

“Out of Sight, Out of Mind”



Though solitary confinement can be described accurately by Justice Stephen Breyer as “Out of sight, out of mind” for many people,¹ most have heard of it, perhaps under its more descriptive terms—“isolation” or “administrative segregation” or “the hole.” Whatever its title, in most prison systems it means isolation from other inmates and prison staff for 22 or more hours a day²—in a windowless cell no larger than a typical parking spot.³ And when the inmate leaves this cell, little or no opportunity for interaction or conversation with another human being is allowed.⁴

Conditions are harsh. A death-row prisoner has no physical contact with other human beings. Housed in isolation, the prisoner may participate in visits with family members, friends, and attorneys only through glass. Meals are delivered to the cell, where the prisoner eats alone. In fact, the food is inserted through a small slot in the cell door, precluding the opportunity for human contact. During recreation, the prisoner is alone. The number of books and commissary items are limited. Jobs, educational opportunities, and other programs are not available.

Those on death row typically are in solitary confinement, conditions of which in Arizona have been previously described.⁵ Such prisoners are confined to a cell for 23 hours a day, with one hour for shower and recreation.

The most recent data available, from

2014, indicate that up to 100,000 prisoners nationwide are in “restricted housing,” including isolation. Those numbers and conditions affecting prisoners have led many—including lawyers, judges, scholars, and directors of correctional systems themselves—to seek more information on the tool and its effects.

Yale Survey

Recently, Yale Law School published *Time-In-Cell*, a definitive national study⁶ of solitary confinement. The report is the product of extensive collaboration between Yale and the Association of State Correctional Administrators (ASCA) (hereafter Survey). The Survey collects responses from virtually all of this country’s prison systems via an extensive questionnaire.⁷

Underscoring the significance of this issue, President Obama on July 17, 2015, gave a speech to the NAACP conference, where he called for the elimination or modification of the practice of solitary confine-

ment.⁸ As a follow up to this and on January 25, 2016, the President announced the adoption of a Department of Justice report banning solitary for juveniles in federal custody and ordering that guards may not use isolation as a punishment for inmates who commit “low level” infractions.⁹

The numbers in the Yale Survey represent current conditions. It confirms that state and federal prisons have a total pris-

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on population of over 1.5 million¹⁰—and more than 2 million if those in jails are included.¹¹ Of the 1.5 million men and women incarcerated in prison, 100,000 inmates of both genders are held in isolation—fully six percent of the prison population.¹²

Placement in “administrative segregation” is often based on considerations bearing no relationship to an inmate’s conduct in prison.¹³ In addition, in most jurisdic-

voice urging reform has come from President Barack Obama. His 2015 speech addressing this topic at the NAACP conference adds the Executive Branch’s voice to those of the American Civil Liberties Union’s National Prison Project, the ABA, and the National Campaign

tions administrative segregation has no fixed end point.¹⁴ In a substantial number of jurisdictions, inmates remained in segregation for more than three years.¹⁵

Clearly, segregation policies must be re-examined. There is now a national debate about the harm such restrictions impose.¹⁶ In addition to the calls for reform from the ASCA, Justices Kennedy, Breyer and Ginsberg; chief operations officers of prison systems; legislators; and judges have joined in expressions of serious concern.

The most recent

Against Torture. Moreover, two Senate hearings have been held on the issue, and there is a pending Justice Department review conducted by Attorney General Loretta E. Lynch.¹⁷ The 2015 “Mandela Rules”—the United Nations Standard Minimum Rules for the Treatment of Prisoners “shaped with input from leaders of corrections in the United States and promulgated by the Committee on Crime Prevention and Criminal Justice of the United Nations”—“have defined confinement of prisoners for 22 hours or more for longer than 15 days to be a form of ‘cruel, inhumane or degrading treatment.’”¹⁸ Undeniably, the concerns for inmate isolation have worldwide scope.¹⁹

Solitary confinement originally was designed to place those found to be too violent or too dangerous out of reach of staff and other prisoners. But we now know that the practice has evolved. Now, in many jurisdictions, solitary is used as a form of punishment for nonviolent offenders who have been found to violate prison rules.²⁰

Many jurisdictions are examining the use of solitary. Forty jurisdictions including Arizona responded to the Survey question

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regarding reconsideration of solitary confinement practices; each reported that they had reviewed their administrative segregation policies and practices during the past three years.²¹ Arizona reported that its goals were “Improvement of out of cell time and programing availability. Decrease of inmate negative procedures.”²²

In June 2015, Justice Anthony Kennedy, in a case about a prisoner who had spent most of his more than 25 years in solitary, spoke about the “human toll wrought by extended terms of isolation.”²³ Significantly, he referred to prior decisions holding that constitutional requirements of due process require procedural protections for forms of administrative segregation.

