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Lessons and Liabilities in Litigating Solitary Confinement Symposium Essays

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Essay

Lessons and Liabilities in Litigating Solitary Confinement

KERAMET REITER

This Essay reviews the recent deluge of legal attention solitary confinement has received in the United States, focusing in particular on three legal cases: Davis v. Ayala (a U.S. Supreme Court case), Coleman v. Taylor (a case filed and recently dismissed in a federal district court in Illinois), and Ashker v. Brown (a settled case filed in a federal district court in California). A close analysis of the reasoning in each of these cases provides a framework for examining the changing landscape of prison reform litigation in what many are heralding as a new era of reform. Together, these cases reveal one critical, changing mechanism of success in reform litigation: in each of the three cases, lawyers have leveraged careful investigative reporting and collective action by prisoners in changing not just the legal conversation, but also the public attitude towards isolation. This reveals the growing importance of what I call “multi-method” approaches to reform litigation. However, the reforms being sought and implemented are, perhaps, neither so drastic nor so sustainable as critics of solitary confinement might hope. In light of the history of solitary confinement, three lessons have been ignored and deserve further scrutiny: the persistence of solitary, the opacity of solitary, and the administrative discretion governing solitary.

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Lessons and Liabilities in Litigating Solitary Confinement

KERAMET REITER*

I. INTRODUCTION

For advocates of solitary confinement reform (and abolition), 2015 was a red-letter year. The Supreme Court, local federal courts across the United States, and multiple federal and professional agencies scrutinized U.S. solitary confinement practices, levied incisive criticisms, and initiated reform dialogues. Perhaps most dramatically, in June 2015, Justice Kennedy wrote a concurrence in *Davis v. Ayala* in which he explicitly invited challenges to the types of conditions of long-term solitary confinement in which Hector Ayala (whose death sentence the Court upheld) had been housed for over twenty-five years.¹ Just two weeks later, three Illinois prisoners filed a class action complaint on behalf of all 50,000 prisoners in the state. The complaint alleged that all Illinois prisoners faced “a substantial risk of receiving arbitrary, disproportionate, harmful, and unjustified extreme isolation sentences as a result of IDOC’s [the Illinois Department of Corrections’] policies and customs in violation of the United States Constitution.”² Prisoners in isolation alleged that their conditions of confinement violated the Eighth Amendment prohibition against cruel and unusual punishment and that the procedures for their placement in isolation violated the Fourteenth Amendment guarantee of due process protections of liberty interests.³ And just two months after that, in August 2015, the California Department of Corrections and Rehabilitation signed a sweeping settlement agreement in *Ashker v. Brown*, a class action lawsuit brought on behalf of all the prisoners in the state who had been in solitary confinement for ten years or more. Among other things, the settlement set a strict limit of five years on any and all terms of

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¹ *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (Kennedy, J., concurring), *reh’g denied*, 136 S. Ct. 14 (2015).

² Complaint at 1, 33, 46, *Coleman v. Taylor*, No. 1:15-cv-05596 (N.D. Ill. June 24, 2015).

³ *Id.* at 35–36.

solitary confinement in the state.⁴

Then, in September 2015, the Association of State Correctional Administrators (ASCA), in collaboration with the Arthur Liman Public Interest Program at Yale Law School, issued a report describing conditions in “restrictive housing” (a catch-all term for various forms of isolation, segregation, and solitary confinement) and estimating the numbers of prisoners held in such conditions across the United States.⁵ In October 2015, the Bureau of Justice Statistics issued its own report attempting to estimate the number of people in some form of “restrictive housing.”⁶ The Justice report was issued in conjunction with the convening of a National Institute of Justice topical working group on the use of administrative segregation in the United States.⁷ By the end of 2015, the Marshall Project, itself a new investigative journalism platform founded in the fall of 2014 to “create and sustain a sense of urgency about criminal justice in America,” reported that solitary confinement reform would be one of three key criminal justice trends to watch in the coming year.⁸ Advocates of legal reform have every reason to pay attention, but what role will litigation play in this new reform paradigm, and how sustainable are these reforms likely to be?

Prior to 2015, the law on solitary confinement seemed depressingly settled. In 1995, in the first federal court case to consider the constitutionality of long-term solitary confinement in technologically advanced, modern supermax facilities, a notoriously liberal district court judge in the Northern District of California upheld the constitutionality of solitary confinement in extremely restrictive conditions of confinement, even for indefinitely long durations.⁹ And in 2005, the only time the U.S.

⁴ Settlement Agreement at 12, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Aug. 31, 2015) (on file with author).

⁵ LIMAN PROGRAM & ASS’N OF STATE CORRECTIONAL ADM’RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON ii (2015) [hereinafter TIME-IN-CELL], https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf [https://perma.cc/U832-ELQA].

⁶ ALLEN J. BECK, U.S. DEP’T OF JUSTICE, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 1 (2015), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5433> [https://perma.cc/W7KS-LV37].

⁷ Nancy Rodriguez, *Director’s Corner: Setting the Agenda for Administrative Segregation Research*, NAT’L INST. JUSTICE (Oct. 22, 2015), <http://www.nij.gov/about/director/Pages/rodriguez-administrative-segregation.aspx> [http://web.archive.org/web/20151030031209/http://www.nij.gov/about/director/Pages/rodriguez-administrative-segregation.aspx].

⁸ *Mission Statement*, MARSHALL PROJECT, <https://www.themarshallproject.org/about?via=navright#uQlls50ha> [https://perma.cc/QP3Y-LV5J] (last visited Apr. 2, 2016); Andrew Cohen, *Next Year in Criminal Justice: Three Themes That Will Trend, Three That Won’t*, MARSHALL PROJECT (Dec. 21, 2015), <https://www.themarshallproject.org/2015/12/21/next-year-in-criminal-justice> [https://perma.cc/MSZ6-KM39].

⁹ *Madrid v. Gomez*, 889 F. Supp 1146, 1265 (N.D. Cal. 1995); see also Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking*,

Supreme Court considered long-term solitary confinement in supermax facilities, the Court found that the limited procedural protections governing placement in the Ohio State Prison (a supermax) were adequate to protect the prisoners' acknowledged liberty interest in *not* being placed there.¹⁰ The original issue in *Wilkinson v. Austin*, of whether the Ohio supermax violated the Eighth Amendment prohibition against cruel and unusual punishment, was resolved within the lower courts (which ordered some reforms to existing conditions) and was not considered by the Supreme Court.¹¹

Incidentally, Justice Kennedy wrote the opinion for the unanimous court in *Wilkinson*.¹² But Justice Kennedy's concurrence in *Davis*, along with the statewide, class action litigation in Illinois and California, suggested an unsettling of these precedents.

High-profile criticisms of the widespread and long-term use of solitary confinement in the United States bubbled up over the five years prior to Kennedy's concurrence in *Davis*. In 2009, Jean Cassella and James Ridgeway founded Solitary Watch, a web-based project to investigate solitary confinement and consolidate resources on the topic; the site now has hundreds of thousands of visitors per year.¹³ The American Civil Liberties Union founded a national Stop Solitary campaign in 2012,¹⁴ following on the heels of the U.N. Special Rapporteur's explicit condemnation, in 2011, of any term in solitary confinement lasting longer than fifteen days.¹⁵ In 2011 and again in 2013, tens of thousands of California prisoners participated in hunger strikes, explicitly protesting conditions in solitary confinement.¹⁶ In 2012 and 2014, Democratic Senator Dick Durbin hosted two congressional hearings critically evaluating the practice of solitary confinement throughout U.S. prisons.¹⁷

1986–2010, 5 U.C. IRVINE L. REV. 89, 93 (2015) (discussing *Madrid v. Gomez* and its impact on subsequent cases).

