

## **Legislative Regulation of Isolation in Prison: 2018-2021**

### Abstract

Legislative activity seeking to limit or abolish the use of solitary confinement (often termed "restrictive housing") has increased in recent years. Efforts to "stop" solitary (nationally and internationally) are underway through organizing, hunger strikes, litigation, administrative reform, and media campaigns. The goal is to end the practice of leaving people in cells for hours, days, months, and years on end.

This paper provides an overview of recent pending and enacted legislative proposals. From 2018 to 2021, legislation aiming to limit or end the use of isolation in prison was introduced in more than half of the states and in the U.S. Congress. As of the summer of 2021, legislators had proposed statutes in 32 states and in the U.S. Congress, and both states and the federal system have enacted a variety of provisions.

The statutes vary in scope. Some are comprehensive and address the treatment of all people incarcerated within a prison or jail system and impose limits on the reasons that prison authorities can use to put individuals into isolation, the duration of such confinement, and/or the extent to which the conditions of isolation can depart from those in general population. In addition, some statutes focus on the use of solitary confinement for subpopulations, such as pregnant or young people, or people who have received certain medical or mental health diagnoses. Many statutes have reporting requirements to create some measures of transparency and data collection. A few aim to create monitoring and oversight beyond the prison administration.

This paper hones in on examples of enactments by detailing statutes in Colorado, Massachusetts, Minnesota, New Jersey, and New York. This paper also provides an integrated overview of the features of the various statutory regimes. In addition, because Pennsylvania legislators invited members of the Liman Center to testify in August of 2021 on a proposed bill, the paper contextualizes the proposed Pennsylvania bill within the recent nationwide waves of

legislative activity and analyzes the text of the proposed bill. This paper also draws on other work of the Liman Center's researchers, who are part of collaborative efforts underway since 2013 to track the rules governing solitary confinement, the numbers of people held in prison in isolation, and the conditions of their confinement. *Time-In-Cell 2019: A Snapshot of Restrictive Housing*, published in September 2020, is the latest report documenting these efforts. It is available at:

<https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell-2019.pdf>.

This legislative analysis will, we hope, be helpful in formulating and evaluating means to limit or end the use of isolation as a disciplinary or "protective" measure. The Liman Center will also provide periodic updates of legislative activity and trends.<sup>1</sup>

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To limit solitary confinement entails focusing on 1) the time in and out of cell; 2) the criteria and procedures that put individuals into restrictive housing; 3) the conditions under which people in such settings live; and 4) the mechanisms by which individuals leave solitary confinement. To ensure that no person spends most waking hours in a small cell without meaningful human contact and activities, some jurisdictions are restructuring their systems to end solitary confinement. Several jurisdictions have or are considering rules requiring that individuals spend between four and twelve hours outside of cells each day. Many have constrained the use of solitary confinement by limiting the basis for placement in restrictive housing, excluding certain subpopulations from the practice, increasing oversight of its use, and requiring programming and opportunities for social action for persons in restrictive housing.

Below, we outline some of what we have learned during a decade of research on solitary confinement. We outline data on the use of isolation nationwide and provide an overview and analyses of the

dozens of legislative initiatives since 2017 on the topic. We close with an analysis of the draft Pennsylvania statute to show the challenges of legislative drafting and the ways to clarify how to be effective in ending the harms of solitary confinement.

The range and spectrum of efforts underway to curb or end solitary confinement is impressive. Our hope is that this account of the contours of dozens of statutes enacted and pending will be useful when provisions introduced elsewhere enable insight on the choices to be made. The length of this overview is but one example of the growing national consensus that isolation is a form of punishment that ought no longer to be tolerated, just as we no longer permit (but once did) putting incarcerated people on diets of bread and water, whipping them, and leaving them in chains.<sup>2</sup>

## **I. The Liman Center and Its Work on Solitary Confinement**

During the past several years, the Liman Center has helped to gather data to produce the only national, longitudinal database on the numbers of people held in isolation in the United States and the conditions in which they live. The Liman Center has done some of this research with directors of prison systems across the country; they are part of an organization that is now called the Correctional Leaders Association (CLA), and that previously was known as the Association of State Correctional Administrators (ASCA). See Appendix A for an overview of those reports.

Together, we have drafted and sent surveys to gather data on restrictive housing. In 2013, we provided an assessment of all the policies governing administrative segregation.<sup>3</sup> Since then, we have published a series of monographs detailing the demographic composition of the people held in restrictive housing and the conditions under which they live.<sup>4</sup> We have also done a study of a small number of jurisdictions that have not used isolation for individuals serving capital sentences.<sup>5</sup>

Below, we provide an overview of the many years of research findings that explain why we believe that legislation has and will make important contributions to stop isolation of individuals in detention. Our experiences as researchers have underscored the critical role played by benchmarks (be they from administrators of facilities, courts, or legislators) and the centrality of definitions, directives, and provisions for data collection, reporting, transparency, oversight, and implementation.

## II. The Use of Solitary Confinement in the United States

Before turning to the harms of solitary confinement and consideration of the many statutes addressing them, we provide an overview of the scope and nature of the use of solitary confinement, the policies that govern its use, and the people who are impacted. By analyzing policies in place in 2012 and 2013, we learned how easy it was for prison systems to decide to put people into isolation because individuals were perceived to be "threats to institutional security" and how little attention was then paid to ensuring people left such isolation promptly.<sup>6</sup>

The Liman Center then turned to learn more about the numbers of people held and the conditions of confinement in solitary confinement. Working with correctional leaders, we surveyed state and federal correctional departments in 2013 and 2014 to develop a national account. We defined solitary confinement then as "separating prisoners from the general population, typically in cells (either alone or with cellmates), and holding them in their cells for most of the hours of the day for thirty days or more."<sup>7</sup> Based on the data collected, we estimated that, in 2014, about 80,000 to 100,000 people were in solitary confinement in prison systems across the country.<sup>8</sup>

In light of feedback from those surveyed, the definition was modified slightly so that we asked about individuals held in a cell for an average of at least 22 hours per day for at least 15 continuous days. Using this definition, our 2016 report identified 67,442 people in solitary in prison systems in 48 jurisdictions,<sup>9</sup> and our 2018 report estimated that about 61,000 people were in isolation as of the fall of 2017.<sup>10</sup>

The report published in 2020, which was drawn from data collected in the summer of 2019 (before the COVID-19 pandemic), estimated that 55,000 to 62,500 people were held in isolation in prisons around the country.<sup>11</sup> We also learned about the duration of confinement and health status. The 33 jurisdictions that responded to the CLA/Liman survey reported that close to 3,000 people had been kept in solitary confinement for more than three years,<sup>12</sup> and that more than 3,000 people in solitary confinement had been diagnosed with a serious mental illness (SMI), defined differently across jurisdictions.<sup>13</sup> In some six jurisdictions, more than 10% of the people in solitary confinement had been diagnosed with a serious mental illness.

The 2020 report also concluded that race was associated with placement in solitary confinement. Black women were much more likely to be placed in isolation than white women. In 2019, 22% of the total female prison population was Black; 42% of women in solitary confinement were Black.<sup>14</sup> Black and Hispanic men were also somewhat more likely to be placed in restrictive housing than white men. In 2019, Black men made up 40% of the total custodial population and 43% of the solitary confinement population. Hispanic men made up 15% of the total custodial population and 17% of the solitary confinement population.<sup>15</sup>

The chart, Comparing Restrictive Housing Numbers from 2014 to 2020,<sup>16</sup> provides a summary of the survey data on the numbers of people held in a cell for an average of 22 hours or more for 15 days or more;<sup>17</sup> given that many but not all jurisdictions responded, for some reports, we used that data to estimate national totals.

**Comparing Restrictive Housing Numbers from 2014 to 2020**

	2014-2015 ASCA-Liman Survey	2015-2016 ASCA-Liman Survey	2017-2018 ASCA-Liman Survey	2019-2020 CLA- Liman Survey
<b>Number of Jurisdictions Responding</b>	<b>34</b> jurisdictions, or <b>73%</b> of prison population of 1.6 million people	<b>48</b> jurisdictions, or <b>96.4%</b> of prison population of 1.5 million people	<b>43</b> jurisdictions, or <b>80.5%</b> of prison population of 1.5 million people	<b>39</b> jurisdictions, or <b>58%</b> of prison population of 1.4 million people
<b># Prisoners Reported in Restrictive Housing</b>	<b>66,000+</b>	<b>67,442</b>	<b>50,422</b>	<b>31,542</b>
<b>Estimated Total Prisoners in Restrictive Housing in all U.S. Jurisdictions</b>	<b>80,000 – 100,000</b>	not estimated given substantial reporting	<b>61,000</b>	<b>55,000 – 62,500</b>

Absolute numbers is one metric, and another important metric is the percentage of people within a prison system held in isolation. The chart below provides that information.

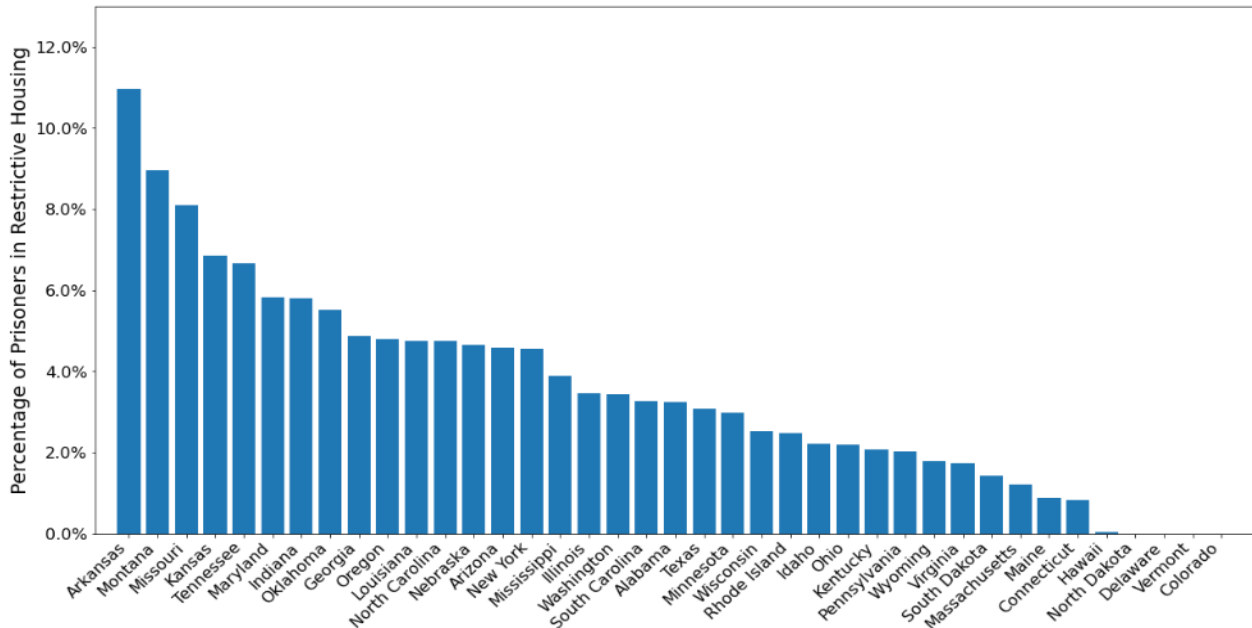
**Restrictive Housing as Percent of Total Custodial Population  
from 2015 to 2019\***

	2015	2017	2019
<b>Minimum</b>	0.5%	0.5%	0.8%
<b>Maximum</b>	14.5%	19.0%	9.0%
<b>Survey-Wide Average</b>	5.0%	4.4%	3.8%
<b>Median</b>	4.9%	4.0%	3.4%

\* Including 33 jurisdictions reporting restrictive housing rates across all three years.

