

Human Rights Fact-Finding in the Shadows of America’s Solitary Confinement Prisons

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You could be in outerspace.

-DANIEL, sentenced to 730 days of solitary confinement in a Special
Housing Unit at a New York prison.

Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a total institution that controls their daily existence in a way that few of us can imagine . . . It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic.

-UNITED STATES SUPREME COURT JUSTICE WILLIAM J. BRENNAN¹

* The views expressed in this chapter are the author’s alone and do not necessarily reflect the views or policies of the New York Civil Liberties Union or the American Civil Liberties Union. This chapter is dedicated to the entire NYCLU *Boxed In* team and all the individuals who shared their stories. Special thanks to Scarlet Kim, the principal investigator of the NYCLU’s human rights fact-finding mission, and Elena Landriscina.

I. Introduction

For many advocates in the United States, the phrase “human rights investigation” is likely to invoke an image of investigators being dispatched abroad to a foreign state unwilling or incapable of investigating alleged abuses.² There is, however, nothing particularly novel about human rights fact-finding in the United States,³ although many engaged in the work may not have thought to label it “human rights fact-finding.” Independent monitoring agencies,⁴ investigative commissions,⁵ nongovernmental organizations (NGOs),⁶ and other advocates have long been engaged in pursuing fact-finding missions related to fundamental human rights concerns. The benefits of explicitly employing a human rights framework to conduct fact-finding missions about abuses occurring within the United States, however, remains underexplored by domestic lawyers and advocates.

In conjunction with the International Human Rights Fact-Finding in the Twenty-First Century conference,⁷ this chapter seeks to further consideration of this question through a case study of a domestic human rights fact-finding investigation in the United States. The fact-finding investigation was conducted by the New York Civil Liberties Union (NYCLU), a civil rights organization headquartered in New York City and the New York state affiliate of the American Civil Liberties Union. From 2011 to 2012, the NYCLU conducted an investigation of the use of extreme isolation, also known as solitary confinement, as punishment against individuals incarcerated post-conviction in New York prisons. This fact-finding investigation led to a multimedia human rights report,⁸ a complaint filed with the United Nations Special Rapporteur on Torture that prompted an Allegation Letter to be communicated to the US government,⁹ testimony submitted to the Inter-American Commission on Human Rights,¹⁰ and a class action lawsuit seeking equitable prospective relief filed in US federal court.¹¹

Section II of this chapter provides the historical background and legal context regarding the use of solitary confinement that informed the NYCLU’s fact-finding mission. Section III describes the NYCLU’s fact-finding investigation and the results achieved in the context of this framework. This chapter concludes that the NYCLU’s utilization of a human rights framework was of key importance for placing New York’s solitary confinement practices in an international context, and contrasting well-established human rights protections with still-developing domestic law. That human rights framework was reinforced by adherence to the principles of human rights fact-finding, many of which do not commonly inform investigations in the United States. Most notable among these principles was the duty of continuing care, even after the publication of a report, to the victims of human rights abuses who participated in the investigation. On a broader scale, the NYCLU’s experience suggests that domestic investigation that is pursued under a human rights framework and consonant with human rights fact-finding principles will further the important goal of ensuring that human rights fact-finding in the United States is viewed as a mission of equal, if distinct, importance as compared to other domestic fact-finding mechanisms.

II. Solitary Confinement

The NYCLU's contemplation of a fact-finding mission began by surveying the historical and legal context regarding the use of solitary confinement and forms of extreme isolation in New York prisons. This survey revealed the widespread use of harsh conditions of confinement to punish incarcerated individuals for breaking internal prison rules. These practices appeared to be in conflict with international human rights law, while at the same time domestic accountability mechanisms had effectuated only narrow, albeit important, constraints on its use.

A. History and Use in New York Prisons

The State of New York has a long history of using isolation¹² against those incarcerated in its prisons.¹³ From 1821 to 1823, New York's Auburn state prison experimented with extreme isolation, housing a group of prisoners in individual cells "without any labor or other adequate provisions for physical exercise."¹⁴ Alexis de Tocqueville and Gustave de Beaumont, who toured the prison during this period, reported:

This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills. The unfortunates, upon whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation.¹⁵

New York quickly abandoned the practice, as did the handful of other states that experimented with extreme isolation.¹⁶ By the turn of the twentieth century, extreme isolation had largely ceased to be a significant feature of incarceration in America.¹⁷

The late 1980s, however, saw a dramatic resurgence in the use of solitary confinement in American prisons, including New York.¹⁸ By 1991, 36 states, including New York, had constructed or repurposed facilities dedicated to confining prisoners in solitary confinement and other forms of extreme isolation.¹⁹ Today, at least 44 states have freestanding extreme isolation facilities housing approximately 25,000 prisoners.²⁰

New York epitomized the modern trend to expand extreme isolation. The state began by designating cellblocks in lower-security facilities to place prisoners in extreme isolation.²¹ In 1991, the state converted Southport Correctional Facility, a maximum-security prison opened in 1988, into a dedicated extreme isolation facility. Southport was transformed from a prison that "offered extensive classes and clean hallways" to one where prisoners are "kept isolated, shackled at the waist and wrists when allowed out of their 6-by-10 cells and made to spend their daily recreation hour in newly built cages." Between 1998 and 2000, New York constructed 10 additional facilities dedicated to extreme isolation, with the

combined capacity to house approximately 3,700 prisoners.²² The tenth facility was Upstate Correctional Facility, a stand-alone prison with the capacity to house 1,200 prisoners in 600 double-occupancy extreme isolation cells.²³

