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Law's Infamy
Ashker v. Governor of California and the Failures of Solitary Confinement Reform

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ABSTRACT: Instead of focusing on overturned and repudiated legal decisions, already consigned to legal infamy, I focus in this paper on a particular punitive practice that has allegedly been repudiated: solitary confinement. Through the lens of the case of *Ashker v. Governor of California*, a class action lawsuit filed on behalf of 500 prisoners in California who had each been housed continuously in solitary confinement for ten years or more, I examine whether *Ashker* indeed repudiated the practice of solitary confinement, consigning it to legal infamy. I argue that solitary confinement persists in California, resisting legal infamy, through two underappreciated mechanisms: publicized demonization of agitators and strategic deployment of scientific expertise. While I trace how the practice of solitary confinement has persisted in California, in spite of a seemingly reform-oriented 2015 settlement in the *Ashker* litigation, I also examine how this persistence and its mechanisms might reveal alternative possibilities for reform, which might, finally, render solitary confinement a legally infamous practice.

On August 31, 2015, the parties in the case of *Ashker v. Brown* announced that they had reached a sweeping settlement agreement eliminating solitary confinement for periods of more than five years in all California prisons. The settlement also guaranteed the 500 class members, who had each been in continuous solitary confinement for at least ten years, the opportunity to live in the general prison population. At the time, Todd Ashker, the lead plaintiff in the case, had been in solitary confinement at Pelican Bay State Prison for 25 years. For more than two decades, his life had consisted of at least 22 hours a day locked in a windowless, poured concrete cell measuring 80-square-feet. If he was lucky, and prison officials followed policy, Ashker left the cell three times a week for a 15-minute shower, and a few more times for an hour or two of exercise in an outdoor "dog run." In 25 years, Ashker had only two phone calls with his mother. He went years at a time without a social visit.[1]

[1] "Exhibit A: Declaration of Todd Ashker in Support of Plaintiff's Motion for Class Certification," *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. May 2, 2013), https://ccrjustice.org/sites/default/files/assets/195-1%20Exhibits%20A-F.pdf.

Ironically, a series of massive, statewide prisoner hunger strikes in 2011 and 2013, protesting the durations and conditions of confinement in the Pelican Bay Security Housing Unit, or SHU, had provided Ashker with opportunities for more social contact than he had two prior decades. Ashker was one of the strike leaders, and one of the lead negotiators, who met more than once, face-to-face, with California Department of Corrections and Rehabilitation (CDCR) and other state officials to coordinate an end to the strikes.[2] The weeks-long hunger strikes infused the *Ashker* litigation with a sense of urgency: would these prisoners starve themselves to death absent a legal resolution? Until the 2015 *Ashker* settlement, Todd Ashker expected to die in the SHU, whether from assault, refusing food, or natural causes. But within a year of the 2015 *Ashker* settlement, Ashker, along with the hundreds of other class members for whom he was the named representative, would be living in the general prison population. In a 2018 letter to a reporter, Ashker wrote: "I'm still amazed at how big the sky looks."[3]

Over the past decade, the hunger strikes and the *Ashker* settlement have been the subject of hundreds of pages of criminological, philosophical, and legal scholarship, largely celebrating the prisoners' brave collective action and the sweeping reforms set into motion by the *Ashker*

[2] Keramet Reiter, "The Pelican Bay Hunger Strike: Resistance within the Structural Constraints of a U.S. Supermax Prison," *South Atlantic Quarterly*, 113.3 (2014): 579-611.
[3] Victoria Law, "'As Long As Solitary Exists, They Will Find a Way to Use It'" *The Nation*, Jul. 14, 2018, https://www.thenation.com/article/archive/long-solitary-exists-will-find-way-use/.

case.[4] I have been among those writers, albeit one sounding a cautionary tone, suggesting that the reforms may well be limited or unsustainable.[5]