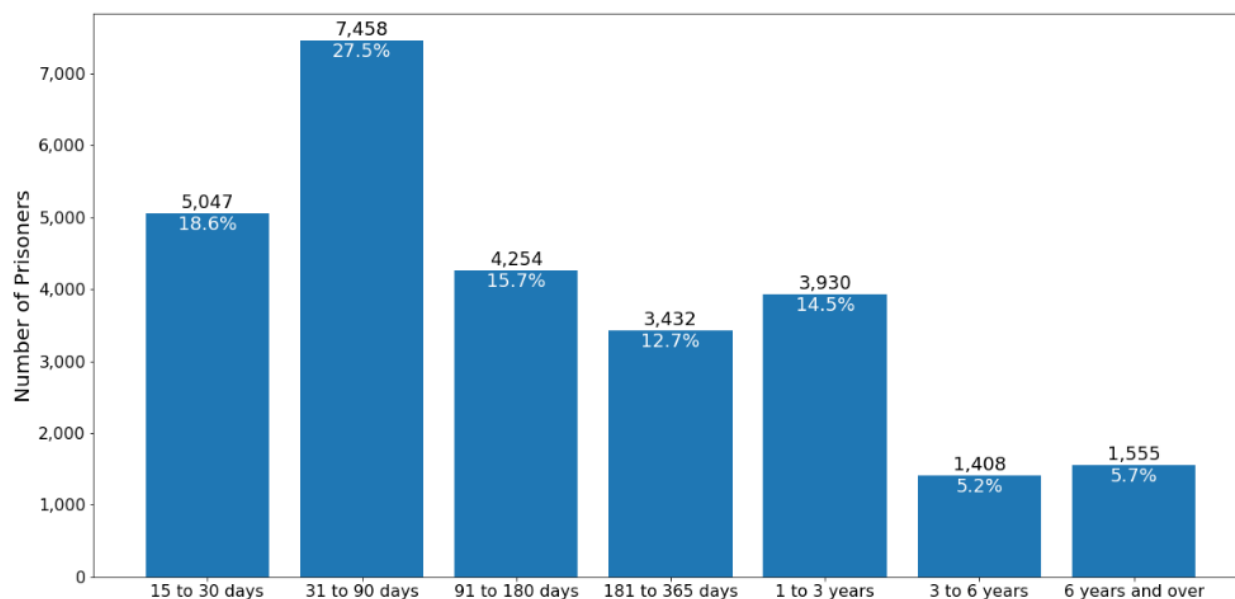
In addition to such aggregate information, the CLA/Liman Reports also provide information jurisdiction-by-jurisdiction for many metrics, including the percentages of prisoners in restrictive housing across jurisdictions. We reproduce below one of the charts from the 2020 volume; jurisdictions are arrayed from the higher percentages to the lower percentages of people in solitary confinement.

**Percentage of Prisoners in Restrictive Housing, by Jurisdiction,  
2019**



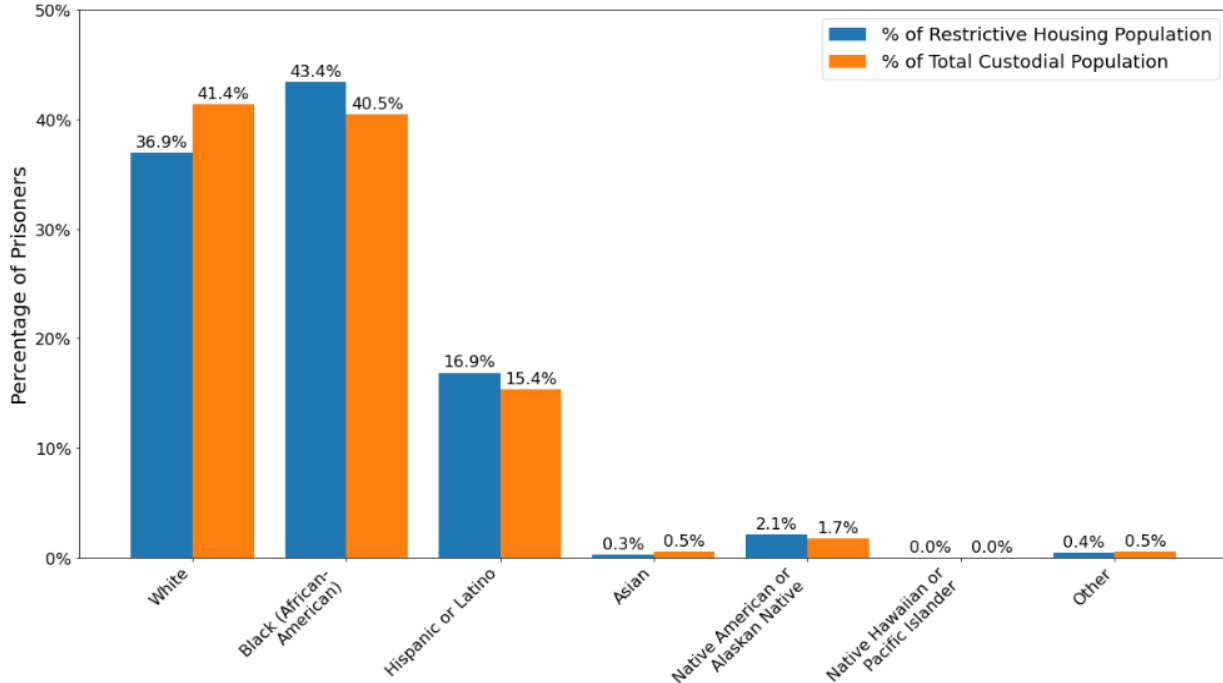
The surveys addressed the length of time that people were confined in restrictive housing. As the graph below details, in the jurisdictions reporting information, more than 80% of prisoners held in restrictive housing were kept there for more than 30 days at a time.<sup>18</sup> About 3,000 individuals spent three years or more in such conditions.

#### Prisoners in Restrictive Housing by Length of Time, 2019



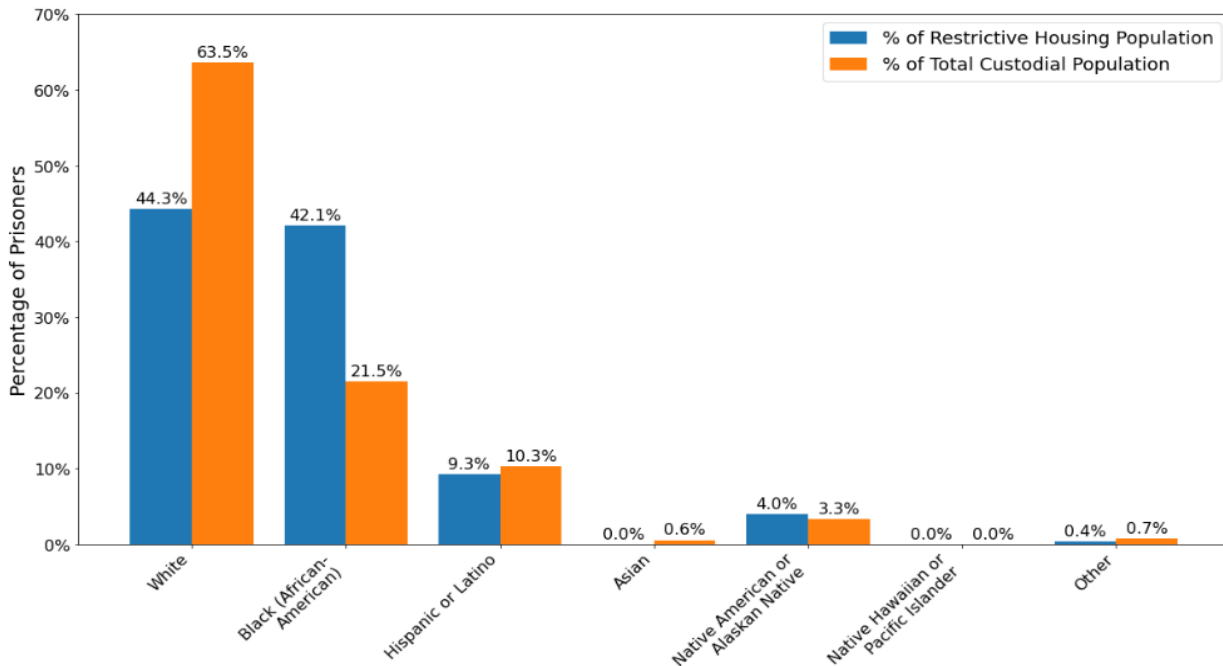
We tracked demographic information about the people held in restrictive housing. As noted above and in the graph on the next page, Black and Hispanic or Latino male prisoners represented a larger percentage of prisoners held in restrictive housing, as compared with the total custodial population.<sup>19</sup>

**Race/Ethnicity of Male Prisoners in Total Custodial Population and in Restrictive Housing Population, 2019**



With respect to female prisoners, Black prisoners represented a substantially larger percentage of prisoners held in restrictive housing, as compared with the general population.<sup>20</sup>

**Race/Ethnicity of Female Prisoners in Total Custodial Population and in Restrictive Housing Population, 2019**





### III. Recognition of the Harms of Solitary Confinement

When we began this work almost a decade ago, solitary confinement was often described as a useful response to the problems and challenges of running a prison system. In contrast, today a consensus has emerged that solitary confinement is itself a problem to be solved. In 2016, the American Correctional Association (ACA) adopted new accreditation standards to regulate the use of solitary confinement.<sup>21</sup> ACA rejected its use for people who were pregnant and for juveniles,<sup>22</sup> and counseled against its use for individuals with serious mental illness.<sup>23</sup> Further, ACA defined "extended restrictive housing" to be 29 days or more.<sup>24</sup>

Many correctional systems have imposed their own limits. For example, Colorado, Delaware, North Dakota, and Vermont reported in 2019 that they no longer put people in cells for 22 hours on average or more per day for 15 days or more.<sup>25</sup> These executive actions to limit the use of solitary interact with a series of decisions by courts that have, in some instances, found the use of solitary confinement unconstitutional.<sup>26</sup>

These efforts to end and to limit solitary confinement come in response to an extensive literature on its harms.<sup>27</sup> Denying human beings sociability—interaction with other humans—undermines their physical and mental health and can have long-lasting effects on individuals and their families.

Evidence of human suffering comes from individuals who have experienced isolation<sup>28</sup> and from studies that have found a link between prolonged isolation and a range of negative psychological effects including anxiety, panic, cognitive dysfunction, and loss of control.<sup>29</sup> Isolation and the sensory deprivation it entails have been linked to hallucinations, difficulty concentrating, and self-harm.<sup>30</sup> For example, one study focused on New York City's jails between 2010 and 2013 determined that "acts of self-harm were strongly associated with assignment of inmates to solitary confinement. Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm."<sup>31</sup> Harmful physical changes, including increased risk of early onset of cardiovascular disease, have also been documented.<sup>32</sup>

In 2020, health care experts concluded that, under the U.S. Food and Drug Administration metric of "harms-to-benefits" for medications and medical devices, solitary confinement would be considered "inappropriate for use with humans."<sup>33</sup> Research has also indicated that people subjected to solitary confinement are more likely to die not long after release from prison.<sup>34</sup> In addition,

research has addressed the harms to correctional staff who work in solitary confinement units; a series of negative health consequences, both physical and psychological, have been reported.<sup>35</sup> The well-being of staff and prisoners is interdependent, and solitary confinement taxes both sets of individuals.

#### **IV. The Critical Role of Legislation**

An important driver of change has been the work of legislatures which, since 2017, have become involved in regulating the use of isolation. We have chosen to offer overviews from two time periods, 2018-2020 and 2020-2021, so as to capture the accelerating pace and broadening scope of activities in the state and federal systems. For a list of legislative proposals addressing solitary confinement during the last several months, see Appendix B.

##### ***Legislative Efforts 2018-2020***

An overview of legislative initiatives between October of 2018 and the summer of 2020 comes from the CLA/Liman Center Report, *Reforming Restrictive Housing*. This focus on legislative initiatives continued into *Time-In-Cell 2019: A Snapshot of Restrictive Housing*, which was published in September of 2020. From 2018 to 2020, legislation to limit the use of isolation in prison was introduced in more than half the states and in the U.S. Congress.<sup>36</sup>

Some of these proposals regulated the use of isolation for all people in a system. Other legislation sought to curtail restrictive housing for subpopulations including individuals who were pregnant, below a certain age, or identified as having a serious mental illness. (Those subpopulations are sometimes described as "vulnerable;" yet, given the documentation of solitary's impact, we are all "vulnerable" to its debilitating impacts.) In addition, many provisions called for regulation of the duration (hours and days) of solitary confinement, access to activities and health care, and less isolating and better conditions in confinement. Many provisions also called for improved oversight, expanded data collection, and increased public reporting about restrictive housing.

Below we provide details, first by focusing on a few jurisdictions that enacted an interrelated, comprehensive approach, and then, to provide an integrated cross-jurisdiction

review, we organize many of the statutes by the facets of confinement that they address.

