

ARTICLES

“WE WILL NOT BE INVISIBLE” WOMEN AND SOLITARY CONFINEMENT IN THE U.S.

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“Although segregation is practiced similarly in men’s and women’s prisons (deprivations and humiliation are often generalized practices), women will have a unique sense of their confinement in segregation because this sense is intertwined with the gendering project of the prison regime and their own disadvantaged position in society. Thus, experiences of segregation should be viewed as gendered.”²

Abstract

Solitary confinement is a hot topic these days, and human rights activists, prison authorities, and international human rights’ bodies are addressing both its effects and its effectiveness in prison administration. Since the nineteenth century, the United States Supreme Court has also considered the treatment of prisoners in the context of the Eighth Amendment. The discussions, however, draw their data from men and respond to the experience of solitary in men’s prisons. Not discussing women’s reality does not make an issue “gender-neutral.” It is very gender specific. It is about men and men’s experience of solitary confinement.³ Women often find themselves in solitary confinement for far different reasons than men. What happens to women at the hands of guards and the system, as well as the effects on their self-esteem, mental and emotional health is unique to women. Spending time in jail can be a deeply traumatizing experience for women, and often triggers past experiences of trauma and violence. Additionally, women are far more likely to experience sexual victimization in jail than men are.⁴ Between 2009 and 2011, women represented

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2. Joane Martel, *Telling the Story: A Study in the Segregation of Women Prisoners*, 28 SOC. JUST. 196, 199 (2001).

3. U.S. DEPT. OF JUST. REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, FINAL REPORT (Jan. 2016) (U.S. Department of Justice issuing a 128-page report on the use of restrictive housing in January of 2016, only referred to women in the entire report when addressing pregnancy and post-partum women). Feminist agendas also don’t include conversations about women and solitary confinement.

4. Elizabeth Swavola, Kristine Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, 14 (2016), <https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails->

approximately 13 percent of people held in local jails, but 27 percent of victims of inmate-on-inmate sexual victimization and 67 percent of victims of staff-on-inmate sexual victimization.⁵

Women are sent to solitary confinement for different reasons than men and are impacted by solitary in far different ways. The U.S. Constitution imposes a duty on the State to assume responsibility for the safety and general well-being of a person when the State places her in custody.⁶ When most female prisoners have suffered violence and trauma in their lives, and solitary confinement can cause irreparable damage even to prisoners with no history of mental illness or trauma, the State neglects its custodial responsibility when it imposes solitary confinement on women prisoners.

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report/legacy_downloads/overlooked-women-and-jails-report-updated.pdf
[<https://perma.cc/2YFB-ZWK8>].

5. *Id.*

6. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

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INTRODUCTION

Although placing a prisoner in solitary confinement is not per se a constitutional violation, the Supreme Court recognizes that the duration and conditions of the isolation may constitute cruel and unusual punishment.⁷ Further, proposed legislation in numerous states, diverse and often shocking investigative reports, and even the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners all address the overuse of solitary confinement. Unfortunately, almost all policy decisions and publications speak of solitary confinement only in reference to male prisoners. Rarely do reports consider with any depth that maintaining a person locked in a small room with no materials, no activities, and no contact with any other human being may affect women differently than men. This article explores the relationship between solitary confinement and women prisoners, what causes their ingress into solitary and how solitary affects them, as well as how that effect is magnified by race, mental health, and a history of trauma. Finally, case after case of sexual assault and sexual harassment of women in solitary by prison staff, the higher incidence of suicide in solitary, the high incidence of women with mental illness in solitary, and the insalubrious conditions for pregnant women confined in solitary all demonstrate that the State should not maintain solitary confinement in women's prisons. The State is simply incapable of carrying out its custodial function.

Section I briefly describes solitary confinement and identifies current scholarship, authority, and Supreme Court case law about it. Section II details the reality of women and incarceration. Section III considers solitary confinement through the lens of women, specifically what causes women's ingress into solitary. Section IV explores the impact, psychological and behavioral, that solitary confinement has on women. Finally, Section V, using the background already developed, builds the case for how the State should be aware of all of this, and thus acts with deliberate indifference, violating the Eighth Amendment, when placing women in solitary confinement.

*I. WHAT CHARACTERIZES SOLITARY CONFINEMENT?*⁸

Solitary confinement is generally characterized as physical isolation of a prisoner from 22 to 24 hours a day behind a steel door, limiting all access to other prisoners and even prison staff, access to showers, natural daylight, hygiene products, books and other personal supplies, as well as telephone calls, visits, and activities.⁹ Additionally, medical and mental health treatment are even less

7. *Finney v. Hutto*, 410 F. Supp. 251, 275 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

8. Solitary Confinement can also be called administrative or disciplinary segregation, restrictive housing, secure housing unit (SHU), "seg," or "the hole."

9. Elizabeth Alexander, "*This Experiment, So Fatal*": *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1, 4-

available to prisoners in solitary than to those in the rest of the prison facility.¹⁰ Prisoners have no supplies and no contact with any other prisoner, yet each time they leave their cells, they are strip searched and then shackled. Often, the only psychological support they have to survive days and years of inactivity and lack of human contact is a mental health worker who stops outside their cell and asks through a tiny opening in the cell door if they are okay. This private information becomes public by the fact that everyone on the unit can hear the conversation.

More than 15 days in isolation can cause irreparable damage to a person, according to Juan Mendez, UN Special Rapporteur on Torture.¹¹ Yet, in the fall of 2015, the United States isolated almost 70,000 prisoners for 22 hours or more a day for longer than 15 days.¹² The National Inmate Survey administered by the Department of Justice showed that 20 percent of all prison inmates had spent time in solitary confinement, with 10 percent of them passing more than 30 days in isolation.¹³ In the U.S., it is not uncommon for a person to spend years, even an entire prison sentence, restricted to a 6-foot by 8-foot cell with occasional solitary yard time and three showers a week. The Eighth Amendment bans cruel and unusual punishment, and it “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency” against which actions within the prison system must be measured.¹⁴ Prolonged or inappropriate use of solitary confinement or lack of access to health or mental health resources should trigger Eighth Amendment scrutiny. Prison officials themselves can be held liable for acting with “deliberate indifference” to a prisoner’s safety, by knowing that a prisoner is at risk of serious harm and disregarding that risk.¹⁵

The Supreme Court has no definitive statement about solitary confinement; however, conditions that result in serious deprivation of basic human needs may

5 (2015). *See also* Cyrus R. Vance Center for International Justice et al., *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement of Detainees*, 3 (2016), https://www.weil.com/~media/files/pdfs/2016/un_special_report_solitary_confinement.pdf [<https://perma.cc/59VX-TXUL>].

10. Am. Friends Serv. Comm., *Solitary Confinement Facts*, <https://www.afsc.org/resource/solitary-confinement-facts> (last visited Oct. 31, 2017) [<https://perma.cc/ZMJ9-86S3>].

11. Cyrus R. Vance Center for International Justice et al., *supra* note 8.

12. Ass’n of State Correctional Administrators et al., *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*, 1 (Nov. 2016), <https://law.yale.edu/system/files/area/center/liman/document/aimingtoreducetic.pdf> [<https://perma.cc/PTX2-J5LP>].

13. Alan J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS (Oct. 2015), 1, <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> [<https://perma.cc/3THJ-G5YZ>] (conducting a survey in 590 detention facilities, with over 91,000 inmates surveyed nationwide). *See also* Ass’n of State Correctional Administrators et al., *supra* note 11, at 5 (estimating that some 80,000 to 100,000 people were in solitary confinement at some point in 2014 in U.S. prisons, approximately one in every six or seven prisoners).

14. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

15. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

rise to the level of Eighth Amendment violations.¹⁶ As far back as 1890, the Supreme Court held that conditions of solitary confinement at that time could be considered an additional punishment that was a “terror and peculiar maker [sic] of infamy,” pointing out that Great Britain and other countries actually repealed their statutes for solitary confinement out of “revolt against this severity.”¹⁷ Disciplinary isolation may violate the Constitution depending on the duration and the conditions of the punishment, and should be scrutinized by Eighth Amendment standards.¹⁸ The Supreme Court developed a two-part test for measuring Eighth Amendment violations in the context of incarceration: i) a prisoner must demonstrate that she faced a substantial risk of serious harm, and ii) that prison staff acted with deliberate indifference to that risk.¹⁹ Deliberate indifference, the equivalent of recklessness, does not require intent but a knowledge of the risk and a subsequent failure to take “reasonable measures to abate it.”²⁰ “Knowledge” of a substantial risk can be inferred from an obvious fact, such as a pregnancy or mental illness.²¹

Over 200 years ago, the Quakers attempted to isolate inmates as a means of reforming them but found that the isolation caused many of the prisoners to become mentally ill.²² They stopped using isolation. Juan Mendez states that because prisoners often manifest irreversible, harmful psychological effects after only 15 days of isolation, solitary confinement constitutes cruel, inhuman and degrading punishment, even torture, and violates the International Covenant on Civil and Political rights and the Convention Against Torture.²³ The Inter-American Commission on Human Rights established that “solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”²⁴

16. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (holding that conditions that “deprive inmates of the minimal civilized measure of life’s necessities . . . could be cruel and unusual under the contemporary standard of decency recognized by the Court”).

17. *In re Medley*, 134 U.S. 160, 170 (1890).

18. *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978). *See also* *Estelle*, 429 U.S. at 102 (1976) (holding that Eighth Amendment standards address more than “physically barbarous” punishments).

19. *Farmer*, 511 U.S. at 847 (1994).

20. *Id.*

21. *Id.* at 842.

22. Liza Chowdhury, *Intersections of Race and Gender on Prison Punishment and Adjustment* (2015), 18-19, (unpublished Ph.D. dissertation, Rutgers University) (on file with Rutgers University Libraries).

23. Cyrus R. Vance Center for International Justice et al., *supra* note 8, at 3 (“[p]rolonged and indefinite solitary confinement should be prohibited under all circumstances”).

24. Inter-Am. Comm’n on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, ¶ 411, OEA/Ser/L/V/II, Doc. 64 (Dec. 31, 2011). *See also* Inter-Am. Comm’n on Human Rights, *Resolution 1/08: Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII, §3 (Mar. 13, 2008).

Additionally, the Commission stated that solitary confinement should never last for more than 30 days.²⁵ The European Court also declared that sensory and social isolation can “destroy the personality,” and it cannot be justified for any reason.²⁶ And yet, it is still regularly used in the United States. In New York State alone, 1600 women cycle through solitary confinement every year.²⁷ According to the Bureau of Justice Statistics, twenty percent of inmates in the U.S. in 2011 over 320,000, had spent time in solitary over one twelve-month period.²⁸

Experts and researchers alike agree that solitary confinement can have lasting harmful effects.²⁹ Physical effects such as deterioration of eyesight, insomnia, heart palpitations, and lethargy are not uncommon among prisoners in solitary confinement.³⁰ The laundry list of psychological harms is much longer, including anxiety, depression, anger, cognitive disturbances, self-harm, suicide, hallucinations, psychosis and paranoia, and, furthermore, undiagnosed mental illnesses and prior history of psychological disorders can be aggravated or triggered by solitary confinement.³¹ Solitary confinees in New York City jails were seven times more likely to harm themselves than those prisoners in the general population, and this was even more common among young and mentally ill prisoners.³² In one year in California, 73% of all suicides among the incarcerated population occurred in isolation units.³³

“A decade ago, the Bureau of Justice Statistics estimated that 56% of people in state prisons had some [diagnosis] of mental illness.”³⁴ Because placing people with a preexisting mental illness in isolated housing can increase the risk of psychiatric deterioration, violence, self-injury, and suicide, the American Psychiatric Association has advised against segregating individuals with mental illness, as has the American Public Health Association and the National Commission on Correctional Health Care.³⁵ Proposed legislation also calls “for screening individuals and imposing limits on isolation for individuals with

25. *Id.*

26. Inter-Am. Comm’n on Human Rights, Report on the Human Rights of Persons Deprived of Liberty in the Americas, *supra* note 23, ¶ 416.

27. Annie Brown, *Behind Deborah’s Story: Women in Solitary Confinement*, MEDIUM (Nov. 5, 2015), <https://medium.com/aj-story-behind-the-story/behind-deborah-s-story-25bc99e9d5fc> [<https://perma.cc/U5NH-UL25>].

28. Beck, *supra* note 12.

29. American Civil Liberties Union, *Worse Than Second Class, Solitary Confinement of Women in the United States* (2014), https://www.aclu.org/sites/default/files/field_document/worse_than_second-class.pdf [<https://perma.cc/4ZGD-UF2T>].

30. Chowdhury, *supra* note 21, at 19-20.

31. *Id.*

32. Cyrus R. Vance Center for International Justice et al., *supra* note 8, at 11.

33. *Id.*

34. Ass’n of State Correctional Administrators et al. *supra* note 11, at 11.

35. *Id.*

mental illness.”³⁶ Solitary confinement is not good for mental health overall, and is devastating for prisoners with already fragile mental health.

Findings have also been inconsistent about the effectiveness of solitary, confirming what the Quakers had already discovered 200 years ago. The American Bar Association’s Criminal Justice Standards on the Treatment of Prisoners recommend that “only the most severe disciplinary offenses, in which safety or security are seriously threatened, ordinarily warrant a sanction that exceeds [30 days] placement in disciplinary housing, and *no placement in disciplinary housing should exceed one year.*”³⁷ Representatives of all segments of the criminal justice system debated and came to consensus on these standards.³⁸

Most women’s facilities today have some form of solitary confinement. In many isolation units, women complain about a complete lack of privacy, from their toilets being visible from the cell door, to being watched by guards, often male guards, while showering, dressing, or even using the toilet. Ironically, one can be deprived of all human contact and at the same time, be deprived of personal privacy. In California, when the women complain about the guards watching them shower, the guards turn off the water.³⁹ In New York, one researcher stated that all but one of the women in solitary complained that they never received enough sanitary napkins when menstruating.⁴⁰ One prisoner in Indiana who has spent nearly five years in solitary, had her cell searched every single day by guards, despite the fact that she was strip searched every time she left the cell.⁴¹

II. HOW WOMEN END UP IN PRISON AND HOW THEIR EXPERIENCE IN PRISON IS UNIQUE TO WOMEN.

In 2014, the U.S. incarcerated over 215,000 women, a number that is 700% greater than it was in 1980.⁴² While still only 7 percent of the overall incarcerated population in the U.S., the number of women has grown far more quickly than the male prison population.⁴³ Black and Latina women are being locked up in

36. *Id.*

37. ABA Standards for Criminal Justice Treatment of Prisoners § 23-4.3 (3d edition) (Am. Bar Ass’n 2011) (emphasis added).

38. *Peoples v. Fischer*, 898 F. Supp. 2d 618, 620-21 (S.D.N.Y. 2012).

39. VICTORIA LAW, *RESISTANCE BEHIND BARS: THE STRUGGLE OF INCARCERATED WOMEN* 7 (PM Press 2009).

40. Brown, *supra* note 26.

41. Victoria Law, *Women in Solitary Confinement: “The Isolation Degenerates Us into Madness,”* Solitary Watch (Dec. 11, 2013), <http://solitarywatch.com/2013/12/11/women-solitary-confinement-isolation-degenerates-us-madness/> [<https://perma.cc/R7RK-FEU6>].

42. *Fact Sheet: Incarcerated Women and Girls* 1, THE SENTENCING PROJECT (Nov. 2015) <http://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/8KMU-YFZ5>].

43. *Id.* See also *Prisoners in 2014 Summary*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14_Summary.pdf [<https://perma.cc/QYU4-T3AV>] (corroborating that women make up 7 percent of the prison population).

disproportionate numbers. The Bureau of Justice statistics found that while one in every 1,099 White women has been to prison, among Black women, the number increases to one in every 300, and amongst Latina women, one in every 704.⁴⁴ Almost a million women serve probationary sentences, under the control of corrections departments but not behind bars.⁴⁵ Women's experience and concerns rarely surface in prison reform. In sheer numbers, women are nearly invisible, unless one happens to be one of those 215,000 who are currently incarcerated.