In another June 2015 decision, Justice Breyer, joined by Justice Ginsburg, addressed the “dehumanizing effect of solitary confinement,” citing research portraying “anxiety, panic, rage, loss of control, paranoia, hallucinations [and] self-mutilations” caused by such isolation.²⁴ To this can be added anger, madness, suicide, and compulsive behavior like pacing or cleaning a cell over and over.²⁵ As one person reported, “Prisoners recount a daily struggle to maintain their sanity and a longing to catch sight of a tree or bird.”²⁶

Notwithstanding such calls for change, the United States Supreme Court, on October 13, 2015, passed on a Virginia death row inmate’s due process solitary confinement claim, dismissing his petition as moot.²⁷ Advocates for reform are hoping this only means it was not a proper case to decide the issue.

Arizona was one of the jurisdictions to answer most of the administrative segregation questions, including the questions dealing with racial makeup of the general prison population as well as those in administrative segregation.

As of Fall 2014, Arizona had approximately 42,000 inmates in prison, reporting a total male custodial population of 38,078 of which 2,402, or 6.3 percent, were in administrative segregation.²⁸ Arkansas and Kentucky were first and second with respect to percentage of prison population in solitary, and Arizona was tied for third place with Kansas.²⁹ Of the total male prison population in Arizona, 38 percent were White, 14 percent Black, 41 percent Hispanic, 1

2.5 percent of male custodial population in administrative segregation.³⁵

In Arizona the percentage of both male and female custodial population held in administrative segregation decreased between Fall 2011 and Fall 2014, from 2,955 to 2,402 for males and 18 to 10 for females.³⁶ In most jurisdictions, the percentage of prisoners confined in administrative segregation has remained relatively constant.³⁷

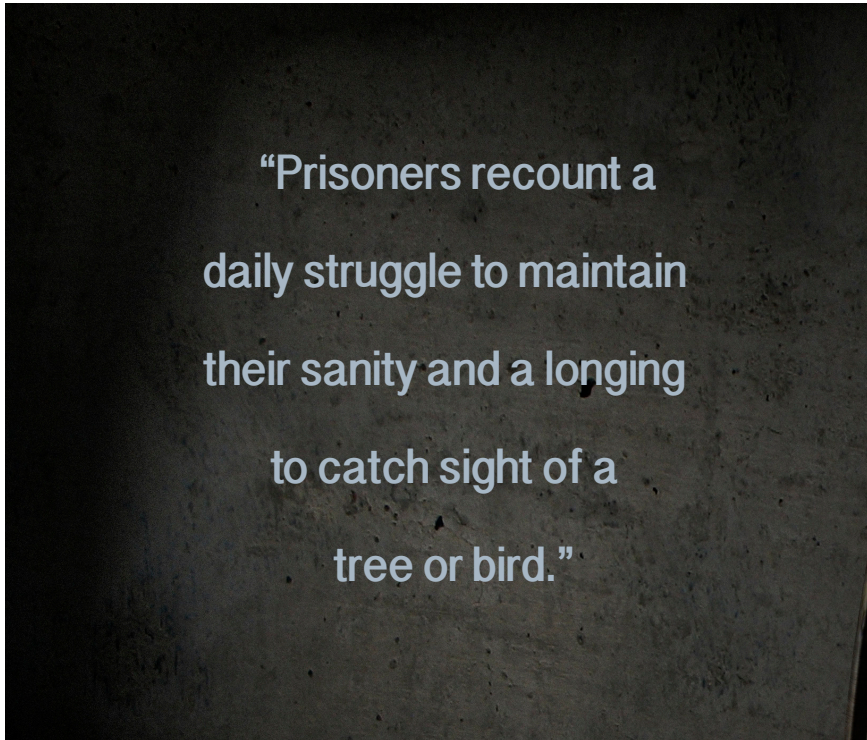
Of the 21 jurisdictions providing information on the makeup of those in administrative segregation as compared to their general prison population, Blacks and Hispanics were usually overrepresented in administrative segregation.³⁸

In 2013, a total of 4,400 prisoners went from administrative segregation directly to the community without any type of prior assessment or effort to assess whether they have ongoing mental health needs.³⁹ This is a dangerous situation not only for them but potentially for the community at large. These individu-

als may well have sustained permanent damage in solitary.