***States in the Forefront: Snapshots of Comprehensive Reforms  
in Massachusetts, Minnesota, New Jersey, and New Mexico***

Between 2018 and 2020, Massachusetts, Minnesota, New Jersey, and New Mexico enacted comprehensive legislation on isolation in prison. The 2018 Massachusetts statute defined restrictive housing as "a housing placement where a prisoner is confined to a cell for more than 22 hours per day," and mandated that "[a] prisoner shall not be held in restrictive housing to protect the prisoner from harm by others for more than 72 hours," unless specified conditions apply.<sup>37</sup> When such conditions apply to permit separation of a prisoner from general population for that prisoner's safety, appropriate housing must afford the prisoner "approximately the same conditions, privileges, amenities and opportunities as in general population."<sup>38</sup>

The statute also required a mental health screening before any individual can be placed in restrictive housing and prohibited placement of people with serious mental illnesses in restrictive housing.<sup>39</sup> The statute prohibited the placement of other categories of people in restrictive housing, including anyone who is pregnant or who has a permanent physical disability<sup>40</sup> as well as youth held in Department of Youth Services facilities.<sup>41</sup> In addition, Regular reviews with written reports were required for every person held in restrictive housing.<sup>42</sup> In addition, the statute required access to programming for all individuals held in restrictive housing for over 60 days.<sup>43</sup>

To assist with challenges related to the implementation of the Massachusetts statute, the Massachusetts Department of Correction (MADOC) engaged Falcon Correctional and Community Services, Inc. (Falcon Group), an interdisciplinary team of corrections experts, to "validate those aspects of its disciplinary system that were working well, and to suggest specific evolutions in policy and practice that can bring MADOC's use of restrictive housing in line with best correctional and clinical practices today and in the future."<sup>44</sup>

That report the Falcon Group produced provides insights into the challenges of implementation and how correctional departments can respond. Among the Falcon Group's conclusions were that an exception to the statutory definition of restrictive housing that exempts isolation ordered by a healthcare provider from otherwise applicable limits on restrictive housing resulted in problematic

risks. As the Falcon Group explained, "conditions imposed on the order of a healthcare provider as the least restrictive means of ensuring safety from imminent harm to self or others, while a critical exercise in medical autonomy, do present the risk of inappropriate use, prolonged isolation, and other conditions that—but for the order of a healthcare provider—would be considered Restrictive Housing."<sup>45</sup> The Falcon Group also observed that MADOC's disciplinary unit "allows for up to ten years of confinement in conditions that would otherwise be labeled as Restrictive Housing by most definitions."<sup>46</sup>

The Falcon Group offered a series of recommendations including the dissolution of Massachusetts's disciplinary unit as well as the elimination of "all use of Restrictive Housing as currently defined," so that "no housing unit operates under conditions of confinement that require placement in a cell 22 or more hours per day."<sup>47</sup> According to the Falcon Group, "[t]his model represents the future of disciplinary and administrative segregation and grew out of the Correctional Service Canada (CSC) Structured Intervention Unit (SIU) model."<sup>48</sup> That report was issued in March of 2021 and, in the summer of 2021, the Massachusetts Department of Correction announced that it aims to end restrictive housing in all of its prisons over the next three years.<sup>49</sup>

In 2019, Minnesota enacted a law focused on the conditions of confinement, the mental health of people held in restrictive housing, and the duration of confinement. The statute required that living conditions in restrictive housing "are approximate to those offenders in general population, including reduced lighting during nighttime hours."<sup>50</sup> The legislation established a daily wellness round in the restrictive housing setting by a health services staff member.<sup>51</sup> The law required mental health screening and services,<sup>52</sup> instructed the commissioner to develop a system of behavioral incentives,<sup>53</sup> and prohibited the direct release of a prisoner to the community "from a stay in restrictive housing for 60 or more days absent a compelling reason."<sup>54</sup> The legislation directed the commissioner of corrections to receive reports of all prisoners who are in restrictive housing for more than 30 consecutive days as well as reports about all those held for more than 120 days, which must include a reason for the placement and a "behavior management plan."<sup>55</sup>

New Jersey also enacted legislation in 2019, effective August 1, 2020, to make comprehensive changes in the use of solitary confinement.<sup>56</sup> The legislation prohibited placement in isolation for "non-disciplinary reasons" for all prisoners, unless there is a "substantial risk of serious harm" to the prisoner or to others.<sup>57</sup>

As the Legislative Preamble explained, isolation was not to be used under conditions or for periods of time that “foster psychological trauma,” psychiatric disorders, or “serious, long-term damage” to the prisoner’s brain.<sup>58</sup> New Jersey also provided that a prisoner could not be placed in restrictive housing for more than 20 consecutive days or for more than 30 days in a 60-day period.<sup>59</sup>

Further, New Jersey prohibited the placement of people in “isolated confinement” if they are in “vulnerable populations”<sup>60</sup> and defines those populations to include prisoners under age 21; over age 65; with mental illness, developmental disabilities, or a serious medical condition; who are pregnant or postpartum; who have a “significant auditory or visual impairment”; or who are “perceived to be” LGBTI.<sup>61</sup> The legislation also required that, except under certain enumerated circumstances, any individual “determined to be a member of a vulnerable population shall be immediately removed from isolated confinement and moved to an appropriate placement.”<sup>62</sup>

Another illustration of reform comes from New Mexico, which limited the use restrictive housing and created mechanisms for oversight and transparency applicable to state-run and to privately-run facilities. The New Mexico Corrections Restricted Housing Act of 2019 defined “restricted housing” as “confinement of an inmate locked in a cell or similar living quarters in a correctional facility for twenty-two or more hours each day without daily, meaningful and sustained human interaction.”<sup>63</sup> The law, effective July 1, 2019, prohibited, without exception, the use of restrictive housing for prisoners younger than 18 years of age or prisoners who are “known to be pregnant.”<sup>64</sup> For people who have a “serious mental disability,” explained as any “serious mental illness . . . [or] significant functional impairment . . . or intellectual disability,” restricted housing was prohibited except to prevent an imminent threat of harm, in which case placement was capped at 48 hours.<sup>65</sup>

New Mexico required that correctional facilities produce quarterly reports on the use of restrictive housing, which must include the “age, gender, and ethnicity” of all prisoners placed in restrictive housing that quarter, and post the report to its public website.<sup>66</sup> The Act also established that private correctional facilities regularly report all monetary settlements paid as a result of lawsuits filed by incarcerated people or their estates against the private correctional facility or its employees.<sup>67</sup>

Montana's 2019 legislation, effective January 1, 2020, restricted the use of isolation and set minimum requirements for the conditions in restrictive housing<sup>68</sup>. The law defined restrictive housing as "a placement that requires an inmate to be confined to a cell for at least 22 hours a day for the safe and secure operation of the facility".<sup>69</sup> The legislation established limiting factors that apply to all prisoners, such as a periodic review of a prisoner's status in protective custody<sup>70</sup> or review of isolation of "an adult inmate that continues beyond 30 days."<sup>71</sup> The legislation also focused on subgroups and banned solitary confinement for pregnant and postpartum prisoners (with narrow exceptions),<sup>72</sup> in youth facilities if a placement lasts 24 hours or more,<sup>73</sup> and for prisoners with a serious mental disorder if a placement lasts for more than 14 days unless "a multidisciplinary service team determines there is an immediate and present danger to others or to the safety of the institution."<sup>74</sup> Placement in solitary was not to exceed 22 hours a day, and facilities must provide access to certain resources and activities, like showers, exercise, educational programs, and commissary.<sup>75</sup>

***Categories of Regulation: 2018-2020  
Populations, Conditions, Duration, Reporting***

As explained at the outset, after providing examples from a few jurisdictions, we turn to specific topics that jurisdictions, including those just discussed, have addressed. The five states we described are part of a set of 29 jurisdictions in which bills were introduced and part of 15 (as of the spring of 2020), in which legislation was enacted.<sup>76</sup> In this section, we discuss the categories of regulations. The summary below provides a snapshot, explained in the materials that follow.

**Legislation Addressing Restrictive  
Housing, 2018 to 2020**

29 jurisdictions considering or enacted  
legislation limiting the use of restrictive housing

15 states and the federal government enacted  
provisions — some comprehensive and others  
targeted to subpopulations and/or requiring  
reporting

8 states and the U.S. Congress had pending bills as  
of the spring of 2020

**Subpopulations:** Sixteen jurisdictions—15 states and the federal government<sup>77</sup>—enacted statutes that limit or prohibit the use of restrictive housing for youth, pregnant prisoners, or those with serious mental illness. The states are Arkansas,<sup>78</sup> Colorado,<sup>79</sup> Florida,<sup>80</sup> Georgia,<sup>81</sup> Louisiana,<sup>82</sup> Maryland,<sup>83</sup> Massachusetts,<sup>84</sup> Montana,<sup>85</sup> Nebraska,<sup>86</sup> New Jersey,<sup>87</sup> New Mexico,<sup>88</sup> South Carolina,<sup>89</sup> Texas,<sup>90</sup> Virginia,<sup>91</sup> and Washington.<sup>92</sup>

Of these states, eleven limited (with some variation in language) the use of restrictive housing for prisoners who are pregnant, and in some cases, for prisoners who are postpartum. For example, Louisiana prohibited (with some exceptions) placement in solitary confinement of a prisoner who “is pregnant, or is less than eight weeks post medical release following a pregnancy, or is caring for a child in a penal or correctional institution.”<sup>93</sup> With exceptions, Texas, Virginia, and South Carolina prohibited the use of restrictive housing for pregnant prisoners or prisoners who had given birth in the past 30 days unless there is a reasonable belief of flight risk or that the prisoner will harm themselves, the fetus, or another person.<sup>94</sup> Other states that limited the use of restrictive housing for pregnant prisoners include Georgia,<sup>95</sup> Maryland,<sup>96</sup> Massachusetts,<sup>97</sup> Montana,<sup>98</sup> New Jersey,<sup>99</sup> and New Mexico.<sup>100</sup>

Statutes enacted by the federal government and by six states limited the placement of youth in restrictive housing. The federal First Step Act of 2018 prohibited “the involuntary placement” of a juvenile “alone in a cell, room, or area for any reason” other than as a response to “a serious and immediate risk of physical harm to any individual.”<sup>101</sup> New Mexico banned, without exceptions, restrictive housing for youth under the age of 18.<sup>102</sup> Washington prohibited the use of “room confinement” for youth under the age of 18 except to prevent imminent harm, in which case confinement must be limited at four total hours in a 24-hour period.<sup>103</sup> Nebraska’s law prohibited the placement of youth under the age of eighteen in “room confinement” as punishment, retaliation, or due to staff shortage, and discouraged placement in room confinement beyond one hour in a 24-hour period.<sup>104</sup> Nebraska’s law also provided for documenting and reporting the use of room confinement for youth under the age of 18.<sup>105</sup> New Jersey banned, with certain exceptions, the use of “isolated confinement” for youth under the age of 22.<sup>106</sup> Montana’s law prohibited the use of restrictive housing for individuals in youth facilities except “when it is necessary to protect the youth or others,” in which case restrictive housing must be shorter than 24 consecutive hours.<sup>107</sup> Arkansas’s enactment ruled out isolation of individuals in a juvenile detention

facility, except under certain circumstances, such as cases of "imminent threat," "physical or sexual assault," or attempted escape, and required written authorization by the director of the facility for every 24-hour period that the juvenile remains in isolation.<sup>108</sup>

Six statutes addressed the use of restrictive housing for prisoners with serious mental illness, a disability, or a substance use disorder. Massachusetts required a mental health screening before any individual can be placed in restrictive housing and prohibited placement of people with serious mental illnesses in restrictive housing.<sup>109</sup> Montana prohibited placement in restrictive housing for "behavior that is the product of [an] inmate's disability or mental disorder unless the placement is after prompt and appropriate evaluation by a qualified mental health professional," and restrictive housing must be "for the shortest time possible, with the least restrictive conditions possible."<sup>110</sup> New Jersey banned placement of prisoners with a mental illness, developmental disability, auditory or visual impairment, or serious medical condition in isolated confinement unless there is a "substantial risk of serious harm" to the prisoner or others, in which case mental and physical evaluations are required daily.<sup>111</sup> New Mexico's law described that individuals with "serious mental disability" could be placed in restrictive housing only if they met certain criteria.<sup>112</sup> There, restrictive housing may only be used for those with a "serious mental disability" when it is necessary to "prevent an imminent threat of physical harm to the inmate or another person." If such conditions exist, restrictive housing is limited to 48 consecutive hours.<sup>113</sup> Colorado Senate Bill 20-007, signed by the governor on July 13, 2020, prohibited the use of solitary confinement for individuals receiving evaluation, care, or treatment for substance use.<sup>114</sup>

A summary of the regulations related to subpopulations appears on the next page.