63 percent of crimes committed by women relate to nonviolent property, drugs, and public order, while only 45 percent of crimes committed by men are nonviolent.⁴⁶ In Oklahoma, a full 85 percent of all incarcerated women were charged with property crimes or drug crimes, all non-violent crimes.⁴⁷ The type of crimes committed and their causes differ between men and women. In 1917, after extensive research, scholar Alberta Guibord published the results of a study demonstrating that adverse socio-economic conditions were the primary risk factor for women's offending.⁴⁸ One hundred years later, the hypothesis remains. "Poverty is the dominant reason women commit crimes, whether it's sex work, welfare fraud, or drug offenses."⁴⁹ Women have experienced "mean lives" of abuse and poverty, suffering at the hands of individuals as well as society.⁵⁰ Both physical and sexual abuse in childhood play a driving force in female offending.⁵¹

Since 1992, Kathleen Daly has written about a "feminist pathways approach" to studying women and crime.⁵² The feminist pathways approach focuses on "how abuse and oppression of women and girls narrows their options and may place them on a trajectory where crime may be the most logical response."⁵³ Adverse Childhood Experience studies (ACEs) demonstrate that adverse events during childhood lead to cognitive, emotional and social

44. LAW, *supra* note 38, at 1.

45. *Fact Sheet: Incarcerated Women and Girls*, *supra* note 41.

46. *Id.*

47. Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 WIS. J. L. GENDER & SOC'Y 281, 293 (2012).

48. Joanne Belknap, "Offending Women": A Double Entendre, 100 n. 3, 100 J. CRIM. L. & CRIMINOLOGY, 1061, 1081 (2010).

49. Sarah Shourd, *How Solitary Confinement Destroys Women*, DAILY BEAST (May 26, 2014), <http://www.thedailybeast.com/articles/2014/05/26/how-solitary-confinement-destroys-women.html> [<https://perma.cc/UW6J-WPZ7>].

50. Wynn, *supra* note 46, at 285-86.

51. SUSAN F. SHARP, *MEAN LIVES, MEAN LAWS: OKLAHOMA'S WOMEN PRISONERS* 12 (Rutgers University Press, 2014).

52. *Id.* at 13. Daly identifies five pathways into crime for women: 1) women who ran away or were turned out of their home at an early age developed survival skills that often were criminal such as prostitution and theft; 2) those who had been the victims of childhood abuse began using drugs to cope with their abuse and often acted out violently; 3) battered women who had not been involved in crime or drug abuse early in their lives sometimes became violent, especially towards their abusive partners; 4) Involvement with drugs through relationships with males; and 5) Involvement with crime through commission of economic crimes, often motivated by poverty.

53. *Id.* at 12.

impairments.⁵⁴ While the original CDC-Kaiser Permanente study about ACEs sought to understand the connection between adverse experiences and trauma in childhood with adult risky behavior, especially related to health, research has also connected adverse childhood experiences and incarceration.⁵⁵ The more adverse experiences a woman has as a child, the more social problems, mental health problems and physical health problems she is likely to experience as an adult.⁵⁶ She also is more likely to engage in risky behavior as an adult.⁵⁷ Women with five or more adverse childhood experiences are 7-10 times more likely to use illegal drugs. The ACE studies do not seek to understand a single traumatic experience in a person's life, but rather, the "systemic nature of family dysfunction that predicts risky behaviors that are in turn used to diminish the emotional pain that has resulted from adverse experiences."⁵⁸ While only 7 percent of middle class women registered four or more adverse experiences, 49.5 percent of incarcerated women registered a four or higher.⁵⁹ Further, with each point increase in the ACE score, the probability of having a diagnosis of bipolar disorder or PTSD even before entering prison increased by 26 and 37.9 percent respectively.⁶⁰

Across the board, studies show that incarcerated women have an extremely high incidence of prior victimization. At Logan Women's Correctional Center in Illinois, 75 percent of the women report having been a victim of sexual abuse or assault in their lives and a staggering 90 percent state that they have been a victim of violence at some point in their lives.⁶¹ As Susan Sharp wrote in *Mean Lives, Mean Laws*, "we do not do a good job protecting or intervening with this population during childhood. They are frequently victimized, and they are not given tools to deal with that victimization."⁶² This is important for understanding not only some of the factors that contribute to women committing crimes, but also their behavior while in prison. Women's emotional and psychological health are not reset to zero when incarcerated. All of their histories, their coping mechanisms and learned survival skills accompany them and are, in fact, exacerbated in the controlled, stressful environment of prison.

Not only do adverse childhood experiences play a huge factor in women's incarceration, but mental illness and other stressors such as family

54. *Id.* at 17. See also CTR. FOR DISEASE CONTROL AND PREVENTION, CDC ON ADVERSE CHILDHOOD EXPERIENCES (ACEs), <https://www.cdc.gov/violenceprevention/acestudy/> [<https://perma.cc/6VG7-U9QA>].

55. Wynn, *supra* note 46, at 285-86.

56. SHARP, *supra* note 50, at 17.

57. *Id.*

58. *Id.* at 18.

59. Wynn, *supra* note 46, at 285.

60. *Id.* at 285.

61. ALYSSA BENEDICT & DEANNE BENOS, THE GENDER INFORMED PRACTICE ASSESSMENT (GIPA), SUMMARY OF FINDINGS AND RECOMMENDATIONS 4, (Nov. 2016), available at <http://www.thejha.org/sites/default/files/GIPA%20SUMMARY%20November%2018%202016.compressed.pdf> [<https://perma.cc/4XPP-UCCD>].

62. SHARP, *supra* note 50, at 63.

responsibilities and physical health affect their well-being. 58 percent of women prisoners in Illinois were on the mental health caseload while only 25 percent of the men were.⁶³ Sixty percent of the women suffer from Post Traumatic Stress Disorder⁶⁴ and a staggering 85 percent of them reported regular drug use by the age of 15.⁶⁵ Moreover, inmates with mental health problems have a higher incidence of self-harm, including suicide.⁶⁶ Not only is prison not likely to provide the treatment and care they need, but in the highly controlled prison environment, they are also more likely to have difficulty conforming to the rules, thus increasing their risk of being sent to isolation or solitary confinement.⁶⁷

Finally, women enter prison with adverse childhood experiences, mental illness and mental health vulnerabilities, and a whole host of actual problems that they cannot resolve from behind bars. At least 60 percent of women prisoners have children under 18, and many care for other family members too.⁶⁸ When men go to prison, their children remain in the care of their mother or another relative. When women go to prison, children are frequently dispersed among friends and family or put into foster care. Besides bearing the weight of guilt for “abandoning” their children, mothers are also concerned about the ongoing care of their children. Judgment, self-judgment and anxiety weigh heavily. Often single parent heads of households, they will likely lose their home or apartment and all of their belongings as well as personal documents while incarcerated.

In prison, women do not have the freedom to come and go, to make decisions, to parent, to speak freely, or to choose with whom they will live. Compounding these stressors are a profusion of outside pressures from worry about family, fear of being judged by their children, family and community, already existing mental health issues, to trauma-triggered coping mechanisms. These factors can make conforming to the restrictive environment and rules even more difficult for women.

III. Women are sent to solitary for not embodying gender stereotypes and for not following rules made for men.

“Reckless eyeballing,” “mouthing off,” and fighting can all land a woman prisoner in solitary. While some infractions may put the security of other prisoners and staff at risk, women generally go to solitary confinement for minimal infractions, for behavior triggered by mental illness, anxiety about

63. BENEDICT & BENOS, *supra* note 60, at 5. See also Joanna E. Saul, *This Game is Rigged: The Unequal Protection of Our Mentally-Ill Incarcerated Women*, 5 MOD. AM. 42 (2009) (showing that 73 percent of women in state prisons actually have a mental health problem, as compared to 55 percent of male state inmates).

64. *Id.* at 16.

65. *Id.* at 5.