New York's SHU cells are about the size of a typical elevator.²⁴ Prisoners held in SHU are locked inside 23 hours a day, with one hour of recreation. Meals are delivered through a food slot in the cell door, which might be the only human contact the prisoner has for the entire day.²⁵ At the time of the NYCLU's fact-finding investigation, New York's prisons had the capacity to hold nearly 5,000 individuals in extreme isolation.²⁶ New York filled those cells with prisoners who were sent there for a fixed term—a sentence of days, weeks, months, or years—as punishment for violating one or more internal prison rules.²⁷

As the use of solitary confinement was dramatically expanded in New York and other states, studies began to scientifically document the human toll of the practice. In the mid-1980s, psychiatrists studied a group of prisoners living in extreme isolation in the "Special Housing Unit" of a Massachusetts prison and identified a variety of negative physiological and psychological symptoms exhibited by the prisoners. Dubbed "SHU syndrome," these symptoms included social withdrawal; anxiety and nervousness; panic attacks; irrational anger and rage; loss of impulse control; paranoia; hypersensitivity to external stimuli; severe and chronic depression; difficulties with thinking, concentration, and memory; and perceptual distortions, illusions, and hallucinations.²⁸ Additional studies similarly confirmed these responses by prisoners housed in extreme isolation.²⁹ For people with pre-existing mental health issues, research demonstrated that extreme isolation could be devastating and result in further mental deterioration.³⁰

B. International and Domestic Law

International human rights standards have long been profoundly concerned with the effects of solitary confinement on human dignity and, as evidenced by the scientific studies noted above, the acute harm such isolation causes to individuals. In 1992, the United Nations Human Rights Committee (HRC) found that conditions of solitary confinement may amount to cruel, inhuman, or degrading treatment or punishment, in violation of Article 7 of the International Covenant on Civil and Political Rights.³¹ In 2006, the HRC specifically observed that solitary confinement as practiced in the United States could violate also the terms of Article 10 by incarcerating prisoners "in general conditions of strict regimentation in a depersonalized environment."³² In the same year, the United Nations Committee against Torture similarly noted that the practice of extreme isolation in US prisons may violate the Convention against Torture by constituting "cruel, inhuman or degrading treatment or punishment."³³

Consistent with the consensus of these bodies, the United Nations Special Rapporteur on Torture recently concluded:

Given its severe adverse health effects, the use of solitary confinement itself can amount to acts prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture or cruel, inhuman or degrading punishment as defined in article 16 of the Convention [against Torture].³⁴

International human rights authorities also call for the blanket prohibition against solitary confinement for particular vulnerable populations, including juveniles and those suffering from mental disabilities, and an abolition of the use of solitary confinement for disciplinary purposes.³⁵

In contrast to the consensus under international human rights law, the development of law prohibiting solitary confinement and isolation under the United States Constitution has proceeded far more slowly. The United States Supreme Court has affirmed that “[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards” that prohibit “cruel and unusual punishment.”³⁶ Federal courts have held extreme isolation violates the Eighth Amendment when used against prisoners with serious preexisting mental illness or who are prone to suffering severe mental injury.³⁷ The United States courts have not yet, however, conclusively extended this holding to protect against the risk of harm and degradation that all human beings—including healthy adults with no preexisting mental health illness—may experience when confined in extreme isolation for even short amounts of time.³⁸

III. Fact-Finding Investigation

In light of this landscape, the NYCLU elected to pursue a human rights fact-finding mission. At its core, the purpose of any human rights fact-finding is the truth.³⁹ Fact-finding itself “entails a great deal of information gathering in order to establish and verify the facts surrounding the alleged human rights mission.”⁴⁰ Fact-finding missions serve the purpose of “bringing violations and responsibilities to light, providing early warning and information and influencing national and international action.”⁴¹ Even where the “truth” of a violation is established or noncontroversial, human rights fact-finding “draws attention to serious violations and accountability gaps”⁴² and facilitates “storytelling” that can “play a critical role in restoring victims’ dignity.”⁴³

The past several decades have seen the professionalization and standardization of principles and methods for international human rights fact-finding.⁴⁴ Attention to the methodology of human rights fact-finding has resulted in the promulgation of numerous guidelines, standards, and training materials. In the view of the United Nations High Commissioner for Human Rights, the aim of these standards is to “guarantee . . . sound outcomes” through “cogency and coherence in research and analytical frameworks and methods, rather than rigid uniformity in application.”⁴⁵ With regard to NGOs, in 2010 the International Bar Association promulgated the “Guidelines on International Human Rights Fact-Finding Visits and Reports” (hereinafter the “Lund-London Guidelines”).⁴⁶

These guidelines emphasize the need for competence, accuracy, objectivity, transparency, and credibility, and require that all investigators act in an “independent, unbiased, objective, lawful and ethical manner.”⁴⁷ Key principles drawn from these guidelines applicable to domestic fact-finding include the following broad categories: (1) defining the purpose of the fact-finding mission, (2) gathering information and conducting interviews, (3) issuing a fact-finding report, and (4) conducting follow-up.⁴⁸ The application of each of these principles is discussed below in the context of the NYCLU’s fact-finding investigation.

A. Purpose

At the time of the NYCLU's fact-finding mission in 2011, whether New York was using extreme isolation to punish prisoners was not a matter of factual controversy or a closely guarded secret. Indeed, for many years New York government officials had publicly announced and vigorously defended their use of punitive isolation.⁴⁹ In addition, in 2003 a New York NGO report highlighted solitary confinement practices in many New York state prisons.⁵⁰ Several years later a lawsuit and legislation were successful in protecting the most seriously mentally ill from the worst harms of solitary confinement.⁵¹

As the excerpts at the beginning of this article suggest, however, the fact that New York's use of solitary confinement was unhidden was hardly the same thing as saying that its use and human toll were well known to most policymakers and the public. Although the tireless work of New York advocates and NGOs over a decade had raised the profile of the issue, it nevertheless remained true that New York's solitary practices continued to largely persist in a "shadow world," and that the voices of the men and women confined for months or years in extreme isolation were rarely heard.⁵²

It was also apparent that the extensive use of solitary confinement in New York, as in the United States, was occurring in an "accountability gap."⁵³ Domestic courts provided little chance for the vast majority of prisoners seeking protection against the harms of solitary confinement.⁵⁴ Prospects for change were little better in the legislative sphere. Some policymakers had expended energies on enacting legislation to protect the seriously mentally ill from solitary confinement just several years prior, and viewed those protections as the most that could be accomplished on the issue. Other policymakers were openly hostile to any comprehensive reform of the use of solitary confinement.⁵⁵ Indeed, since the 1990s, many of these same policymakers had played a significant role in ensuring that New York had invested hundreds of millions of taxpayer dollars in building and operating a regime heavily reliant on punitive isolation.