## Enacted Legislative Reforms: Subpopulations, 2018-2020

15 jurisdictions enacted statutes limiting or prohibiting restrictive housing for subpopulations

Pregnancy	Youth	Prisoners with serious mental illness, disability, or substance use disorder
<p><b>11 Jurisdictions:</b></p> <p>Georgia Louisiana Maryland Massachusetts Montana Nebraska New Jersey New Mexico South Carolina Texas Virginia</p>	<p><b>7 Jurisdictions:</b></p> <p>United States Arkansas Nebraska New Mexico New Jersey Montana Washington</p>	<p><b>6 Jurisdictions:</b></p> <p>Massachusetts Montana Nebraska New Jersey New Mexico Colorado</p>

**Transparency, Data Collection, and Oversight:** In addition to these constraints, nine jurisdictions required data collection and reporting on the use of restrictive housing. That group includes the federal government,<sup>115</sup> Maryland,<sup>116</sup> Massachusetts,<sup>117</sup> Michigan,<sup>118</sup> Minnesota,<sup>119</sup> Nebraska,<sup>120</sup> New Mexico,<sup>121</sup> and Virginia.<sup>122</sup> These reporting requirements sought to document the scope of restrictive housing and the populations placed in restrictive housing. Minnesota's law, for example, requires the commissioner of corrections to file an annual report with the legislature providing "(1) the number of inmates in each institution placed in segregation during the past year; (2) the ages of inmates placed in segregation during the past year; (3) the number of inmates transferred from segregation to the mental health treatment unit; (4) disciplinary sanctions by infraction; (5) the lengths of terms served in segregation, including terms served consecutively; and (6) the number of inmates by race in restrictive housing."<sup>123</sup> Since its passage, reports have been filed annually on January 15<sup>th</sup> for 2020<sup>124</sup> and 2021.<sup>125</sup>

### **Innovations in 2020-2021: New York, Colorado, and Connecticut**

We turn now to legislative activity during the last several months. By way of an overview, bills have been introduced in 32 states and the federal government. Legislatures have voted to enact provisions in seven states—Arkansas, Colorado, Connecticut, Kentucky, Louisiana, New York, and Tennessee.

As we outlined above for the 2018-2020 period, we focus first on a few enactments in states before providing a catalogue of the many regulations imposed. Here we draw on examples from New York, Colorado, and Connecticut.

A much-discussed major enactment is New York's Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, which will take effect in April of 2022.<sup>126</sup> The HALT Act defines "segregated confinement" to mean "any form of cell confinement for more than seventeen hours a day other than in a facility-wide emergency or for the purpose of providing medical or mental health treatment."<sup>127</sup>

Key features of HALT are its requirement of seven hours out of cell per day and the three-day limit on the use of solitary confinement and requirements for out-of-cell time.<sup>128</sup> The HALT Act prohibits segregated confinement for more than three consecutive days or more than six days in a 30-day period unless a person has committed one of the serious violations identified by the statute.<sup>129</sup> HALT also prohibits placement in segregated confinement for more than 15 consecutive days or 20 total days within a 60-day period.<sup>130</sup> In addition, HALT instructs that out-of-cell programming be offered to people in segregated confinement at least four hours per day, including at least one hour of recreation.<sup>131</sup>

In addition to addressing the entire population, HALT also addresses subpopulations. HALT prohibits segregated confinement altogether for people who are 21 years old or younger; 55 years old or older; living with a disability; diagnosed with a serious mental illness; or pregnant, postpartum, or caring for a child in a correctional institution.<sup>132</sup>

For implementation, the HALT ACT instructs correctional administrators to publish monthly reports online detailing the demographics of the people held in segregated confinement, the number of days spent in segregated confinement, the number of people held by a facility, and a list of all incidents resulting in segregated confinement by the facility.<sup>133</sup> In addition, the HALT Act mandates extra training for staff working on segregated confinement units.<sup>134</sup>

Colorado's legislation was signed into law on June 24, 2021 and goes into effect in part on January 1, 2022 and in part on July 1, 2022.<sup>135</sup> This statute puts a hard stop on restrictive housing, which it defines as "the state of being involuntarily confined in one's cell for approximately twenty-two hours per day or more with very limited out-of-cell time, movement, or meaningful

human interaction whether pursuant to disciplinary, administrative, or classification action.”<sup>136</sup> Under the statute, individuals placed in restrictive housing in local jails may not, without a written court order, be held for more than 15 days in a 30-day period. A court may only grant such an order if it finds by clear and convincing evidence that “[t]he individual poses an imminent danger to himself or herself or others;” “[n]o alternative less-restrictive placement is available;” “[t]he jail has exhausted all other placement alternatives;” and “[n]o other options exist, including release from custody.” A jail may hold an individual in restrictive housing for an additional seven days if the jail files a motion for court order prior to the expiration of the 15-day placement and the court’s decision remains pending.

Further, the legislation mandates that “[a] local jail shall not involuntarily place an individual in restrictive housing, including for disciplinary reasons,” if the individual has been “diagnosed with a serious mental illness or is exhibiting grossly abnormal or irrational behaviors or breaks with reality,” has “self-reported a serious mental illness, suicidality, or is exhibiting self-harm,” is “pregnant or in the postpartum period,” is under 18 years old, or suffers from certain physical, developmental, or neurological impairments.<sup>137</sup> The only exceptions to this rule involve enumerated circumstances relating to medical treatment, or when “[n]o other less restrictive option is available and the individual is not responding to ongoing de-escalation techniques.”<sup>138</sup>

Moreover, people in restrictive housing in local jails must be provided with “basic hygiene necessities, including shaving and showering at least three times per week; exchanges of clothing, bedding, and linen on the same basis as” general population; “access to writing letters or receiving letters;” “opportunities for visitation;” “access to legal materials;” “access to reading materials;” “a minimum of one hour of exercise five days per week outside of the cell;” “access to outdoor exercise at least one hour per week, weather permitting;” “telephone privileges to access the judicial process and to be informed of family emergencies as determined by the local jail;” and “access to programs and services.”<sup>139</sup>

Connecticut’s legislature enacted a statute, known as the PROTECT Act, that had comprehensive limits on the use of solitary confinement.<sup>140</sup> In lieu of signing the statute, Connecticut’s governor issued an executive order.<sup>141</sup> That order mandates that, “[b]y September 1, 2021, the Department of Correction shall guarantee that, outside of extraordinary circumstances,

incarcerated persons in the general population shall be held in isolated confinement only due to disciplinary status."<sup>142</sup> In addition, the order requires that, "outside of extraordinary circumstances," every "incarcerated person in isolated confinement shall have a meaningful opportunity to be out of such person's cell for two hours each day," and shall not "be held in prolonged isolated confinement due to disciplinary status."<sup>143</sup> The order also directs Connecticut's Department of Correction to "make policy changes to limit the use of isolated confinement on members of vulnerable populations," which are defined as anyone who is under 18 years old or over 65 years old, pregnant, or suffering from certain mental, medical, or physical conditions.<sup>144</sup> Previously, in 2017, Connecticut enacted a statute that focused on the use of solitary confinement for juveniles.<sup>145</sup> That law provides that "no child shall at any time be held in solitary confinement or held for a period that exceeds six hours."<sup>146</sup>

***Categories of Regulation: 2020-2021  
Populations, Conditions, Duration, Reporting***

Enacted bills address restrictive housing for juveniles and seniors, people who are pregnant or postpartum, and people suffering from mental illness and disabilities. The bills also confront conditions of confinement, duration of confinement, reasons for placement in restrictive housing, monitoring and documentation, reporting, and staff training. Below we again provide a synthesis through a catalogue of the issues addressed and, once again, we include the jurisdictions profiled above.

***Subpopulations:*** Several states have enacted legislation in 2021 that places limitations or prohibitions on the use of restrictive housing for juveniles. Arkansas prohibits people in juvenile detention facilities from being placed in punitive isolation<sup>147</sup> or solitary confinement<sup>148</sup> as a disciplinary measure for more than 24 hours, unless the person has committed an assault or engaged in conduct that poses an imminent threat, or has escaped or attempted escape. Colorado also prohibits local jails from placing people who are under 18 years old in solitary confinement.<sup>149</sup> In New York, people under the age of 22 may not be placed, for any length of time, in segregated confinement.<sup>150</sup> Tennessee prohibits juvenile "seclusion"<sup>151</sup> for "discipline, punishment, administrative convenience, retaliation, staffing shortages, or any reason other than a temporary response to behavior that threatens immediate harm to a youth or others."<sup>152</sup>

Several states placed limitations or prohibitions on restrictive housing for people who are pregnant or postpartum. In

Arkansas, an individual may not be placed in restrictive housing<sup>153</sup> for 30 or more days if the individual is pregnant, has delivered a child within the previous 30 days, is breastfeeding, or is under a physician's care for postpartum depression or other postpartum conditions.<sup>154</sup> In Colorado, people detained in local jails may not be placed in solitary confinement<sup>155</sup> if pregnant or postpartum, unless a series of conditions are met, including the presence of imminent danger to others and the unavailability of less restrictive options. Kentucky prohibits restrictive housing for people who are pregnant or "in the immediate postpartum period."<sup>156</sup> New York prohibits segregated confinement<sup>157</sup> for people who are pregnant, in the first eight weeks of the postpartum period, or caring for a child in a correctional institution.

As noted, Colorado and New York also limit or prohibit restrictive housing for people with mental illness and disabilities. Colorado forbids local jails from involuntarily placing someone in restrictive housing with a few exceptions. New York requires mental health assessments upon placement in segregated confinement and prohibits segregated confinement for people diagnosed with serious mental illness or with certain disabilities.<sup>158</sup>

***Time Out-of-Cell and Conditions of Confinement:*** As noted, Colorado imposes obligations on local jails to provide certain services that would be given to people in general population and to ensure access to exercise, visits, and legal assistance.<sup>159</sup> Also as noted, New York requires that people in segregated confinement be offered out-of-cell programming at least four hours per day, "including at least one hour for recreation."<sup>160</sup> New York also prohibits changes in diet as a form of punishment.<sup>161</sup>

Colorado and New York also place limitations on the duration of confinement. As noted, without a court order, in Colorado, a person in jail may not be held in restrictive housing for more than 15 days in a 30-day period.<sup>162</sup> In New York, corrections staff are not to put an individual in segregated confinement for more than three consecutive days or more than six days in a 30-day period unless, after an evidentiary hearing, the state determines that the person engaged in certain kinds of serious conduct, including, for example, causing "serious physical injury or death to another," leading or organizing a riot, or procuring deadly weapons, among other violations.<sup>163</sup> No one may be placed in segregated confinement for "longer than necessary and no more than fifteen consecutive days or twenty total days within any sixty day period."<sup>164</sup>

**Transparency, Data Collection, and Oversight:** Colorado and Louisiana require monitoring and documentation of restrictive housing placements. In Colorado, when a person in a local jail is involuntarily placed in restrictive housing, “[a]t least twice per hour, a medical or mental health professional or local jail staff must check [on her], face-to-face or through a window.” As noted, local jails must also document the time each person spends out of cell on a daily basis, including “all meaningful human contact the individual received while out of cell” and “any mental or medical services received.” Each individual must be provided with “a clear explanation of the reason” for the placement, the monitoring procedures, date and time, court dates, and the “behavioral criteria the individual must demonstrate to be released from restrictive housing.” A Louisiana Resolution also “urge[s] and request[s]” that a legislative auditor conduct an audit on the “use of all forms of solitary confinement, room confinement, or room isolation in facilities housing juveniles arrested or adjudicated for a delinquent or status offense in the state of Louisiana.”<sup>165</sup>

Four states have imposed reporting obligations. Colorado requires people who run jails to submit quarterly reports to the Department of Public Safety on solitary confinement demographics; reasons for and length of confinement; injuries, deaths, and crimes committed while in confinement; and how many times the jail “sought a written order to hold someone beyond the fifteen days in restrictive housing and the outcome.” Kentucky requires the submission of annual reports with information about restrictive housing demographics, reasons for placement in restrictive housing, and the dates of placement and release. Such reports must be submitted to the Judiciary Committee and presented online.<sup>166</sup> Louisiana requires that a report submitted to the state’s Juvenile Justice Reform Act Implementation Commission include available data on solitary confinement demographics for juveniles, the duration of their confinement by facility, and the “top five reasons” they were placed in isolation by facility.<sup>167</sup> New York requires that correctional administrators publish monthly reports online and detail the solitary confinement demographics, duration of confinement, and reasons for confinement.<sup>168</sup>

### ***Pending Legislation as of the Summer of 2021***

Legislatures continue to be presented with proposals for comprehensive reform. As of the summer of 2021, more than 50 proposals in 25 jurisdictions addressed isolation in jails and prisons.

### ***Federal Proposals***

Among the various proposals at the federal level is a bill, introduced to the U.S. House of Representatives, entitled "Restricting the Use of Solitary Confinement Act."<sup>169</sup> That proposal would limit the use of solitary confinement within the federal prison system for certain populations, including pregnant or postpartum prisoners, prisoners 65 years or older, and prisoners with a serious medical condition by using an alternative appropriate medical or other unit. The Act proposes limiting the duration of solitary confinement to no more than 15 consecutive days or no more than 20 days during a 60-day period. This proposal would also mandate that the Bureau of Prisons prepare a report to be submitted to the Committees on the Judiciary of the House of Representatives and of the Senate with recommendations on how to reduce the use of solitary confinement in federal prisons to near zero within ten years.