I, at least, thought I had already said all I had to say about *Ashker*: from the beginning, the demands were insufficiently radical to fundamentally re-shape either solitary confinement, or the prison system into which it is inextricably woven.[6] And the resulting settlement reflected this, providing temporary individual relief for the class members, "unsettling" the practice of solitary confinement, but not seriously and sustainably altering the practice, let alone abolishing it. The month the case settled in 2015, I wrote that "one settlement agreement … cannot sweep away decades of abusive prison policies," warning that settlements are weaker than judicial decisions as non-precedential reference points, that prison officials still seemed to be clinging to all their beliefs about dangerous and undeserving prisoners requiring placement in restrictive solitary confinement, and that the settlement did not do enough to promote transparency around solitary confinement practices in the state.[7] I wrote with conviction, but also a hope that I would be proven wrong and could write something else besides this piece.

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[4] *See, e.g.,* Angelica Camacho, "Unbroken Spirit: Pelican Bay, California Prisoner Hunger Strikes, Family Uprisings, and Learning to Listen," Dissertation, https://escholarship.org/uc/item/1sg3k05g; Chris S. Earle, "Just Violence?: California's Short Corridor Hunger Strikes and Arguments Over Prison Legitimacy," *Argumentation and Advocacy*, 51.3 (2015): 185-199; Lisa Guenther, "Political Action at the End of the World: Hannah Arendt and the California Prison Hunger Strikes," *Canadian Journal of Human Rights*, 4.1 (2015): 33-56; Jules Lobel, "Litigation to End Indeterminate Solitary Confinement in California: the Role of Interdisciplinary and Comparative Experts," in *Solitary Confinement: Effects, Practices, and Pathways toward Reform*, Jules Lobel and Peter Scharff Smith, eds, Oxford University Press (2019): pp 353-71; Zafir Shaiq, "More Restrictive than Necessary: A Police Review of Secure Housing Units," *Hastings Race and Poverty Law Journal*, 10.2 (2013): 327-378; Azadeh Shahshahani and Priya Arvind Patel, "From Pelican Bay to Palestine: The Legal Normalization of Force-Feeding Hunger-Strikers," *Michigan Journal of Race & Law*, 24.1 (2018): 1-14.

[5] Reiter, "The Pelican Bay Hunger Strike"; Keramet Reiter, "(Un)Settling Solitary in California," *Social Justice,* Sept. 28, 2015, http://www.socialjusticejournal.org/?p=3214; Keramet Reiter, "Lessons and Liabilities in Litigating Solitary Confinement," *University of Connecticut Law Review,* 48.4 (2016): 1167–89; Keramet Reiter, "The International Persistence & Resilience of Solitary Confinement," *Oñati International Series in Law & Society*, 8.2l (2018): 247-66.

[6] Reiter, "The Pelican Bay Hunger Strike."

[7] Reiter, "(Un)Settling Solitary Confinement."

But nine years after the first Pelican Bay Hunger Strike, and nearly five years after the state and the prisoners reached an initial settlement agreement, Todd Ashker and his eponymous case continue to be regularly in the national news. Sometimes the news is good. In spite of my warning that settlements have limited legal relevance compared to judicial decisions and orders, the *Ashker* case and settlement has been a touchpoint in the American Civil Liberty Union's "Stop Solitary Campaign," kicked off the same summer as the first hunger strikes centered in and around Pelican Bay.[8] I will return to a more nuanced discussion of both alternative interpretations of the broader relevance of legal settlements and the broader implications of the *Ashker* case, outside of California prisons, in the conclusion.

Despite *Ashker's* national (and even international) implications, California prisoners continue to complain about the conditions and durations of solitary confinement in the state. Although the *Ashker* settlement agreement was originally scheduled to sunset three years ago, the plaintiffs' lawyers are still arguing that the promises of the agreement are unrealized.[9] So I return again to the hunger strikes and the *Ashker* litigation, mining the legal motions and filings, the public commentary, and the scholarship for new insights about when reform works, where it goes wrong, and especially what makes and unmakes infamous cases.

