision claims that the inmate is entitled to appear and "be represented at the hearing; an independent hearing officer; and a written statement of reasons for the decision made at the hearing."<sup>67</sup> There is no clarification as to who may represent the inmate, who the independent hearing officer is, in what capacity the officer advocates for the inmate, who is present at the hearing, or even what the guidelines are for what the review committee is seeking from the inmate. Further, it is worth noting that, in addition to not clarifying who sits on this review committee, the Act itself states that "the final decision to place an inmate in isolated confinement shall be made by the facility administrator."<sup>68</sup> Importantly, the Act does not require notice to be provided to the inmate for whom placement in solitary confinement is being considered.<sup>69</sup> Moreover, after the initial hearing within the first seventy-two hours, a review of such placement only occurs every thirty days.<sup>70</sup> The language of this provision is notably at odds with Section 30:4-82.8(a)(9), which prohibits isolated confinement for "more than [twenty] consecutive days, or for more than [thirty] days during any [sixty]-day period."<sup>71</sup> Overall, it is disappointing that a progressive piece of legislation failed in such a way to clarify and strengthen the appeals process for inmates, and as a whole the Isolated Confinement Restriction Act does not fare better in this area compared to other states.<sup>72</sup>

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policies, appeals systems, grievance systems, personal interviews, documentation, and review processes).

<sup>66</sup> N.J. STAT. ANN. § 30:4-82.8(a)(4).

<sup>67</sup> N.J. STAT. ANN. § 30:4-82.8(a)(4).

<sup>68</sup> N.J. STAT. ANN. § 30:4-82.8(a)(5).

<sup>69</sup> See, e.g., MODEL ACT: IMPROVING PUBLIC SAFETY, PROTECTING VULNERABLE POPULATIONS & ENSURING DUE PROCESS IN IMPOSING LONG-TERM ISOLATED CONFINEMENT § 4(c)(i) (ACLU NATIONAL PRISON PROJECT 2011) (ON FILE WITH ACLU) ("The [prisoner] must receive written and effective notice at least 48 hours before the hearing that such placement is being considered, the facts upon which consideration is based, and the [prisoner's] rights under this Act, and any regulations or policies promulgated under this Act;").

<sup>70</sup> N.J. STAT. ANN. § 30:4-82.8(a)(4).

<sup>71</sup> N.J. STAT. ANN. § 30:4-82.8(a)(9).

<sup>72</sup> Ghafar, *supra* note 65, at 529 (noting that across ten states that together house more than half of the prisoners in the United States, the most common form of prisoner involvement in the exit process was during classification review where inmates may

The Act also addresses the need for staff training. Section 30:4-82.11(b) requires the creation of procedures by the facility commissioner for the training of disciplinary staff and solitary confinement staff.<sup>73</sup> Pursuant to the Act, this training must include periodic assistance from appropriate professionals, standards emphasizing the restrictive circumstances under which solitary confinement may be used, how to identify developmental disabilities, how to identify the symptoms of mental illness and trauma disorders, as well as how to safely respond to people in distress.<sup>74</sup> The Act also states that such training must include information of the facility's standards for solitary confinement.<sup>75</sup> These standards "shall be limited to when an inmate commits an offense involving violence, escapes or attempts to escape, or poses a threat to institutional safety; that the maximum penalties for each offense shall be based on the seriousness of the offense; and available less restrictive interventions."<sup>76</sup> Considering the issue surrounding the traditional deference afforded to correctional facilities in their policies and procedures, it is particularly important for senior management to set the tone on their views towards the use of solitary confinement. Executive Director of the Colorado Department of Corrections, Rick Raemisch—who was able to lower the consecutive day limit on solitary confinement to fifteen days—responded to those who asked how he changed the culture of reliance and overuse of solitary confinement by saying, "It's not a question of culture. It's a question of leadership."<sup>77</sup> By implementing clear conditions on when and how solitary confinement may be used and reiterating them through training, it follows that there are likely to be fewer incidences of abuse by officials.

The Act requires the commissioner to develop procedures for these training opportunities by August 2020 when the Isolated Confinement Restriction Act goes into effect.<sup>78</sup> Regarding mental health training, the ACLU recommends at least eight hours of instruction on the types and symptoms of mental illness for all officers and staff.<sup>79</sup> Staff working in any mental health or "step-down" units must attend an additional forty-

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"participate in hearings or interviews with prison administrators, and receive copies of the final placement decision").

<sup>73</sup> N.J. STAT. ANN. §30:4-82.11(b).

<sup>74</sup> N.J. STAT. ANN. §30:4-82.11(b)(1)-(3).

<sup>75</sup> N.J. STAT. ANN. §30:4-82.11(b)(2).

<sup>76</sup> N.J. STAT. ANN. §30:4-82.11(b)(2).

<sup>77</sup> ASS'N OF ST. CORRECTIONAL ADMIN. & YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 68 (2018).

<sup>78</sup> N.J. STAT. ANN. §30:4-82.11(b).

<sup>79</sup> MODEL ACT, *supra* note 69 at § 3(a).

hours of initial instruction as well as twelve hours annually if they continue to work in that unit.<sup>80</sup> In its recommendations for the Federal Bureau of Prisons, the Department of Justice noted that the Bureau required quarterly mental health training of restrictive housing staff as well as specialized suicide prevention training for “health care providers, lieutenants, chaplains, and correctional counselors.”<sup>81</sup> The Act notably only requires “periodic” assistance from professionals on the use of solitary confinement, but it is unclear whether “periodic” assistance extends to the training on disabilities, disorders, and mental illness.<sup>82</sup> Mental health training is important for screening the symptoms and needs of the mentally ill, especially those who often “cannot make their needs known to mental health staff.”<sup>83</sup>

#### IV. ANALYSIS: WHY ABOLITION IS THE ONLY SOLUTION

The common justification for solitary confinement is its use as a necessary last resort against dangerous and violent prisoners.<sup>84</sup> While this justification stems from legitimate safety concerns by prison officials, there is no evidence that solitary confinement deters inmates from misbehaving.<sup>85</sup> Moreover, the common perception that solitary confinement is only reserved for the worst of the worst is not borne out by the evidence, despite its apparent justifications on the grounds of safety.<sup>86</sup> Empirical studies show that only a minority of the solitary confinement population are the result of violence or dangerousness.<sup>87</sup>

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<sup>80</sup> MODEL ACT, *supra* note 69 at § 3(a).