Another proposal in the U.S. House of Representatives, entitled "Kalief's Law," would amend the Omnibus Crime Control and Safe Streets Act of 1968 to "provide for the humane treatment of youths who are in police custody, and for other purposes." The bill's aims include prohibiting solitary confinement for youth and limiting the conditions and duration of temporary separation of youth.<sup>170</sup>

Also before Congress is HR 2293, the Federal Correctional Facilities COVID-19 Response Act. This Act would establish "procedures related to the coronavirus disease 2019 (COVID-19) in correctional facilities."<sup>171</sup> This Act aims to ensure that "medical isolation for COVID-19 is distinct from punitive solitary confinement;"<sup>172</sup> the bill would authorize recreational materials and expanded programming and communication privileges for people in medical isolation. The bill calls for a report by the Attorney General to Congress to explain steps taken to make medical isolation for COVID-19 distinctive from segregation that is imposed for discipline.

### ***State Proposals as of the Summer of 2021***

Many of the bills in state legislatures focus on limiting the use of solitary confinement for certain populations, including pregnant and postpartum people, juveniles, seniors, and those with mental illness or disabilities. In addition, in about half of the jurisdictions where legislation has been introduced,<sup>173</sup> proposals would establish reporting requirements to various oversight

committees or commissions. Some bills also call for limits on the duration of solitary confinement and for special training for staff. In two states, Delaware and South Carolina, legislation was introduced to limit courts' authority to sentence an individual to solitary confinement.<sup>174</sup>

In four states (Connecticut, Maine, Nebraska, and New Hampshire), bills were introduced to establish a general prohibition on the use of solitary confinement within the state. Connecticut's bill (enacted but vetoed by the Governor) was known as the PROTECT Act and its purposes included to "prohibit the Department of Correction from using solitary confinement in its facilities."<sup>175</sup> The legislation introduced in Maine aimed to ban solitary confinement in both jails and prisons in the state.<sup>176</sup> The statute proposed in Nebraska provided that "no person shall be placed in solitary confinement."<sup>177</sup> The proposal in New Hampshire would have repealed the authority of state or county correctional facilities to discipline an inmate by use of solitary imprisonment.<sup>178</sup>

In a few jurisdictions that, in prior years, had enacted solitary confinement regulations, more legislation was introduced in the last year. For example, in Arkansas, proposed legislation would supplement what had been put into place by establishing a reporting system to collect data on the length of solitary confinement.<sup>179</sup> In Kentucky, legislation was enacted that aimed to prohibit solitary confinement of pregnant or immediately postpartum incarcerated individuals and to establish reporting requirements<sup>180</sup>; proposed legislation would extend prohibitions to subgroups such as young people.<sup>181</sup> And in Massachusetts, proposed legislation would address suicide prevention among those in isolation as a result of "behavioral health needs" and to establish response practices for such individuals.<sup>182</sup> In addition, Massachusetts proposed a bill to provide criminal justice reform protections to those in restrictive housing.<sup>183</sup>

## **V. A Case Study: The 2021 Proposed Pennsylvania Legislation**

These many enactments and proposals provide the necessary context in which to consider current and future proposals. Below we use Pennsylvania's 2021 draft Act, amending Title 61 of the Pennsylvania Consolidated Statutes, as an example of the challenges that drafters face as they work with a range of constituencies to develop legislation.



The 2021 proposal marks an important step toward limiting harmful isolation practices and mitigating the impact of solitary confinement. Below, we outline several of the salient aspects of the bill, as we note the strides made and the questions raised. As we discuss, clearer mandates to curb solitary confinement are necessary to make proposed reforms effective.

***The Definition of and Criteria for Placement in Solitary Confinement***

The Pennsylvania statute defines solitary confinement to be placing a person, based on a variety of rationales, in a "cell or similarly confined holding or living space . . . for approximately 20 hours or more per day, with severely restricted activity, movement and social interaction." Section 5101. This definition is one of the strengths of the draft, which moves away from the 22-hour per day in cell definition of solitary confinement and calls for four hours out of cell per day when a person is held in isolation. (As we discussed, the HALT Act provides another benchmark, of seven hours per day out of cell. Others propose that the time out of cell presumptively be most of a person's waking hours.<sup>184</sup>) Another strength of Pennsylvania's proposed legislation is the effort to limit the length of stay in solitary confinement and to prohibit its use for designated populations.

Yet questions emerge. The proposed legislation creates presumptive caps on the length of time in solitary confinement, but the methods to calculate what time "counts" towards those caps are not clear, making implementation difficult. Moreover, while some jurisdictions have called for the end of solitary confinement, the Pennsylvania proposal authorizes solitary confinement under some circumstances. Indeed, the draft outlines broad bases for such placement. These provisions, as explained below, are problematic.

The proposed statute permits solitary confinement if a series of conditions, detailed below, are "met":

- when there is a "substantial risk of immediate serious harm to [the individual] or another, as evidenced by recent threats or conduct, and a less restrictive intervention would be insufficient to reduce the risk." Section 5102 (a) (1). Under this provision, the institution bears the "burden of establishing this standard by clear and convincing evidence" that such a risk exists and no less restrictive alternative is available;

- when an "inmate is subject to a disciplinary sanction." Section 5102 (a) (2).
- only after the "inmate [has] received a personal and comprehensive physical and mental health examination" or, if the inmate in question is in a jail, they must be examined within "12 hours of . . . being placed in solitary confinement." Section 5102 (a) (3); and
- when the "decision to place an inmate in solitary confinement is made by the chief administrator." Section 5102 (a) (4).

Several aspects of this formulation raise concerns. First, the standard for being placed in solitary confinement is open-ended rather than restricted to a few predicates, such as specified acts of violence. Likewise, a segment of the bill devoted to "Regulations" calls on the Secretary of Corrections to "promulgate regulations necessary to administer the provision" and to limit the reasons for placement in solitary to "an offense involving violence, escapes or attempts to escape or poses a threat to institutional safety." Section 5113 and 5113 (5) (i).

While violence and escapes are delineated categories, "a threat to institutional safety" is underspecified and leaves a vast amount of discretion in the hands of a person deciding another person is a "threat." Indeed, as discussed in the Liman Center's 2013 report on the policies governing isolation, that phrase was present in regulations around the country, and it provided no guidance, created few constraints, and landed tens of thousands of people in solitary confinement.<sup>185</sup> In short, such broad provisions leave undue discretion with institutional actors and such licensure could well produce results contrary to the aims of this legislation.

### ***The Process for Deciding Placement***

The statute provides that a person is to be held for no more than 72 hours in solitary confinement before being provided with a hearing that offers "timely, fair and meaningful opportunities . . . to contest the confinement." Section 5102(b). The statute further provides that the person subject to such confinement "shall be represented by legal counsel" and shall "be permitted to appear" at this hearing. Section 5102(b) (2) and (3).

Provisions such as these are critical to offering meaningful opportunities to evaluate the merits of allegations that a person needs to be placed in solitary confinement. But the statute as drafted needs clarification.

One set of questions surround the laudable proposal to provide a lawyer. How this provision is to work in practice within the 72-hour time frame is unclear and, of course, one would not want to have the potential for a lawyer to extend the time in isolation. What is the timing for finding counsel or will facilities have made arrangements to have counsel on stand-by? What information would the lawyer have access to and when? Will the lawyer be given access to all materials relevant to the isolation decision? How would the lawyer meet with the individual represented, under what circumstances, and with what efforts to preserve confidentiality? If the attorney believed that there was insufficient time to prepare for the hearing, are there provisions for continuances so that a person does not remain in isolation?

The provision for the right to be present at the hearing raises another set of concerns. In the U.S. legal system, a person whose conduct is at issue in a hearing generally has a right to be present. Yet the phrasing in the statute creates ambiguity around this right. The statute provides "in the absence of exceptional circumstances, unavoidable delays or reasonable postponements," a person can appear. Section 5102(b)(2). No guidance is given as to what "exceptional circumstances" means or why that exception should exist. Phrases such as "unavoidable delays" and "reasonable postponements" are also vague and, moreover, seem to permit an extension of the 72-hour requirement for a hearing. The result could be that a person is held without a hearing for much longer, as no other cap is given on postponements.

In addition, Section 5106 authorizes "use of solitary confinement pending investigation." Like Section 5102(b)(2), no time frame is specified. Furthermore, the statute does not explain (as it should) that time spent in solitary during the pending investigation counts toward the 15- and 20-day caps provided in other parts of the statute. In short, to make these caps on the time in isolation apply in practice, revisions of the text are needed.

The burden of proof attached to the hearing is also unclear. Under the proposed language, the institution has the "burden" of establishing risk and the lack of suitable alternatives to mitigate that risk. Section 5102 (a) (1). The statute does not, however, explain how that burden could be met or rebutted. For example, if

a staff member asserts a risk, a threat, or a lack of less restrictive alternatives, does that assertion suffice? Or, is additional evidence required to support a claim and, if so, what kind of evidence satisfies the standard specified of "clear and convincing burden"?

This ambiguity surrounding what happens before and during the hearing and the kind and nature of proof sufficient to meet the state's burden interacts with the statute's broad criteria for placement in solitary confinement to create other kinds of risks—that many people could be sent to isolation, spend a good deal of time there beyond 15 or 20 days, and that decision-making around who is in isolation will not be consistent.

The statute's discussion of the hearing officer and decisions rendered also require revisiting. The statute requires the hearing to be "conducted by an independent hearing officer" but does not define the criteria to determine independence. Section 5102(b)(4). For example, could a hearing officer be a staff member who works on the unit in which an incident occurred? Further, the statute does not clarify what level of authority the independent hearing officer would have. For example, such a person could come from senior administration or the central office, or be at the facility level.

What the statute does call for—laudably—is that the incarcerated person is, at the hearing, to receive "a written statement of the reasons for the decision to place the inmate in solitary confinement." Section 5102(b)(5). It is unclear from the wording whether this written statement is meant to be the findings from the hearing or the allegations that were the original basis for placement in solitary. Both are important to a transparent and fair process and, assuming the provision in Section 5102(b)(5) is meant to describe a written decision based on the hearing officer's findings, the statute does not build in mechanisms for another level of review such as an appeal of that ruling to others. Creating that form of review of each decision could enhance conformity with the statutory requirements and consistency in decision making.

### ***The Duration of Solitary Confinement and Return from Solitary Confinement***

The statute addresses the duration of confinement by providing that a person shall not be "placed or retained in solitary confinement" if "the chief administrator" determines that the person "no longer meets the standards for solitary

confinement." The provision appears to cap the time in solitary confinement as "no more than 15 consecutive days," or "no more than 20 days in a 60-day period." Section 5102(c)(1-3). Further, the statute limits institutional lockdowns by not permitting solitary confinement beyond the same time limits—no more than 15 consecutive days or 20 during a 60-day interval. Section 5102(f).

Yet Section 5109 provides for people in solitary to be "gradually acclimated to the general population" and does not clarify how that process comports with the time limitations of Section 5102(c)(1-3). And, as noted above, no information is provided about how the time during the investigation phase is to be calculated, if at all, toward the 15 to 20 days. Moreover, the statute authorizes solitary confinement during "lockdowns" and leaves it to the "chief administrator" to decide if such confinement is required for the "safety of the inmates." Section 5105. The statute does not explain how these periods are to be calculated for the caps or what restrictions, if any, exist around the chief administrator's decision-making power in this instance. Some decisions may need to be made quickly but also need to be governed by meaningful standards. Guidance benefits both administrators and individuals subject to their decisions.

We note that the statute does mention that the Secretary is to review this decision and requires that the reasons for lockdown be published and provided, if requested, to the General Assembly. Section (5105)(1). Public accountability is helpful, but one would presume that the reasons would be concern for safety. More is likely meant to be required and needs to be specified.

Another area of ambiguity comes from the discussion on release to the community. The statute provides that no person shall be released from solitary "directly . . . to the public during the last 180 days of an inmate's term . . . unless it is necessary for the safety of the inmate, staff, other inmates or the public." 5102(g)(5). That provision does not specify who makes that judgment and the basis for doing so. "Safety" is a broad term that can be used to justify a good many decisions.

Many of the concerns raised above could be addressed if the statute stated, for example, that any time spent in solitary—for evaluation, for investigation, or otherwise—counts toward the cap. Further, provisions could state that the availability of lawyers and of efforts to acclimate to general population ought to begin within 12 to 24 hours of a placement in solitary confinement and not delay release.