66. Saul, *supra* note 62, at 43.

67. Alexander, *supra* note 8, at 13.

68. Nicholas Kristof, *Mothers in Prison: “Prison got me sober, but it didn’t get me anywhere.”*, N. Y. TIMES, (Nov. 25, 2016), http://www.nytimes.com/2016/11/25/opinion/sunday/mothers-in-prison.html?_r=0 [<https://perma.cc/5MYX-ZRMC>].

family on the outside, withdrawal from drugs, or as retaliation for filing a complaint against a guard. For these frequently minor infractions, 20.4 percent of female prisoners reported spending time in restrictive housing over a 2-year period.⁶⁹

For women, age, race, and level of education play important roles in characterizing the women who most frequently go to solitary, while for men, the strongest factor characterizing the men who go to solitary is the type of crime he committed.⁷⁰ Women comprise only 7 percent of the general prison population, but they are disciplined at higher rates than men.⁷¹ This begs the question of whether women have a higher incidence of acting out in prison, or, are just more likely to be disciplined for certain behaviors once behind bars. One study from Rhode Island measured the quantity of infractions, the severity and type of the infraction as well as the staff members that reported them.⁷² Male prisoners averaged 1.9 disciplinary infractions annually, while the female prisoners committed 6.83 disciplinary infractions per year.⁷³ Eighty-two percent of the infractions were nonviolent, combining 59 percent for “disobedience” and another 23 percent for “contraband, vandalism, substance abuse, and sexual misconduct.”⁷⁴ Women of color, overrepresented in the prison population, are also overrepresented in solitary confinement; most likely, because they do not conform to the behavior expected of (White) women and are often perceived as aggressive or unfeminine.⁷⁵

69. Beck, *supra* note 12, at 4.

70. Angela R. Gover, Deanna M. Pérez & Wesley G. Jennings, *Gender Differences in Factors Contributing to Institutional Misconduct*, 88 THE PRISON J. 378, 393-394 (2008).

71. PRISONERS IN 2014 SUMMARY, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14_Summary.pdf [https://perma.cc/4NVJ-ZWRV]. See also Beck, *supra* note 12 (while 17.9 percent of men report spending time in solitary, that number rises to 20.4 percent for women).

72. Donna Collins & Carole Dwyer, *RIDOC's Journey Towards a More Gender Responsive, Trauma Informed Code of Discipline*, Rhode Island Department of Corrections (2016) (unpublished panel presentation and powerpoint citing statistics from FY 2011).

73. Collins, *supra* note 71, slide 9.

74. Collins, *supra* note 71, slide 11. See also Beck, *supra* note 12, at 4 (corroborating that 17.9 percent of male prisoners and 20.4 percent of female prisoners reported spending time in restrictive housing in 2011-12).

75. Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 634 (2008). Diverse studies indicate that women of color are disproportionately represented among prisoners in solitary. In a study coauthored by the Association of State Correctional Administrators and the Arthur Lima Program at Yale Law School, black women made up 41 percent of those in punishment, although they only comprised 24 percent of the prison population. (Ass'n of State Correctional Administrators, *supra* note 11, at 39). Among both men and women, black prisoners were 30 percent more likely to have a disciplinary action against them, and 65 percent more likely to be sent to solitary. (Race & Just. News, *Black Women Overrepresented in Solitary Confinement* 3, THE SENTENCING PROJECT, Dec. 16, 2016, <http://www.sentencingproject.org/news/race-justice-news-black-women-overrepresented-solitary-confinement/> [https://perma.cc/A5FJ-RMAK]). See also Chowdhury, *supra* note 21, at 87-88 (finding that white female prisoners were more often disciplined for drugs, contraband, and disobeying orders, while black women prisoners

Do women actually commit more infractions? Women are still held to standards that will punish them for “offending the collective morality.”⁷⁶ Men should not use drugs or commit crimes, but are not judged in the same manner. Women who use drugs and commit crimes are seen with distrust and disdain, especially if they are mothers.⁷⁷ The prison system was designed by men and for men. Solitary confinement and disciplinary policies generally also come in a one-size-fits-all package. However, gender-neutral in a system designed for men is not gender-neutral. Women are expected to respond to control, restriction and orders in a top-down hierarchical system the way men are expected to respond, except they were not conditioned as men.⁷⁸ “Guards complain that women ask ‘why?’ in response to a command they don’t understand.”⁷⁹

In addition to expectations that women conform to men’s behaviors and rules, women respond differently to rules made for a masculine prison system not only because they are not men and have not been socialized in the same manner, but also because many women have spent their lives being dominated or controlled by society, by men, and by gender expectations. For a woman, keeping her mouth shut and pretending that she agrees with a statement might be what pushes her over the edge after conforming and keeping silent for so long. Harsh treatment of women may be what caused her arrest in the first place, but it also contributes to her isolation in solitary, and can be used to control her for “failing to conform to societal standards of femininity.”⁸⁰

Women prisoners who stand up to the system often face “extreme levels of administrative harassment” such as strip-searches, cell searches, and solitary confinement.⁸¹ Women are once again reminded that their autonomy is extremely limited, and their bodies are not their own to control. In his work on power, violence and resistance in women’s prisons, Phil Scraton states that

“the coercive removal of prisoners’ clothes amounts to a symbolic enactment of the stripping of rights that accompanies imprisonment . . . particularly resonant as an identity-stripping and negating act for women who so often have their identities and rights stripped through sexual assault outside prison. Subjected to the isolation of ‘time-out cells’, ‘special segregation’ or ‘special care units’, women prisoners’ daily lives are diminished by confinement

were more likely to be sent to solitary for verbal and physical assaults against other prisoners or against guards). Further research is needed to understand why black women are disproportionately represented in solitary, whether this is related to them being more frequently targeted for disciplinary infractions, reacting to injustices within the prison system, not recognizing the authority of guards, or for other reasons.

76. SHARP, *supra* note 50, at 3.

77. *Id.*

78. SILJA J. A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* 19 (Seal Press 2007).

79. *Id.*

80. Arrigo & Bullock, *supra* note 74, at 634.

81. Phil Scraton, *Bearing Witness to the ‘pain of others’: Researching Power, Violence and Resistance in a Women’s Prison*, 5 INT’L J. CRIME JUST. SOC. DEMOCRACY 5, 10 (2016).

in a ‘prison within a prison’, where the ‘ultimate regulation of the female body’ is painfully administered.”⁸²

A. Women get sent to solitary for answering back, spitting, fighting among themselves, and “being mouthy”.

Biased expectations of how women should behave often create a different standard for behavior deemed worthy of punishment or isolation. Women cite disobeying orders, creating a disturbance, being out of place, spitting, fighting with other prisoners, profanities, and even attempted suicide as some of the reasons they are “locked down.”⁸³ While men might be locked down for similar behavior, they are more often sent to solitary for allegedly attacking guards or participating in gangs.⁸⁴ Men are more likely to commit assaults against other prisoners or guards.⁸⁵ Women are more often cited for rule breaking, stealing from other prisoners and verbal abuse.⁸⁶ Prisons punish women for not conforming to rules designed for men, and at the same time they punish women for not conforming to roles expected of women. Prisons “punish women who fail to subscribe to a model of femininity that historically has been (re)produced in discourse as white, pure, passive, heterosexual, and located in motherhood. When women operate outside of this model, even slightly, they are disciplined harshly for doing so.”⁸⁷ Women with mental illness have more difficulty conforming to the behavioral expectations of staff, because they operate outside of the “gender-neutral” norms for prison, but also fail to conform to gender-specific expectations for women.⁸⁸

B. Suicide attempts, self-harming and other manifestations of mental illness can also lead to solitary.

Women with mental illness often struggle to conform to the tight control and regulations imposed in prison, and they can be sent to solitary for operating outside expected norms. Seventy-seven percent of women and thirty-three

82. *Id.* at 10.

83. Victoria Law, *Women in New York State Prisons Face Solitary-Confinement or Shackling while Pregnant or Sick*, Solitarywatch.org (Feb. 16, 2015), <http://solitarywatchcom/2015/02/16/women-in-new-york-state-prisons-face-solitary-confinement-and-shackling-while-pregnant-or-sick/> [https://perma.cc/9DDC-N2NV]. See also Cassandra Shaylor, *It's Like Living in a Black Hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 394 (demonstrating that women are far more likely than men to be sentenced to solitary for minor infractions and for subscribing to expected roles of femininity). See also TALVI, *supra* note 77, at 134-35.

84. Shaylor, *supra* note 82, at 394.

85. Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1, 33 (2003).