Critics are unanimous that isolation does not make the public safer or stronger; that it is often unnecessary, ineffective, and cruel; and that many inmates are still housed in solitary without a present reason to do so.⁴⁰ It is difficult for those released from isolation—either into a general prison population or back on the street—to adapt. It exacerbates mental illness. Although those in isolation account for approximately three percent to six percent of all prison populations, they account for about 50 percent of the suicides.⁴¹

As indicated previously, President Obama called for the elimination or modification of the practice. Urging that the practice be terminated are the ACLU⁴²; the United Nations Special Rapporteur on Torture (calling



“Prisoners recount a daily struggle to maintain their sanity and a longing to catch sight of a tree or bird.”

percent Asian, and 6 percent Other.³⁰ Of those males in administrative segregation, 41 percent were White, 12 percent Black, 42 percent Hispanic, and there was one Asian inmate on death row.³¹

Of the 3,934 total female population 10, or 0.25 percent, were in administrative segregation.³² Of the total female population, 52 percent were White, 9 percent were Black, 28 percent were Hispanic, and 1.0 percent made up other groups.³³ Of those in administrative segregation, 50 percent were White, 20 percent were Black, 20 percent were Hispanic, and 10 percent were other population groups.³⁴ Of the jurisdictions reporting on administrative segregation, the highest percentage of male prisoners was 7.5 percent of the male custodial population, with the lowest percentage being less than 0.1 percent. The median was approximately



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for a global ban on solitary confinement for more than 15 days); and the ABA, urging that death row

prisoners be treated and housed among the general prison population.⁴³

The paramount finding of the Survey⁴⁴ is that:

Prolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern. Commitments to lessen the numbers of people in isolated settings and to reduce the degree of isolation have emerged from across the political spectrum. Legislators, judges, and directors of correctional systems at both state and federal levels, joined by a host of private sector voices, have called for change. In many jurisdictions prison directors are revising their policies to limit the use of restricted housing and the deprivation it entails.

As part of a recent landmark legal settle-

ment of a federal suit filed by inmates held in isolation for at least 10 years in California, the number of inmates in isolation will be reduced sharply and time spent in isolation will be capped. Prison reform advocates hope the settlement will serve as a model for other states.⁴⁵ The settlement stops the practice of automatically sending gang members to isolation cells. Only inmates found guilty of serious prison infractions, such as violence, weapons, narcotics possession or escape, will be sent to isolation and not for indefinite terms or long-term stays.⁴⁶ California also has a program to move those in solitary back into the general prison population. Under California's new policy, about 1,100 inmates have been released from solitary—with few problems.⁴⁷

Colorado has discontinued its policy of placing prisoners with severe mental illnesses in long-term solitary.⁴⁸

New York as the result of a lawsuit brought by the New York Civil Liberties Union has agreed to overhaul the way solitary is administered in the state's 54 prisons, which hold 60,000 inmates—with approximately 4,000 of that population in

solitary.⁴⁹ This includes reducing the number held in isolation and changing the term from unlimited years to three months in most cases, eliminating the wide discretion correction officers had to put an inmate in solitary, and improving living conditions and the food served. Previously 2,000 inmates a year were released directly from solitary into the community without receiving any transitional support, but now there will be "step down" programs in New York providing mental health counseling, education and drug treatment for solitary prisoners. The state had agreed to an interim settlement two years earlier that eliminated the use of solitary for pregnant woman, developmentally disabled inmates, and prisoners under age 18. Finally, in the new agreement still to be approved by the court, isolation will not be imposed for first-time prison violations of drug use or possession.

As noted in the Survey:

In sum, dozens of initiatives are underway to reduce the degree and duration of isolation, or to ban it outright, and to develop alternatives to protect the safety



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and well-being of the people living and working in prisons.