### ***The Role of Health Care Clinicians***

Once a person is in solitary confinement, the statute calls for a daily evaluation by a clinician to assess if the person is "a member of a vulnerable population." Section 5102(d). The statute defines such people to include people "21 years of age or younger," "55 years of age or older," prisoners who are "pregnant or in the postpartum period," or have "suffered a miscarriage or terminated a pregnancy" or are "perceived to be lesbian, gay, bisexual, transgender, or intersex," persons with the "mental health classification of C Code or D Code," or persons with "intellectual or developmental disabilities." Section 5101. Upon identifying such people, they shall be "immediately removed from solitary confinement and moved to an appropriate placement." Section 5102(d).

Efforts to limit the use of solitary are beneficial. Yet the statute provides no *ex ante* prohibitions but rather directs removal after the fact. Further, the statute does not address the time spent in cell in the context of medical isolation. Section 5105(2) permits individuals to be put into "medical isolation" for no more than 24 hours under "emergency confinement" and then put into a "mental health unit" following a medical evaluation. Section 5105(2)(iv). This section does not specify any limitation on the time spent inside the cell for individuals subject to medical isolation. (It is possible that the requisite medical examination could take place outside of a cell; if it does, that time could be the only occasion a person would be outside a cell in the 24-hour period.) For the vulnerable individuals this section of the statute addresses, this length of time in isolation could be devastating.

Moreover, given that, as drafted, hearings could be postponed and, in county jails, evaluations can be no less than "every seven days" under Section 5102(d), a person falling within those subcategories could spend additional days in solitary confinement that may or may not count against the 15- or 20-day cap. No provision is made to screen out such people before they are placed in solitary confinement. A revision could call for screening so that people within these subcategories are not sent to isolation. Some jurisdictions, as discussed above, put in time frames capping isolation (under medical supervision) to four to six hours for evaluations.

Furthermore, that statute provides that individuals can be placed in "protective custody" solitary confinement with consent or involuntarily. Section 5105(3). The statute provides no information as to whether this period of confinement is limited in

duration in any way or is subject to periodic review to assess its continued necessity.

Once a placement called "protective custody" occurs, it is unclear how the placement is terminated, what procedural protections the individual has, or how administrators ought to conduct themselves, other than that a person may contest a placement (Section 5105(3)(iv)) or opt out if voluntarily placed (Section 5105(3)(v)). The statute does provide that a person in such protective custody is to be provided "comparable opportunities for activities, movement and social interaction" but no information is provided as to how that is to occur and with whom social interaction will take place. Section 5105 (c)(iii). (Section 5105(4) also states that a person who is "vulnerable" cannot be put with "one or more inmates" without "informed, voluntary, written consent.")

#### ***Conditions within Solitary Confinement and Time Out-of-Cell***

The statute calls for cells to have proper ventilation and light. Section 5102 (g)(1). The statute also instructs that lighting be "on the same schedule" as in "other housing units" and not be on "for 24 hours a day," absent a "physician or psychiatrist" providing a written opinion that leaving the light on is "necessary to prevent suicide or self-harm." Section 5102(g)(7). Medical oversight is one way to mitigate the potential harms; a more effective means is to prevent people from being in isolation for more than a very few hours and require that they be under medical care when in such settings for any amount of time.

Also provided for is "access to food, water or any other basic necessity." Section 5102(g)(3). Not addressed is whether the food has to be the same in quantity and quality as that provided to people not in solitary confinement.

In another section of the bill, the Secretary is called upon to make regulations to reduce the isolation of solitary confinement by "easing restrictions" on a variety of activities. Section 5113 (4). Again, the intent is laudable, however the specifications and directions lacking. Not specified is what constitutes "easing," how to implement those changes, and the time frame to make such alterations.

#### ***Additional Efforts to Limit the Use of Solitary Confinement***

The proposed statute charges the Secretary with creating procedures and policies, as well as a process to review solitary

confinement decisions. Section 5107. These provisions call for the Secretary to develop step-down or transitional programs. Section 5107(3). The statute also states more generally that the system ought to use other forms of sanctions in lieu of solitary confinement. Section 5108. These goals are again laudable, yet a lack of specificity and of time frames undercuts these goals.

### ***Oversight and Reporting***

The statute proposes the creation of an "independent investigator to monitor correction institutions" to ensure compliance, to interview individuals in solitary confinement, and to review relevant documents. Not specified are the numbers of people to hold that role, their resources and support, whether they have a "golden key" giving them full access to all facets of a facility at any time unannounced, or to whom the reports shall be made of the investigations. Section 5110.

Another provision creates a mechanism for discipline of "misconduct" by staff. Section 5111. Such mechanisms of accountability are important not only for those in custody, but also for staff themselves. What remains ambiguous in the statute, however, is the trigger for these hearings and what constitutes misconduct. The statute does make clear that a central remedy is release of an individual, as well as the remedies to seek redress in courts, including "actual damages" and injunctive relief. Section 5112. Moreover, while addressing staff misconduct, the statute does not yet address how to support staff in the transformation in a prison system that no longer uses solitary confinement.

A step toward transparency is the requirement of quarterly reports on publicly accessible websites. The reports should require information on the demographics of people in solitary, the duration of time each person has spent, and the basis for their confinement. See Section 5114. Databasing the written reasons for placement, the activities while in placement, the methods of stepping down, and the health care provided would be helpful as well.

### ***The Proposal as a Whole***

We have detailed many other jurisdictions' approaches, and as can be seen, several provide models of mandates that are clearer than the current Pennsylvania draft, and many impose specific curbs on solitary confinement to limit rather than authorize its use. Pennsylvania's legislation is one example of a commitment to



limiting solitary confinement that leaves a great deal of administrative discretion to decision-making by staff and the Secretary. To succeed in making change, much more clarity in direction and more boundaries would be needed.

## **VI. Moving Forward**

The 2021 proposal in Pennsylvania is one of dozens pending that mark the national effort to put a stop to the harms of solitary confinement. As the range of statutes throughout the country makes plain, several jurisdictions have articulated clear goals, caps, and mechanisms to end or limit isolation. Legislators need to set the parameters as they create methods to support the people who live in prison, those who work there, and their communities to improve the safety and well-being of us all.

**Appendix A: CLA (ASCA)-Liman Research Projects****2012****Prison Visitation Policies: A Fifty-State Survey****2013****Administrative Segregation, Degrees of Isolation, and Incarceration:**  
A National Overview of State and Federal Correctional Policies**2014****Time-In-Cell: The ASCA-Liman 2014 National Survey of**  
Administrative Segregation in Prison**2016****Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on the**  
Numbers of Prisoners in Restricted Housing and on the Potential of  
Policy Changes to Bring about Reforms**Rethinking "Death Row": Variations in the Housing of Individuals**  
Sentenced to Death**2018****Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide**  
Survey of Time-in-Cell**Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to**  
Make Changes**2020****Time-In-Cell: A 2019 Snapshot of Restrictive Housing based on**  
Nationwide Surveys of U.S. Correctional Facilities

**Appendix B: Recent Legislative Efforts Addressing Solitary Confinement**

<b>Jurisdiction</b>	<b>Bill Number</b>
Federal	HR176
Federal	HR131
Federal	HR2293
Alabama	HB36
Alabama	HB253
Arizona	HB2167
Arkansas	HB1887
California	AB1225
Connecticut	SB1059
Delaware	SB98
Georgia	HB377
Georgia	HB58
Illinois	HB3738
Illinois	HB3564
Kentucky	HB86
Louisiana	HB68
Maine	LD696
Maryland	HB851
Maryland	HB917
Maryland	HB131
Massachusetts	HB1851
Massachusetts	HB209, SB 1567
Massachusetts	HB2504, SB1578
Missouri	SB471
Nebraska	LB620
Nebraska	LB471
New Hampshire	HB557
New York	SB1623
New York	SB2177
New York	SB4984
New York	SB2105
New York	AB2518
New York	SB8570
Pennsylvania	HB1004
Pennsylvania	HB1037
Pennsylvania	SB138
Rhode Island	HB5740
Rhode Island	SB8395

South Carolina	HB3212
South Carolina	SB51
South Carolina	SB53
Tennessee	HB0223
Tennessee	SB1418
Tennessee	HB0031
Tennessee	SB0827
Tennessee	HB0916
Tennessee	HB0222
Tennessee	SB1412
Tennessee	HB1579
Washington	SB5413
Washington	SB5248
Washington	HB1312
West Virginia	HB3189

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<sup>1</sup> This overview builds on testimony submitted on August 6, 2021, for a hearing related to An Act Amending Title 61 (Prisons and Parole) of the Pennsylvania Consolidated Statutes, providing for solitary confinement; that hearing, held on August 10, 2021, was convened by the Senate's Democratic Policy Committee of the Commonwealth of Pennsylvania. Those proceedings can be found at <https://www.senatormuth.com/policy/>.

<sup>2</sup> One account of the history of punishment practices comes from Judith Resnik, Hirsu Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola, and Meredith Wheeler, *Punishment in Prison: Constitution the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NORTHWESTERN LAW REVIEW 45 (2020). That article appears in a volume devoted to the issue of solitary confinement; a large literature, much of it cited in the ASCA/Liman and CLA/Liman Reports, addresses isolation in prison.

<sup>3</sup> See Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies, YALE LAW SCHOOL, ARTHUR LIMAN PUBLIC INTEREST PROGRAM (June 2013).

<sup>4</sup> [Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison](https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_combined_web_august_2015.pdf), YALE LAW SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM (Aug. 2015), at [https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell\\_combined\\_web\\_august\\_2015.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_combined_web_august_2015.pdf) (hereinafter 2014 "Time-in-Cell"); [Aiming to Reduce Time-in Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms](https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtor educetic.pdf), YALE LAW SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM (November 2016), at <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtor educetic.pdf> (hereinafter 2016 "Aiming to Reduce Time-in-Cell"); [Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes](https://law.yale.edu/sites/default/files/area/center/liman/document/asca_lima), Yale Law School, Arthur Liman Center for Public Interest Law (October 2018), at [https://law.yale.edu/sites/default/files/area/center/liman/document/asca\\_lima](https://law.yale.edu/sites/default/files/area/center/liman/document/asca_lima)

[n\\_2018\\_restrictive\\_housing\\_efforts\\_in\\_four\\_jurisdictions\\_to\\_make\\_changes.pdf; Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell](#), Yale Law School Arthur Liman Public Interest Program (October 2018) (hereinafter 2018 “Reforming Restrictive Housing”); [Time-In-Cell 2019: A Snapshot of Restrictive Housing](#), Yale Law School Arthur Liman Center for Public Interest Law (September 2020), at [https://law.yale.edu/sites/default/files/area/center/liman/document/asca\\_limann\\_2018\\_restrictive\\_housing\\_released\\_oct\\_2018.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/asca_limann_2018_restrictive_housing_released_oct_2018.pdf) (hereinafter “Time-in-Cell 2019”).

<sup>5</sup> [Rethinking "Death Row": Variations in the Housing of Individuals Sentenced to Death](#), Yale Law School, Arthur Liman Public Interest Program (July 2016).

<sup>6</sup> Hope Metcalf, Jamelia Morgan, Samuel Olikier-Friedland, Judith Resnik, Julia Spiegel, Haran Tae, Alyssa Work, & Brian Holbrook, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies* (June 2013), available at [https://law.yale.edu/sites/default/files/area/center/liman/document/Liman\\_overview\\_segregation\\_June\\_25\\_2013\\_TO\\_POST\\_FINAL\(1\).pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/Liman_overview_segregation_June_25_2013_TO_POST_FINAL(1).pdf) [hereinafter ASCA-LIMAN ADMINISTRATIVE SEGREGATION NATIONAL OVERVIEW 2013].

<sup>7</sup> See 2014 “Time-in-Cell” at 11.

<sup>8</sup> 2014 “Time-in-Cell” at 2.

<sup>9</sup> “Aiming to Reduce Time-in-Cell” at 1.

<sup>10</sup> 2018 “Reforming Restrictive Housing” at 4.

<sup>11</sup> “Time-In-Cell 2019” at 5.

<sup>12</sup> “Time-in-Cell 2019” at 11-13.

<sup>13</sup> “Time-in-Cell 2019” at 48-50.

<sup>14</sup> *Id.* at 25, fig. 10.

<sup>15</sup> *Id.* at 24, fig. 9.

<sup>16</sup> *Id.* at 101, tbl. 28.

<sup>17</sup> Definitions varied slightly among jurisdictions.

<sup>18</sup> *Id.* at 12, fig. 3.

<sup>19</sup> *Id.* at 24, fig. 9.

<sup>20</sup> *Id.* at 25, fig. 10.