<sup>81</sup> U.S. DEP’T. OF JUSTICE, *supra* note 11, at 57; *see also* U.S. DEP’T. OF JUSTICE, *supra* note 11 at 80, 118 (noting that The National Institute of Corrections provides a 32-hour “Management of Restrictive Housing Populations” training program that includes training, technical assistance, information services, and policy development assistance to federal, state, and local correctional agencies).

<sup>82</sup> *See* N.J. STAT. ANN. §30:4-82.11(b)(1).

<sup>83</sup> *Casey v. Lewis*, 834 F. Supp. 1477, 1550 (D. Ariz. 1993).

<sup>84</sup> Anthony Gangi, *Why We Need Solitary Confinement in Corrections*, CORRECTIONS 1 (May 31, 2016), <https://www.correctionsone.com/public-perceptions/articles/why-we-need-solitary-confinement-in-corrections-FRkqBaMQYSXFqIsW/>; *see also* LIMAN PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE LIMAN-ASCA 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 8 (Aug. 27, 2015) (“Several states . . . specified that the purpose of administrative segregation was not punitive, but to ensure the safety and security of prisoners and staff.”) [hereinafter 2014 National Survey].

<sup>85</sup> ALISON SHAMES, ET AL., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 20 (May 2015).

<sup>86</sup> *Id.* at 12.

<sup>87</sup> *See, e.g., id.*; LIMAN PROGRAM AT YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 60 (Oct. 2018) (“[W]e learned that the criteria for placing prisoners in isolation were broad, as was the discretion afforded correctional staff to place individuals”); THE N.Y. CIV. LIBERTIES UNION, *Lawsuit: Syracuse Jail is Harming Children With Abusive Solitary Confinement Conditions* (Sept. 21, 2016),

Most placements in solitary confinement are for being perceived as *potentially* violent but without committing a violent act or breaking prison rules.<sup>88</sup> Further, the prison rules violated are often minor infractions such as failure to obey orders, using abusive language, or moving during a count.<sup>89</sup> Although the safe operation of a correctional facility is important, the data does not support the correlation between the use of solitary confinement and safety.<sup>90</sup>

Part of what makes solitary confinement inherently problematic is that any justifications for its use tend to be punitive in nature, even if the stated reason for an inmate's placement is characterized as non-disciplinary. Solitary confinement erupted when correctional facilities were faced with the dilemma of how to punish the punished.<sup>91</sup> Considering the horrifying effects that any period of solitary confinement may have, justification is wholesomely difficult—even as a means of punishment.<sup>92</sup> Furthermore, solitary confinement is inefficient at achieving its purported goal of deterring inmate misbehavior or violence. In fact, solitary confinement increases the likelihood of recidivism.<sup>93</sup>

Using New Jersey's Isolated Confinement Restriction Act as an example, this section seeks to establish a two-fold argument. First, solitary confinement must be abolished as both a management tool and a form of punishment in correctional facilities because solitary confinement is a short-term solution that contributes to the problems that it purports to solve. The effects solitary confinement inflicts on

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<https://www.nyclu.org/en/press-releases/lawsuit-syracuse-jail-harming-children-abusive-solitary-confinement-conditions> (reporting that one inmate was placed in solitary confinement for singing a Whitney Houston song in his cell).

<sup>88</sup> SHAMES, *supra* note 85, at 12.

<sup>89</sup> SHAMES, *supra* note 85, at 14.

<sup>90</sup> NATIONAL INSTITUTE OF JUSTICE, RESTRICTIVE HOUSING IN THE U.S. ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 18 (Nov. 2016) ("Using data from three states (Arizona, Illinois, and Minnesota) and one control state (Utah), and a multiple interrupted timeseries design, Briggs, Sundt, and Castellano (2003) . . . . concluded that 'the bulk of the evidence presented here suggests that supermax is not effective at reducing system wide levels of prison violence.'").

<sup>91</sup> See *e.g.*, Childress, *supra* note 4 (discussing the alleged origins of supermax prisons and the reliance on solitary confinement after two guards were violently murdered at Illinois' Marion State Penitentiary in 1983).

<sup>92</sup> See Haney, *supra* note 28 at 132.

<sup>93</sup> SHAMES, *supra* note 85, at 20 ("[T]here is no evidence that confinement in a supermax facility produces a deterrent effect on the individual. A recent study [also] found that exposure to short-term disciplinary segregation as a punishment for initial violence did not deter incarcerated people from committing further violence in prison."); SHAMES, *supra* note 85, at 26 (finding that some states reported higher recidivism rates among supermax inmates and inmates who had been held in solitary confinement).

inmates—regardless of subjection to disciplinary or non-disciplinary segregation—supports this proposition. Second, the Act and similar legislation nominally address the issue of solitary confinement without substantive changes that will effectively curb its practice.

Even “progressive” legislation intended to broadly restrict solitary confinement is insufficient when it carves out various exceptions, which consequently lead to the overuse and misuse of the practice.<sup>94</sup> In effect, the broad and arbitrary exceptions overshadow any provisions in the Act that would seriously curtail the use of solitary confinement.

1. *Analyzing the Act: What Works and What Does Not*

One of the simplest yet most important provisions in solitary confinement legislation is the operative definition because this definition lays the framework for what constitutes acceptable conditions of solitary confinement. Moreover, a definition typically states the number of isolation hours that legally constitute solitary confinement.<sup>95</sup> For New Jersey, the Act restricts the amount of time that an inmate can sit in segregation, which cannot exceed twenty days, or more than thirty days within a period of sixty days, making it the lowest time restriction set by state legislation.<sup>96</sup> Many other jurisdictions define solitary confinement as segregation for twenty-two to twenty-four hours a day.<sup>97</sup>

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<sup>94</sup> See Kim, *supra* note 9.

<sup>95</sup> S.B. 3495, State S., 2017-2018 Sess. (N.Y. 2017).

<sup>96</sup> Kim, *supra* note 9.