In this context, the NYCLU concluded that a human rights fact-finding investigation was the ideal vehicle for fomenting action. A fact-finding investigation, grounded in the framework of international human rights law, would highlight the "accountability gap" in New York and the urgent need for its closure. The investigation would build on the previous work of advocates to present a timely and comprehensive systemic picture of the use of extreme isolation on all classes of prisoners. Finally, the investigation would focus extensively on highlighting the voices of those who experienced extreme isolation first-hand, helping to bring the human toll out of the shadows and into the public discourse.

B. Information Gathering

Fact-finding standards make clear that information gathering is at the heart of fact-finding, and often it will require "considerable effort" to gather, verify, and analyze that information.⁵⁶ It is "essential" to "make use of all data collection techniques available," including conducting interviews, making site visits, obtaining and reviewing all relevant written materials and documents, assessing local laws and practices, and keeping "full and fair notes."⁵⁷ Guidelines also recommend that any obstacles to obtaining information be fully documented.⁵⁸

In particular, fact-finding guidelines underscore that interviews are critical to the fact-finding process. In general, standards recommend that that “all parties” should be interviewed in order to “achieve a balanced, comprehensive picture,” and that accounts should always be corroborated with any available written materials.⁵⁹ When interviews are conducted, they should only be with the interviewee’s informed consent and full understanding of the purpose of the fact-finding mission, and requests for confidentiality must be respected.⁶⁰

All standards reflect the potentially perilous nature of interviews for victims. These interviews may put victims at risk of external retaliation, and the interview itself may put the victims at risk of stress or traumatization.⁶¹ Accordingly, the interviewer should both be prepared to conduct the interview for as long as necessary to ascertain all the relevant facts, and be prepared to terminate the interview if necessary.⁶² Investigators should be alert to the immediate humanitarian needs of the interviewees.⁶³

The particularly acute risk for people interviewed in places of detention has prompted specific guidance for interviews occurring in jails and prisons.⁶⁴ Because of their confinement, people suffering human rights abuses while detained may be unable or unwilling to provide full accounts of their mistreatment, and be subject to reprisal and retaliation if they do so.⁶⁵ Furthermore, as noted in OHCHR’s Manual on the Effective Investigation and Documentation of Torture (the “Istanbul Protocol”), “[e]very precaution should be taken to be sure that prisoners do not place themselves at risk unnecessarily, naively trusting an outsider to protect them.”⁶⁶ For these reasons, when interviews cannot be conducted confidentially, human rights fact-finding guidelines advise conducting group interviews or abandoning interviews altogether.⁶⁷

Assuming that an interview in a detention setting can take place, the interviewers should conduct thorough and reliable interviews, and also to be aware of the importance of simply letting detainees tell their story. As noted in the Istanbul Protocol, “prisoners who do not often see outsiders may never have had a chance to talk about their torture,” and “empathy and human contact may be the most important thing that people in custody receive from the investigator.”⁶⁸ The OHCHR Manual emphasizes that “detainees have a real need to tell their own experiences,” and succinctly explains that an interviewer should “never forget that at the end of the interview h/she can leave the detention facility, but the detainee has to return to his or her cell.”⁶⁹

1. Data and Policies

Using New York’s open records laws, the NYCLU began by seeking to obtain a comprehensive picture of the state’s use of extreme isolation.⁷⁰ The NYCLU’s request fell into three broad categories. First, the NYCLU requested systemic statistical data on who was placed in SHU (including characteristics such as race, mental health diagnosis, and primary language), for how long, and for what reasons.⁷¹ Second, the NYCLU requested all official policies and procedures regarding the use of extreme isolation and the written policies governing conditions of confinement for prisoners confined to SHU.⁷² Finally, the NYCLU requested documentation illuminating the daily on-the-ground conditions for prisoners in SHU, including documentation regarding the number of incidents of self-harm and suicide,

and the number and type of “deprivation orders” issued by staff that deny prisoners access to basic necessities such as bedding, clothing, showers, and regular meals.⁷³

Although freedom of information laws in the United States promise access to records and documentation likely unavailable in many other fact-finding investigations, compliance with these laws was far from assured. It took nearly one year, and dozens of communications between the NYCLU and the New York prison system that nearly reached litigation, before some of the information was finally disclosed.⁷⁴

2. Prisoner Documents

Another key component of this fact-finding mission was gathering all available documentation related to individual prisoners in SHU who communicated with the NYCLU. While corroborating and verifying the account of an incarcerated victim may be an all but impossible task in some situations, in this case it was eased significantly by the fact that New York imposed extreme isolation as part of an officially sanctioned punitive measure, and corrections officials completed a significant amount of paperwork at each stage of the process.

The NYCLU was therefore able to obtain, with the consent of the prisoner, the prisoner’s disciplinary files, which included the prisoner’s disciplinary history as well as the specific acts prison officials alleged were committed that resulted in the SHU sentence. With the prisoner’s consent, the NYCLU was also able to review medical and mental health files, providing corroboration of physical injuries and psychological harms prisoners claimed to have experienced while in SHU. In some cases the NYCLU obtained audio recordings of the disciplinary hearing where the prisoner’s guilt was adjudicated and the sentence to SHU imposed, as well as documents specific to the deprivation orders imposed on that particular prisoner while he or she was confined in a SHU cell.