<sup>21</sup> American Correctional Association, *Restrictive Housing Performance Based Standards* (2016), at 39, ACA Standard 4-RH-0034 [hereinafter ACA 2016 Restrictive Housing Standards].

<sup>22</sup> *Id.* at 38-39.

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<sup>23</sup> *Id.* at 17.

<sup>24</sup> *Id.*

<sup>25</sup> "Time-in-Cell 2019" at 6 & n.35.

<sup>26</sup> See, e.g., *Reynolds v. Quiros*, 990 F.3d 286 (2d Cir. 2021); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019).

<sup>27</sup> A fuller discussion of the lines of research discussed in this paragraph is available in Judith Resnik et al., *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45, 89 (2020).

<sup>28</sup> See Albert Woodfox, *See Albert Woodfox, Solitary* (2019); see also *Collection of Reactions to Time-In-Cell*, Yale Law Journal Forum, Vol. 125 (Jan. 15, 2016), Reginald Dwayne Betts, *Only Once I Thought About Suicide*, <http://www.yalelawjournal.org/forum/only-once-i-thought-about-suicide>.

<sup>29</sup> Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997); Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211 (2020).

<sup>30</sup> Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 294 (2018); see also *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 75 (2012) (statement of Dr. Craig Haney); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 371-75 (2018); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 347-54 (2006).

<sup>31</sup> Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014).

<sup>32</sup> Louise Hawkey, *Social Isolation, Loneliness, and Health*, in *SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM* 1, 1-2 (Jules Lobel & Peter Scharff Smith eds., 2020), at 191, 196.

<sup>33</sup> Brie Williams & Cyrus Ahalt, *First Do No Harm: Applying the Harms-to-Benefits Patient Safety Framework to Solitary Confinement*, in *SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM*, at 159, 163.

<sup>34</sup> Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan E. Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN, Oct. 2019, at 1.

<sup>35</sup> See generally Cyrus Ahalt, Colette S. Peters, Heidi Steward & Brie A. Williams, *Transforming Prison Culture to Improve Correctional Staff Wellness and Outcomes for Adults in Custody "The Oregon Way": A Partnership Between the*

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*Oregon Department of Corrections and the University of California's Correctional Culture Change Program*, 8 *ADVANCING CORRECTIONS* J. 130 (2019).

<sup>36</sup> Information about pending and enacted legislation was drawn from our own research and other sources, including the ACLU Stop Solitary Campaign and the Vera Institute of Justice. Detailed information regarding legislation enacted or pending as of July 2019 can be found on the Liman Center website at [www.law.yale.edu/liman](http://www.law.yale.edu/liman).

The states in which legislation has been introduced were Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. Specific pending and enacted laws are cited, *infra* notes 13 and 14. Bills regarding restrictive housing proposed between October 2018 and June 2020 that failed include: Alabama House Resolution 90, House Joint Resolution 93, and House Joint Resolution 92, Alabama Legislature, 2020 Session (to recognize the injustice suffered by Anthony Ray Hinton); Florida House Bill 165, Senate Bill 228, and House Bill 347, 2020 Florida Legislature (to prohibit solitary confinement for youth under the age of 18); Florida Senate Bill 762, 2020 Florida Legislature (to prohibit solitary confinement and limit restrictive housing of those with serious medical needs); Illinois House Bill 4898, One Hundred and First Illinois General Assembly, 2020 (to prohibit solitary confinement of youth under the age of 21); Illinois House Bill 0892, One Hundred and First Illinois General Assembly, 2020 (to limit solitary confinement to maximum 10 consecutive days for all state inmates); Kentucky House Bill 147, 2020 Kentucky Legislature (to prohibit solitary confinement of youth, except to prevent imminent and significant harm); Maryland House Bill 0742, Maryland General Assembly, 2020 Session (to limit the use of solitary confinement for people with mental illnesses); Mississippi Senate Bill 2743, Mississippi Legislature, 2020 Session (to establish an ombudsman for the Department of Corrections); Oregon House Bill 3186, Seventy Ninth Oregon Legislature, 2019 (to prohibit solitary confinement beyond 15 consecutive days); South Carolina Senate Bill 1018, One Hundred and Twenty Third South Carolina General Assembly, Second Session (to end solitary confinement of children under the age of 18); Tennessee House Bill 1240, One Hundred and Eleventh Tennessee General Assembly, 2020 (to prohibit solitary confinement of pregnant people and for 8 weeks postpartum); Wisconsin Assembly Bill 398, Wisconsin Legislature, 2019-2020 Session (to end solitary confinement for pregnant prisoners); Wisconsin Assembly Bill 825, Wisconsin Legislature, 2019-2020 Session (to require mental health evaluation for all prisoners prior to placement in solitary confinement, and to limit solitary confinement of those with serious mental illness to maximum 10 consecutive days).

<sup>37</sup> 2018 Mass. Legis. Serv. Ch. 69, §§ 39A(b), 87.

<sup>38</sup> *Id.* § 39A(b).

<sup>39</sup> *Id.* §§ 39, 87.

<sup>40</sup> *Id.* § 39A(d)-(e).

<sup>41</sup> *Id.* § 10B.

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<sup>42</sup> *Id.* § 39B.

<sup>43</sup> *Id.* § 39E.

<sup>44</sup> Elevating the System: Exploring Alternatives to Restrictive Housing (Falcon, Inc. (Mar. 2021) at 4, available at <https://www.mass.gov/doc/falcon-report/download>. The Falcon Report credited the Massachusetts Department of Corrections for commissioning their report. *Id.* At 1.

<sup>45</sup> *Id.* at 9.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 32-34.

<sup>48</sup> *Id.* at 34.

<sup>49</sup> Deborah Becker, *Mass DOC Moves to End Solitary Confinement* (June 30, 2021), <https://www.wbur.org/news/2021/06/30/massachusetts-department-of-correction-solitary-confinement-falcon-report>.

<sup>50</sup> SF 8, 2019 Leg., 1<sup>st</sup> Special Sess. Section 10(2) (Minn. 2019).

<sup>51</sup> *Id.* § 10(6).

<sup>52</sup> *Id.* §§ 10(5-6).

<sup>53</sup> *Id.* § 10(7).

<sup>54</sup> *Id.* § 10(8).

<sup>55</sup> *Id.* § 10(3).

<sup>56</sup> A 314, S 3261, 2018-2019 Leg., Reg. Sess. (N.J. 2019).

<sup>57</sup> *Id.* § 4.

<sup>59</sup> *Id.* § 4(a)(9).

<sup>60</sup> *Id.* § 2(b).

<sup>61</sup> *Id.* § 3.

<sup>62</sup> *Id.* § 4(a)(7). Circumstances include a temporary, facility-wide, emergency lockdown, a mental health emergency requiring "medical isolation," and a request by the individual for protective custody. *Id.* § 4(d).

<sup>63</sup> See New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019).

<sup>64</sup> See *id.* § 3(A)-(B).

<sup>65</sup> See *id.* § 4.



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<sup>66</sup> See *id.* § 5.

<sup>67</sup> See *id.* § 6.

<sup>68</sup> HB 763, 2019 Leg., Reg. Sess. Section 1 (Mont. 2019).

<sup>69</sup> *Id.* § 2(12).

<sup>70</sup> *Id.* § 3(3).

<sup>71</sup> *Id.* § 3(10).

<sup>72</sup> *Id.* § 3(6).

<sup>73</sup> *Id.* § 12.

<sup>74</sup> *Id.* § 5(4).

<sup>75</sup> *Id.* § 8-10.

<sup>76</sup> The enacted bills include U.S. Senate Bill 756, One Hundred and Fifteenth U.S. Congress, Second Session (enacted December 2018)); Arkansas House Bill 1755, Ninety Second Arkansas General Assembly, 2019 Session (enacted April 2019); Colorado Senate Bill 20-007, Seventy Second Assembly, 2020 Session (awaiting Governor's signature); Florida House Bill 1259, 2020 Legislative Session (enacted June 2020); Georgia House Bill 345, 2019-2020 Georgia General Assembly, Regular Session (enacted May 2019); Louisiana House Bill 344, Louisiana State Legislature, 2020 Session (enacted June 2020); Maryland Senate Bill 809, Maryland General Assembly, 2019 Session (enacted April 2019); Maryland House Bill 1001, Maryland General Assembly, 2019 Session (enacted May 2019); Massachusetts House Bill 1851 (enacted April, 2018); Minnesota Senate File 8, Ninety First Minnesota Legislature, 1st Special Session 2019-2020 (enacted May 2019); Montana House Bill 763, Sixty Sixth Montana Legislature, 2019 Regular Session (enacted May 2019); Nebraska Legislative Bill 230, 2019-2020 Nebraska Unicameral Legislature (enacted February 2020); New Jersey Assembly Bill 3979, New Jersey Legislature 2018-2019 Session, Second Session (enacted January 2020); New Jersey Assembly Bill 314, New Jersey Legislature 2018-2019 Session, Second Session (enacted July 2019); New Jersey Assembly Bill 3979, Two Hundred and Eighteenth New Jersey Legislature, 2018-2019 Session (enacted January 2020); New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019); South Carolina House Bill 3967, One Hundred and Twenty Third Legislative Session (enacted May 2020); Texas House Bill 650, Eighty Sixth Texas Legislature, 2019-2020 (enacted May 2019); Virginia House Bill 1648, 2020 Virginia Legislative Session (enacted March 2020); Virginia Senate Bill 1777, House Bill 1642, 2020 Virginia Legislative Session (enacted March 2019); Washington Senate Bill 6112, House Bill 2277, 2019-2020 Washington State Legislature (enacted April 2020).

<sup>77</sup> See U.S. Senate Bill 756, One Hundred and Fifteenth U.S. Congress, Second Session (enacted December 2018).

<sup>78</sup> See Arkansas House Bill 1755, Ninety Second Arkansas General Assembly, 2019 (enacted April 2019).

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<sup>79</sup> See Colorado Senate Bill 20-007, Seventy Second Assembly, 2020 Session (awaiting signature).

<sup>80</sup> See Florida House Bill 1259, 2020 Legislative Session (enacted June 2020).

<sup>81</sup> See Georgia House Bill 345, 2019-2020 Georgia General Assembly, Regular Session (enacted May 2019).

<sup>82</sup> See Louisiana House Bill 344, Louisiana State Legislature, 2020 Session (enacted June 2020).

<sup>83</sup> See Maryland Senate Bill 809, Maryland General Assembly, 2019 Session (enacted April 2019).

<sup>84</sup> 2018 Mass. Legis. Serv. Ch. 69, §§ 39A(b), 87.

<sup>85</sup> See Montana House Bill 763, Sixty Sixth Regular Session of the Montana Legislature, 2019 (enacted May 2019).

<sup>86</sup> See Nebraska Legislative Bill 230, 2019-2020 Nebraska Unicameral Legislature (enacted February 2020).

<sup>87</sup> See New Jersey Assembly Bill 3979, New Jersey Legislature 2018-2019 Session, Second Session (enacted January 2020).

<sup>88</sup> See New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019).

<sup>89</sup> See South Carolina House Bill 3967, One Hundred and Twenty Third Legislative Session (enacted May 2020).

<sup>90</sup> See Texas House Bill 650, Eighty Sixth Texas Legislature, 2019-2020 Section 6 (enacted May 2019).

<sup>91</sup> See Virginia House Bill 1648, 2020 Virginia Legislative Session (enacted March 2020).

<sup>92</sup> See Washington Senate Bill 6112, House Bill 2277, 2019-2020 Washington State Legislature (enacted April 2020).

<sup>93</sup> See Louisiana House Bill 344, Louisiana State Legislature, 2020 Session (enacted June 2020), Section 1(B).

<sup>94</sup> See Texas House Bill 650, Eighty Sixth Texas Legislature, 2019-2020 (enacted May 2019), Section 501.144(a) (barring such placement "unless the director or director's designee determines that the placement is necessary based on a reasonable belief that the inmate will harm herself, her unborn child or infant, or any other person or will attempt escape."); Virginia House Bill 1648, 2020 Virginia Legislative Session (enacted March 2020), Article 2.2 (barring such placement "unless an employee of the Department has a reasonable belief that the inmate will harm herself, the fetus, or any other person or poses a substantial flight risk."); South Carolina House Bill 3967, One Hundred and Twenty Third Legislative Session (enacted May 2020) ("Correctional facilities, local detention facilities, and prison or work camps must not place a known

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pregnant inmate, or any female inmate who has given birth within the previous thirty days, in restrictive housing unless there is a reasonable belief the inmate will harm herself, the fetus, or another person, or pose a substantial flight risk.”).