¹⁰ *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005); see also Keramet Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 STUD. L. POL. & SOC'Y 71, 114–15 (2012).

¹¹ *Wilkinson*, 545 U.S. at 218.

¹² *Id.* at 212.

¹³ See SOLITARY WATCH, <http://solitarywatch.com/> [<http://web.archive.org/web/20160414160239/http://solitarywatch.com/>] (last visited Apr. 2, 2016).

¹⁴ See *We Can Stop Solitary*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/feature/we-can-stop-solitary?redirect=stop-solitary-resources-advocates> [<https://perma.cc/4ES8-W6RH>] (last visited Apr. 2, 2016).

¹⁵ *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, U.N. NEWS CENTRE (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097> [<https://perma.cc/PC5H-URAC>].

¹⁶ Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance Within the Structural Constraints of a US Supermax Prison*, 113 S. ATLANTIC Q. 579, 579–81 (2014).

¹⁷ See *Durbin Commends President Obama's Leadership in Addressing Solitary Confinement*, U.S. SEN. DICK DURBIN (Jan. 26, 2016), <http://www.durbin.senate.gov/newsroom/press-releases/durbin>

Even in late 2014, however, the conversation about solitary confinement was primarily political. That changed in 2015, when large-scale litigation about conditions of solitary confinement suddenly seemed viable.

The three 2015 federal cases of *Davis v. Ayala*, *Coleman v. Taylor*, and *Ashker v. Brown* together signal the possibility for sweeping legal reconsiderations of the practice of solitary confinement, especially in its longer-term iterations, across the United States. A close analysis of the context in which each case arose and of the reasoning underlying the litigation, settlement, and opinions in these cases, provides a framework for examining the changing landscape of prison reform litigation in what many are heralding as a new era of reform.¹⁸ Together, these cases reveal critical, changing mechanisms of success in reform litigation. In each of the three cases, empirical scholarship, careful investigative reporting, and even collective action by prisoners, have been integral parts of the litigation and legal reasoning underlying the cases. This exemplifies the growing importance of what I call “multi-method” approaches to reform litigation. However, the reforms Justice Kennedy called for in *Davis*, the ones being sought in *Coleman*, and the ones being implemented in *Ashker*, are, perhaps, neither so drastic nor so sustainable as critics of solitary confinement might hope. In light of the history of solitary confinement, each of these cases ignores three lessons, which deserve further scrutiny: the persistence of solitary, the opacity of solitary, and the administrative discretion governing solitary.

In the first three parts of this Essay, I introduce each of the three landmark 2015 cases and analyze the context for and reasoning in each, identifying the multi-method approaches along with the historical blind spots visible between the lines of the legal reasoning. In the fourth part, I summarize the “lost lessons” of prior reform and suggest how they might be better incorporated into future litigation efforts.

-commends-president-obamas-leadership-in-addressing-solitary-confinement [https://perma.cc/FB8S-PLTM] (detailing Senator Durbin’s condemnation of solitary confinement in two hearings as Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights).

¹⁸ See, e.g., Eli Hager & Gerald Rich, *Shifting Away from Solitary: More States Have Passed Solitary Confinement Reforms This Year than in the Past 16 Years*, MARSHALL PROJECT (Dec. 23, 2014), <http://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary> [https://perma.cc/V4SV-6GDM] (documenting the substantial increase in solitary confinement reforms in 2014 when compared to the sixteen years prior); see also David M. Shapiro, *To Seek a Newer World: Prisoners’ Rights at the Frontier*, 114 MICH. L. REV. 124 (2016).

II. JUSTICE KENNEDY'S INVITATION TO A BEHEADING¹⁹

In *Davis v. Ayala*, Justice Kennedy wrote a short concurrence to the majority opinion upholding Hector Ayala's death sentence, which Kennedy was "unqualified" in supporting.²⁰ In his concurrence, however, Justice Kennedy outlined his response to "one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal question presented by this case."²¹ Appending this kind of commentary with "no direct bearing" on the case at hand was unusual enough, but the substance of the commentary was even more surprising. In a short but sweeping three-page review, Justice Kennedy summarized the existing evidence in literature, law, and science that solitary confinement "exact[s] a terrible price" from inciting a "mindless state" to "terror" to "anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors."²² Justice Kennedy concluded with an invitation to prisoners and their advocates to bring a case to challenge (or even behead)

¹⁹ This is a riff on Vladimir Nabokov's classic novel, *INVITATION TO A BEHEADING* (Dmitri Nabokov trans., Vintage Int'l 1989) (1959) (raising the irrationality of the death penalty as a punishment). This reference to Nabokov's novel as a relevant metaphor for thinking about the secrecy and irrationality of extreme punishments builds on the work of Michael Mushlin, who argues that Franz Kafka's classic work *In the Penal Colony* provides another helpful metaphor for thinking about the challenges to reform, especially where bureaucrats lack the power to implement reforms, and punitive institutions remain closed off to public oversight. Michael B. Mushlin, "I Am Opposed to This Procedure": How Kafka's *In the Penal Colony* Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons, 93 OR. L. REV. 571, 625–26 (2015).

²⁰ *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (Kennedy, J., concurring), *reh'g denied*, 136 S. Ct. 14 (2015). The central question in *Davis* concerned the constitutionality of the decades-old death sentence of Hector Ayala. In 1985, Hector Ayala, along with his older brother Ronaldo Ayala, was charged with murdering three men in a San Diego auto body shop, as part of a robbery. In 1989, in separate trials, both brothers were convicted and sentenced to death. 'Executioner' of 3 Given Death Sentence, L.A. TIMES (Feb. 10, 1989), http://articles.latimes.com/1989-02-10/local/me-2458_1_death-sentence [<https://perma.cc/LK4L-HAX2>]. At Hector Ayala's trial, the prosecutor used peremptory challenges to strike all seven of the eligible African-American and Hispanic jurors in the jury pool. *Davis*, 135 S. Ct. at 2193–94. Hector Ayala litigated the racially disparate impact of these challenges for the next quarter of a century; in the spring of 2015, the Supreme Court heard arguments in the case. *Id.* at 2187. In June of 2015, Justice Alito delivered the 5-4 opinion of the Court: any constitutional error that took place as a result of the prosecutor's peremptory challenges to strike all the minority jurors was "harmless." *Id.* at 2208. The decision reaffirmed the extremely high standard prisoners must meet in order to prove constitutional error in an appeal of a death penalty proceeding (and severely limited the Court's 1986 holding in *Batson v. Kentucky*, which had restricted lawyers' abilities to use peremptory challenges in apparently racially biased patterns). See Hadar Aviram, *Davis v. Ayala: Post-Conviction Review of Batson, Harmless Error, and a Surprising Dignity Opinion from Justice Kennedy*, PRAWFSBLAWG (June 18, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/week25/> [<https://perma.cc/T2VY-X4AH>], for an analysis of this aspect of the case. Put simply, the holding, supported by the Court's five Republican-appointed justices, sided with the interests of the California courts and prosecutors, and against the interests of the death-sentenced prisoner. Justice Kennedy joined the majority opinion. *Davis*, 135 S. Ct. at 2208 (Kennedy, J., concurring).

²¹ *Davis*, 135 S. Ct. at 2208 (Kennedy, J., concurring).

²² *Id.* at 2210.

the practice of solitary confinement: “In a case that presented the issue, 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.”²³ Such an invitation deserves careful scrutiny. What kind of case might “present the issue” of whether long-term solitary confinement is constitutional, and what kind of “alternatives” might be “required”?

