

**Reassessing Solitary Confinement II:
The Human Rights, Fiscal, and Public Safety Consequences**

Hearing before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

held February 25, 2014

Statement for the Record: The Policies Governing Isolation in U.S. Prisons

submitted by

**Hope Metcalf, Director of the Arthur Liman Public Interest Program, and
Judith Resnik, Arthur Liman Professor of Law***

Yale Law School

February 28, 2014

*The institutional affiliation is provided for identification purposes only. This statement was written with the assistance of Senior Liman Fellow-in-Residence Megan Quattlebaum and Yale Law students Katherine Culver, Corey Guilmette, Brian Holbrook, Emma Kaufman, Jamelia Morgan, Samuel Oliker-Friedland, Julia Spiegel, Haran Tae, Megan Wachspress, and Alyssa Work.

The Arthur Liman Public Interest Program at Yale Law School appreciates the Senate's continuing focus on the effects of prolonged isolation on the people who live and who work in prisons, on public safety, and on government budgets. We provide this statement to summarize the findings of the Liman Program's 2013 *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies*.¹ This report, surveying policies across the country, provides a unique window into administrative segregation.

Isolation in prison is described by numerous terms – disciplinary segregation, protective custody, administrative segregation, special management units, and other phrases – to reflect somewhat different, albeit often overlapping, rationales for such confinement. Our research was on administrative segregation, used in every jurisdiction in the United States and explained as placement for security, rather than for punishment.

The study was conducted with the assistance of the Association of State Corrections Administrators (ASCA), which enabled the Liman Program to review policies on administrative segregation that were in effect in 2013 in 46 states and the Federal Bureau of Prisons. Below, we detail how corrections departments define the criteria for placement in administrative segregation, the processes for determining who falls within those criteria, some of the rules governing contact while in isolation, and the provisions for exit. Because we looked at written policies, we cannot report on how policies are implemented or on how isolation is experienced.

What we can report is that, despite the 47 different policies, administrative segregation throughout the United States shares the same basic features: criteria for placement give broad discretion to decision-makers; detention generally is open-ended, rather than for a fixed duration; confinement is close and restrictive; and access to contact with visitors and to activities is very limited.

Looking at the rules sheds light on why the practice of administrative segregation has become so prevalent. The policies provide relatively little guidance about which concerns and what risks necessitate segregation, and under which circumstances or by which criteria an inmate should be returned to general population. Thus, the rules do not reflect how segregation is actually used, either in the jurisdictions where isolation remains commonplace or in those that, in recent years, have reduced their segregation populations. As a consequence, we remain concerned that isolation is used too often, for too long, and with too little oversight. Thus, we share the goals, expressed repeatedly at the February 25th Hearing, of diminishing both the use of isolation and the degrees of isolation for those confined, whether under the rubric of administrative, punitive, or disciplinary segregation.

¹ That report, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies* (July 2013) is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286861. Citations to all policies referenced here are provided in the endnotes to that report.

I. Expansive Criteria for Entering Isolation

Correctional systems explain that administrative segregation is used to ensure the safety of inmates, staff, and the public. As testimony presented at the Hearing on February 25, 2014 emphasized, the issue is not whether safety is central but whether reliance on isolation promotes safety.

Reading the many policies makes plain the degree of discretion accorded to correctional officials when deciding whether to put individuals into isolation. Whether in Alabama, Arkansas, Delaware, Hawaii, Indiana, New York, North Dakota, Pennsylvania, Vermont, or elsewhere, policies permit placement based on a wide range of criteria, often defined broadly. Below, we excerpt a few policies to provide a first-hand understanding of the breadth of the criteria and the degree of discretion accorded. Segregation is permitted when or if:

- “Continued presence in the general population poses a serious threat to life, property, security or the orderly operation of the institution.” - Alabama, AR 436.3A;
- “Any other circumstances where, in the judgment of staff, the offender may pose a threat to the security of the facility.” - Arkansas, AR836 DOC 4.6;
- “Continued presence in the general population poses a threat to life, property, self, staff, other offenders or to the safety/security or orderly operation of the facility.” - Delaware, DOC IV.2 4A; *see also* Pennsylvania, DC-ADM 802, III; Oklahoma, OP-040204.1;
- “Presence of the inmate in general population would pose a serious threat to the community, property, self, staff, other inmates, or the security or the good government of the facility.” - Hawaii, COR.11.01.2.2.a.2; *see also* North Dakota, DOC 5A-20.2.a; Vermont, DOC 410.03;
- “Based on: 1) threat an offender’s continued presence in the general population poses to life, self, staff, other offenders, or property; 2) threat posed by the offender to the orderly operation and security of the facility; and 3) regulation of an offender’s behavior which was not within acceptable limits while in the general offender population.” - Indiana, DOC 02-01-111-II;
- “Administrative segregation admission results from a determination by the facility that the inmate’s presence in general population would pose a threat to the safety and security of the facility.” - New York, 7 NYCRR 301.4(b).

In addition to such general provisions, many states include other bases for isolation. Below we excerpt examples from California, the Federal Bureau of Prisons, Florida, Kentucky, Maryland, Mississippi, Montana, North Carolina, Pennsylvania, South Dakota, and Tennessee. Administrative segregation may be based on the following reasons:

- Continued presence in general population would jeopardize “the integrity of an investigation of an alleged serious misconduct or criminal activity.”
- California, Cal. Code Regs. Tit. 15 § 3335(a);
- “Disruptive geographical group and/or gang-related activity.” - Bureau of Prisons, P5217.01(2);
- “A conviction of a crime repugnant to the inmate population.” - Florida, Fla. Admin. Code r. 33-602.220(3)(e);
- “Those who received unusual publicity because of the nature of their crime, arrest, or trial, or who are involved in criminal activity of a sophisticated nature, such as organized crime.” - Montana, DOC 4.2.1(IV)(C)(d);
- “Those with special needs, including those defined by age, infirmity, mental illness, developmental disabilities, addictive disorders, and medical problems.” - Montana, 04.05 120C(f); *see also* Kentucky, CCP 10.2(II)(G)(3)(i); Maryland DOC.100.002, Sec. 18(B)(2)(e);
- “As a cooling off measure.” - North Carolina, DOC C.1201(a)(4)(E);
- “There is a history of unresponsiveness to counseling or conventional disciplinary sanctions and the inmate is flagrantly or chronically disruptive to the security and/or disciplined operation of the institution.” - South Dakota, 1.3.D.4(B)(5);
- “Pending prosecution and disposition in criminal court for felony charges incurred during incarceration.” - Tennessee, 404.10(VI)(A)(d); *see also* Mississippi, SOP 19-01-01(77);
- “No records and/or essential information are available to determine the inmate’s custody level or housing needs.” - Pennsylvania, DC–ADM 802, Sec. 1(A)(1)(j).

To summarize, the admission criteria in most systems provide discretion to decision-makers about what behaviors can trigger placement. A common feature across jurisdictions is that the substantive criteria for placement include general concerns about the safety of inmates and staff as well as of institutional security, along with additional bases for confinement. Some jurisdictions enumerate grounds for placement, such as the kind of offense for which a person is incarcerated or the number of infractions a person has incurred, in addition to more general safety and security justifications.

A few jurisdictions have narrowed or are planning to narrow the criteria. For example, in Colorado as of 2013, administrative segregation policies were under revision to require showings of serious bodily harm or other discrete acts. Virginia revised its policy in 2012 to require specific predicate acts for admission to long-term segregation.

II. Decision-Making and Isolation

All of the policies authorize immediate temporary placement in segregation. Thereafter, some but not all jurisdictions provide for notice of the grounds for the placement and an opportunity for a hearing evaluating the need for continued segregated detention. The kind of notice and hearing required varies substantially, as do the decision-makers. Some systems leave decision-making at the unit-level, others place authority in committees, and others require oversight by the warden or the central office.

To understand the formal criteria for placement decisions, we examined policies governing two junctures – the first (non-emergency) placement and then what is generally termed “periodic review.” The challenge in reading policies was that it was, at times, difficult to decide what to classify as a “hearing.” For example, some policies reference formal opportunities for presentations by inmates, while other policies mention the possibility of inmate statements but are unclear about whether such information is provided directly to the decision-makers.

All policies provide for some form of ongoing review, but again, with a great deal of diversity in terms of timing, level of oversight, and criteria. Given the breadth of discretion built into the criteria for placement, whether review and oversight imposes constraints cannot be known from the policies, nor can we know about compliance with the rules themselves.