<sup>97</sup> See, e.g., N.Y. CIV. LIBERTIES UNION, *The Humane Alternatives to Long-Term (“HALT”) Solitary Confinement Act*, <https://www.nyclu.org/en/legislation/humane-alternatives-long-term-halt-solitary-confinement-act> (referring to state law permitting solitary confinement for twenty-three hours per day) (last visited Jan. 19, 2021); THE S. POVERTY L. CTR, SOLITARY CONFINEMENT: INHUMANE, INEFFECTIVE, AND WASTEFUL 7 (Apr. 2019) (noting that in Florida, solitary confinement refers to isolation for twenty-two to twenty-four hours per day); UNITED NATIONS OFFICE ON DRUG & CRIMES, THE UNITED NATIONS STANDARD MINIMUM RULES FOR TREATMENT OF PRISONERS 14 [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf) (last visited Jan. 19, 2021) (defining solitary confinement as isolation lasting twenty-hours per day); Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado’s Prisons*, ACLU (Dec. 5, 2018), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons> (referring to Colorado’s policy of solitary confinement placement for twenty-two hours per day); Burke Butler, et. al., *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas*, THE AM. CIV. LIBERTIES UNION OF TEX. (Feb. 5, 2015), <https://www.aclutx.org/en/report/a-solitary-failure> (discussing solitary confinement in Texas, which refers to isolation for twenty-two hours per day).

Despite the clarity of the general definition in the Act, it notably fails to define administrative or investigative segregation.<sup>98</sup> The sheer inclusion of these categories in the Act causes confusion as both are forms of non-disciplinary segregation, which is banned by Section 30:4-82.8(a)(2).<sup>99</sup> Nor do any of the three exceptions include administrative or investigative isolation.<sup>100</sup>

## 2. *The Restrictions and Exceptions*

The Act highlights the inherent tension between broad restrictions and its manifold exceptions. Together these two essential components paint the picture of a good faith attempt to address the issue, the product of a well-meaning legislature. But despite the praise it has received,<sup>101</sup> this Act only nominally addresses solitary confinement. The Act is composed of dozens of little compromises that when aggregated and implemented will result in continued misuse of this practice. This section analyzes how the quantity and content of the exceptions that permit the use of solitary confinement overpower the restrictions of the Act.

### 1. The Restrictions

The Act has been praised as “the most progressive legislative reform to the practice of solitary confinement in the [United States]” because of the restrictions.<sup>102</sup> The Act sets when, against whom, and for how long solitary may be used.

#### i. Twenty-day limit

In addition to the twenty-hour “limit” discussed above, the Act similarly imposes restrictions on how many days an inmate may be held in solitary confinement. Section 30:4-82.8(a)(9) prohibits solitary confinement lasting more than twenty consecutive days or more than thirty days over a sixty-day period.<sup>103</sup> The necessity of clear legislative restrictions on the permitted duration of confinement cannot be overstated. It is a common misperception that solitary confinement is a brief sentence for inmates.<sup>104</sup> While disciplinary solitary confinement is *supposed to* last a definite period of time by definition, more often than

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<sup>98</sup> Isolated Confinement Restriction Act, N.J. STAT. ANN. § 30.4-82.7 (2019).

<sup>99</sup> See N.J. STAT. ANN. § 30.4-82.7.

<sup>100</sup> N.J. STAT. ANN. § 30.4-82.8(a)(2).

<sup>101</sup> Kim, *supra* note 9.

<sup>102</sup> Kim, *supra* note 9.

<sup>103</sup> N.J. STAT. ANN. § 3:4-82.8(a)(9).

<sup>104</sup> SHAMES, *supra* note 85, at 15.



not, an individual remains in solitary confinement beyond that time period.<sup>105</sup> Still, non-disciplinary or administrative solitary confinement are notoriously problematic because such confinements allow for indefinite sentences.<sup>106</sup>

The Act's duration restriction provides a good example of a provision that is comparatively better than other states, however still insufficient. In most other states the durational limit is no more than thirty consecutive days.<sup>107</sup> The United Nations has stated that any period of solitary confinement longer than fifteen days constitutes torture.<sup>108</sup> Considering that New Jersey's first attempt at a solitary confinement law in 2016, vetoed by then-Governor Chris Christie, passed in both houses with a fifteen-day restriction, it is disappointing that it was compromised for the Act.<sup>109</sup> Furthermore, only one state, Colorado, has already successfully instituted the fifteen-day recommended restriction.<sup>110</sup> Additionally, as the permanence and severity of the effects of solitary confinement become more universally understood—as well as how quickly they can set in—it becomes harder to justify the practice based on any justification, especially punishment.

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<sup>105</sup> Compare U.S. DEP'T. OF JUSTICE, *supra* note 11, at 4 (defining disciplinary solitary confinement as punishment that lasts for a determinate term for violation of a specific rule), with SHAMES, *supra* note 85, at 15 (reporting that in federal prison and at least nineteen states, solitary confinement is permitted for an indefinite period. This report also noted that's in 2009, the average solitary confinement term was *over six years* in Illinois supermax prisons and nearly four years in Texas correctional facilities), and LIMAN PROGRAM AT YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 14 (Oct. 2018) (noting that according to an aggregate of data from responding jurisdictions, about one-fifth of inmates were held for fifteen days to one month, and almost 10% were held for more than three years).

<sup>106</sup> U.S. DEP'T. OF JUSTICE, *supra* note 11, at 4 (defining administrative solitary confinement as punishment that lasts for an indeterminate term).

<sup>107</sup> See, e.g., THE S. POVERTY L. CTR, *supra* note 97, at 8 (discussing Florida's policy that disciplinary solitary confinement is permitted for between thirty and sixty days, and no more than ninety); Dan M. Clark, *NY Proposes New Curbs on Use of Solitary Confinement in State Prisons, Local Jails*, N.Y. L. J. (Aug. 28, 2019), <https://www.law.com/newyorklawjournal/2019/08/28/ny-proposes-new-curbs-on-use-of-solitary-confinement-in-state-prisons-local-jails/> (reporting on the new rules proposed by lawmakers to phase in a 30-day cap on solitary confinement over the next three years); KATIE ROSE QUANDT, ET AL., SOLITARY WATCH, LOUISIANA ON LOCKDOWN: A REPORT ON THE USE OF SOLITARY CONFINEMENT IN LOUISIANA STATE PRISONS, WITH TESTIMONY FROM THE PEOPLE WHO LIVE IT ,70 (June 2019) (noting that Louisiana Department of Corrections' solitary confinement policy is a review every ninety days).

<sup>108</sup> UNITED NATIONS, *supra* note 36.

<sup>109</sup> Kim, *supra* note 9.

<sup>110</sup> LIMAN PROGRAM AT YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 67 (Oct. 2018).