3. Correspondence and Interviews

The interviews with prisoners—nearly all of whom were still confined in SHU at the time that the NYCLU sought to interview them—was perhaps the most important and difficult aspect of the fact-finding investigation. As noted above, interviewing people in detention, particularly those who are being subject to the very conditions that produced the human rights concerns under investigation, raised complicated questions. The NYCLU’s ability to address these issues in an “objective . . . and ethical manner” was aided significantly by confidential correspondence with prisoners prior to any interview taking place.⁷⁵ This pre-interview correspondence, while time-intensive, provided significant benefits for the overall fact-finding process.

With regard to the threat of retaliation, as many of the fact-finding standards emphasize, it is all but impossible to guarantee that reprisal against an individual will not occur. Nevertheless, the pre-interview correspondence allowed the NYCLU to take some measure of the particular vulnerabilities of the prisoner, to gauge the possibility of retaliatory action, and to proceed accordingly.

The pre-interview correspondence and review of records was also a significant aid in verifying and corroborating prisoners’ accounts. As noted above, prior to any interviews the NYCLU was able to obtain and review extensive documentation related to particular prisoners. In many cases, a prisoner’s account was substantially corroborated by written records.⁷⁶ In

other cases, the prisoners provided credible and consistent explanations as to why reports were incorrect or incomplete. In a few cases, the prisoner's account was in conflict with written records in a manner in which the prisoner did not or could not adequately address.

Finally, the pre-interview correspondence allowed for a significant amount of preparatory work. The correspondence allowed the interviewers to build an initial rapport with the interviewee prior to the interview, laying the groundwork for open dialogue about intense and potentially harmful experiences.⁷⁷ The correspondence allowed interviewers to identify, in advance, factual discrepancies that needed to be explored in an in-person interview. The interviewers had a sense of the prisoner's mental health history, and the duress that the prisoner might be experiencing during the interview process. Finally, the interviewers had a sense of the time to allot to each interview.

Informed by this pre-interview process, the NYCLU conducted dozens of interviews in a confidential visitation room where notes were taken by hand.⁷⁸ Two investigators were present at each interview. The interviews took place at multiple prison facilities spread throughout New York. The interviewers placed no restriction on the amount of time spent with the interviewee, and began by explaining to the interviewee the purpose of the interview and the mission of the fact-finding investigation. Where the interviews ran beyond the allotted time, the investigators returned to the facility later to continue the interview.

In part due to the extensive pre-interview preparatory work, the interviewers were able to focus a significant amount of time on simply letting the prisoners "tell their story" about their time in extreme isolation.⁷⁹ These stories were often painful for the prisoner to tell and for the interviewers to hear. The interviewers remained cognizant of the need to terminate the interview if the prisoner's recounting of his SHU experience, which he or she was still living day-to-day, appeared to be significantly exacerbating trauma.⁸⁰

A few months after the initial interview, the NYCLU returned for a follow-up visit with all interviewees. This follow-up interview allowed the NYCLU to re-verify the accuracy and completeness of prisoners' accounts, reconfirm informed consent to use the individual's anonymized account in a public report, and ensure that the previous interviewees had not suffered any retaliation or reprisals.⁸¹ The interim period between the two visits also allowed the investigators to obtain and review additional documents.

In addition to interviews of prisoners, the NYCLU sought out interviews with family members who had loved ones confined in SHU, and prison staff, including detention officers, social workers, counselors, and prison chaplains. Finding staff willing to be interviewed "on the record" was a challenge. Many expressed fear at losing their jobs or retribution from their colleagues. Despite these difficulties, the NYCLU was ultimately able to interview several former prison staff members who agreed to be interviewed about working with prisoners confined in extreme isolation, the effect it had on them and other staff, and their view of New York's extreme isolation practices.

C. Fact-Finding Report

The primary end contemplated by most human rights fact-finding is a report written by the investigators and published promptly after the conclusion of the investigation.⁸² Many guidelines note, however, that a human rights report is not the only end result of fact-finding

and that the principles “do not prejudice . . . other ventures or the use of fact finding in other contexts.”⁸³ The OHCHR Manual identifies three key principles for a human rights report: (1) accuracy and precision, (2) promptness, and (3) that the result be action-oriented, setting forth recommendations for the next steps to be taken.⁸⁴ The report should be widely publicized and disseminated in order to maximize its impact and effect on state actors.⁸⁵

Approximately one year after the NYCLU’s investigation began, the NYCLU published a human rights report entitled *Boxed In: The True Cost of Extreme Isolation in New York’s Prisons*, coauthored by the principle investigators.⁸⁶ The report summarized the history and context of extreme isolation in New York, analyzed policies and statistical data, presented first-person anonymous accounts of prisoners who had spent anywhere from months to decades in SHU confinement, set forth findings that New York’s use of SHU violated human rights norms, and made concrete recommendations to address those violations.