Initial (Non-Emergency) Placement and Oversight of that Decision: Thirty-eight jurisdictions specify that a hearing be held upon initial placement, while nine jurisdictions authorize administrative segregation and do not mention hearings. All but seven of the jurisdictions mandating hearings also require that some form of written notice be provided to the inmate in advance of the hearing. Among states that require hearings, nearly all specify that the hearings must take place within 14 days of placement. Some have longer intervals; for example,

Connecticut and Ohio call for hearings within 30 days, and Iowa specifies that an initial hearing be held within 60 days.

Most of the policies authorize a diverse set of institutional authorities – staff, shift commanders, deputy wardens, wardens – to make initial decisions on placing prisoners immediately in segregation. Policies call for additional procedures thereafter. Thirty-one jurisdictions authorize decision-making by a committee. In some instances, as in New Jersey and Virginia, a hearing officer makes an initial recommendation to the committee. In twelve jurisdictions, a hearing officer (or another individual official) decides whether to place an inmate in administrative segregation. In three jurisdictions, Hawaii, Kentucky, and Tennessee, the warden or his/her designee is responsible for making initial determinations.

Of the 38 jurisdictions that specify hearing procedures, 30 authorize inmates to present evidence (by oral statements, written submissions, or documents) and/or to call witnesses, subject to security considerations. Eight states (Arizona, Connecticut, Idaho, Maine, Mississippi, Nevada, New Mexico, and New York) do not specify that inmates can present evidence.

Of these 38 jurisdictions, eight authorize inmates to have a representative, advocate, assistant, or counselor to assist with hearing proceedings. Nine additional jurisdictions provide for assistance or appoint representatives in specified circumstances – such as language barriers, illiteracy, or mental illness – so as to help in preparation for the hearing or to explain the inmate’s rights and/or the proceedings. The Federal Bureau of Prisons provides that a “non-probationary staff member will be available to help the inmate compile documentary evidence and written witness statements to present at the hearing,” and notes that the responsibility is “limited” to helping obtain relevant copies of documents. Twenty jurisdictions do not specify that inmates can be represented by individuals such as an advocate, assistant, or counselor at hearings.

Most policies do not mention lawyers as participants. One state, Vermont, expressly bans lawyers; two others, Alaska and Massachusetts, expressly permit attendance by lawyers.

States employ several means to review the initial decision to place inmates in administrative segregation. In addition to “periodic review,” discussed below, many states provide for prompt review (required as an institutional policy matter) or for an optional appeal by the inmate.

Fifteen jurisdictions authorize automatic review by the warden (or designee). For example, in Ohio, a hearing officer issues a report to the warden, who decides whether placement is appropriate. Six of these states (Alaska, Colorado, Nebraska, Ohio, Vermont, and Washington) provide for another level of review, typically at the central office. Nine jurisdictions provide for automatic review by the central office: Arizona, the Federal Bureau of Prisons, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, Rhode Island, and Virginia. North Dakota and Oklahoma state that reviews will be done by “the appropriate authority.”

Some states require that initial decisions by hearing officers or classification committees be approved by the warden or central office. For example, Washington has different decision-making systems depending on the length of isolation, and also uses a distinctive nomenclature – intensive management and intensive treatment. For placement in administrative segregation for periods up to 47 days, a multi-disciplinary classification team reviews the placement and continuation. After 47 days, the classification team must either return the inmate to general population or make a referral for “Intensive Management Status” (IMS) or “Intensive Treatment Status” (ITS), where the inmate would stay for a minimum period of six months. Following a hearing, the classification team may recommend transfer to ITS/IMS; any such transfer must be approved by the Assistant Secretary for Prisons (or designee).

A fewer number of states specify that inmates can appeal a placement. Five states permit inmates to appeal placement decisions to the warden: Kansas, Maine, Mississippi, Pennsylvania, and South Dakota. Two of those states, Pennsylvania and South Dakota, provide for another level of review. In some states, such as Arizona, Michigan, New York, and Oregon, inmates can appeal to the central office. The Federal Bureau of Prisons permits an inmate to appeal placements in the Special Management Unit (SMU) to the Bureau’s Office of General Counsel. Several jurisdictions, including Mississippi, Virginia, and North Carolina, specify that inmates may seek review of placement decisions through regular grievance channels. In 2013, policies in nine jurisdictions did not specify that review or appeal of the initial placement decision was available.