The evidence Justice Kennedy presents in his concurrence, as well as the context in which *Davis* arose, provide two important insights into the kinds of cases that might viably challenge the constitutionality of solitary confinement and produce a judicial requirement for the implementation of alternatives. First, multi-method approaches will be required to bring a case. Second, the history of prior litigation (including litigation in which Kennedy himself issued opinions) deserves more attention and incorporation into future litigation strategies.

The sheer range of sources Justice Kennedy references in critiquing solitary confinement suggests that any challenge to the practice of solitary confinement will necessarily need to mobilize and analyze a wide array of expert evidence from history, science, and even the popular media. In two concise paragraphs in his concurrence, Justice Kennedy reviews the history of solitary confinement: feared in the 1770s in England; characterized as permanently, psychologically damaging in popular literature—like Dickens’ *A Tale of Two Cities*—in the mid-nineteenth century; condemned as worse than a sentence to death by the U.S. Supreme Court in *In re Medley* in 1890; and criticized by scholars from nearly every discipline from law to medicine throughout the twentieth century.²⁴ Later in the concurrence, Justice Kennedy describes “a new and growing awareness . . . of the subject . . . of solitary confinement,” as exemplified, he suggests, by a *New Yorker* story about Kalief Browder.²⁵ Browder, who was sixteen years old at the time of his arrest, spent two years in solitary confinement on New York City’s Riker’s Island jail, pre-trial.²⁶ He was ultimately released, but he committed suicide one year later.²⁷

This concise survey of the state of knowledge about solitary confinement over time reveals that reforming the conditions of

²³ *Id.* at 2209.

²⁴ *Id.* at 2210.

²⁵ *Id.*

²⁶ See Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015) [hereinafter Gonnerman, *Kalief Browder*], <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [https://perma.cc/D8QH-KVBW] (recounting the arrest and imprisonment of Browder in New York); see also Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, at 26 (providing a detailed account of Browder’s experience on Rikers Island and the pre-trial events that ultimately led to his release after all charges against him were dropped).

²⁷ Gonnerman, *Kalief Browder, 1993–2015*, *supra* note 26.

confinement will require something more than a “case that presents the issue” of solitary confinement to the court. The social science evidence from doctors as well as from “penology and psychology experts”²⁸ about the detrimental effects of solitary confinement, in addition to the investigative reports into horrific individual experiences in solitary confinement, will be vital pieces of any case presentation, just as they are vital pieces of Kennedy’s argument in his concurrence.

While Justice Kennedy suggests that some of this evidence about the detrimental effects of solitary confinement is new, he implicitly acknowledges that some of it has existed since the first prisons opened in the United States, in the early nineteenth century.²⁹ A particular challenge of any new case confronting the practice of solitary confinement, therefore, will be reframing and integrating old and new evidence in a way that accounts for the persistence of solitary confinement as a correctional practice. While details of the practice have changed—such as the size of and conditions in isolation cells, the lengths of time spent in isolation, and the reasons for being sent to isolation—solitary confinement has existed in some form in every prison system in America, from the first penitentiaries in Philadelphia and Auburn, to the most modern facilities in California, Colorado, and Guantánamo Bay, Cuba.³⁰ Litigation, then, must account for the persistence of solitary confinement.

Kennedy’s own concurrence reveals, and indeed perpetuates, two mechanisms of this persistence: lack of transparency and deference to prison administrators. In his concurrence, Justice Kennedy indirectly acknowledges the opacity of prisons, noting that, after sentencing, “[p]risoners are shut away—out of sight, out of mind.”³¹ But Justice Kennedy mistakenly equates this opacity with a lack of attention on the part of lawyers and judges to conditions of confinement: “[T]he public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional

²⁸ *Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring).

²⁹ *See id.* at 2209.

³⁰ For an analysis of the use of solitary confinement in early penitentiaries, see generally REBECCA M. McLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 37, 56 (2008) (discussing the uses of solitary confinement in the Walnut Street prison (Penn.) and Auburn (N.Y.) throughout the 1700s and 1800s); MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835*, at 193–96, 294–95 (1996) (discussing Walnut Street prison in addition to Eastern State penitentiary); Ashley Rubin, *A Neo-Institutional Account of Prison Diffusion*, 49 *LAW & SOC’Y REV.* 365, 368–70 (2015) (referencing prior research such as McLennan and Meranze). For an analysis of the persistence of the practice in modern facilities, see Reiter, *supra* note 10, at 78 (beginning with an analysis of the Walnut Street prison, founded in 1780s Pennsylvania).

³¹ *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring).

experts.”³² To say that lawyers and judges have “assumed” correctional policies were for policymakers and experts is to ignore both the long history of litigation in the United States challenging exactly this point,³³ as well as the frequency with which judges have paid attention to correctional policies and found them perfectly acceptable.³⁴

Justice Thomas argues exactly this point in his own *Davis* concurrence, indicating that he has paid attention to the conditions of confinement in which Hector Ayala is being held, and found them to be perfectly constitutional—“a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest.”³⁵ Moreover, in Kennedy’s concurrence, describing the conditions of solitary confinement Hector Ayala “likely” experienced, he cites his own majority opinion in *Wilkinson v. Austin*, a case in which lawyers and judges alike engaged in a “careful assessment” of correctional policies governing solitary confinement in Ohio’s supermax.³⁶ *Wilkinson*, in fact, is an example of another case in which judges ultimately found that conditions in solitary confinement were perfectly acceptable.³⁷ The problem, then, is not a lack of close legal attention to correctional policies, but rather the fact that these policies have withstood legal reform efforts.

One reason why the policies have remained resistant to reform is apparent in both Kennedy’s concurrence in *Davis* and in his earlier opinion in *Wilkinson*: judges evaluating conditions of confinement tend to defer to prison administrators, who claim that potentially unconstitutional conditions of confinement are necessary to maintain institutional safety

³² *Id.* at 2209–10.

³³ See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 34, 37 (1998) (describing a change in judicial reform in the 1960s); see also Reiter, *supra* note 10, at 73–74 (examining how courts addressed the constitutionality of solitary confinement before supermax prisons were built and then in the two decades after the first supermaxes were built).

³⁴ See, e.g., COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL 27–33 (2007) (discussing the Court’s deference to legislative “intent” in laws challenged by Eighth Amendment claims); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009) (arguing that courts look to the crime itself when determining if a state was cruel in the punishment it handed down); Sharon Dolovich, *Forms of Deference in Prison Law*, FED. SENTENCING REP., Apr. 2012, at 245, 245 [hereinafter Dolovich, *Forms of Deference*] (addressing deference to state actors because their job is complex); Richard H. Fallon Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1277–78 (2006) (addressing the refusal by courts to guarantee constitutional rights because of lacking “judicially manageable standards”); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 331–32 (2010) (arguing that jail and prison regulatory exemptions from federal and state Administrative Procedures Acts create spheres of expanded discretion for jail and prison administrators).

³⁵ *Davis*, 135 S. Ct. at 2210 (Thomas, J., concurring).

³⁶ *Id.* at 2208 (Kennedy, J., concurring) (citing *Wilkinson v. Austin*, 545 U.S. 209, 218 (2005)) (additional citations omitted).

³⁷ *Wilkinson*, 545 U.S. at 213 (holding that Ohio’s New Policy for classifying prisoners in supermax prisons complied with the Due Process Clause).

and security.³⁸ Kennedy himself acknowledges the need for exactly this deference in his *Davis* concurrence: “Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates.”³⁹ With the phrase “of course,” Kennedy assumes the need for discretion, but he also suggests that the discretion to place a prisoner in solitary confinement should be constrained within terms that are “temporary” (presumably as opposed to “long-term”). But Kennedy does not specify a definitional duration for “temporary.”