The report was launched in conjunction with a website. The website contained a short documentary video that featured interviews with family members who had loved ones confined in SHU, and a virtual “tour” of Malone, New York, a small town near the Canadian border that is home to Upstate Correctional Facility.⁸⁷ It also allowed readers to send a message directly to New York state policymakers asking them to take action to address extreme isolation in New York prisons.⁸⁸ The website also contained an extensive library of source materials relied upon by the NYCLU for the report. For example, the website contained redacted letters from prisoners in SHU, all of the original statistical data obtained and analyzed by the NYCLU, and written policies and procedures.⁸⁹ Several original journalistic and academic pieces were published that relied on documents and data taken directly from the website’s library.⁹⁰

D. Follow-Up

Fact-finding guidelines make clear that the work of investigators should not stop after the publication of the report. Rather, the NGO should engage in follow-up advocacy, including seeking opportunities to collaborate with other NGOs seeking to address the human rights situation, and considering the “best means” by which to encourage government officials to act on the findings.⁹¹ In addition, the NGO has a duty of care to those interviewed for the report, imposing a requirement that “the safety of those interviewed . . . should continue to be monitored by the NGO, particularly where safety concerns were already present.”⁹² The NGO should act where there are any “post-mission threats or hostile acts” against interviewees.⁹³

In terms of advocacy, the NYCLU followed up the report by engaging international human rights bodies with formal complaints and by bringing a class action lawsuit against New York prison officials in federal district court.⁹⁴ This follow-up was complimented by the NYCLU continuing to raise the profile of the issue in other public forums and events. Importantly, the report itself also accomplished the goal of playing a “role in restoring victims’ dignity” and led to follow-up with prisoners and their family members.⁹⁵ Subsequent to the publication of the report, the NYCLU heard from prisoners and families alike that the report had given an important voice to their experiences and suffering.

With regard to follow-up with the interviewees, the NYCLU continued to monitor the situation and to receive and respond to follow-up correspondence with interviewees. In addition, by virtue of the NYCLU's lawsuit seeking class action status, the interviewees were also putative class members represented directly by NYCLU attorneys in the litigation.

IV. Conclusions

Although a common perception may be that international human rights standards are less useful, or even irrelevant, in nations such as the United States, with relatively accessible accountability mechanisms, the NYCLU's experience demonstrated that not to be the case. As the NYCLU's investigation showed with regard to the issue of solitary confinement, the human rights framework can serve a singular and indispensable purpose where an "accountability gap" has manifested and the state's domestic systems have proven incapable of effectively addressing a pressing human rights concern.

Even where direct legal enforcement of international human rights standards is difficult to effectuate, reliable fact-finding reports may motivate action by policymakers and the public, or indirectly affect the interpretation of domestic constitutional law. This may be particularly true where, as was true regarding solitary confinement in New York, domestic law lags well behind every authoritative international human rights standard on the issue. Applying a human rights framework in these cases, however, must mean more than just citing to human rights norms alongside domestic legal standards when discussing issues of concern. Rather, NGOs should adhere to the basic principles of human rights fact-finding at each step in the investigative process, in order to further several important objectives.

First, adherence to these principles ensures a credible and reliable investigation. This is important not only for the investigation at hand, but also more broadly for bringing coherence to all domestic human rights fact-finding. In the United States, expertise ranges from NGOs highly experienced in human rights fact-finding to NGOs that are conducting their first-ever fact-finding mission. Just as is the aim with the recent promulgation of fact-finding standards at the international level, attention to methodological consistency by NGOs operating within the United States will, over time, bolster the credibility, reliability, and impact of domestic human rights fact-finding and reports.

Second, human rights fact-finding principles necessitate the consideration of concerns that have no obvious analogue in traditional domestic investigative efforts. Most notably is the ongoing duty of care to victims of human rights abuses who communicate with investigators. Human rights fact-finding principles make clear that investigators must be cognizant of the risks to interviewees both during and after the investigative process, and be prepared to act and follow up as necessary. This principle of human rights fact-finding guards against the possibility that victims will find themselves exposed to an increased risk of harm by virtue of participating in the investigative process, and that they may never again hear from investigators after the publication of a report. As human rights fact-finding becomes more commonplace in the domestic sphere, best practices and standards that have evolved in the international context should not be lost. From the very outset of the process, NGOs should

be examining their capacity to effectuate this and other core fact-finding principles as they consider whether they can undertake a fact-finding mission.

Finally, the overall acceptance and respect for fundamental human rights is furthered by domestic investigations being identified as “human rights fact-finding,” particularly in the United States where the applicability of “international human rights law” may be a matter of some controversy. This objective will be far more readily realized if there is consistent adherence to basic principles of human rights fact-finding. The more that domestic investigators act in compliance with well-established fact-finding principles and can thus identify their work as “human rights fact-finding” missions, the greater the potential to positively reinforce the role of international human rights norms in the minds of policymakers and the public, and the better the chance of ensuring accountability and redress for all victims of human rights abuses.

Notes

1. *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), at 354–355 (Brennan, J., dissenting).
2. See Robertson, “Human Rights Fact-Finding: Some Legal and Ethical Dilemmas,” 3 *UCL Hum. R. Rev.* (2010) 15, at 16–17 (describing five different kinds of fact-finding exercises, nearly all of which contemplate human rights fact-finding conducted by a body constituted of members from outside the country under investigation).
3. For example, see Knuckey, Glenn, and MacLean, “Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street,” The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at the Leitner Center for International Law and Justice (Fordham Law School) (2012) (documenting incidents of excessive force and denial of medical care by local police in response to Occupy Wall Street demonstrators in New York); see The Advocates for Human Rights, “A Practitioner’s Guide to Human Rights Monitoring, Documentation, and Advocacy” (2011) (providing “step-by-step guidance” for US advocates seeking to “use human rights monitoring, documentation, and advocacy in their social justice work”); see Skinner, “A Clinical Model for Bringing International Human Rights Home: Human Rights Reporting on Conditions of Immigrant Detention,” 7 *Seattle J. Soc. Just.* (2009) 649 (describing human rights fact-finding of immigrant detention facilities in Washington State).
4. In New York, for example, the Correctional Association of New York is an oversight body with a statutory mandate to visit and inspect state prison facilities.
5. In New York, for example, the specially chartered Kaye Commission conducted a wide ranging fact-finding inquiry to determine whether criminal defendants were being provided with the right to counsel. Commission on the Future of Indigent Legal Defense Services, “Final Report to the Chief Judge of the State of New York” (18 June 2006).
6. Human Rights Watch, Amnesty International, and the American Civil Liberties Union are just some examples of US-based NGOs who have done extensive human rights reporting within the United States.
7. This conference was hosted by the Center for Human Rights and Global Justice, New York University School of Law in New York City, November 1-2, 2013.
8. Kim, Pendergrass, and Zelon, “Boxed In: The True Cost of Extreme Isolation in New York’s Prisons,” New York Civil Liberties Union (2012): http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf.
9. Lieberman, Pendergrass, and Landriseina, “Allegation Letter from New York Civil Liberties Union to United Nations Special Rapporteur on Torture Juan Mendez concerning New York State Prisoners Held in Solitary Confinement and Other Forms of Extreme Isolation,” New York Civil Liberties Union (February 5, 2013): http://www.nyclu.org/files/releases/ExtremeIsolation_UNletter_2.5.13.pdf.
10. Pendergrass and Landriseina, “Written Testimony of the New York Civil Liberties Union Regarding the United States’ Use of Solitary Confinement as Practiced in New York State Prisons, Thematic Hearing of