## ii. Ban on Non-Disciplinary Solitary Confinement

Notably, the Act also stands out because of its ban of solitary confinement for non-disciplinary reasons, though subject to some exceptions.<sup>111</sup> Non-disciplinary solitary confinement tends to be synonymous with “administrative segregation,” which is typically used when an inmate is perceived as a current or future threat to others.<sup>112</sup> This form of solitary confinement is problematic for two primary reasons. First, administrative segregation often entails confinement for an unspecified time period.<sup>113</sup> For the 2015 Yale Law School report on administrative segregation, thirty-two out of forty-four responding jurisdictions self-reported that their correctional facilities had no minimum time period for administrative segregation.<sup>114</sup> Notably, forty-two out of the same forty-four jurisdictions also reported no *maximum* confinement period.<sup>115</sup> The Isolated Confinement Restriction Act is commendable for enacting a twenty-consecutive-day limit, compared to many states’ thirty-day limit.<sup>116</sup>

Second, administrative segregation tends to be a “catch-all” category for the justification of placement of inmates in solitary confinement; the criteria for placement and discretion wielded by those in charge of the placement tends to be broad.<sup>117</sup> Further, because

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<sup>111</sup> Isolated Confinement Restriction Act, N.J. STAT. ANN. § 30.4-82.8(a)(2) (2019).

<sup>112</sup> LIMAN PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE LIMAN-ASCA 2014 SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 1 (Aug. 2015); *see also* U.S. DEP’T. OF JUSTICE, *supra* note 11, at 4.

<sup>113</sup> *See* McClary v. Kelly, 4 F. Supp. 2d 195, 211 (W.D.N.Y. 1998) (finding that a plaintiff inmate had a right to due process because he was held in administrative segregation for four years in violation of the prison’s own rules requiring “specific reasons why administrative segregation is warranted.”); U.S. DEP’T. OF JUSTICE, *supra* note 11, at 4.

<sup>114</sup> LIMAN PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE LIMAN-ASCA 2014 SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 10, 27, n.96, n.97 (Aug. 2015) (The forty-six responding jurisdictions included forty-four states, the District of Columbia and Federal Bureau of Prisons. The six states that did not respond were California, Idaho, Maine, Maryland, New Mexico, and Vermont).

<sup>115</sup> *Id.* at 27.

<sup>116</sup> *See* UNITED NATIONS, *supra* note 36 (noting that the United Nations Special Rapporteur on Torture, Juan E. Méndez, stated solitary confinement lasting more than 15 days is torture and thus, should be prohibited); THE S. POVERTY L. CTR., *supra* note 97, at 8 (finding that in Florida, punitive solitary confinement typically lasted between 30 to 60 days, and administrative confinement has a maximum limit of 90 days, which is notably not always followed); Clark, *supra* note 107 (reporting on the new rules proposed by lawmakers to phase in a 30-day cap on solitary confinement over the next three years); VIRGINIA DEP’T OF CORRECTIONS OPERATING PROCEDURE, Offender Discipline, Institutions No. 861.1, § 6(A)(5), <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-861-1.pdf> (permitting solitary confinement for a maximum of 30 days).

<sup>117</sup> LIMAN PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE LIMAN-ASCA 2014 SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 8 (Aug. 2015).

administrative segregation tends to occur if there is a perceived threat, often inmates who act out tend to fall under the umbrella of administrative segregation.<sup>118</sup> Many “misbehaving” inmates are acting under the duress of a mental illness, or symptoms of it.<sup>119</sup> As such, placement in solitary is hardly a solution.<sup>120</sup> In addition to this definition, the Act also states five classifications of segregation of inmates from general population: emergency confinement, isolated confinement, less restrictive intervention, medical isolation, and protective custody.<sup>121</sup> While the Act’s non-disciplinary solitary confinement ban can be considered one of its achievements, the next section will explain how it will be undermined in application of the various exceptions.

## 2. The Exceptions

As discussed in Section I(B)(3), the Act contains three exceptions to the prohibition of non-disciplinary solitary confinement: the lockdown exception, protective custody exception, and medical emergency exception.<sup>122</sup> Each exception explains in varying detail the circumstances under which correctional facilities may place an inmate

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<sup>118</sup> See Maureen L. O’Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, CO DEPT. OF CORRECTIONS, 82 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf> (“It is impossible to ignore the extremely disproportionate rate at which inmates with serious mental illness are assigned to [administrative segregation].”); David Lovell, *Patterns of Disturbed Behavior in a Supermax Population*, 35(8) CRIM. JUST. AND BEHAV., 985, 990 (2008) (“Serious mental illness can safely be attributed to at least 25% of supermax prisoners in this study” of 122 inmates across 3 Supermax prisons in Washington’s prison system at the time); see also Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1121 (W.D. Wis. 2001) (“Defendants’ screening process is not a reasonable safeguard against housing seriously mentally ill inmates at Supermax because it is not designed to keep seriously mentally ill inmates out of Supermax.”), Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev’d on other grounds*, 178 F.3d 385 (5th Cir. 1999) (“Furthermore, plaintiffs submitted credible evidence of a pattern in TDCJ of housing mentally ill inmates in administrative segregation—inmates who, to be treated, would have to be removed to inpatient care.”).

<sup>119</sup> See Ashley Halvorsen, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can Be Leveraged to Encourage Best Practices*, 27 S. CAL. INTERDIS. L.J., 205, 206 (2017) (“[N]ot only are the mentally ill more likely to be placed in solitary confinement, they often find it exceedingly difficult to meet the requirements to be released back into the general prison population.”); Rebecca Wallace, *Out of Sight, Out of Mind: Colorado’s Continued Warehousing of Mentally Ill Prisoners in Solitary Confinement*, ACLU COLO. (2013), <http://aclu-co.org/wp-content/uploads/files/imce/Solitary%20Report.pdf> (discussing the Colorado Department of Corrections practice of “continued warehousing of mentally ill prisoners in solitary confinement”).

<sup>120</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 90 at 11.

<sup>121</sup> Isolated Confinement Restriction Act, N.J. STAT. ANN. § 30:4-82.7 (2019).

<sup>122</sup> N.J. STAT. ANN. § 30:4-82.8(d).

in solitary confinement for reasons other than violation of a rule.<sup>123</sup> The sections below will analyze each exception and discuss which components are necessary for the safe operation of correctional facilities, and which are inherently problematic primarily because they tend to be punitively misused.