The history of solitary confinement in the United States suggests that “temporary” isolation readily becomes long term and semi-permanent, especially when prison officials define the conditions under which isolation is necessary.⁴⁰ In fact, throughout the 1970s, California prison officials faced challenges to the conditions of solitary confinement in the exact Adjustment Center unit in San Quentin where Hector Ayala has been in solitary confinement for the past twenty-five years.⁴¹ Although federal courts in California ordered substantial reforms to the conditions of confinement at the Adjustment Center in the 1970s, it remains in operation

³⁸ See Dolovich, *Forms of Deference*, *supra* note 34, at 246 (“[D]eference to prison officials is written right into the substantive constitutional standards.”); Reiter, *supra* note 9, at 93 (“U.S. federal courts have held that supermaxes are necessary tools of safety and security, based on the assertions of prison administrators that this is the case.”).

³⁹ *Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring).

⁴⁰ See Keramet Reiter, *Reclaiming the Power to Punish: Legislating and Administering the California Supermax, 1982–1989*, LAW & SOC’Y REV. (forthcoming) (discussing the extended lockdowns used in California prisons in the 1970s and institutionalized in the 1980s). For other discussions of extended lockdowns, see *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1422 (N.D. Cal. 1984) (challenging extended lockdowns in California in the 1970s and 1980s through permanent injunction), *aff’d in part, rev’d in part*, 801 F.2d 1080, 1085 (9th Cir. 1986); *Adams v. Carlson*, 352 F. Supp. 882, 886 (E.D. Ill.) (challenging extended lockdowns in Illinois in the 1970s), *vacated*, 488 F.2d 619 (7th Cir. 1973); DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE RADICAL CIVIL RIGHTS ERA 100–01 (2014) (referencing extended lockdown as a prison condition that led to uprising of black prisoners); MIKE FITZGERALD, CONTROL UNITS AND THE SHAPE OF THINGS TO COME (1975).

⁴¹ See Reiter, *supra* note 40 (discussing litigation around extended lockdowns). For references to the conditions in San Quentin’s Adjustment Center and Ayala’s housing status there, see Tamar Birkhead, *Prisoners in Isolation: In Davis v. Ayala, Justice Anthony Kennedy Issues a Call to Action in His Discussion of Solitary Confinement*, JUV. JUST. BLOG (July 8, 2015), <http://juvenilejusticeblog.web.unc.edu/2015/07/08/prisoners-in-isolation-in-davis-v-ayala-justice-anthony-kennedy-issues-a-call-to-action-in-his-discussion-of-solitary-confinement/> [<https://perma.cc/SNV5-YTZA>] (describing exchange between Justice Kennedy and Ayala’s lawyer Anthony Dain about Ayala’s conditions of confinement in “administrative segregation”); Nancy Mullane, *The Adjustment Center: Where No One Wants to Go*, KALW LOC. PUB. RADIO (Oct. 22, 2012), <http://kalw.org/post/adjustment-center-where-no-one-wants-to-go> [<https://perma.cc/85VK-HTZV>] (describing conditions in and the history of the Adjustment Center); *San Quentin Demands*, PRISONER HUNGER STRIKE SOLIDARITY, <https://prisonerhungerstrikesolidarity.wordpress.com/education/the-prisoners-demands-2/demands-across-the-system/s-an-quentin-demands/> [<https://perma.cc/F86N-8D6F>] (presenting open letter signed by Hector Ayala to San Quentin officials describing conditions in the Adjustment Center, where Ayala is housed).

more than three decades later.⁴² The San Quentin Adjustment Center, then, stands as an example of the fact that lawyers and judges have paid attention to conditions of solitary confinement, but that this attention has resulted in neither elimination of solitary confinement nor the imposition of constraints to make the isolation “temporary.”

Solitary confinement has not only persisted in spite of litigation, it has expanded, with few ameliorations to the harsh conditions that have characterized segregation for decades. During oral arguments in *Davis*, in the spring of 2015, Justice Kennedy asked Ayala’s attorney, Anthony Dain, about the conditions in San Quentin’s Adjustment Center. Dain explained: “It’s a 150-year-old prison and their administrative segregation is single cells, a very old system, very small”⁴³ Dain elaborated, describing Ayala’s conditions of confinement: “When I visit him, I visit him through glass and wire bars It is a single cell. . . . You are allowed one hour a day [outside the cell].”⁴⁴ Hector Ayala’s conditions of confinement are an example of the persistence of solitary confinement in both “very old” and “very small” forms as well as in more modern and relatively spacious forms. Notably, only 102 of California’s 746 death-row prisoners are housed in solitary confinement in San Quentin’s Death Row Adjustment Center.⁴⁵

By contrast, more than 3,000 other prisoners in California are held in other forms of long-term solitary confinement for terms ranging from a few months to more than forty years.⁴⁶ These 3,000-plus prisoners are housed in modern supermax facilities, which were built in California in the late 1980s in order to meet minimum space requirements (eighty square feet), to provide adequate lighting (fluorescent lights remain on twenty-four hours per day), and to guarantee an average of an hour per day out-of-cell time (each eight cells are linked to one exercise yard, called a “dog

⁴² See *Spain v. Proconier*, 408 F. Supp. 534, 539–40 (N.D. Cal. 1976), *aff’d in part, rev’d in part*, 600 F.2d 189, 189–90 (9th Cir. 1979) (describing cruel and unusual characteristics of conditions for a class of seven plaintiffs).

⁴³ Birkhead, *supra* note 41. Contrary to Dain’s implication about the age of the Adjustment Center, the isolation facility itself is relatively new within San Quentin; it was built in 1960. Mullane, *supra* note 41.

⁴⁴ Mark Joseph Stern, *20 Years in a Windowless Cell*, SLATE (June 19, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/supreme_court_and_solitary_confinement_justice_anthony_kennedy_finds_it.html [<https://perma.cc/SQW6-62HL>].

⁴⁵ DIV. OF ADULT OPERATIONS, CAL. DEP’T OF CORR. & REHAB., DEATH ROW TRACKING SYSTEM: CONDEMNED INMATE LIST (2016), http://www.cdcr.ca.gov/capital_punishment/docs/condemned_inmatelistsecure.pdf [<https://perma.cc/28R5-GCQG>]; Howard Mintz, *San Quentin: Inside California’s Death Row*, SAN JOSE MERCURY NEWS (Dec. 29, 2015), http://www.mercurynews.com/crime-courts/ci_29323310/inside-californias-death-row [<https://perma.cc/MAC6-LH64>].

⁴⁶ Keramet Reiter, *Parole, Snitch, or Die: California’s Supermax Prisons and Prisoners, 1987–2007*, 14 PUNISHMENT & SOC’Y 530, 531 (2012); Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/solitary-confinement-california-prisons.html> [<https://perma.cc/H58L-X7NJ>].

run”).⁴⁷ In California, up until the settlement in *Ashker*, further discussed below, more than 2,000 state prisoners were held in solitary confinement *indefinitely* because of their alleged status as gang members, not because of a specific disciplinary violation.⁴⁸

Ayala, then, is an exception among death row prisoners for being in solitary confinement, and he is an exception among prisoners in solitary confinement for being housed in a small, old isolation unit, built half a century ago. If the Supreme Court (or any lower court) were to reconsider Ayala’s conditions of confinement specifically, any recommended reforms could be limited in a variety of ways: to death row prisoners, to cells built more than twenty-five years ago, or to prisoners who have spent more than ten years, or more than twenty years, in isolation.