86. *Id.*

87. Shaylor, *supra* note 82, at 6.

88. Shourd, *supra* note 48.

percent of men in solitary were diagnosed as mentally ill in one Florida report.⁸⁹ Additionally, women are sent to solitary for self-harming activities and attempted suicide, as these behaviors “violate” the norms established in prisons. In one study, 25 percent of the women in solitary cited self-injurious behavior, such as self-cutting, attempted suicide, or even setting their pants on fire, as the reason they were sent to segregation.⁹⁰ Segregation will not resolve whatever triggered the self-harming behavior. More frequently, solitary confinement exacerbates the stress and worsens self-destructive behavior. For women who self-mutilate daily, cutting can be a coping mechanism or even an act of resistance to “counteract the negated self that results from the subhuman conditions” of solitary.⁹¹ One prisoner told a story of being sent to segregation for “disruptive behavior” but while in segregation, her mental illness caused behavior that just kept compounding and extending her time in solitary.⁹² She cut her wrists, was sewn up, and upon returning from the hospital, her solitary time was increased by 30 days because of the attempted suicide.⁹³

Often prison guards are not prepared to deal with serious mental illness, and react to incarcerated women’s emotionally disturbed outbursts in ways that aggravate situations.⁹⁴ Too often, prisons respond to behaviors that clearly signal mental illness, such as an inmate covering herself in feces, talking to herself, or experiencing paranoid delusions, with medicalization and punishment.⁹⁵ Psychiatric medicines are prescribed and distributed but actual therapy and treatment is hard to come by. Remembering that the vast majority of women prisoners brings a history of violence and abuse to prison with them and that the incidence of mental illness is higher in the prison population, medicating a person as a means of changing her behavior will not resolve her struggles.

Women demonstrate a strong correlation between mental illness and “disruptive” behavior in prison. Mentally ill prisoners not only experience more disciplinary problems because of their difficulty in conforming to regulations and controlled environments, but prison can also trigger behavioral issues and even psychopathology, especially among trauma survivors.⁹⁶ In prison, women face regular violation of their space and their bodies as cell searches and strip searches become part of the routine. Women who take psychiatric medications have disciplinary infractions twice as often as men and even as “nondisordered” females.⁹⁷ Historically, women have been medicated more quickly and more freely for symptoms that are the same as men who are not medicated.⁹⁸ It is

89. Joseph B. Allen, *Extending Hope into “The Hole”*: Applying *Graham v. Florida* to *Supermax Prisons*, 20 WM & MARY BILL RTS. J. 217, 226 (2011).

90. Martel, *supra* note 1, at 203-04.

91. *Id.* at 203.

92. Law, *supra* note 40.

93. *Id.*

94. TALVI, *supra* note 77, at 134.

95. Shaylor, *supra* note 82, at 393.

96. Richard C. McCorkle, *Gender, Psychopathology, and Institutional Behavior: A Comparison of Male and Female Mentally Ill Prison Inmates*, 23 J CRIM. JUST. 53, 54 (1995).

97. *Id.* at 57.

98. *Id.* at 60.

highly possible that disruptive women are more quickly labelled as disturbed and subsequently put on psychiatric medications.⁹⁹ Female prisoners currently on psychotropic medications had infraction rates that were twice that of other women prisoners.¹⁰⁰ At Bedford Hills Correctional Facility in New York, a full 80 percent of the “unusual incident reports” involved women that were on the active mental health caseload.¹⁰¹ At Logan Women’s Prison in Illinois, the John Howard Association documented that more than 50 percent of the women in segregation were receiving mental health treatment.¹⁰² In the Rhode Island study, 74 percent of the women with the highest number of days in segregation were diagnosed Seriously Mentally Ill (SMI).¹⁰³

Some theorists have begun to discuss when mental illness causes nonconformity with regulations and disciplinary infractions, and when multiple disciplinary infractions or disruptive behavior cause a prison to label or diagnose a prisoner as mentally ill.¹⁰⁴ While the prison system cannot simply tolerate disruptive behavior, solitary confinement cannot be an appropriate response to a seriously mentally ill prisoner who is likely to decompensate when tossed in a cell with no contact with other human beings, no activity and no help. The discussion must consider more than disruption control; in fact, it must consider the mental and emotional pain of seriously mentally ill inmates in a manner that will not only keep the prison safe, but will also provide the health care the prisoner needs.

C. Worrying about her family can sometimes get a woman into trouble, and at other times, keep her from getting into trouble.

Concern about one’s family, especially children can be both a cause and a deterrent for segregation. Because phone calls and visits are rare or even impossible when a prisoner is in solitary confinement, sometimes having children gives women the self-discipline to hold back when they would like to respond or react to a situation.¹⁰⁵ They do not want to risk access to their children, even if only by telephone. However, separation from one’s children and loved ones, and worry about their well-being, can also be major stressors in

99. *Id.*

100. Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, 39 (2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> [<https://perma.cc/BJ2F-FAF4>].

101. *Id.*

102. Gwyneth Troyer, *JHA Special Prison Monitoring Report: Overcrowded, Underresourced, and Ill-Conceived: Logan Correctional Center, 2013/14*, 27 (2013-2014), <http://thejha.org/sites/default/files/Logan%20Correctional%20Center%20Report%202013-2014.pdf> [<https://perma.cc/XM8V-5X3Q>].

103. BENEDICT & BENOS, *supra* note 60, at 13.

104. *See* McCorkle, *supra* note 95, at 60.

105. *See* Chowdhury, *supra* note 21, at 71.

a woman prisoner's life that sometimes cause her to adjust poorly to prison and incur disciplinary infractions.¹⁰⁶

D. Solitary confinement can also be used in retaliation against a prisoner for filing a complaint or reporting sexual assault.

Women who report staff sexual misconduct frequently get sent to segregation pending an institutional investigation of the case.¹⁰⁷ Sometimes the prison alleges that she is in solitary for her "protection;"¹⁰⁸ at other times, they justify solitary as a disciplinary measure because of the illegal sexual contact. In Denver, a woman reported that the prison created a disciplinary infraction called "False Reporting to Authorities" to discourage prisoners from reporting sexual abuse.¹⁰⁹ They might fear not being able to prove an allegation and receiving a punishment instead. Former prisoner Sunday Daskalea won a \$350,000 settlement of compensatory damages because of sexual abuse suffered while incarcerated. When she first complained, however, she was placed in solitary and deprived of all of her belongings.¹¹⁰ A court found her complaint credible.

Women are placed in solitary as punishment for "lying about the sexual assault"¹¹¹ while frequently, the guard receives a light disciplinary infraction, or is simply transferred to another prison.¹¹² In New Mexico, an inmate spent 100

106. *Id.* at 90-91. *See also* Gover, Pérez & Jennings, *supra* note 69, at 392-93 (Sept. 2008) (being separated from minor children can produce greater levels of stress and guilt, which can cause women to act out more in the prison setting).

107. Victoria Law, *Women in Solitary: Sent to Solitary for Reporting Sexual Abuse*, SOLITARY WATCH (Dec. 12, 2013), <http://solitarywatch.com/2013/12/12/women-solitary-confinement-sent-solitary-reporting-sexual-assault/> [<https://perma.cc/CK2Z-DWYE>].

108. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASSOCIATION OF NEW YORK, 148 (2015), <http://www.correctionalassociation.org/wp-content/uploads/2015/03/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> [<https://perma.cc/Y63B-ZFHJ>].

109. Law, *supra* note 106.

110. *Daskalea v. D.C.*, 227 F.3d 433, 438-39 (D.C. Cir. 2000) (Daskalea was sexually assaulted a number of times while incarcerated, and on one occasion, she was dragged from her cell and forced to perform a striptease before guards and inmates and was again sexually assaulted. When she finally spoke up, her underwear was confiscated as "evidence" and she was placed in solitary). *See also* *Ortiz v. Jordan*, 562 U.S. 180, 185-88, (2011) (after filing a complaint of sexual assault against a guard, Ortiz charged that she was placed, shackled and handcuffed, in solitary confinement in a cell without adequate heat, clothing, bedding, or blankets, in retaliation for filing complaints. A jury returned a guilty verdict against two staff members, and granted her \$625,000 in compensatory and punitive damages).