Procedural Reviews: In all of the policies examined, some form of ongoing evaluation is required to determine whether or not an inmate should remain in administrative segregation. “Periodic review” is the general term used to denote an automatic review at specified intervals – ranging from weekly to yearly – of the continuing placement. The authority to continue to hold an individual varies from the unit itself to the central office, and in a few instances, the director or commissioner of the state-wide department of corrections. In some jurisdictions, inmates may appeal periodic review decisions. In many jurisdictions, policies do not detail the criteria by which, upon periodic review, inmates are entitled to be transferred out of segregation. What policies cannot reveal is whether and how the frequency of reviews correlates with the length of time spent in segregation.

Structured Time, Step-Downs, and Exiting Isolation: Some jurisdictions describe “Step-Down,” “Intensive Management,” or “Behavioral Management” programs to permit increased access to time out of cell, visits, commissary, and other incentives tied to the completion of certain goals, such as behavioral plans or classes. For example, New Mexico has a “behavior-driven progressive incentive system consisting of steps that encourages appropriate behavior.” Mississippi’s program focuses on inmates who are currently in administrative segregation and who will be released within six months. Those inmates receive reentry-focused programming in a segregated setting.

In some states, such programs need to be completed before an inmate can be transferred out of segregation. Generally speaking, inmates must stay in such programs for significant periods of time, such as six months to a year. Further, in some jurisdictions, disciplinary infractions of any kind can extend the length the time in segregation.

III. Conditions While in Isolation

The policies provide very different levels of information about the day-to-day experiences of long-term confinement in a segregation unit. For example, some policies set out specific conditions such as minimum square footage, standards for amount and type of light (artificial or natural), the number and type of personal effects permitted, access to library services, and phone privileges. Another approach, taken by a number of states (Florida is an example), provides that “administrative confinement status may limit conditions and privileges . . . [but] treatment of inmates . . . shall be as near to that of the general population” as the separation “shall permit.” Other policies give no details on the conditions.

How isolating segregation is depends in part on whether and under what circumstances persons so confined can speak with and interact with other people. In general, policies did not detail the degree of social interaction permitted, either with other inmates and/or with staff or third parties.

Group-based Programs: Washington is one of several states, including Colorado, Massachusetts, Mississippi, and Virginia, exploring ways to provide greater opportunities for group activities and for therapy. Working in conjunction with Disability Rights Washington and the Vera Institute, Washington developed what it terms “intensive management” or “intensive treatment” to provide structured group activities and/or various therapies for those in segregation. Staff members assign inmates to specific programs based on individualized assessments of mental health and behavior. To return to general population, inmates are required to participate.

Visits while in Isolation: Contact with persons outside the facilities is another aspect of sociability, and visitation is addressed by all the policies we reviewed. The policies varied with respect to the types of visitors permitted, whether visits could be contact or not, what discretion to limit visitation existed, and the frequency and duration of the visits allowed. Some policies noted that wardens had discretion over visiting, or that visits can be limited based on security concerns or in relationship to the performance of inmates, including those in step-down programs. Aside from such provisions, statewide policies did not address the criteria to be used to limit visits as a disciplinary matter. In this arena as in others, decisions at the facility-level both fill gaps and may create site-specific practices.

Categories of Visitors: The policies vary a good deal in terms of detailing visitation rules. All appear to assume lawyer access to clients, but a few specify requirements or note opportunities for contact visits. For example, several states require attorneys to obtain advance approval from a superintendent or warden. Ten states provide that limitations on contact visits in segregation do not apply to legal counsel.

Twenty states specifically provide inmates in administrative segregation units with access to religious personnel. In some instances, the focus is on institutional employees, such as chaplains. Arkansas, for example, specifies that chaplains visit “regularly and on request.” Iowa provides that religious personnel may visit “upon request.” Illinois, Indiana, Kentucky, Maine, and New York advise that the chaplain is to visit at least once a week. Minnesota authorizes a facility’s religious coordinator to make visits once a month. Nevada provides that visitation by religious personnel “will be encouraged and allowed.”