the Inter-American Commission on Human Rights on Solitary Confinement in the Americas,” New York Civil Liberties Union (March 12, 2013): <http://www.nyclu.org/content/testimony-iachr-thematic-hearing-solitary-confinement>.

11. Third Amended Class Action Complaint, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. filed March 6, 2013). For case information and filings, see <http://www.nyclu.org/news/nyclu-seeks-class-action-status-challenge-use-of-solitary-confinement-ny-prisons>.
12. A full version of the history of solitary confinement and the use of solitary confinement under international law first appeared in the NYCLU’s human rights report, *Boxed In*. Kim et al., *supra* note 8.
13. In New York, as throughout the United States, the term “prison” refers to a post-conviction detention facility, while the term “jail” refers to a facility used for pretrial detention and short terms of post-conviction incarceration. Although beyond the scope of the NYCLU’s investigation or this chapter, it should be noted that solitary confinement is also used in New York’s pretrial detention facilities, most notably at New York City’s jail on Rikers Island, which houses approximately 12,000 prisoners daily. Defies, “The Crime of Solitary Confinement: The Punishment Is Cruel and Unusual,” *New York Daily News* (June 4, 2012): <http://www.nydailynews.com/opinion/crime-solitary-confinement-article-1.1088507>.
14. Barnes, “The Historical Origin of the Prison System in America,” 12 *J. Am. Inst. Crim. L. & Criminology* (1921) 35, at 53.
15. De Beaumont and De Tocqueville, *On the Penitentiary System in the United States and Its Application in France* (Lieber (trans.), 1833) 5.
16. Barnes, *supra* note 14, at 56 n.54.
17. See Haney and Lynch, “Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement,” 23 *NYU Rev. L. & Soc. Change* (1997) 477, at 485-488 (discussing the general trend toward circumscribing the use of extreme isolation in the late nineteenth and early twentieth centuries).
18. On October 22, 1983, prisoners at the United States Penitentiary (USP) in Marion, Illinois, a federal correctional facility, killed two corrections officers in separate incidents. The warden declared a state of emergency and placed USP Marion on permanent lockdown status. For the next 23 years, all prisoners incarcerated at USP Marion were confined to their cells for 23 hours a day. Some commentators trace resurgence in solitary confinement in the United States to the incident at USP Marion. Richards, “USP Marion: The First Federal Supermax,” 88 *The Prison J.* (2008) 6, at 10.
19. Human Rights Watch, “Prison Conditions in the United States” (1991), at 3-4.
20. Mears, “Evaluating the Effectiveness of Supermax Prisons,” Urban Institute Justice Policy Center (2006), at 4.
21. The section of the New York Codes, Rules and Regulations, which compiles state agency rules and regulations, addressing the operation of SHUs was first adopted in 1970. N.Y. Comp. Codes R. & Regs. tit. 7, ch. 6 (“Special Housing Units”). New York prison litigation in the 1970s and 1980s featured complaints about the conditions in various SHUs. See e.g. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), at 185-187 (discussing conditions in the SHU at Green Haven Correctional Facility); see generally, *Frazier v. Ward*, 426 F. Supp. 1354 (N.D.N.Y. 1977) (discussing conditions in the SHU at Clinton Correctional Facility).
22. Correctional Association of New York, “Lockdown New York: Disciplinary Confinement in New York State Prisons” (2003), at 8.
23. “New Concept in Disciplinary Housing: Upstate,” *DOCS Today* (Apr. 2003), at 15.
24. Kim et al., *supra* note 8, at 5, 12.
25. *Ibid.* at 1.
26. Department of Corrections and Community Services, “Daily Population Capacity Report” (June 11, 2012): <http://www.boxedinny.org/library/>.
27. Kim, Pendergrass, and Zelon, *supra* note 8, at 17-22.
28. Grassian, “Psychopathological Effects of Solitary Confinement,” 140 *Am. J. Psychiatry* (1983) 1450.
29. Brodsky and Scogin, “Inmates in Protective Custody: First Data on Emotional Effects,” 1 *Forensic Rep.* (1988) 267; Grassian, “Psychiatric Effects of Solitary Confinement,” 22 *Wash. U. J. L. & Pol’y* (2006) 325; Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement,” 49 *Crime & Delinquency* (2003) 124; Miller and Young, “Prison Segregation: Administrative Detention Remedy or Mental Health Problem?,” 7 *Crim. Behavior & Mental Health* (1997) 85; Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,” 34 *Crime & Just.* (2006) 441.