The harms of such confinement for prisoners, staff, and the communities to which prisoners return upon release are more than well-documented. In some jurisdictions isolated confinement has been limited or abolished for especially vulnerable groups (the mentally ill, juveniles, and pregnant women), and across

the country, correctional directors are working on system-wide reforms for all prisoners.⁵⁰

In our own State of Arizona, a Consent Decree in 2013 provided for increased access to health care for all those in administrative segregation and increased out-of-cell time for the mentally ill.⁵¹

Criminal sentencing reform is now taking place in the federal system and in many

states. In the view of the authors, we as a society are incarcerating too many people for too long a time where other sentencing options would better fit the crime and keep society safe at the same time. In Arizona, however, “Since 1992, the population in the Arizona prison system, both privately and publicly run, has increased by 171 percent. This is far in excess of the state’s population growth of 75 percent over that time, and reflects an increase in the incar-

endnotes

- Justice Breyer, joined by Justice Ginsburg, dissenting in *Glossip v. Gross*, 135 S. Ct. 2726, 2765-66 (2015), where, in addition to his concerns about solitary confinement, he requested that a case dealing with the death penalty be sent to the Court.
- Id.*
- Justice Kennedy concurring in *Davis v. Ayala*, 135 S. Ct. 2187, 2208-10 (2015). He notes, *inter alia*, that solitary exerts a terrible price, especially for the young and mentally ill who often end up in prison. In this case, the prisoner had spent the great majority of his more than 25 years in administrative isolation. Justice Kennedy had previously spoken against isolation cells during testimony before Congress in March 2015. N.Y. TIMES, Editorial, June 20, 2015, at A18.
- Id.*
- See R. L. Gottsfield, Douglas L. Rayes & Patricia Starr, *A Court’s Remarkable Recovery From a Capital Case Crisis*, 48 ARIZ. ATT’Y 18 n.19 (Nov. 2011). *And see* Survey, *infra* n. 6 at 52 for a discussion of the use of solitary for death-sentenced inmates. For a very detailed and recent description of the conditions of Arizona solitary confinement on death row see the Complaint in *Nordstrom v. Ryan, et al.*, CV-02176-DGC-JZB, filed Oct. 29, 2015, U.S.D.C. D. Ariz., by an inmate who has spent 19 years on Arizona death row and is alleging violations of due process, the Eighth Amend-ment and civil rights arising out of his treatment as a death row inmate in solitary.
- Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation In Prison*, The Liman Program, Yale Law School Association of State Correctional Administrators (Aug. 2015) (hereafter Survey). Available at ASCA at www.asca.net. In addition to compiling the numbers of prisoners in solitary confinement in the United States, the Survey addresses the length of time spent in administrative segregation, the degree of isolation, the physical environment of the cell, exercise and showers, opportunities for interpersonal contact, social visits, phone calls, social correspondence, legal visits and legal mail, and programming. *See* Survey at 27, 36, 39, 41, 44-48.
- Id.* at i-ii.
- As reported by Baker & Goode, *infra* note 16. *See also* note 17 *infra*.
- U.S. Department of Justice, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, FINAL REPORT (Jan. 2016); Michael D. Shear, *Obama bans solitary confinement for juveniles in federal prison*, N.Y. TIMES, Jan. 25, 2016. *See also* Barack Obama, *Why we must rethink solitary confinement*, WASH. POST, Jan. 25, 2016.
- Supra* note 6 at ii and 3. This estimate does not include people in local jails, juvenile facilities, or in military and immigration detention. The Survey differentiates between those held in administrative segregation in relationship to those held in other forms of restricted housing. *Id.* at 14.
- Id.*
- Jess Bravin, *Study fuels doubt over solitary jailing*, WALL STREET J., Sept. 3, 2015, at A3, uses the six percent figure. *And see* Survey, *supra* note 6 at ii. As such the figure of 100,000 inmates in segregation is much higher than Justice Kennedy’s figure of 25,000 cited in *Davis v. Ayola*, *supra* note 3. The figure includes inmates in some form of restricted housing, which includes administrative segregation as well as restriction for other reasons. *Supra* note 6 at ii. The 100,000 figure does not include people in local jails, juvenile facilities, or in military and immigration detention. *Id.* at ii. Only 36 jurisdictions gave figures for the number of people in administrative segregation. *Id.* at 22. The jurisdictions were asked to compare Fall 2011 and Fall 2014, and in most the percentage of prisoners confined in administrative segregation remained relatively constant. *Id.*
- Supra* note 6 at ii and 6-9.
- Id.*
- Id.*
- Supra* note 6 at i. In addition to Bravin, *supra* note 12, see the following as part of the excellent series the *New York Times* ran on long-term solitary confinement and its severe consequences: Peter Baker & Erica Goode, *Critics of solitary confinement are buoyed as Obama embraces their cause*, July 22, 2015, at A16; Erica Goode, *Punished for life*, Aug. 4, 2015, at D1, D6; Ian Lovett, *California agrees to overhaul use of solitary confinement*, Sept. 2, 2015, at A14, A16; Timothy Williams, *Prison officials join movement to curb solitary*, Sept. 9, 2015, at A1, A18; Adam Liptak, *There’s a case on solitary, if the Court wants it*, Sept. 15, 2015, at A12; *See also* Zusha Elinson, *California to scale back solitary jailing*, WALL STREET J., Sept. 2, 2015, at A3.
- See* Survey, *supra* note 6, at iii, 3-7, for those organizations urging reform. The 2014 Senate hearings were chaired by Senators Richard Durbin of Illinois and Ted Cruz of Texas. Also active in ending the practice of solitary confinement are Senators Ron Johnson of Wisconsin, Thomas Carper of Delaware, Mike Lee, Rand Paul of Kentucky, Cory Booker of New Jersey, and various legislation has been introduced in both the Congress and certain states. *Id.* *And see* Baker & Goode, *supra* note 16, the “Critics” article for President Obama’s speech and the Justice Department review.
- The quote is from the Survey, *supra* note 6, at iii.
- See, e.g., China: Rights advocate describes torture and solitary confinement*, WALL STREET J., Sept. 24, 2015, at A20; Nick Cumming-Bruce, *China insists to U.N. that it’s combating torture*, N.Y. TIMES, Nov. 18, 2015, at A4.
- Baker & Goode, *supra* note 16;