The fact that the Supreme Court even took notice of Hector Ayala’s conditions of confinement depended on Ayala’s exceptional circumstances as a death-sentenced prisoner in a state that guarantees such prisoners legal representation at each stage of the appellate process. Across the United States, there are just under 3,000 death-sentenced prisoners, and only a small fraction of these are housed in long-term solitary confinement in conditions like Ayala’s.⁴⁹ By contrast, as many as 300,000 prisoners (one in every five) across the United States spent time in some form of isolated confinement in 2012.⁵⁰ Although data about this population has not yet been systematically collected, preliminary reports suggest that, in some states and some prison facilities, the *average* lengths of such stays in isolation can be as long as two to three years.⁵¹ In sum, then, the universe of cases in which a prisoner is represented by an attorney and gets a

⁴⁷ Reiter, *supra* note 46, at 531.

⁴⁸ *Id.* at 542.

⁴⁹ As of January 2016, there were 2,943 prisoners under sentence of death in the United States. *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<https://perma.cc/2WWMR-N5DS>] (last visited Feb. 3, 2016). The exact number of death-sentenced prisoners in solitary confinement is unknown; conditions vary by state and are not carefully tracked. In general, however, prisoners on death row have more privileges than prisoners in solitary confinement. For instance, death row prisoners, unlike solitary confinement prisoners, can usually socialize on “group” exercise yards, make phone calls, visit the law library regularly, and even, in some cases, send e-mails. See, e.g., Harrison Jacobs, *What It’s Like Inside the Terrifying Super-max Prison Where the Boston Bomber Is Expected to Be Executed*, BUS. INSIDER (May 15, 2015), <http://www.businessinsider.com/the-super-max-prison-where-the-boston-bomber-will-be-executed-is-known-as-guantanamo-north-2015-5> [<https://perma.cc/THG5-6T42>].

⁵⁰ See BECK, *supra* note 6, at 1 (showing varying demographics of prisoners, at least twenty percent of whom spent time in isolated confinement in 2012).

⁵¹ See TIME-IN-CELL, *supra* note 5, at 28 (“The two jurisdictions reporting the largest percentages of prisoners held in long-term segregation were the Federal Bureau of Prisons, which held 58% of the prisoners in administrative segregation at ADX Florence (234 out of 404 prisoners) for more than 3 years, and Pennsylvania, which held 45% of the prisoners in administrative segregation at SCI Greene (123 out of 271 prisoners) for more than 3 continuous years.”); Reiter, *supra* note 46, at 548 (showing that the average length of stay in the SHU at Pelican Bay was over two years in 2007).

hearing in the Supreme Court, such that the issue of solitary confinement can even be “presented,” is vastly smaller than the total number of prisoners in long-term solitary confinement across the United States. Most prisoners in isolation (but not under sentence of death) have no right to a lawyer, no opportunity to put their claims before an appellate court, and therefore no chance to describe their conditions of confinement to Justice Kennedy.⁵²

Even when such a case was presented to the Supreme Court, a few months after the publication of Justice Kennedy’s concurrence in *Davis*, the Court declined to hear the case.⁵³ In *Prieto v. Clarke*, Alfred Prieto, one of only eight prisoners then sentenced to death in Virginia, challenged the harsh conditions of his permanent solitary confinement and sought a right to have his automatic assignment (as a death-sentenced prisoner) to those harsh conditions reviewed (and presumably reconsidered) within the prison system.⁵⁴ Alfred Prieto’s case seemed as analogous to Hector Ayala’s as possible: a death-sentenced prisoner, held for years (seven) in solitary confinement, in conditions only a minority of state prisoners experienced. Moreover, Prieto sought a moderate alternative: rather than seeking the abolition of solitary confinement, he sought more due process protections governing his assignment to solitary confinement.⁵⁵ The Fourth Circuit Court of Appeals denied Prieto’s request, and Prieto appealed to the Supreme Court. On October 1, 2015, while Prieto’s appeal was pending, the state of Virginia executed him.⁵⁶ On October 13, the Supreme Court dismissed his petition as moot.⁵⁷

Prieto’s case confirms the myriad challenges any one prisoner, even one with a lawyer and a right to appeal, will face in actually presenting the issue of the constitutionality of long-term solitary confinement to the Supreme Court. Moreover, even if Justice Kennedy wants to consider such a case, he is likely in the minority. In *Davis*, even while he invited a case that would seek to eliminate (or at least ameliorate) Hector Ayala’s harsh

⁵² For a review of the obstacles non-death sentenced prisoners face in bringing challenges to the conditions of their confinement, see Keramet Reiter, *Making Windows in Walls: Strategies for Prison Research*, 20 *QUALITATIVE INQUIRY* 417, 422 (2014).

⁵³ *Prieto v. Clarke*, 780 F.3d 245 (4th Cir.), *cert. denied*, 136 S. Ct. 319 (2015).

⁵⁴ *Id.* at 247.

⁵⁵ *Id.*

⁵⁶ Tom Jackman, *Triple Murderer Alfredo Prieto Is Executed in Virginia*, WASH. POST (Oct. 1, 2015), https://www.washingtonpost.com/local/public-safety/judge-allows-execution-of-alfredo-prieto-to-proceed/2015/10/01/eaec9f28-67c6-11e5-9223-70cb36460919_story.html [https://perma.cc/PD7K-VSJ6].

⁵⁷ *Prieto*, 136 S. Ct. at 319. For an analysis of the case, see Robert Barnes, *If Kennedy Is Looking for a Solitary Confinement Case, an Inmate Has One*, WASH. POST (Aug. 9, 2015), https://www.washingtonpost.com/politics/courts_law/if-kennedy-is-looking-for-a-solitary-confinement-case-an-inmate-has-one/2015/08/09/b59a6444-3e0a-11e5-b3ac-8a79bc44e5e2_story.html [https://perma.cc/64CH-GGDA].

conditions of confinement in long-term isolation, Justice Kennedy joined Justice Alito's majority opinion, which literally invited the execution of Ayala. Justice Kennedy does not acknowledge the incoherence, but Justice Thomas does. In what Steve Vladek described as a "curt" paragraph,⁵⁸ Justice Thomas wrote: "[T]he accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest. And . . . Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth."⁵⁹ Thomas's dissent is a reminder that reform of solitary will face many challenges, not least among them the perspective that the prisoners therein deserve nothing better.

By October of 2015, after the Supreme Court dismissed Alfred Prieto's case, advocates wondered whether Justice Kennedy's "invitation to a beheading" of the practice of long-term solitary confinement was hollow. After all, what case could have presented a more precise question than Prieto's? This Part has suggested that, even had the Court accepted Prieto's case, explicitly considered his conditions of confinement, and ordered reforms, solitary confinement might yet persist.

Still, other prisoners and their advocates mobilized in 2015 to challenge the conditions of long-term solitary confinement at the state level. Two cases—one in Illinois and one in California—reiterate the themes visible in *Davis*: multi-method approaches bring challenges to long-term solitary confinement to the attention of the judiciary, but the persistence of solitary confinement, the opacity of the practice, and judicial deference to prison officials interact to undermine reform efforts.