111. Matthew Clarke, *ACLU Report: Women Uniquely Harmed by Solitary Confinement*, PRISON LEGAL NEWS (May 5, 2016), <https://www.prisonlegalnews.org/news/2016/may/5/aclu-report-women-uniquely-harmed-solitary-confinement/> [<https://perma.cc/NPV5-8ALS>].

112. Andrew Mannix, *Prison sex-abuse cases grow, but prosecutions are rare*, THE SEATTLE TIMES, Aug. 2, 2015, (citing multiple cases of prison guard culpability with minimal sentencing and additional data on limited investigation of allegations and prosecutions) <https://www.seattletimes.com/seattle-news/prison-sex-abuse-cases-grow-but-prosecutions-are-rare> [<https://perma.cc/MW86-SG73>].

days in solitary for “lying about multiple staff sexual assaults.”¹¹³ However, a court eventually found her claim credible and awarded her damages in a civil rights lawsuit.¹¹⁴ Another woman complained because a male officer watched her while she took a shower, and she was subsequently sent to solitary for filing the complaint.¹¹⁵ In a case reported in Illinois, a prison administrator threatened to add a year to a woman’s prison sentence when she attempted to report multiple staff sexual assaults.¹¹⁶ Lisa Jaramillo spent 100 days in solitary in New Mexico, for “lying” about a sexual assault, which was later found to be true.¹¹⁷ Finally, former staff from a women’s prison in Ohio stated that guards threatened women who reported sexual abuse and then forced them to spend long periods in solitary, often in cells that had feces and blood smeared on the walls.¹¹⁸

Additionally, prisoners who complain about conditions of their confinement, about lack of access to healthcare or even in defense of other prisoners, are often placed in solitary as a retaliation for the complaint. One inmate spent five weeks in solitary because she complained about the medical department’s failure to supply her cancer medication.¹¹⁹ Sending women to solitary for filing complaints in general, but especially for reporting sexual abuse is an effective measure for reducing the number of complaints filed. It creates a strong disincentive for speaking up about abusive incidents.¹²⁰

IV. *Being in solitary confinement can have profound and damaging impact on women.*

*“I contend that social controls are exercised on women **as women** and that women therefore experience segregation **as women**. Thus, the way in which women make sense of, and give meaning to, their own experiences of segregation will be partly influenced by their relative position in embedded social definitions and practices.”¹²¹*

The Revised UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) state that indefinite and prolonged solitary confinement “shall be prohibited.”¹²² Two hundred years ago, the Quakers perceived that prolonged isolation caused mental disturbances, but solitary confinement is alive and well in the U.S. prison system. While the impact of solitary confinement is damaging to both male and female prison populations, women feel the impact differently

113. *Id.*

114. *Id.*

115. TALVI, *supra* note 77, at 132.

116. Law, *supra* note 106.

117. Clarke, *supra* note 110.

118. Law, *supra* note 106.

119. Clarke, *supra* note 110.

120. *Id.*

121. Martel, *supra* note 1, at 198 (emphasis in original).

122. G.A. Res. E/CN.15/2015/L.6/Rev.1, annex, The Nelson Mandela Rules (May 18-22, 2015), http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf [https://perma.cc/A62Y-SG6G].

than men. Women confined in segregation suffer a deterioration of their mental and physical health, generally lose contact with their families and find themselves at a much higher risk for abuse by prison guards.

A. Solitary confinement causes mental illness and exacerbates already existing mental illness.

Whether a person's mental illness is preexisting or caused by solitary confinement cannot always be measured, but researchers and prisoners alike have no questions about how isolation makes any person's mental health worse. According to the American Civil Liberties Union, 75 percent of incarcerated women have some degree of mental illness.¹²³ Even a healthy adult risks suffering "severe psychological debilitation" when forced to undergo sensory deprivation, total lack of activities, and the absence of human interaction, but a person with a mental illness will deteriorate far more quickly.¹²⁴ Solitary confinement not only triggers latent mental illness, or inflames anxiety, depression and other mental illness that had been kept under control, but it also causes mental illness. Eighty percent of incarcerated women have suffered physical or sexual abuse at some point in their lives.¹²⁵ This affects their emotions, their coping mechanisms, their fears, and their general reactions to their environment. Often the total lack of power to make any decisions in their lives and the constant surveillance by male guards can "retraumatize survivors and trigger flashbacks, anxiety, and depression."¹²⁶ Anger, depression, anxiety, fear, and paranoia, the emotions that are common in solitary, are much stronger for women with mental illness, and with no supportive resources, they can intensify quickly.¹²⁷

The American Bar Association recommends that no prisoner with a serious mental illness be placed in long-term segregation. However, women with severe mental health issues often find themselves in solitary exactly because they are incapable of conforming to prison norms.¹²⁸ In effect, they are punished severely for behavior that is beyond their control.¹²⁹ It is not only that sometimes they are not capable of avoiding disruptive behavior, but the State's action of placing them in solitary can also intensify their illness and cause severe emotional distress.¹³⁰

A U.S. district court in California found that continued confinement of prisoners who are mentally ill or prisoners who are at risk of suffering severe mental illness because of the conditions in solitary was cruel and unusual

123. Shourd, *supra* note 48.

124. *Id.*

125. *Id.*

126. Kraft-Stolar, *supra* note 107, at 148.

127. Shourd, *supra* note 48.

128. Amy Fettig, *Women Prisoners Altering the Cycle of Abuse*, 36 AMERICAN BAR ASSOCIATION: HUM. RTS. 1, 3 (2009).

129. Shourd, *supra* note 48.

130. Fettig, *supra* note 127, at 3.

punishment in violation of the Eighth Amendment.¹³¹ Utilizing the *Farmer v. Brennan* standard, the court held that while every prisoner in solitary confinement lived under harsh conditions, this did not necessarily rise to the level of cruel and unusual punishment.¹³² However, the court found that the prison administrative acted with *deliberate indifference* with respects to mentally ill prisoners in solitary, having *actual subjective knowledge* that the conditions created a *substantial risk of harm*.¹³³ (emphasis added).

One prisoner who spent years in solitary described her experience of other inmates' suffering. She said, "I watched a woman claw chunks out of her cheeks and nose and write on the wall with her blood . . . My neighbor bashed her head against the concrete until officers dragged her out to a padded cell."¹³⁴ She described other situations, calling attention to the fact that a woman in solitary not only must cope with her own emotional well-being regarding the isolation, but may also suffer second-hand trauma through the experiences of her fellow prisoners.¹³⁵

Women in solitary confinement are at a far greater risk of self-harm and suicide than women in the general population. Women prisoners are likely to suffer mental illness, have a high frequency of adverse childhood experiences, and often, because of experiences of trauma and violence, are more vulnerable to developing mental illness under the harsh conditions of solitary. Self-harming is common among women in solitary. Sometimes they use self-harm as a coping mechanism to counteract solitary and remind themselves that solitary is not all there is, that they are legitimate persons even in total isolation, and that they are real.

Many women release their anger and frustration at the situation by self-inflicted injuries or even attempts at suicide.¹³⁶ Almost half of all successful suicides in prison are committed by prisoners who have spent time in solitary.¹³⁷ While one could question whether the solitary confinement provoked the suicide or whether prisoners who are suicidal are more likely to end up in solitary, the correlation between the two is unquestionable. Women in solitary might be more prone to violence or more dangerous, but studies show that the violence is more

131. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-67 (N.D. Cal. 1995) (holding that those prisoners already mentally ill were at such high risk of severe injury when placed in solitary, that it was "the mental equivalent of putting an asthmatic in a place with little air to breathe." The court further held that "the risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.'").

132. *Id.* at 1266-67.

133. *Id.*

134. Law, *supra* note 40.

135. *See Madrid*, 889 F. Supp. at 1223 (recognizing that not only do the "severity of the environment and restrictions in the SHU (often) cause mentally ill inmates to seriously deteriorate; (but) other inmates who are otherwise able to psychologically cope with normal prison routines may also begin decompensating in the SHU.").