30. Abramsky and Fellner, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003) 145-168; Cloyes, "Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample," 33 *Crim. J. & Behavior* (2006) 760, at 773-774; Grassian, "Psychiatric Effects of Solitary Confinement," *supra* note 29, at 332, 348; Haney, *supra* note 29.
31. UN Human Rights Comm., CCPR General Comment No. 20: Article 7 (10 March 1992).
32. UN Human Rights Comm., "Concluding Observations of the Human Rights Committee: United States of America", U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec. 2006), at para. 32. Article 10 of the International Covenant on Civil and Political Rights provides, in part, that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" and states that "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." International Covenant on Civil and Political Rights, GA Res. 2200A (XXI) (16 December 1966).
33. UN Comm. against Torture, "Conclusions and Recommendations of the Committee against Torture: United States of America," U.N. Doc. CAT/C/USA/CO/2 (25 July 2006), at para. 36.
34. UN GA, "Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment," U.N. Doc. A/66/268 (5 August 2011), at para 70 [hereinafter 2011 Interim Report of the Special Rapporteur]; see also UN GA "Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment," U.N. Doc. A/63/175 (28 July 2008), at paras. 77-85 [hereinafter 2008 Interim Report of the Special Rapporteur].
35. 2011 Interim Report of the Special Rapporteur, *supra* note 34, at paras. 77-78; 2008 Interim Report of the Special Rapporteur, *supra* note 34, at paras. 80, 83 (citing to guidance from the Committee against Torture and the Committee on the Rights of the Child, as well as the Basic Principles for the Treatment of Prisoners).
36. *Hutto v. Finney*, 437 U.S. 678, 685 (1978).
37. See e.g. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1116-1126 (W.D. Wis. 2001) (granting preliminary injunction on behalf of mentally ill prisoners housed in an extreme isolation facility); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), rev'd on other grounds, 243 F.3d 941 (5th Cir. 2001), adhered to on remand, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("Conditions in [extreme isolation] units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1266-1267 (N.D. Cal. 1995) (finding conditions of extreme isolation unconstitutional for the mentally ill).
38. The ambivalence about solitary confinement in the United States' federal courts is not necessarily reflective of the majority legal opinion of the American law community. The American Bar Association, a mainstream legal organization and the largest bar association in the United States, has called for an abolition of conditions of extreme isolation and for a strict set of safeguards and protocols to ensure that prisoners are separated from the general population only when absolutely necessary based on a demonstrable need for separation, and that separation is "for the briefest term and under the least restrictive conditions practicable." See American Bar Association, *ABA Standards for Criminal Justice: Treatment of Prisoners* (2011), Standard 23.2.6, Standard 23-3.8(b) ("Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population."); see also *ibid.* Standard 23-4.3(a) ("[Disciplinary] sanctions should never include: . . . conditions of extreme isolation. . ."). For additional standards and commentary from the American Bar Association pertaining to segregation, see Standard 23-1.2 Commentary, and Standard 23-2.7.
39. Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the International Bar Association, *Guidelines on International Human Rights Fact-Finding and Reports* (The Lund-London Guidelines) (2009), at para. 1 [hereinafter Lund-London Guidelines] (defining fact-finding as "a mission or visit mandated by an NGO to ascertain the relevant facts relating to and elucidating a situation of human rights concern").
40. OHCHR, "Training Manual for Human Rights Monitoring," U.N. Doc. HR/P/PT/7 (2001) [hereinafter OHCHR Manual], at 9. The Office of the High Commissioner for Human Rights (OHCHR) has published a complete version of the 2001 manual, as well as updated versions of certain revised sections. OHCHR indicates that those sections of the 2001 manual that have not yet been superceded by a later revision should still be used. For citation purposes, "OHCHR Manual" refers to the original 2001 manual, and

- “OHCHR Manual Revised” refers to a specific revised section. These editions are available at: <http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials.aspx>.
41. OHCHR Manual Revised, *supra* note 40, at Introduction, iii.
 42. Pillay, United Nations High Commissioner for Human Rights, “Human Rights Investigations and Their Methodology” (24 February 2010).
 43. Crow, “From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions,” 26 *Mich. J. Int. L.* (2005) 1097, at 1126
 44. See Robertson, *supra* note 2, at 3, 5-11 (noting that “academics have generally overlooked the importance” of human rights fact-finding, urging the need for a “contemporary look at the ethical and legal dimensions of human rights fact-finding,” and describing some of the history of human rights fact-finding); see also Groome, *The Handbook of Human Rights Investigation* (2001) 33 (describing human rights fact-finding as a relatively “new science” that “benefits from employing systems and procedures that have proven to be most effective”).
 45. Pillay, *supra* note 42.
 46. Lund-London Guidelines, *supra* note 39, at para.1.
 47. *Ibid.* at para. 10. See also *ibid.* at para. 8 (“The mission’s delegation should comprise individuals who are and are seen to be unbiased. The NGO should be confident that the delegation members have the competence, experience and expertise relevant to the matters pertaining to the terms of reference.”).
 48. Lund-London Guidelines, *supra* note 39, also provide guidance specific to out-of-country fact-finding, such as standards regarding the use of interpreters, translation of the report, and other logistical details.
 49. New York Department of Corrections, “DOCS Opening Eight Maximum-Security Disciplinary Housing Units” (Press Release) (26 May 1998): <http://www.doccs.ny.gov/PressRel/1998/greenemax.html>.
 50. Correctional Association of New York, *supra* note 22.
 51. SHU Exclusion Law of 2008, 2008 N.Y. Laws 1 (codified as amendments to N.Y. Mental Hygiene Law § 45 and N.Y. Correct. Law §§ 2, 137.6, 401, 401-a); Private Settlement Agreement, *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 02-CV-4002 (S.D.N.Y. filed April 2007). For case filings and information about *Disability Advocates, Inc. v. New York State Office of Mental Health*, see http://www.disability-advocates.org/adv_detail.php?CID=3.
 52. *O’Lone*, 482 U.S. at 354 (Brennan, J., dissenting).
 53. Pillay, *supra* note 42.
 54. Several factors have impeded meaningful judicial review of extreme isolation. Beginning in the 1980s, the Supreme Court issued a series of rulings instructing lower courts to grant enormous deference to executive officials operating corrections systems, most notably *Turner v. Safly*, 482 U.S. 78 (1987) At the same time, the Court began requiring prisoners to meet difficult and elusive thresholds to prove constitutional violations. See e.g. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (requiring prisoners to meet a “deliberate indifference” standard in order to show conditions of confinement are unconstitutionally harmful). Finally, prisoners seeking to challenge conditions of confinement in federal courts face significant procedural and legal obstacles under the Prison Litigation Reform Act enacted in 1996. Pub. L. No. 104-134, 110 Stat. 1321 (1996).
 55. See e.g. “Spitzer Spokeswoman Spells Out Opposition to Anti-SHU Proposal,” *Legislative Gazette* (July 11, 2007).
 56. OHCHR Manual, *supra* note 40, at 99.
 57. Lund-London Guidelines, *supra* note 39, at paras. 48, 49.
 58. *Ibid.* at para. 53.
 59. *Ibid.* at paras. 35, 48, 54. See also Robertson, *supra* note 3, at 8 (discussing need for focus of investigation to expand beyond victims only, and stating that “American NGOs have learnt to look at life from both sides now”).
 60. Lund-London Guidelines, *supra* note 39, at paras. 41-42.
 61. OHCHR, “Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,” U.N. Doc. HR/P/PT/8/Rev.1 (2004), at paras. 146-149 [hereinafter Istanbul Protocol].
 62. Lund-London Guidelines, *supra* note 39, at paras. 40, 46, 47.
 63. *Ibid.* at para. 47.
 64. OHCHR Manual, *supra* note 40, at chapter IX “Visits to Persons in Detention.” See also Istanbul Protocol, *supra* note 61, at chapter IV(C) “Official Visits to Detention Centers.”