#### i. Lockdown Exception

First, the Act permits a lockdown exception if it is determined that one is necessary to ensure the safety of the inmates until the circumstances no longer exist.<sup>124</sup> Ideally, facility-wide lockdowns should be the only permitted instance of solitary confinement; the circumstances that trigger this are limited instances where the danger to inmates and prison officials are serious.<sup>125</sup> Unlike administrative solitary confinement where the justification for placement is based on some perceived future threat, lockdown only occurs in response to events.<sup>126</sup> Moreover, the Act protects against possible misuse with reporting requirements.<sup>127</sup>

#### ii. Protective Custody

The Act also permits a protective custody exception, which allows the isolation of an inmate either at the discretion of a facility administrator or at the request of the inmate.<sup>128</sup> Protective custody can be a useful tool to remove a vulnerable inmate from the general population based on perceived threats, often due to immutable

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<sup>123</sup> N.J. STAT. ANN. § 30:4-82.8(d).

<sup>124</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1).

<sup>125</sup> See, e.g., Childress, *supra* note 4; Marisa Iati, *Five Mississippi Inmates were Killed in a Week, Officials Say. Then Two Went Missing*, WASH. POST (Jan. 5, 2020), <https://www.washingtonpost.com/nation/2020/01/03/mississippi-prisons-lockdown-after-five-inmates-killed-week/> (discussing an incident at Parchman in which five prisoners were killed and several were injured, resulting in a lockdown); Suzanne Moore, *“Large-Scale Fights” Leads to Lockdown at NY Facility Where Two Escaped*, CORRECTIONS ONE (Aug. 30, 2015), <https://www.correctionsone.com/riots-and-crowd-control/articles/large-scale-fights-leads-to-lockdown-at-ny-facility-where-2-escaped-HZj5g8Ua4gOwPPQE/> (reporting on two large-scale, violent fights that occurred at Clinton Correctional Facility, resulting in lockdown).

<sup>126</sup> LIMAN PROGRAM AT YALE LAW SCH., TIME-IN-CELL: THE LIMAN-ASCA 2014 SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 8 (Aug. 2015).

<sup>127</sup> N.J. STAT. ANN. § 30:4-82.8(d)(1) (requiring that if the lockdown lasted for more than twenty-four hours, the prison official documents the *specific* reasons for its necessity and why alternatives were insufficient. These reasons must also be published on the Department of Corrections website within fifteen days of the lockdown, and meaningful notice of the reasons must be provided to the Legislature).

<sup>128</sup> N.J. STAT. ANN. § 30:4-82.7 (defining protective custody as the “confinement of an inmate in a cell or similar confined holding or living space, under conditions necessary to protect the inmate or others.”).

characteristics such as disabilities or sexual orientation.<sup>129</sup> As discussed in Section III(B) above, the Act sets fairly clear guidelines to regulate this exception—particularly in instances of involuntary protective custody.<sup>130</sup> There are, however, issues with this exception.

First, the Act asserts that protective custody inmates must receive similar privileges, such as activities, movement, and social contact, as inmates in general population.<sup>131</sup> Whether this is likely to occur or is even feasible, however, is questionable. And if it does become common practice in New Jersey correctional facilities, it is unlikely that the privileges permitted for protective custody inmates will be similar to those permitted for general population.<sup>132</sup> Further, the privileges provision of the protective custody exception is at odds with another provision. Section 30:4-82.8(d)(4)(f) requires that before the facility use protective custody, the facility must attempt a less restrictive intervention, including transfer “to a special-purpose housing unit for inmates who face similar threats.”<sup>133</sup> At least one other state has already successfully implemented such a specialized unit that is separate from both general population and solitary confinement housing.<sup>134</sup> If such a special-purpose housing is available in facilities in the state, why are they not the default placement for inmates in need of protection?

Further, this exception also stands at odds with the Act’s prohibition on the use of solitary confinement against vulnerable populations.<sup>135</sup> Despite the different name, protective custody is solitary confinement, nonetheless. This exception effectively overrides the prohibition on solitary confinement of members of a vulnerable population, so long as the correctional places the inmates in solitary confinement under the euphemism of protective custody.

While the restrictions set on the protective custody exception appear beneficial, they nonetheless highlight how solitary confinement by any name cannot be divorced from its punitive roots. Protective custody is not the only or most effective solution to this common

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<sup>129</sup> U.S. DEP’T. OF JUSTICE, *supra* note 11, at 4; *see also* United States v. D.W., 198 F. Supp. 3d 18, 74 (E.D.N.Y. 2016) (“[O]ften, the only means of protection available to vulnerable inmates is separation from the general population.”).

<sup>130</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(b).

<sup>131</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(c).

<sup>132</sup> *See* QUANDT, *supra* note 107, at 93.

<sup>133</sup> N.J. STAT. ANN. § 30:4-82.8(d)(4)(f).

<sup>134</sup> SHAMES, *supra* note 85, at 22 (reporting on Washington’s “Skill Building Unit,” which houses and provides out-of-cell programming for intellectually and developmentally disabled inmates).

<sup>135</sup> N.J. STAT. ANN. § 30:4-82.8(b) (“Except as otherwise provided in subsection d. of this section, an inmate who is a member of a vulnerable population shall not be placed in isolated confinement.”).

predicament for correctional facilities.<sup>136</sup> It is counterproductive at best, and harmful at worst, to hold the most vulnerable inmates in the same restrictive conditions as violent, misbehaving inmates.<sup>137</sup>

### iii. The Medical Isolation Exception

The Act permits medical isolation to “prevent[] the spread of a communicable disease,” as well as “mental health emergenc[ies].”<sup>138</sup> Like the lockdown exception, the first portion of the medical isolation exception—using solitary confinement as a means to quarantine an infectious inmate—is an understandably necessary and acceptable circumstance that requires such an extreme response. Notwithstanding, the latter half of the exception is one of the most problematic exceptions of the Act.

It is a dangerous misperception that isolating an inmate who is experiencing a mental health emergency in solitary confinement conditions is the only solution. Nor is it an appropriate response.<sup>139</sup> The consequences of relying on solitary confinement as a tool for managing and treating the mentally ill are far-reaching. There are three pertinent issues with correctional facilities’ overreliance on solitary confinement of the mentally ill. First, it is well-documented that the psychological implications of solitary confinement are so severe that it engenders symptoms of mental illness in any prison.<sup>140</sup> It follows that inmates suffering from pre-existing mental health issues experience exacerbation of their symptoms, as well as complications with re-establishing social functionality.<sup>141</sup> One researcher even concluded that “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than

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<sup>136</sup> See SHAMES, *supra* note 85, at 22.

<sup>137</sup> See SHAMES, *supra* note 85, at 28.

<sup>138</sup> N.J. STAT. ANN. § 30:4-82.7.

<sup>139</sup> See SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 34 (2003) (arguing that the manner with which prison staff treats inmates who are suffering from a mental illness episode is inappropriate and can aggravate the issue).