136. Shaylor, *supra* note 82, at 397.

137. Clarke, *supra* note 110.

often turned against themselves, and they are most dangerous to themselves.¹³⁸ Almost half of the prisoners in solitary are estimated to be mentally ill, and of that half, nearly half attempt suicide at some point during their incarceration.¹³⁹ As Silja Talvi expressed in *Women Behind Bars*, “confining a suicidal inmate to their cell 24 hours a day only enhances isolation and is antitherapeutic.”¹⁴⁰ Finally, not only does solitary contribute to the pain and anguish of prisoners in general and especially prisoners with mental illness, but the State punishes emotional decompensation and self-harm by adding to a person’s time in solitary, rather than providing help.¹⁴¹

The emotional scars of solitary confinement, especially for women already living with mental illness, often endure far beyond their last day in solitary and sometimes even permanently. Women who have spent time in solitary manifest emotional and even physical fallout long after they are released from prison. Criminologist Joane Martel studied these effects in formerly segregated women and found that many of them developed agoraphobia, panic disorder, and “difficulty being in crowded or noisy rooms.”¹⁴² She stated that long-lasting effects even after release from solitary include “invalidating stigmas, relived abuse, uncontrollable paranoia or anxiety. . . (and) difficulties with sexual intimacy” among other effects, and that these feelings seem to have “reconstructed or reshaped (their) self-images.”¹⁴³ Furthermore, solitary confinement can trigger a cycle of behavior or difficulty in coping that results in a return to solitary, or even a return to prison once a woman has been released. Because women struggle to adjust back to the general prison population after solitary and even more so to life outside of prison, the likelihood of their return to prison increases.¹⁴⁴

As Joane Martel explained, not only are the effects extremely damaging, but they reach “far beyond the original intent of segregation policies.”¹⁴⁵ The majority of women arrive in solitary confinement carrying mental illness as part of their reality, then conditions of total control and a lack of privacy retrigger traumatic experiences for many, and they break down, unable to endure the isolating conditions.

138. Shaylor, *supra* note 82, at 397. See also TALVI, *supra* note 77, at 122-25 (identifying women in full-blown psychiatric crisis, committing suicide far more frequently than the general population).

139. TALVI, *supra* note 77, at 137.

140. *Id.* at 125.

141. Kraft-Stolar, *supra* note 107, at 148.

142. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 496 (2006).

143. *Id.*

144. Shaylor, *supra* note 82, at 397.

145. Scharff Smith, *supra* note 141, at 485.

B. Being in solitary confinement reduces even further the changes of getting medical attention when a prisoner is sick.

Because solitary confinement is often separated from the rest of the prison facility and prison population, women frequently complain about the difficulty of dealing with critical health conditions. One inmate was sent to solitary because she complained about not receiving the medication prescribed for cancer treatment.¹⁴⁶ In solitary, she found it even harder to receive her medications.¹⁴⁷

Women also complain that when they ask for medical assistance and someone comes to speak to them, the conversation usually occurs through the cell door, thus obliging her to speak loudly and make her health issues become a public event. Finally, across the board, women complain about the difficulty of obtaining toilet paper and sanitary napkins when they are menstruating.¹⁴⁸ One prisoner stated that in order to receive a pad, she actually had to turn in the soiled one.

C. Being pregnant in solitary places both the mother and the baby at serious risk of harm.

The negative consequences of solitary on pregnant women and on their fetuses is undisputed. The UN, the Inter-American Commission on Human Rights, the ACLU, Penal Reform International, and dozens of international organizations have documented the physical and emotional harm that confinement in solitary causes to pregnant women and their fetuses. The U.N. Standard Minimum Rules for the Treatment of Women (the Bangkok Rules), written in a collaborative process with experts on women and prison issues, and representatives from at least 50 nations, were unanimously confirmed by the UN General Assembly. The Bangkok Rules state that, “Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”¹⁴⁹

Solitary impedes access to critical prenatal care¹⁵⁰ or assistance when women have complications to their pregnancies. Even basic exercise, physical movement, and a higher calorie nutritional diet are denied to pregnant women in solitary.¹⁵¹ Many pregnant women experience depression and stress as they deal with hormonal changes and the emotional fallout of knowing they will have a baby that will be taken from them. This intensifies in isolation.¹⁵² The “additional stress of being locked in a cell for 23 hours a day lowers their ability to fight infection and increases the risk of preterm labor, miscarriage, and low

146. Clarke, *supra* note 110.

147. *Id.*

148. *Id.*

149. G.A. Res. 65/229, annex at 12, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (Mar. 16, 2011) [hereinafter Bangkok Rules].

150. Law, *supra* note 82.

151. *Id.*

152. *Id.*

birth weight in babies.”¹⁵³ Others complain that the delivery date is set based on a calendar and convenience, not based on the health of the baby. In California, one pregnant woman who suffered from anxiety and bipolar disorder remained in solitary for 2 months, “including five weeks after prison staff confirmed that she was pregnant.”¹⁵⁴ The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders prohibit placing pregnant women in solitary confinement.¹⁵⁵

D. Solitary punishes women and their families equally.

Sixty-two percent of women in state prisons have children,¹⁵⁶ and they generally lose visiting privileges and even access to telephone calls when in solitary.¹⁵⁷ Solitary punishes children¹⁵⁸ who often cannot even understand their mom’s absence, much less why she stopped calling. Even when visits are permitted, they almost never involve physical contact.¹⁵⁹ “A much larger percentage of women prisoners were living with their children prior to incarceration than male prisoners,” thus this dynamic of solitary hits women far harder.¹⁶⁰ Rule 23 of the UN Bangkok Rules states that “disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.”¹⁶¹ Mothers desperately trying to maintain custody of their children are judged because they have not had contact with their children, at the same time, when children are in state custody, mothers often meet barriers when trying to send letters to their children as well as get news from them. Distance and the lack of contact undermine her best efforts to keep in touch with her children,¹⁶² and make her fearful of whether she will be able to reconstruct the relationship when she gets out.

E. Reports of abuse in solitary at the hands of male guards repeat from state to state, and over decades.

The isolation of solitary confinement means not only are women prisoners separated from the general population and often in a cell by themselves 24 hours a day, but they are also secluded from the rest of the prison facility, creating an

153. *Id.*

154. Kraft-Stolar, *supra* note 107, at 149.

155. Bangkok Rules, *supra* note 148.

156. *Having a Parent Behind Bars Costs Children, States*, THE PEW CHARITABLE TRUSTS (May 24, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/24/having-a-parent-behind-bars-costs-children-states> [https://perma.cc/XYN4-78C2].

157. Kraft-Stolar, *supra* note 107, at 148 (placing women in solitary “damages family relationships” as it deprives not only mothers, but their families, of phone calls and family visits).

158. American Civil Liberties Union, *supra* note 28, at 8.

159. Clarke, *supra* note 110.

160. *Id.*

161. Bangkok Rules, *supra* note 148.

162. Law, *supra* note 82.

environment where emotional and sexual abuse are not uncommon and where there is nowhere to turn for intervention. The UN Human Rights Committee recommended to the U.S. that it should pass legislation allowing male guards access to women's quarters only when accompanied by women officers.¹⁶³ Yet, in the U.S., despite widespread reports of sexual misconduct by male officers against prison inmates, male guards continue to have unlimited access to women's bodies through legal actions like takedowns, strip searches, watching women use the toilet, and overseeing showers in solitary, and through illegal actions like sexual assault.

Solitary confinement units are intentionally designed in a manner to give guards total access to a prisoner's world, which makes women extremely vulnerable to sexual harassment and abuse.¹⁶⁴ Even when sexual harassment and abuse do not occur, prisoners are aware that it could, and stories from other women contribute to their anxiety and fear. Women in some facilities state that even their toilets are in full view of the cell door windows so that guards can look through at any time.¹⁶⁵ Women complain that male guards watch them in the showers, on the toilet, and when they are trying to dress and undress.¹⁶⁶ In solitary, women are under constant surveillance, and there is less supervision of the guards working in the unit. Women in solitary are also cut off from family and lawyers, as well as the rest of the prison population, making them more vulnerable to sexual assault and increasing the chance of the offending guard's impunity.¹⁶⁷ In one facility, the women stated that when they complain because the guards watch them in the showers, the guards simply turn off the water, denying them showers, which are often only two to three times a week anyway.¹⁶⁸

Many solitary confinement units strip search a prisoner any time she leaves her cell, but even where this is not policy, a pat down search is conducted by whichever guard is accompanying the woman. While the guards are required to act in a professional manner to effectively search the woman without embarrassing her, women prisoners report that male guards regularly grope them during the search.¹⁶⁹ Once again, she has no autonomy in relation to what someone else can do with her body. Further, "cell extractions," are generally performed by male guards and are rough experiences. These too may trigger post-traumatic stress reactions in women who have experienced prior trauma such as rape or domestic violence.¹⁷⁰

163. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, ¶33, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

164. Shaylor, *supra* note 82, at 390.

165. Angola 3 News, *Torturing Women Prisoners – an Interview with Victoria Law* (Oct. 20, 2009), <http://angola3news.blogspot.com/2009/10/torturing-women-prisoners-interview.html> [https://perma.cc/Y3MF-WBG4].