ceration rate from 393 per 100,000 population to 624 per 100,000.”⁵² Yet, Arizonans also have begun to question seriously our mass incarceration dilemma.⁵³

The authors urge that Arizona continue to review its solitary confinement policies and follow the lead of other jurisdictions that already have curtailed their use and duration of long-term solitary confinement.⁵⁴ We urge the release from solitary of those no longer needing such treatment.

This should extend to those on death row as the period of time between the sentence of death and execution of the sentence extends for decades in Arizona and throughout this country—the norm being 20 years or more.⁵⁵

It is hoped the expressions of concern by Justices Kennedy, Breyer and Ginsburg will result in the Court accepting review of a solitary confinement case.

As noted by Justice Kennedy⁵⁶:

In a case that presented the issue the judiciary may be required within its proper jurisdiction and authority to determine whether workable alternative systems for long-term confinement exist, and if so, whether a correctional system should be required to adopt them. ... Over 150 years ago, Dostoyevsky wrote, “The degree of civilization in a society can be judged by entering its prisons.” ... There is truth to this in our own time. **AZ**

Survey, *supra* note 6, at i and 6-9.

21. *Supra* note 6, at 55.

22. *Id.* at Appendix B.

23. *Supra* note 3.

24. *Supra* note 1.

25. See Goode, *Punished*, *supra* note 16, at D6; see also articles at note 16 *supra*.

26. *Id.*

27. *Prieto v. Clarke*, No. 15-31, rev’w denied, Oct. 13, 2015. See 780 F. 3d 245 (4th Cir. 2015). Apparently the inmate was executed before the Court could rule.

28. Survey, *supra* note 6, at 18. *And see* Dan Hunting, *Arizona’s incarcerated population*, Morrison Institute for Public Policy, Nov. 2015, available at <https://morrisoninstitute.asu.edu/sites/default/files/content/products/The%20Incarcerated%20Population.pdf>. This study points out, *inter alia*, that the prison population, which has increased by 171 percent since 1992, has far exceeded the state’s population growth during the same period, which was only 75 percent.