<sup>140</sup> See Dillon, *supra* note 23, at 275; see also Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. POL’Y 325, 333 (2006) (“I have observed that, for many of the inmates so housed, incarceration in solitary caused . . . the appearance of acute mental illness in individuals who had previously been free of any such illness.”).

<sup>141</sup> See Bennion, *supra* note 23, at 743 (“Prisoners entering solitary confinement with mental-health issues often find those issues severely exacerbated.”); Haney, *supra* note 28, at 142 (“[P]risoners with preexisting mental illnesses are at greater risk of having this suffering *deepen into something more permanent and disabling.*”) (emphasis added).

10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”<sup>142</sup>

Second, there are simply far too many inmates in our correctional facilities suffering from mental illnesses, such that relying on solitary confinement is impractical and even worsens the problems it seeks to resolve.<sup>143</sup> As of 2015, there were ten times more people with mental illnesses in correctional facilities than mental health treatment facilities.<sup>144</sup> Other estimates have claimed that as much as a third of the country’s prison population suffers from mental health issues.<sup>145</sup> Between 2017 and 2018, data self-reported by thirty-three states showed that a median of 7.9% of the male custodial population was in restrictive housing and suffering from serious mental illness.<sup>146</sup> Three states reported less than 1%, and two reported 0% of their male custodial population as having a serious mental illness and being held in restrictive housing.<sup>147</sup> But, thirteen states reported double digits, and New Mexico reported that 63.9% of their seriously mentally ill male custodial population was in restrictive housing.<sup>148</sup>

The third issue with using solitary confinement as a tool for managing the mentally ill is that symptoms may drive the “disruptive behavior” that lands them in solitary.<sup>149</sup> These inmates, as a result of

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<sup>142</sup> Haney, *supra* note 28, at 132.

<sup>143</sup> See Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-cv-01317, 2012 U.S. Dist. LEXIS 182974, at \*41 (S.D. Ind. Dec. 31, 2012) (“[Psychological] pain produces suffering, and a delay in treating the condition complicates the condition, can accelerate or intensify decompensation and can reduce the chances of a mentally ill prisoner achieving or re-establishing an optimal level of functioning.”); Joyce Kosak, *Mental Health Treatment and Mistreatment in Prisons*, 32 WM. MITCHELL L. REV. 389, 397–98 (2005) (noting that when adequate mental health treatment is provided to prisons, there is a notable improvement in safety as evidenced by a reduction in the number of violent disciplinary infractions, which are typically disproportionately high for inmates with a mental illness as a result of inadequate treatment).

<sup>144</sup> Darrell Steinberg & David Mills, *When Did Prisons Become Acceptable Mental Healthcare Facilities?*, STANFORD L. SCH. THREE STRIKES PROJECT, 2 (Feb. 19, 2015), [https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report\\_v12.pdf](https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report_v12.pdf).

<sup>145</sup> LIMAN PROGRAM AT YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 46 (Oct. 2018) (citing JENNIFER BRONSON & MARCUS BERZOFKSY, DEP’T. OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, NCJ 250612 (June 2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>).

<sup>146</sup> *Id.* at 48.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Ghafar, *supra* note 65, at 544 (discussing how “step-down” prison programs that allow inmates to exit solitary confinement by incentivizing “good behavior” is troublesome for mentally ill inmates because “[i]n a circular fashion, the extreme social

their psychological conditions, often have difficulty conforming to the hyper-regulated environment of prison.<sup>150</sup> As a result, prison staff often “treat disordered behaviors as disorderly behavior.”<sup>151</sup> One of the most salient examples of this was an inmate in Tamms Correctional Center, Illinois, who received a sentence of one year in solitary confinement after cutting his arm open with glass and eating his flesh.<sup>152</sup> In cases such as this, an inmate’s symptoms or claims of mental illness may be portrayed as manipulation or malingering.<sup>153</sup> This is a blatant and disturbing mischaracterization, as such behavior is often consistent with symptoms of mental illness, and many cases demonstrate inmates “inflicting self-harm to escape their cell, even if just for a trip to medical.”<sup>154</sup> The cases are gruesome, including incidents such as an inmate attempting to relieve an anxiety attack by stabbing paper clips into his abdomen, and another “remov[ing] a screw from his light switch cover and insert[ing] it into his penis just to get out of his cell.”<sup>155</sup> Solitary confinement being the default solution for misbehavior (which symptoms of untreated illness often cause) can perpetuate a destructive cycle: disruptive behavior resulting from a mental illness placing an inmate in solitary, which in turn has a dangerously high likelihood of exacerbating the issue.<sup>156</sup>

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and sensory deprivation of segregation in turn exacerbates those same symptoms that have kept these inmates stuck at the bottom due to repeated disciplinary infractions.”).

<sup>150</sup> Ghafar, *supra* note 65, at 545 n.156.

<sup>151</sup> *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1145 (2008).

<sup>152</sup> ABRAMSKY, *supra* note 139, at 174 (“Inmate appeared before the committee to address the charges. Inmate stated: I’m guilty. I was hungry and I was eating my arm that day. . . . Disciplinary action: Segregation one year.”).

<sup>153</sup> Compare Jean Casella & James Ridgeway, *Illinois Prisoner Says Years of Solitary Confinement Caused Mental Illness, Self-Mutilation*, SOLITARY WATCH (Sept. 2, 2011), <https://solitarywatch.org/2011/09/02/illinois-inmate-claims-years-of-solitary-confinement-have-led-to-mental-illness-and-self-mutilation/> (claiming that Anthony Gay’s seven-year isolation included routine self-mutilation, including an incident in which he cut off one of his testicles and hung it from a string on his cell door), *with* People v. Gay, 2011 IL App (4th) 100009, ¶ 28 (affirming trial court dismissal of defendant’s amended postconviction petition and rejected defendant’s argument that “an offender whose mental illness falls short of criminal insanity is less culpable than other offenders generally.”).

<sup>154</sup> Dillon, *supra* note 23, at 278.

<sup>155</sup> ABRAMSKY, *supra* note 139, at 145; Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection From Psychological Consequences*, 49 DEPAUL L. REV. 567, 573-74 (1999) (citing *Memorandum Compiling Inmate Letters from the MacArthur Justice Center and the Institute for Community Law to the Coalition of Lawyers and Members of Public Interest Community Concerned About Tamms Correctional Center*, 3-5 (July 13, 1998) (on file with author)).