166. *Id.*

167. Shourd, *supra* note 48.

168. Shaylor, *supra* note 82, at 390.

169. *Id.*

170. Arrigo & Bullock, *supra* note 74, at 634.

For a population that has a very high percentage of prior trauma, and experiences of violence and sexual abuse most often at the hands of men, being denied a right to privacy and having no power to do anything about it at the hands of male guards reinforces women prisoners' sense of vulnerability and can re-traumatize them.¹⁷¹ Women are reminded that their body is not theirs to control.¹⁷² Too many women in too many states experience sexual harassment and assault at the hands of male prison guards, and if they have the courage to complain, are either not believed, or punished for engaging in sexual relationships.¹⁷³ If they speak up, they risk retaliation. If they remain silent, the abuse continues.

V. *Solitary confinement for women: A case of cruel and unusual punishment.*

Placing women in solitary confinement creates an unacceptable risk of constituting cruel and unusual punishment. Over 70 percent of incarcerated women are diagnosed as mentally ill. Case law, international bodies such as the United Nations, and nongovernmental entities like the American Bar Association offer guidelines for very limited and restricted use of solitary confinement, noting especially the danger that solitary poses for prisoners with mental illness. Just placing mentally ill prisoners in solitary confinement creates such a high risk of severe injury that the northern district of California found the prison administration responsible for violating the Eighth Amendment.¹⁷⁴ Incarcerated women face specific issues related to solitary because of their high rates of mental illness, common histories of trauma and abuse, roles as mothers and primary caregivers and vulnerability to staff sexual misconduct. Incarcerated women also face issues due to their and unique reproductive health care needs such as pregnancy, abortion, menopause, menstruation, and cancer screening and the difficulty of accessing treatment for these are also unique to women's experience of solitary.¹⁷⁵ Those responsible for the administration of women's prison in the 21st century know or should be aware of all of these factors.

The United States Supreme Court has found that an individual or a prison system violates the 8th Amendment not only for directly administering cruel and unusual punishment, but also for demonstrating a "deliberate indifference" to a substantial risk of serious harm to a prisoner and failing to take measures to alleviate that risk.¹⁷⁶ In 2011, the court held that that Eighth Amendment

171. American Civil Liberties Union, *supra* note 28, at 6.

172. *See* Angola 3 News, *supra* note 164.

173. *Id.*

174. Madrid v. Gomez, 889 F. Supp. 1146, 1279-80 (N.D. Cal. 1995). *See also* U.S. CONST. AMEND. VIII (prohibiting the infliction of cruel and unusual punishment).

175. Kraft-Stolar, *supra* note 107, at 149.

176. Farmer v. Brennan, 511 U.S. 825, 828, 834 (1994). *Farmer* established a 2-part test for when a prison official is liable under the Eighth Amendment. A plaintiff must prove that the alleged deprivation is sufficiently serious, in the case of a health complaint, that a lay person would recognize the need for medical attention or that a physician has diagnosed as needing medical treatment. *Id.* at 858 (Blackmun, J., concurring). For the second part of the

protected prisoners from “an environment where degeneration is probable and self-improvement unlikely.”¹⁷⁷ With such a high percentage of women with mental illness in the incarcerated population, and such a frequent occurrence of sexual abuse in women’s prisons, it is unthinkable that prison officials could be unaware of the substantial risk of serious harm to women in solitary confinement. When an overwhelming majority of the female prison population are victims of violence and trauma in their lives, and solitary confinement can cause irreparable damage even to prisoners with no history of mental illness or trauma, the State acts with deliberate indifference, violating the Eighth Amendment prohibition of cruel and unusual punishment when it imposes solitary confinement on women prisoners.¹⁷⁸

CONCLUSION

Perhaps the tide is changing. England avoids placing women in solitary whenever possible, and when they do use solitary, it is limited to as short a time as possible.¹⁷⁹ Poland no longer allows solitary confinement for women, except in special circumstances.¹⁸⁰ Amnesty International notes that a growing number of U.S. jurisdictions are restricting the specific duties that male guards can perform in women’s prisons, and although this has been challenged, U.S. courts have upheld the restrictions. After settling a class action lawsuit brought on behalf of inmates with mental illness in New York, the state created special prison units that serve as an alternative to solitary confinement for people with serious mental illness.¹⁸¹ The state then passed a law in 2008, the SHU Exclusion Law, prohibiting corrections officials from holding people with serious mental illness in solitary for extended periods.¹⁸² The New York law has many other provisions including more out-of-cell time for prisoners with severe mental illness that are in the special units, better assessment, and additional training on mental health for guards and staff who work in the Residential Mental Health Treatment Units (RMHTU).¹⁸³

test, the “subjective component,” plaintiff must establish that the defendant was “deliberately indifferent” to the health or safety of the inmate. This is greater than mere negligence, but does not require actual intent. *Farmer* holds that it is enough that the official acted or failed to act “despite his knowledge of a substantial risk of serious harm.” *Id.* at 842.

177. *Battle v. Anderson*, 564 F.2d 388, 392 (10th Cir. 1977).

178. Correctional Association of New York, *Domestic Violence Survivors Justice Act* (last visited on Feb. 12, 2017), <http://www.correctionalassociation.org/domestic-violence-survivors-justice-act> [<https://perma.cc/S483-BJSH>] (demonstrating that “nine of ten incarcerated women have experienced severe physical or sexual violence in their lifetimes, eight of ten experienced serious physical or sexual violence during childhood; 75% suffered severe physical abuse by an intimate partner during adulthood, and 37% were raped before their incarceration”).

179. Cyrus R. Vance Center for International Justice et al., *supra* note 10, at 37.

180. *Id.*

181. Kraft-Stolar, *supra* note 107, at 147 n.340.

182. *Id.*

183. *Id.* at 147 n.340-41.

Colorado also made intentional changes to solitary confinement and specifically addressed women and solitary. Women are no longer held in restrictive housing in Colorado, and they radically limited the use of solitary with women.¹⁸⁴ Further, when the prisoner involved in an infraction is classified as mentally ill, she is not placed in solitary, and if the assessment team decides that a person involved in an infraction acted because of mental illness, that person is not placed in solitary.¹⁸⁵ With these changes, Colorado has found that inmate on staff assaults are the lowest they have been in ten years, self-harm has been reduced, and when released from solitary, the prisoners are not returning to solitary.¹⁸⁶ Rick Raemisch from the Colorado Department of Corrections said, “We believe these reforms have led to safer institutions, and in the long run, since 97% of our inmates return to the community, it has also led to safer communities.”¹⁸⁷ He followed this by affirming, “It is my belief that the overuse of solitary confinement in the United States for over a hundred years has not worked. It is time to change.”¹⁸⁸

England, Poland, Colorado, and New York demonstrate that solitary confinement can be treated with deliberate attention, attention to women, and attention to prisoners with mental illness. The outcome of these changes has been an improvement in each location. Data is available. Choosing not to access data from research, states, and countries is acting with deliberate indifference to a harsh reality. These initiatives signal hope for a new awareness and offer guideposts for how to reconsider women’s incarceration, mental health issues, and solitary confinement, especially for the female population. We must consider criminal justice as an opportunity for change in individual lives and in society rather than as an extremely ineffective punitive measure.

184. Rick Raemisch, Colo. Dept. of Corrections, *Opening the Steel door: how Colorado is Reforming Solitary Confinement*, Penal Reform International Expert Guest Blog (July 24, 2015), <https://www.penalreform.org/blog/opening-the-steel-door-how-colorado-is-reforming/> [https://perma.cc/5BSW-3KRB].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*