All of the jurisdictions reviewed also provide for inmates to have personal visits while in administrative segregation. A handful of jurisdictions provide that visitation regulations are the same for prisoners in administrative segregation as for those in general population.

In terms of the type or number of visitors for inmates in administrative segregation, a few states specify categories of permissible visitors. Connecticut, New Jersey, Tennessee, and Washington limit visitors, for some kinds of segregation, to “immediate family” or “relatives.” Oregon limits an inmate to two people on the visitation list at any given time, while Mississippi limits an inmate to ten visitors.

Contact/Non-Contact Visits: Seventeen jurisdictions do not specify whether visits are contact or non-contact. Twenty-two states bar contact visits for all or part of the administrative segregation population. California and Nebraska bar contact visits for inmates in the “Secured Housing Unit” or “Intensive Management Unit” but allow contact visits for inmates in other forms of administrative segregation. Minnesota’s Administrative Control Unit provides that visits may take place through a closed-circuit television monitor.

Eleven states permit personal contact visits for inmates in administrative segregation. Ten of those states authorize the warden or designee to determine whether the visit is contact or non-contact. Vermont ties contact visits to progression through the phases of a step-down program for those in administrative segregation.

Additional Requirements and Restrictions: Many states set out possible restrictions on visitation based on broad institutional concerns. A formulation found in six states is that “offenders have opportunities for visitation unless there are substantial reasons for withholding such privileges.” In Florida, “those inmates who are a threat to the security of the institution shall be denied visiting privileges.” Massachusetts provides that “the length and number of visits may be limited due to space, schedules, personnel constraints, or when there is a substantial reason to justify limitation.”

Twenty-five jurisdictions expressly authorize the superintendent, warden, or other designee to limit visitation at his/her discretion or upon a determination that visits would be a security risk. Twelve of those states further require that, for inmates in administrative segregation, advance permission for personal visits be requested from the warden, superintendent, or other correctional officer. Those policies typically do not provide guidelines for making such decisions.

Some policies focus on inmate behavior as a criterion for visiting, but include a presumption in favor of visits. In Alaska, for example, the warden may restrict access to visitation “only if an individualized determination is made that an inmate’s participation threatens the order and security of the facility.” Kentucky provides that inmates who pose a security threat may be required to have visits in a different and more secure visiting area.

All policies address the frequency of visits. Twenty-seven states leave that decision to the facility and, typically, the warden, sometimes under guidelines. For example, Indiana authorizes individual facilities to reduce the frequency of visitation, but not to less than two visits per month. Five states expressly provide that inmates in administrative segregation shall have the same number of visits as the general population. When visitation is restricted, most policies provide somewhere between one and two visits, lasting one to two hours, each month. Five states permit increasing the frequency and intervals of visits based on inmate behavior and as other restrictions are decreased. One state – Indiana – mentions the role of visits in relation to leaving prison. Indiana provides that “consideration shall be extended for additional visiting privileges to aid in the offender’s Re-Entry planning and programming.”

IV. Learning from the Written Rules

Reading dozens of policies on isolation underscores the reliance placed on this practice in American prisons. Policies cast a wide net of authority and provide dozens of predicates to permit placement of inmates in isolation. Only a few jurisdictions make placements more difficult by imposing specific controls on such decisions. As of 2013 and despite efforts in several jurisdictions to address the overuse of isolation, the written criteria for placing individuals into segregation facilitate its ready use.

Missing from policies are concrete directives to diminish the reliance on isolation and to restructure isolation to limit the degrees of isolation when prisoners are so confined. The policies governing isolation did not describe isolation as a last resort, to be used sparingly for the shortest duration possible, and under the least isolating conditions.

We appreciate the opportunity to contribute to the dialogue underway to bring those concerns to the fore. The interactions during the last three years among the leaders of prison systems, legislators, judges, researchers, and advocates have begun to restructure expectations,

goals, and practices. Our hope is that written policies will change to reflect these efforts and that new mandates will be implemented. We look forward to participating in the continuing exchanges, and we thank this Committee for its bipartisan leadership in bringing the issue of isolation into focus.

Respectfully submitted,

Hope Metcalf
Director
Arthur Liman Public Interest Program

Judith Resnik
Arthur Liman Professor of Law
Yale Law School