65. OHCHR Manual, *supra* note 40, at 141-142.
66. Istanbul Protocol, *supra* note 61, at para. 132.
67. OHCHR Manual, *supra* note 40, at 141-142; Istanbul Protocol, *supra* note 61, at paras. 91, 97.
68. Istanbul Protocol, *supra* note 61, at paras. 134, 167.
69. OHCHR Manual, *supra* note 40, at 142.
70. Scatlet Kim, Request under the New York Freedom of Information Law to the New York State Department of Corrections and Community Supervision, New York Civil Liberties Union (December 9, 2011): <http://www.boxedinny.org/wp-content/uploads/2012/09/NYCLU-FOIL-Request-2011-12-091.pdf>.
71. *Ibid.*
72. *Ibid.*
73. *Ibid.* These particular requests focused on Upstate and Southport Correctional Facilities, New York's two large prisons entirely dedicated to holding prisoners in extreme isolation.
74. As noted in the final fact-finding report, not all of the information sought by the NYCLU was disclosed. Kim et al., *supra* note 8, at 8 n.13.
75. Lund-London Guidelines, *supra* note 39, at para. 10. In New York, as is the case in American prisons and jails, prisoners are provided (in theory) with confidential access to legal representatives.
76. One particular area where some verbal accounts were markedly different than the written records was with regard to dates and length of time. Perceptual distortions, including difficulty with tracking or estimating time, is a well-studied and well-documented effect of conditions of extreme isolation. Grassian, "Psychiatric Effects of Solitary Confinement," *supra* note 29, at 335. In these cases, investigators relied on the written records for dates and lengths of time, rather than the prisoner's account.
77. See OHCHR Manual, *supra* note 40, at 142 ("It is important to gain the confidence of the detainee. The detainee is likely to think the [Human Rights Officer] is fake and has been planted by the authorities."). Indeed, more than one prisoner who the NYCLU corresponded with was intensely skeptical of the NYCLU at the outset of the investigatory process.
78. Like correspondence, meetings between prisoners and legal representatives in the United States is generally treated as confidential and supposed to take place in an area of the facility where no eavesdropping or monitoring can occur. In practice, effectuating confidentiality can require diligent effort on the part of the investigators.
79. See OHCHR Manual, *supra* note 40, at 142.
80. See Istanbul Protocol, *supra* note 61, at para. 149.
81. See OHCHR Manual Revised, *supra* note 40, at 142 ("During a second or repeated visit, the [Human Rights Officer] should call back most of the detainees seen on previous visits to make sure that they have not suffered reprisals").
82. Lund-London Guidelines, *supra* note 39, at paras. 57, 62.
83. *Ibid.* at para. 1.
84. OHCHR Manual, *supra* note 40, at 390-391.
85. Lund-London Guidelines, *supra* note 39, at para. 66.
86. Kim et al., *supra* note 8.
87. New York Civil Liberties Union, "Boxed In" (Video): www.boxedinny.org To view the documentary video, see www.boxedinny.org, and to see the virtual tour of Malone, see www.boxedinny.org/gallery.
88. *Ibid.* ("Take Action Now").
89. New York Civil Liberties Union, "Library": <http://www.boxedinny.org/library/>.
90. See e.g. Schlanger, "Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities," 18 *Mich. J. Race & L.* (2013) 241, at 242, 248; Nolan, "This Newspaper Photo of an Office Is What Keeps One Prison Inmate in Solitary Going," *Gawker* (2 October 2012): <http://gawker.com/5948289/this-newspaper-photo-of-an-office-is-what-keeps-one-prison-inmate-in-solitary-going>.
91. Lund-London Guidelines, *supra* note 39, at para. 71.
92. *Ibid.* at para. 68.
93. *Ibid.*
94. See *supra* notes 10-12.
95. Crow, *supra* note 43, at 1105.