III. ILLINOIS PRISONERS RESPOND TO THE INVITATION AND "PRESENT THE ISSUE"

On June 24, 2015, lawyers in Chicago, Illinois filed a sweeping class action complaint on behalf of "all individuals who have been or are currently transferred from general prison population into segregation" (in other words, all state prisoners): *Coleman v. Taylor*.⁶⁰ The Complaint alleged that solitary confinement, or "extreme isolation," is imposed on prisoners in Illinois for "long and severely harmful" durations, in violation of the Eighth Amendment prohibition against cruel and unusual

⁵⁸ Steve Vladek, *Opinion Analysis: How Habeas Courts Should Assess Harmless Error in a Procedural Batson Challenge*, SCOTUSBLOG (June 18, 2015), <http://www.scotusblog.com/2015/06/opinion-analysis-how-habeas-courts-should-assess-harmless-error-in-a-procedural-batson-challenge/> [<https://perma.cc/47RS-95GS>].

⁵⁹ *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (Thomas, J., concurring), *reh'g denied*, 136 S. Ct. 14 (2015).

⁶⁰ Class Action Complaint for Declaratory and Injunctive Relief at 1, *Coleman v. Taylor*, No. 1:15-cv-05596 (N.D. Ill. June 24, 2015), ECF No. 1 [hereinafter Class Action Complaint].

punishment and the Fourteenth Amendment guarantee of due process.⁶¹ The Complaint sought the implementation of new rules governing prisoners' placement in solitary confinement, based on standards promulgated by the American Bar Association for the Treatment of Prisoners, including: using the least restrictive conditions of confinement necessary for the shortest possible duration; implementing individualized determinations of dangerousness prior to placement in solitary confinement; and prohibiting the placement of prisoners with serious mental illness in long-term solitary confinement.⁶²

In a sense, this complaint responded directly to Justice Kennedy's invitation in his *Davis* concurrence, issued just a week earlier. Just as with Kennedy's "multi-method" critique of solitary confinement, *Coleman* relied on a multi-method litigation approach: building on the momentum of a successful grassroots effort to close the state's highest security prison in 2014, drawing on the findings of an independent non-profit's (the Vera Institute of Justice) analysis of the use of solitary confinement throughout the Illinois Department of Corrections in 2011,⁶³ referencing scientific research about the mental health impacts of solitary confinement, incorporating legal references (including Kennedy's) into the Complaint, and relying on national and international standards governing solitary confinement.⁶⁴ A simple legal argument about Eighth and Fourteenth Amendment violations would have been inadequate for the Complaint, in part because Illinois' solitary confinement units, like California's Adjustment Center, had previously faced, and survived, litigation in the 1970s and 2000s.⁶⁵

Illinois, in fact, had a long history of continuing to use solitary confinement—even expanding its use—in the face of criticisms of the practice. In the 2000s, the debates focused on Tamms Correctional Center, a supermax opened in 1995, designed explicitly for long-term solitary confinement, and the highest security prison in Illinois. From the day the facility opened, it faced widespread public scrutiny, including a class action lawsuit and a sustained public campaign, coordinated by family members of Tamms prisoners and activists in the Chicago area, to close the

⁶¹ *Id.* at 5.

⁶² *Id.* at 37–45.

⁶³ *Id.* at Exhibit E, ECF No. 1-1.

⁶⁴ *Id.* at 6–8.

⁶⁵ See *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973) (holding that the Due Process Clause is applicable to the revocation of statutory good time credits and punitive segregation in inter-prison administrative actions); *Black v. Brown*, 524 F. Supp. 856, 858 (N.D. Ill. 1981), *rev'd in part, aff'd in part*, 688 F.2d 841 (7th Cir. 1982); *Reiter*, *supra* note 10, at 97–99; see also *Westefer v. Snyder*, 422 F.3d 570, 590 (7th Cir. 2005) (addressing challenges to conditions and policies at Tamms, Illinois' supermax prison that maintained prisoners in long-term solitary confinement until it closed in January 2013).

institution.⁶⁶ On January 4, 2013, Illinois Governor Pat Quinn shut down Tamms Correctional Center, through a budget line item eliminating funding for the institution.⁶⁷ Until January 2013, Tamms was home to 168 prisoners. When Tamms closed, these prisoners were quickly transferred to other facilities throughout the state; however, most remained in some form of solitary confinement.⁶⁸ Between June of 2012 and June of 2013, Illinois' solitary confinement population actually increased by a total of 257 prisoners, in spite of the closure of the state's supermax.⁶⁹

These 2012 and 2013 population reports supplemented data provided in an independent evaluation, conducted by the Vera Institute of Justice and published in 2011. Much of the *Coleman* Complaint relied on evidence from this Vera Institute study, which documented disproportionately long stays in solitary confinement, conditions in solitary confinement units that were “not acceptable with respect to recreation, showers, mental health treatment, or contacts with clinical-services staff,” and inconsistent implementation of isolation policies across the state prison system.⁷⁰ The *Coleman* plaintiffs' reliance on information gleaned from this independent study of the Illinois prison system—rather than on any data regularly collected, or publicly available, in the state—reveals just how opaque solitary confinement units are. This opacity, in turn, echoes Justice Kennedy's statement in his *Davis* concurrence that prisoners are “shut away—out of sight, out of mind” and exposes how critical transparency is to prisoners' and lawyers' abilities to even articulate a claim about unconstitutional conditions of confinement in isolation units.

In August of 2015, the Illinois Attorney General filed a Motion to Dismiss the *Coleman* claims.⁷¹ In the reply in support of this motion, the Attorney General dismissed Justice Kennedy's concurrence in *Davis* as dicta, and distinguished the conditions of confinement in Illinois from those Kennedy had described in his concurrence, noting in particular that some Illinois prisoners in long-term isolation (locked into their cells for

⁶⁶ See *Westefer*, 422 F.3d at 589 (noting that placement in supermax resulted in the almost complete deprivation of “human contact,” attorneys included.).

⁶⁷ Amy Fettig, *Tamms “Supermax” Prison with Its Inhumane and Ridiculously Expensive Solitary Confinement Practices, Is Officially a Thing of the Past!*, ACLU BLOG (Jan. 4, 2013), <https://www.aclu.org/blog/tamms-supermax-prison-its-inhumane-and-ridiculously-expensive-solitary-confinement-practices?redirect=blog/prisoners-rights/tamms-supermax-prison-its-inhumane-and-ridiculously-expensive-solitary> [https://perma.cc/8V2X-Y7HH].

⁶⁸ Jamey Dunn, *DOC Still Working Out Policy for Former Tamms Prisoners*, ILL. ISSUES BLOG (Apr. 1, 2013), <http://illinoisissuesblog.blogspot.com/2013/04/doc-still-working-out-policy-for-former.html> [https://perma.cc/E3YL-U4T5].

⁶⁹ Class Action Complaint, *supra* note 60, at 9; *id.* at Exhibit A, ECF No. 1-2.

⁷⁰ *Id.* at 16.

⁷¹ Motion to Dismiss for Failure to State a Claim, *Coleman v. Taylor*, No. 1:15-cv-05596 (N.D. Ill. Aug. 18, 2015), ECF No. 24.

twenty-three or more hours per day⁷²) have cellmates and, therefore, are not in “solitary confinement.”⁷³ These kinds of negotiations over both the labels used to describe conditions of confinement, and the specific details of conditions—how many hours prisoners have outside of their cells or how much contact they have with medical professionals, for instance—reveal how much control prison officials have not only over the conditions of prisoners’ lives, but over how these conditions are described and interpreted in legal documents.

On February 11, 2016, Judge Zagel dismissed the *Coleman* Complaint without prejudice.⁷⁴ The court found that the plaintiffs’ conditions did not “amount to ‘extreme isolation,’” did not constitute “disproportionate punishment,” and that none of the conditions were severe enough to trigger either a “liberty interest” or the associated due process rights.⁷⁵ In reaching this finding, the court relied primarily on the precedent of *Wilkinson v. Austin*, the one Supreme Court case to consider the constitutionality of long-term solitary confinement, and the same case Justice Kennedy himself referenced in his *Ayala* concurrence. Once again, a claim seemingly responsive to Justice Kennedy’s invitation to present a case challenging solitary confinement, was dismissed.