<sup>95</sup> Georgia House Bill 345, 2019–2020 Georgia General Assembly, Regular Session (enacted May 2019), Section 1(e); (barring, without exception, the placement “in solitary confinement, in administrative segregation, or for medical observation in a solitary confinement setting” for any “pregnant woman or woman who is in the immediate postpartum period”).

<sup>96</sup> Maryland Senate Bill 809, Maryland General Assembly, 2019 Session (enacted April 2019), Section 9–601.1(B)–(C) (barring placement of any pregnant woman in restrictive housing unless there is “a serious and immediate risk of physical harm to the inmate or another” or “an immediate and credible flight risk that cannot be reasonably prevented by other means” or “a situation that poses a risk of spreading a communicable disease that cannot be reasonably mitigated by other means.”).

<sup>97</sup> 2018 Mass. Legis. Serv. Ch. 69, § 39A(d).

<sup>98</sup> Montana House Bill 763, Sixty Sixth Regular Session of the Montana Legislature, 2019 (enacted May 2019), Section 3 (barring placement of any pregnant or postpartum woman in restrictive housing unless an approval has been made by an administrator based on “exigent circumstances.”).

<sup>99</sup> New Jersey Assembly Bill 314, New Jersey Legislature 2018–2019 Session, Second Session (enacted July 2019), Section 3 (barring the use of restrictive housing, with exceptions, for any prisoner who “is pregnant, is in the postpartum period, or has recently suffered a miscarriage or terminated a pregnancy”).

<sup>100</sup> New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019) (barring the use of restrictive housing, without exception, for any inmate known to be pregnant).

<sup>101</sup> See First Step Act of 2018, § 613, Pub. L. 115–391, 132 Stat. 5194, 5248.

<sup>102</sup> See New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019), Section 3(A).

<sup>103</sup> See Washington Senate Bill 6112, House Bill 2277, 2019–2020 Washington State Legislature (enacted April 2020), Section 3.

<sup>104</sup> See Nebraska Legislative Bill 230, 2019–2020 Nebraska Unicameral Legislature (enacted February 2020), Sections 4–5 (requiring that “[d]ocumentation of the room confinement shall include the date of the occurrence; the race, ethnicity, age, and gender of the juvenile; the reason for placement of the juvenile in room confinement; an explanation of why less restrictive means were unsuccessful; the ultimate duration of the placement in room confinement; facility staffing levels at the time of confinement; and any incidents of self-harm or suicide committed by the juvenile while he or she was isolated.”).

<sup>105</sup> Neb. Rev. St. § 83–4,134.01(2) (2018).

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<sup>106</sup> Circumstances include a temporary, facility-wide, emergency lockdown, a mental health emergency requiring “medical isolation,” and a request by the individual for protective custody. A 314, S 3261, 2018–2019 Leg., Reg. Sess. (N.J. 2019). Section 4(b).

<sup>107</sup> See Montana House Bill 763, Sixty Sixth Regular Session of the Montana Legislature, 2019 (enacted May 2019), Section 12.

<sup>108</sup> See Arkansas House Bill 1755, Ninety Second Arkansas General Assembly, 2019 (enacted April 2019), Sections 1(b), 2(b) (barring placement for youth in solitary unless the placement is due to “[a] physical or sexual assault committed by the juvenile while in the juvenile detention facility; . . . [c]onduct of the juvenile that poses an imminent threat of harm to the safety or well-being of the juvenile, the staff, or other juveniles in the juvenile detention facility; or . . . [t]he juvenile escaping or attempting to escape from the 4 juvenile detention facility,” and the director of the facility provides written authorization “every twenty-four-hour period during which the juvenile remains *in punitive isolation or solitary* confinement after the initial twenty-four (24) hours.”

<sup>109</sup> *Id.* §§ 39, 87.

<sup>110</sup> Montana House Bill 763, Sixty Sixth Regular Session of the Montana Legislature, 2019 (enacted May 2019), Section 4.

<sup>111</sup> See New Jersey Assembly Bill 314, New Jersey Legislature 2018–2019 Session, Second Session (enacted July 2019), Section 4(b).

<sup>112</sup> See New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019), Section 4.

<sup>113</sup> *Id.*

<sup>114</sup> See Colorado Senate Bill 20-007, Colorado General Assembly, 2019 Session (enacted July 2020).

<sup>115</sup> See U.S. Senate Bill 756, One Hundred and Fifteenth U.S. Congress, Second Session (enacted December 2018).

<sup>116</sup> See Maryland House Bill 1001, Maryland General Assembly, 2019 Session (enacted May 2019).

<sup>117</sup> See 2018 Mass. Legis. Serv. Ch. 69, § 39B.

<sup>118</sup> See Michigan Senate Bill 848, Ninety Ninth Michigan Legislature, 2018 Regular Session (enacted June 2018).

<sup>119</sup> See Minnesota Senate File 8, Ninety First Minnesota Legislature, 1st Special Session 2019–2020 (enacted May 2019).

<sup>120</sup> Nebraska Legislative Bill 230, 2019–2020 Nebraska Unicameral Legislature (enacted February 2020), in Sections 4 provides,

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“The juvenile facility shall submit a report quarterly to the Legislature on the juveniles placed in room confinement; the length of time each juvenile was in room confinement; the race, ethnicity, age, and gender of each juvenile placed in room confinement; facility staffing levels at the time of confinement; and the reason each juvenile was placed in room confinement. The report shall specifically address each instance of room confinement of a juvenile for more than four hours, including all reasons why attempts to return the juvenile to the general population of the juvenile facility were unsuccessful. The report shall also detail all corrective measures taken in response to noncompliance with this section. The report shall redact all personal identifying information but shall provide individual, not aggregate, data. The report shall be delivered electronically to the Legislature. The initial quarterly report shall be submitted within two weeks after the quarter ending on September 30, 2016. Subsequent reports shall be submitted for the ensuing quarters within two weeks after the end of each quarter; and (d) The Inspector General of Nebraska Child Welfare shall review all data collected pursuant to this section in order to assess the use of room confinement for juveniles in each juvenile facility and prepare an annual report of his or her findings, including, but not limited to, identifying changes in policy and practice which may lead to decreased use of such confinement as well as model evidence-based criteria to be used to determine when a juvenile should be placed in room confinement. The report shall be delivered electronically to the Legislature on an annual basis.”

<sup>121</sup> See New Mexico House Bill 364, 2019 New Mexico Legislature, Regular Session (enacted April 2019).

<sup>122</sup> See Virginia Senate Bill 1777, House Bill 1642, 2020 Virginia Legislative Session (enacted March 2019).

<sup>123</sup> Minnesota Senate File 8, Ninety First Minnesota Legislature, 1st Special Session 2019-2020 (enacted May 2019), Article 3, Section 10, Subdivision 9.

<sup>124</sup> See *2019 Restrictive Housing Report*, at: [https://mn.gov/doc/assets/2019%20Restrictive%20Housing%20Report%20Jan%202020\\_tcm1089-443721.pdf](https://mn.gov/doc/assets/2019%20Restrictive%20Housing%20Report%20Jan%202020_tcm1089-443721.pdf).

<sup>125</sup> See *2020 Restrictive Housing Report*, at: [https://mn.gov/doc/assets/DOC%202020%20Restrictive%20Housing%20Report%20%28final%29\\_tcm1089-466710.pdf](https://mn.gov/doc/assets/DOC%202020%20Restrictive%20Housing%20Report%20%28final%29_tcm1089-466710.pdf).

<sup>126</sup> N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22), § 14.

<sup>127</sup> *Id.* § 1.

<sup>128</sup> *Id.* § 5.

<sup>129</sup> *Id.*

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130 *Id.*

131 *Id.*

132 *Id.* § 2.

133 *Id.* § 5

134 *Id.*

135 Colo. H.B. 21-1211 (June 24, 2021).

136 *Id.* § 17-26-302(6).

137 *Id.* § 17-26-303(1).

138 *Id.* § 17-26-303(2).

139 *Id.* § 17-26-303(2)(j).

140 Conn. S.B. No. 1059, Pub. Act. No. 21-110 (2021).

141 Conn. Exec. Order No. 21-1 (June 30, 2021).

142 *Id.* § 2.

143 *Id.* § 3.

144 *Id.* § 5.

145 2017 Conn. Pub. Act. No. 17-239.

146 Conn. Gen. Stat. § 46b-133(e).

147 The definition is "the placement of a juvenile in a location that is separate from the general population as a punishment." Ark. H.B. 1470 (enacted Mar. 2021).

148 The definition is "the isolation of a juvenile in a cell separate from the general population as a punishment." *Id.*

149 Colo. H.B. 21-1211 (June 24, 2021) § 17-26-303(1).

150 The definition is "any form of cell confinement for more than seventeen hours a day other than in a facility-wide emergency or for the purpose of providing medical or mental health treatment." N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22), §§ 1-2.

151 The definition is "the involuntary segregation of a child from the rest of the resident population regardless of the reason for the segregation." Tenn. S.B. 383 (enacted June, 2021).

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<sup>152</sup> *Id.*

<sup>153</sup> The definition is "a housing placement that requires an inmate or detainee to be confined in a cell for at least twenty-two (22) hours per day." Ark. H.B. 1470 (enacted Mar. 2021).

<sup>154</sup> *Id.*

<sup>155</sup> The definition is "the state of being involuntarily confined in one's cell for approximately twenty-two hours per day or more with very limited out-of-cell time, movement, or meaningful human interaction whether pursuant to disciplinary, administrative, or classification action." Colo. H.B. 21-1211 (June 24, 2021) § 17-26-302(6).

<sup>156</sup> Ky. S.B. 84 (Mar. 2021).

<sup>157</sup> The definition is "any form of cell confinement for more than seventeen hours a day other than in a facility-wide emergency or for the purpose of providing medical or mental health treatment." N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22), § 1.

<sup>158</sup> *Id.* § 2.

<sup>159</sup> Colo. H.B. 21-1211 (June 24, 2021) § 17-26-303(2)(j).

<sup>160</sup> N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22), § 5.

<sup>161</sup> *Id.*

<sup>162</sup> Colo. H.B. 21-1211 (June 24, 2021) § 17-26-303(2)(i).

<sup>163</sup> N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22), § 5

<sup>164</sup> *Id.*

<sup>165</sup> La. H.R. 50 (May 27, 2021).

<sup>166</sup> Kentucky Senate Bill 84, Kentucky General Assembly, 2021 Session (enacted March 2021).

<sup>167</sup> La. H.R. 50 (May 27, 2021).

<sup>168</sup> N.Y. S. 2836, A.B. A2772A, HALT Act, 2021-22 Leg., Reg. Sess. (N.Y. 2021-22).

<sup>169</sup> HR 176 Restricting the Use of Solitary Confinement Act, 2021 Leg., Reg. Sess. (U.S. 2021).

<sup>170</sup> HR 131 Kalief's Law, 2021 Leg., Reg. Sess. (U.S. 2021).

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<sup>171</sup> HR 2293, Federal Correctional Facilities COVID-19 Response Act, 2021 Leg., Reg. Sess. (U.S. 2021).

<sup>172</sup> *Id.*

<sup>173</sup> These states are Arizona, Arkansas, Illinois, Kentucky, Massachusetts, Missouri, Nebraska, New York, Pennsylvania, Rhode Island, and Washington.

<sup>174</sup> See Delaware's Senate Bill 98, Delaware General Assembly, 2021-2022 Session; South Carolina's Senate Bill 51, South Carolina General Assembly, 2021-2022 Session.

<sup>175</sup> HB 5927, 2021-22 Leg., Reg. Sess. (2021).

<sup>176</sup> LD696, 2021-2022 Leg., Reg. Sess. (2021).

<sup>177</sup> NE LB471, 2021-2022 Leg., Reg. Sess. (2021).

<sup>178</sup> HB 557, 2021 Leg., Reg. Sess. (2021).

<sup>179</sup> HB1887, 2021-2022 Leg.

<sup>180</sup> Kentucky Senate Bill 84, Kentucky General Assembly, 2021 Session (enacted March 2021).

<sup>181</sup> See Kentucky House Bill 86, Kentucky General Assembly, 2021 Session.

<sup>182</sup> See Massachusetts S. 1567, H. 2089, 2021 Session.

<sup>183</sup> See Massachusetts S. 1578, H. 2504, 2021 Session.

<sup>184</sup> The Federal Anti-Solitary Taskforce, A BLUEPRINT FOR ENDING SOLITARY CONFINEMENT BY THE FEDERAL GOVERNMENT, [https://www.aclu.org/sites/default/files/field\\_document/the\\_federal\\_anti-solitary\\_taskforce\\_proposal\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/the_federal_anti-solitary_taskforce_proposal_1.pdf).

<sup>185</sup> *Administrative Segregation, Degrees of Isolation and Incarceration: A National Overview of State and Federal Correctional Policies.*