29. Survey, *supra* note 6, at 19.

30. *Id.* at 32.

31. *Id.* at 32.

32. *Id.* at 35.

33. *Id.* at 36.

34. *Id.*

35. *Id.* at 17. Across all reporting jurisdictions, administrative segregation was used less frequently for female prisoners. While a number of jurisdictions reported no women held in administrative segregation, a number reported they were housing women in some form

of restricted confinement that varied in range from 0.9 percent to 7.0 percent. *Id.* at 20.

36. *Id.* at 24 and 35.

37. *Id.* at 22.

38. *Id.* at ii.

39. *Id.*

40. See speech of President Obama referred to in the text before the NAACP, July 15, 2015, at note 8. In July 2015, President Obama visited El Reno federal prison in Oklahoma, said to be the first visit by a sitting President to a prison. See Baker & Goode, *supra* note 16.

41. See Goode, *Punished*, *supra* note 16, at D6.

42. Survey, *supra* note 6, at 6.

43. ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 6 (3d ed. 2011).

44. *Supra* note 6, at i.

45. In 2012, the Center for Constitutional Rights filed suit in federal court against California state officials on behalf of those in California’s maximum security prisons at Pelican Bay, who had spent more than 10 years in solitary, claiming an Eighth Amendment constitutional violation. *Ashker v. Governor of California*, 2014 WL 2465101 (No. C 09-5796 CW). The historic settlement agreement became effective on Sept. 1, 2015. See also articles by Goode, Lovett, and Elinson, *supra* note 16.

46. *Id.* *And see* note 55 *infra*.

47. See Williams, *supra* note 16.

48. *Id.*

49. Michael Schwartz & Michael Winerip, *Deal alters way New York State isolates inmates*, N.Y. TIMES, Dec. 17, 2015, at A1,

A33; See Schwartz & Winerip, *New York agrees to alter solitary confinement in prisons*, N.Y. TIMES, Dec. 16, 2015, www.nytimes.com/2015/12/17/nyregion/new-york-state-agrees-to-overhaul-solitary-confinement-in-prisons.html

50. Survey, *supra* note 6, at 7. To the specific groups mentioned in the quote can be added individuals with disabilities and those in detention awaiting immigration hearings. *Id.* at iii, 3-4.

51. Survey, *supra* note 6, at 6 and n.54. See *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2013) (certifying a class and subclass of all prisoners “subjected to the medical, mental health, and dental care policies and practices” of ADOC and appointing counsel). Stipulation at No. 12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014), ECF No. 1185.

52. See Hunting, *supra* note 28, which is a paper produced for the ASU Morrison Institute for Public Policy, State of Our State Seminar, *Is Criminal Sentencing Reform Right for AZ?* held Nov. 20, 2015, in Phoenix. See also on Morrison’s website another of the seven papers produced for the seminar, *The Sentencing Reform Movement*, by Cassia Spohn.

53. *Id.*

54. It is noteworthy, for instance, that the Vera Institute among others has developed expertise in creating alternatives to administrative segregation. Wilcox & Ram Subramanian, *Solitary confinement: Common*

misconceptions and emerging safe alternatives, Vera Institute of Justice (May 2015), at www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report.pdf. See also Survey, *supra* note 6, for other groups who have produced standards for solitary and its alternatives.

55. See note 5 *supra* and R. L. Gottsfield & Marianne Alcorn, *The Capital Case Crisis in Maricopa County and What (Little) We Can Do About It*, 45 ARIZ. ATT’Y 20 (Part One, April 2009); and 45 ARIZ. ATT’Y 22 (Part Two, May 2009). We fully understand that prison officials, including those in Arizona, need to retain discretion to decide when temporary isolation or alternative sanctions are needed to impose discipline and protect staff and other inmates. At the same time, since 1975, almost 20 percent of condemned inmates have left death row because of executive clemency or a victory in the courts. See Adam Liptak, *supra* note 16, at A14. Arizona has also not been immune from wrongful convictions, both in death penalty cases and in cases involving life sentences. Many of them are featured on the Arizona Justice Project website at www.azjusticeproject.org. Moreover, in California, death row inmates can now watch television and play games like chess or checkers with up to three other condemned prisoners for an hour a day. *Id.*

56. *Supra* note 3.