<sup>156</sup> See ABRAMSKY, *supra* note 139, at 62 (“For the person with mental illness who accumulates misconduct reports, ‘the pattern of custodial routine is an original demand for compliance, and subsequent deprivation and punishment reinforce the original



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The governing standards for both placement into solitary confinement and removal therefrom are often arbitrary and discretionary.<sup>157</sup> Navigating the rules of prison life is difficult for all inmates, let alone those with mental illness, because it is rarely clear what the expectations for inmate behavior actually are.<sup>158</sup> Such ambiguity, coupled with insufficient training of prison staff to recognize and treat inmates with mental illness, has led to a disproportionate amount of mentally ill inmates in solitary.<sup>159</sup>

### 3. No Available Alternatives: Why Other Avenues of Reform Are Insufficient

The argument for abolition is strengthened by the lack of available alternatives to pursue reform of solitary confinement.

#### i. Judicial Reform

Lawsuits against prison officials and administrations have become a common avenue of redress from solitary confinement. The Supreme Court has heard solitary confinement cases over the years, extending significant legal protections to prisoners and expressing its concerns about the effects of solitary confinement.<sup>160</sup> The Court first acknowledged some of the horrors of solitary confinement in *In re Medley*<sup>161</sup> and reasoned that it was an “additional punishment” to an

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demand, which intensifies the problems by imposing more pressures upon already existing pressures *without providing any solution to the original problem.*”) (emphasis added).

<sup>157</sup> See Ghafar, *supra* note 65, at 512 (discussing how scholarship on solitary confinement often focuses on “mental health consequences and the arbitrary reasons and inconsistent processes determining how prisoners are sentenced to this confinement”); Mariam Hinds & John Butler, *Solitary Confinement: Can Courts Get Inmates Out of the Hole?* 11 STAN. J.C.R. & C.L. 331, 363 (June 2015) (discussing a mental health and substance abuse task force that was sent to assess the Maine Department of Corrections “[e]xpress[ed] concern with ‘the amount of discretion exercised by corrections officers in sending prisoners to’ solitary confinement”).

<sup>158</sup> See Ghafar, *supra* note 65, at 530 (finding that such arbitrary standards were used by a majority of the ten states’ Departments of Corrections, including Georgia, Michigan, Arizona, and Ohio).

<sup>159</sup> Hafemeister & George, *supra* note 5, at 46.

<sup>160</sup> Daniel H. Goldman & Ryan Brimmer, *U.S. Supreme Court Cases*, SOLITARY WATCH, <https://solitarywatch.org/resources/u-s-supreme-court-cases/> (last visited Jan. 17, 2020).

<sup>161</sup> *In re Medley*, 134 U.S. 160, 168, 171 (1890) (“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”) (“[T]he solitary confinement to which the prisoner was subjected by the statute of Colorado of

inmate's sentence, amounting to an unconstitutional *ex post facto* punishment. Thus, as early as 1890, this country's judicial system assessed the legality and harms of solitary confinement. Members of the Court have continued to echo the concerns stated in *In re Medley* regarding solitary confinement's legality in light of its harmful effects.<sup>162</sup> Yet, almost inexplicably, the Court has declined to declare the practice *per se* unconstitutional, and has also denied certiorari for several contemporary solitary confinement cases.<sup>163</sup>

#### ii. Administrative Reform

Another more common, but ineffective, avenue used to address solitary confinement has been "administrative" changes, such as minor reforms and policy changes made by the state legislature or by their Department of Corrections. Such changes suggest that this country is moving in the right direction and that the severe, inhumane effects of solitary confinement are becoming more widely condemned. But, while these are important policies, they are largely insufficient. In essence, administrative changes tend to act as an attempt to merely put a band-aid on the issue.

Administrative reforms to solitary confinement swept the country in 2014, dubbing it "the biggest year for reform."<sup>164</sup> These reforms ranged from mere recommendations to pledges by Departments of Corrections to reduce the use of solitary confinement to a complete ban on the use of solitary for certain groups.<sup>165</sup> While these reforms are beneficial and, again, suggest that the reliance on solitary confinement is on the decline, they have not generated lasting results in most states. New York is one of the most illustrative examples. As one of the states that notably ended juvenile solitary confinement, New York soon

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1889 . . . was an additional punishment of the most important and painful character, and is, therefore, *forbidden by this provision of the Constitution.*" (emphasis added).

<sup>162</sup> See *e.g.*, *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., concurring in denial of cert.) ("Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping [petitioners] in 'near-total isolation' from the living world, in what comes perilously close to a penal tomb.") (internal citations omitted).

<sup>163</sup> See *Apodaca*, 139 S. Ct. at 10; *Ruiz v. Texas*, *cert. denied*, 137 S. Ct. 1246 (2017); *Smith v. Ryan*, 823 F.3d 1270 (9th Cir. 2015), *cert. denied* 137 S. Ct. 1283 (2017); *Ayala v. Wong*, 756 F.3d 656 (9th Cir. 2014); *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015), *rehearing denied*, 136 S. Ct. 14 (2015).

<sup>164</sup> Hager, *supra* note 7.

<sup>165</sup> Hager, *supra* note 7 (noting that a Nebraska legislative commission made sixteen recommendations to the state Corrections Department); Hager, *supra* note 7 (reporting that the New Mexico Corrections Department committed to reducing its reliance on solitary confinement); Hager, *supra* note 7 (finding that as of February 19, 2014, New York banned juvenile solitary confinement for disciplinary reasons).

headed advocacy for further restrictions.<sup>166</sup> The Humane Alternatives to Long-Term Solitary Confinement Act (“HALT”) was introduced to the New York Legislature on January 15, 2019, and contained sweeping reforms to solitary confinement, such as suicide prevention and other mental health screening and removal provisions.<sup>167</sup> Additionally, it defined solitary confinement as any segregation for more than seventeen hours—the lowest limit proposed by a state legislature yet.<sup>168</sup> Over the next few months, it appeared that there was enough support for passage in both houses of the state legislature.<sup>169</sup> By mid-June, however, the bill fell short of enactment.<sup>170</sup> Despite this failure to pass the bill, Governor Cuomo and other lawmakers insisted that the Department of Corrections and Community Supervision (“DOCCS”) enact administrative policies.<sup>171</sup> The new rules included bans on solitary confinement against populations such as pregnant women and inmates with mental or physical disabilities, as well as new training requirements and prohibitions against punitive diet restrictions.<sup>172</sup> Perhaps most notably, the DOCCS rules will begin to phase in a thirty-day limit on the use of solitary confinement over the next three years; a ninety-day cap will be effective in October 2021 and a sixty-day cap by April 2022, until the thirty-day cap goes into effect on October 1, 2022.<sup>173</sup>

Since the passage of these rules, reports claim that they (including the ban on juvenile solitary confinement) quickly fell to the wayside in correctional facilities across the state.<sup>174</sup> Correctional facilities in New York have banned and restricted “solitary confinement” in name only, and instead now utilize two common replacements: “keeplock

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<sup>166</sup> N.Y. CIV. LIBERTIES UNION, *supra* note 97.