The *Coleman* plaintiffs deployed a multi-method litigation approach, gathering data not just from prisoner plaintiffs, but from an array of independent experts, and building on the momentum of the public campaign to close Tamms. But these prisoner plaintiffs faced exactly the issues that have plagued earlier attempts to reform solitary confinement: the persistence of solitary confinement even in the face of reform efforts, the opacity of solitary confinement units, and the broad administrative discretion governing the practice.

IV. CALIFORNIA PRISONERS PROPOSE “WORKABLE ALTERNATIVES”

In California, a few months after the *Coleman* case was filed in Illinois, prison officials agreed to settle a six-year-old, class action case: *Ashker v. Brown*.⁷⁶ Just as in the *Coleman* case, *Ashker* raised challenges to

⁷² Class Action Complaint, *supra* note 60, at 2.

⁷³ Reply in Support of Defendant’s Motion to Dismiss Plaintiffs’ Complaint at 4, *Coleman v. Taylor*, No. 1:15-cv-05596 (N.D. Ill. Jan. 18, 2016), ECF No. 24.

⁷⁴ Memorandum Opinion and Order at 8–9, *Coleman v. Taylor*, No. 1:15-cv-05596 (N.D. Ill. Feb. 11, 2016), ECF No. 29. The plaintiffs, however, are planning to file an amended complaint, so the case remains technically pending as of May 2016. E-mail from lead counsel, Alan Mills, to author (Apr. 13, 2016) (on file with author).

⁷⁵ *Id.* at 5–8.

⁷⁶ *Summary of Settlement Terms in Ashker v. Brown (Governor of California)*, PRISONER HUNGER STRIKE SOLIDARITY (Sept. 9, 2015), <https://prisonerhungerstrikesolidarity.wordpress.com/2015/09/09/summary-of-settlement-terms-in-ashker-v-brown-governor-of-california/> [https://perma.cc/Y3ZF-96GR].

both the conditions of solitary confinement and the procedures by which prison officials assign prisoners to these conditions. The *Ashker* case, however, survived motions to dismiss and for summary judgment, and entered settlement negotiations. On August 31, 2015, California prison officials agreed to settle.⁷⁷ An analysis of this case again reveals both the critical role of multi-method litigation approaches and the potential implementation challenges in the face of the opaque and discretionary practices governing the persistent and ongoing use of solitary confinement.

Two prisoners, Todd Ashker and Danny Troxell, initiated *Ashker v. Brown*, pro se, in 2009.⁷⁸ The initial motions in the case attracted little attention. Then, between 2011 and 2013, Ashker and Troxell, along with a few dozen others in long-term solitary confinement in California's supermax, the Pelican Bay State Prison Security Housing Unit (SHU), led three separate hunger strikes to protest both the harsh conditions of their confinement and the administrative process by which prison officials had assigned them to these conditions. The strike essentially amplified the claims in the *Ashker* lawsuit.⁷⁹

To coordinate the hunger strikes, prisoners set aside racial divisions and collaborated across previously mortally divisive gang rivalries.⁸⁰ Each of the hunger strike leaders, including Ashker and Troxell, was serving an *indefinite* term in isolation as a "validated" gang member.⁸¹ In California at the time, three pieces of evidence, like a tattoo, being in possession of "revolutionary" literature, or having a note from another validated gang member, could result in validation as a gang member and assignment to isolation for the duration of a prisoner's sentence.⁸² In August 2011, during the first hunger strike, prison officials released the first ever snapshot data about how many prisoners had been in the Pelican Bay SHU and for how long: more than 500 had been in total isolation for more than ten years.⁸³

After the first hunger strike, a team of civil rights counsel (including

⁷⁷ Settlement Agreement, *supra* note 4.

⁷⁸ *Ashker v. Governor of California*, CENTER FOR CONST. RTS. (May 30, 2012), <http://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown> [<https://perma.cc/LMM6-385B>].

⁷⁹ *Prisoners' Demands*, PRISONER HUNGER STRIKE SOLIDARITY (Apr. 3, 2011), <https://prisonerhungerstrikesolidarity.wordpress.com/the-prisoners-demands-2/> [<https://perma.cc/2GRN-AUPR>].

⁸⁰ For a discussion of the institutionalized racism endemic within the California prison system, see *Johnson v. California*, 543 U.S. 499, 513–14 (2005); Phil Goodman, "It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers", 42 LAW & SOC'Y REV. 735, 735–37 (2008).

⁸¹ Anthony Skeens, *Inside the SHU Part 1: Isolation*, DEL NORTE TRIPPLICATE (June 24, 2013), <http://www.triplicate.com/News/Local-News/Inside-the-SHU-Part-1-isolation> [<http://web.archive.org/web/20160529064235/http://www.triplicate.com/News/Local-News/Inside-the-SHU-Part-1-isolation>].

⁸² For a discussion of the validation policy then in place, see Reiter, *supra* note 46, at 542.

⁸³ Julie Small, *Under Scrutiny, Pelican Bay Prison Officials Say They Target Only Gang Leaders*, S. CAL. PUB. RADIO BROADCAST (Aug. 23, 2011), <http://www.scpr.org/news/2011/08/23/28382/pelican-bay-prison-officials-say-they-lock-gang-bo/> [<http://web.archive.org/web/20131001033957/http://www.scpr.org/news/2011/08/23/28382/pelican-bay-prison-officials-say-they-lock-gang-bo/>].

Legal Services for Prisoners with Children, based in San Francisco, and the Center for Constitutional Rights, based in New York City) joined the prisoners' case. In May 2013, the legal team sought to certify the class of 500 people who had been in isolation in the Pelican Bay SHU for ten years or more.⁸⁴ In June 2014, the federal district court judge overseeing the case certified the class. Between the filing of the motion for class certification and the actual certification, in August 2013, the prisoners led a third hunger strike that involved 30,000 prisoners; some refused food for sixty days. Each hunger strike attracted national and international attention—and escalating condemnation.⁸⁵

Between 2011 and 2014, during the hunger strikes and ongoing *Ashker* litigation, prison officials sought to maintain their control over isolation in California. First, even though the *Ashker* plaintiffs used non-violent tools (hunger strikes and litigation) to seek reform, prison officials characterized them as “convicted murderers who are putting lives at risk to advance their own agenda of violence” both in affidavits filed in *Ashker* and in public commentaries in state newspapers.⁸⁶ Second, prison officials initiated “pre-emptive, but superficial reforms” to the policies by which prisoners were validated as gang members and assigned to indefinite terms in solitary confinement.⁸⁷ (As in Illinois, isolation policies in the Pelican Bay supermax had already been litigated, and prison officials had already secured the right to maintain at least some prisoners in long-term isolation.⁸⁸) Prison officials even transferred eight of the ten named plaintiffs in the *Ashker* litigation out of the Pelican Bay SHU, in an apparent effort to moot the class. The judge overseeing the case issued an order expanding the class to include prisoners anywhere in the state who

⁸⁴ Plaintiffs' Notice of Motion & Motion for Class Certification; Memorandum of Points and Authorities at 15, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Aug. 8, 2013), <https://ccrjustice.org/sites/default/files/assets/195%20Motion%20for%20Class%20Certification.pdf> [<https://perma.cc/3L6V-CCWJ>].