<sup>167</sup> The Humane Alternatives to Long-Term Solitary Confinement Act (“HALT”), S.B. 1623, 2019-2020 N.Y. Legislative Sess. (2019)

<sup>168</sup> *Id.*

<sup>169</sup> Dennis Slattery, *Breaking: HALT Bill Ending Solitary Confinement Gains Enough Support to Pass NYS Senate*, N.Y. ASSOC. OF PSYCHIATRIC REHAB. SERV., (Mar. 22, 2019), <https://www.nyaprs.org/e-news-bulletins/2019/3/22/breaking-halt-bill-ending-solitary-confinement-gains-enough-support-to-pass-nys-senate>.

<sup>170</sup> Clark, *supra* note 107.

<sup>171</sup> Clark, *supra* note 107.

<sup>172</sup> Clark, *supra* note 107.

<sup>173</sup> Clark, *supra* note 107.

<sup>174</sup> See Jake Offenhartz, “Separation Status” Now Replacing Solitary Confinement For Teens on Rikers, Attorneys Say, GOTHAMIST (Aug. 23, 2019), <https://gothamist.com/news/separation-status-now-replacing-solitary-confinement-for-teens-on-rikers-attorneys-say>; Andrea Cipriano, *Solitary Confinement Increases in New York State: Report*, CRIME REPORT (Oct. 29, 2019), <https://thecrimereport.org/2019/10/29/solitary-confinement-increases-in-new-york-state-report/>.

sanctions” and “separation housing status.”<sup>175</sup> Inmate transfers to local and county jails that do not restrict solitary confinement use is another reported workaround to the restrictions.<sup>176</sup>

Other states have followed similar trajectories as New York. After a 2011 *Washington Post* report found Virginia prisons held one in twenty prisoners in solitary confinement—including 500 of the 750 prisoners at Supermax Red Onion State Prison—the Virginia Department of Corrections (“VDOC”) implemented the “Segregation Reduction Step-Down Plan.”<sup>177</sup> The 2016 Department of Justice Restrictive Housing report included VDOC’s efforts as an example for how to provide “a path for inmates in long-term administrative segregation to work their way into the general population.”<sup>178</sup> While the Step-Down Plan created some improvements in Virginia correctional facilities, there remains serious concern both about the long-term effectiveness of the Plan and the lack of additional reform since 2011.<sup>179</sup> Most notably, reports explain that despite the Step-Down Plan’s thirty-day limit on disciplinary solitary confinement, inmates still face indefinite periods of isolation.<sup>180</sup> Further, inmates continue to report horrifying instances of abuse and mistreatment by correctional employees.<sup>181</sup>

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<sup>175</sup> Offenhartz, *supra* note 174 (noting that “separation housing status” is particularly troublesome because there are no apparent placement restrictions based on inmates age, mental health, or medical status, nor is there a definitive end period). *See also* Cipriano, *supra* note 174 (discussing New York’s “keeplock sanctions”).

<sup>176</sup> *See* Ashley Southall & Jan Ransom, *New York City’s Young Inmates Are Held in Isolation Upstate, Despite Ban*, N.Y. TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/nyregion/inmate-solitary-young-nyc.html> (noting that transfers of inmates under the age of 21 sharply increased starting in 2015, the year after the juvenile ban was effected); Taylor Elizabeth Eldridge, *Rikers Doesn’t Put Teens in Solitary. Other New York Jails Do.*, MARSHALL PROJECT (Mar. 28, 2018), <https://www.themarshallproject.org/2018/03/28/rikers-doesn-t-put-teens-in-solitary-other-new-york-jails-do>.

<sup>177</sup> GASPAROTTO, *supra* note 12, at 24-25.

<sup>178</sup> U.S. DEP’T. OF JUSTICE, *supra* note 11, at 77.

<sup>179</sup> GASPAROTTO, *supra* note 12, at 29.

<sup>180</sup> GASPAROTTO, *supra* note 12, at 32.

<sup>181</sup> Editorial, *Horrifying Reports From Solitary Confinement Prove Virginia Still Has Far to Go*, WASH. POST. (June 3, 2018), [https://www.washingtonpost.com/opinions/horrifying-reports-from-solitary-confinement-prove-virginia-still-has-far-to-go/2018/06/03/c7da6df0-6532-11e8-99d2-0d678ec08c2f\\_story.html](https://www.washingtonpost.com/opinions/horrifying-reports-from-solitary-confinement-prove-virginia-still-has-far-to-go/2018/06/03/c7da6df0-6532-11e8-99d2-0d678ec08c2f_story.html) (“[Reports suggest] that the spirit of reform has not permeated the state’s Department of Corrections . . . One [solitary inmate] ‘stated that he has not had recreation or a shower in more than a month.’ Another ‘reported that his food tray slot was opened and he was sprayed in his face with a can of mace’ . . . The prisoner was told if he reported the incident they would ‘beat my \*\*\*\*\* ass.’”).

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## V. CONCLUSION

The ills of solitary confinement are widely known, and research confirms the use of solitary confinement comes with severe consequences to its victims. Yet almost inexplicably, correctional facilities across the country continue to rely on solitary confinement. Moreover, the judicial system demonstrates an open unwillingness to address the *per se* constitutionality of the practice, and Departments of Corrections around the country demonstrate how solitary confinement can be abused.<sup>182</sup> Perhaps more distressing is the failure of state legislatures to abolish solitary confinement. Instead, states pass piecemeal laws that merely tinker with the practice and application within correctional facilities: New Jersey's Isolated Confinement Restriction Act provides the perfect example. Aside from emergency situations, such as a facility-wide lockdown or a quarantine situation, facilities should not use solitary confinement as either a punishment or a management tool. The toll solitary confinement exacts on inmates is far too great to justify its continued use.

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<sup>182</sup> See ASS'N OF ST. CORR. ADM'RS & LIMAN PROGRAM AT YALE L. SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 68 (Oct. 2018).