⁸⁵ See generally Reiter, *supra* note 16, at 603 (“[T]he [third] strike played a critical role in drawing local, national, and international attention to the practice of long-term solitary confinement in the United States . . . [which] led to concrete changes in the prisoners' conditions of confinement . . .”).

⁸⁶ Jeffrey Beard, *Hunger Strike in California Prisons Is a Gang Power Play*, L.A. TIMES (Aug. 6 2013), <http://articles.latimes.com/2013/aug/06/opinion/la-oe-beard-prison-hunger-strike-20130806> [<https://perma.cc/BXS7-HWKY>].

⁸⁷ *Id.*; Keramet Reiter, *(Un)Settling Solitary Confinement in California's Prisons*, SOC. JUST. (Sept. 28, 2015), <http://www.socialjusticejournal.org/?p=3214> [<http://web.archive.org/web/20160222091137/http://www.socialjusticejournal.org/unsettling-solitary-confinement-in-californias-prisons/>].

⁸⁸ See generally *Madrid v. Gomez*, 889 F. Supp 1146, 1271 (N.D. Cal. 1995) (stating that under precedent and statute, state officials may not subject a prisoner to solitary confinement unless he 1) presents a threat to himself or others, 2) endangers institutional security, or 3) jeopardizes the integrity of a criminal investigation).

had spent ten or more years in isolation.⁸⁹

In August of 2015, the prisoner plaintiffs filed ten comprehensive (and extremely critical) expert reports documenting the myriad detrimental impacts—from legal, psychological, and medical perspectives—of long-term solitary confinement.⁹⁰ Just a few weeks later, the parties announced a settlement in the case.

The provisions of the settlement represented drastic changes to both the conditions in and policies governing solitary confinement in California. Prison officials agreed to assign only prisoners who break specific in-prison rules to solitary confinement and to a hard cap of five years on any term in solitary confinement. This eliminated both the policy of validating gang members based on three pieces of evidence of gang association and the policy of assigning these validated gang members to solitary confinement indefinitely.⁹¹ The settlement applied retroactively: all prisoners who had spent more than five years in solitary confinement (including all the *Ashker* class members) would be moved into the general prison population within one year. And officials agreed to collect data about the characteristics of populations in solitary confinement over the subsequent two years and to provide this data to plaintiffs' attorneys, to aid in the monitoring of the settlement.⁹²

The combination of coordinated public action by the hunger striking prisoners; the data about California's solitary confinement practices, which the media requested and published during those hunger strikes; and the assembling of experts to produce reports all contributed to a multi-method litigation strategy. This strategy mobilized much more than straightforward legal arguments to pressure the state to change its solitary confinement policies; outside of the courts, state prison officials faced persistent and harsh public condemnation.

However, the resistance of state officials, from the way they characterized prisoner plaintiffs as advancing agendas of violence throughout the litigation to their attempts to moot the *Ashker* class by moving prisoners out of the Pelican Bay SHU, suggests a high potential for resistance to implementation of the *Ashker* settlement. After all, long-term solitary confinement has been in use in California, as in Illinois, since the 1970s, in spite of years of litigation and multiple attempts at reform. In sum, the progress of the *Ashker* case over six years of litigation, and the

⁸⁹ Order Granting Motion for Leave to File a Supplemental Complaint at 2, 16, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Mar. 9, 2015), <https://ccrjustice.org/sites/default/files/attach/2015/06/Order%20on%20Motion%20to%20Supplement%20Complaint.pdf> [<https://perma.cc/K63V-6KNT>].

⁹⁰ *Expert Reports in Ashker v. Brown*, CENTER FOR CONST. RTS. (Aug. 3, 2015), <https://ccrjustice.org/expert-reports-ashker-v-brown> [<https://perma.cc/WX9H-S99R>].

⁹¹ Settlement Agreement, *supra* note 4, at 4–5, 12.

⁹² *Id.* at 8–10, 13–16.

settlement to which prisoners and prison officials ultimately agreed, reveals not only the importance of multi-method approaches to challenges to solitary confinement, but also the ongoing persistence of solitary confinement as a largely invisible practice, primarily controlled by prison officials.

V. LOST LESSONS

Too many of the attempts to reform U.S. prison conditions generally and solitary confinement specifically ignore two lessons of history. First, solitary confinement has existed in U.S. prisons since the very first penitentiaries opened in Pennsylvania and New York in the 1820s.⁹³ Though the Supreme Court condemned solitary confinement in 1890 as a “further terror [beyond a sentence of death] and peculiar mark of infamy” (as Justice Kennedy noted in his *Davis* concurrence), the practice continued.⁹⁴ In the 1970s, every major case challenging state and federal prison conditions—and there were hundreds of such cases at the peak of the civil rights movement—condemned the dark, dirty, abusive, sometimes even crowded conditions in isolation.⁹⁵ Courts ordered improvements to these conditions of confinement: less dirt, more light and air.⁹⁶ In the 1990s and 2000s in *Madrid* in California and *Westefer* in Illinois, courts ordered further improvements to these conditions of confinement: better policies and more procedures governing placement in isolation. Still, the practice of solitary confinement continued. In light of this continuity, current efforts to refine, reform, and develop alternatives to solitary confinement may be limited in their long-term impact, absent more explicit initiatives to restrict the number of people in solitary confinement, or even to abolish the practice entirely.

Second, litigation has provided one mechanism for oversight of solitary confinement, and has also forced moments of transparency, revealing the abuses that can take place deep inside the prisons within prisons of solitary confinement.⁹⁷ But litigation has also been a force for perfecting solitary confinement. Following the improvements to solitary confinement ordered in the 1970s, the practice continued to be used, albeit

⁹³ Ashley T. Rubin, *A Neo-Institutional Account of Prison Diffusion*, 49 *LAW & SOC'Y REV.* 365, 378–79 (2015).

⁹⁴ *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160, 170 (1890)), *reh'g denied*, 136 S. Ct. 14 (2015).

⁹⁵ See generally Reiter, *supra* note 10, at 103 (describing the improvements made to prisoner living conditions as a result of copious litigation in the 1970s).

⁹⁶ *Id.*

⁹⁷ See Reiter, *supra* note 10, at 86 (“These lawsuits resulted in court orders which subjugated prisons, and sometimes entire state departments of corrections, to expert monitoring, federal court oversight, and enforceable promises to alter and improve conditions of confinement.”).

in a cleaner, brighter, and less crowded form.⁹⁸ In 1995, considering one of the first challenges to modern, hygienic supermax facilities like the Pelican Bay SHU, Judge Thelton Henderson of the Northern district court of California said the conditions pushed the boundaries of the humanly tolerable, and ordered that at least the mentally ill should be uniformly excluded from such conditions of confinement.⁹⁹ And yet, twenty years later, across the United States, states are still defending the placement of the mentally ill in solitary confinement, as evidenced by the complaint in *Coleman* in Illinois.

No matter how strong the case, how solid the evidence, and how firmly Justice Kennedy condemns the practice of solitary confinement, neither Kennedy nor the Supreme Court can single-handedly wipe out our national tradition of solitary confinement. Actual elimination (or even reductions) of solitary confinement will require concerted effort to incorporate critics, intellectual experts, and especially the prison officials who manage overcrowded and dangerous prisons day in and day out, in designing real alternatives, subject to consistent and persistent oversight.

⁹⁸ *See id.* (describing how reform measures for isolation conditions following the 1970s litigation led to the development of today's principles of such confinement).

⁹⁹ *See Madrid v. Gomez*, 889 F. Supp 1146, 1267 (N.D. Cal. 1995).