After contextualizing *Ashker* in a pantheon of infamous prisoners' rights and civil rights cases, and providing some brief additional background on the case, I explore how the practice of solitary confinement has continued much as I predicted in 2015: persisting, often beyond public oversight, driven by discretionary administrative decision-making. But I also identify and trace two new mechanisms in the persistence of the practice: publicized demonization of agitators and

[8] J. Ridgeway and J. Casella, "New video: ACLU launches 'Stop Solitary' campaign," *Solitary Watch*, Sept. 30, 2011, https://solitarywatch.org/2011/09/30/new-video-aclu-launches-stop-solitary-campaign/.
[9] *See* Center for Constitutional Rights, "*Ashker v. Governor of California*" list of legal motions and briefs, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.

strategic deployment of scientific expertise. I then discuss the national and international implications of these mechanisms of persistence, suggesting that the patterns have implications for understanding how infamous cases might be unmade, if not avoided in the first place.

Such analyses seem especially important in light of recent shifts in the U.S. federal judiciary. As of 2020, one in four circuit court judges had been appointed by the unusually authoritarian 45th president of the United States. Moreover, of the 45th president's 187 total federal judicial appointees, 78 percent were male, and 89 percent were white, entrenching the already exaggerated representation of white male perspectives in the federal courts.[10] In light of this re-shaping of the federal judiciary, legal pundits predict a new rash of *Plessys, Lochners,* and *Stanfords*, permitting discrimination in service provision and voting access, minimizing workers' rights to organize, and limiting the rights of vulnerable populations like prisoners and pregnant women, in the coming generations of federal judicial lawmaking.[11] In this context, analyzing disappointing legal results, whether infamous outcomes or failures to establish existing practices as infamous seems all the more critical, especially in the context of class actions and settlements, where so much legal reform actually happens these days.[12]

Did Ashker v. Governor of California *render the practice of solitary confinement infamous?*

[10] Carrie Johnson, "Trump's Impact On Federal Courts: Judicial Nominees By The Numbers," *NPR,* Aug. 5, 2019, https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers; Federal Judicial Center, "Demography of Article III Judges, 1789-2017," https://www.fjc.gov/history/exhibits/graphs-and-maps/gender.

[11] See, e.g., Amelia Thomson-Devaux, "Is the Supreme Court Heading for a Conservative Revolution?" *FiveThirtyEight*, Oct. 7, 2019, https://fivethirtyeight.com/features/is-the-supreme-court-heading-for-a-conservative-revolution/.

[12] *See* Judith Resnik, "Reorienting the process due: Using jurisdiction to forge post-settlement relationships among litigants, courts, and the public in class and other aggregate litigation," *New York University Law Review*, Vol. 92 (2017): 1017-67.

Ashker has been treated as a decision that repudiated the practice, at least of *indeterminate*, solitary confinement and sparked legal, legislative, and administrative reforms across the United States.[13] But did it render the practice infamous? Simply posing the question feels potentially dismissive of the inspiring collective action the Pelican Bay SHU prisoners coordinated, the ongoing creative legal battle their lawyers are waging, and the real day-to-day improvements many prisoners have experienced in the conditions of their confinement as a result of the case. But the question is meant to provoke a deeper engagement with the concepts of infamy and injustice, and especially the more subtle legacies of implementations failures.

In the field of prisoners' rights, under the "protections" of the Eighth Amendment, the consignment of practices to legal infamy is rare. As recently as 1995, prisoners in Alabama were chained to hitching posts for punishment.[14] As recently as 2005, kids as young as 16 could be executed for their crimes.[15] As recently as 2009, one prisoner a week was dying unnecessarily from inadequate medical care in California.[16] In spite of repudiation of these specific practices, prisoners continue to die in four-point restraints in prison, be executed for crimes they committed as teenagers, and die daily from inadequate medical care, especially as the COVID-19 pandemic rages through our prisons.[17] In light of this institutional resistance to change, prisoners' rights

[13] *See* Keramet Retier, "After Solitary Confinement: A New Era of Punishment?" *Studies in Law, Politics, and Society*, Vol. 77: 1-29.
[14] *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).
[15] *Roper v. Simmons,* 543 U.S. 551 (2005).
[16] *Brown v. Plata*, 563 U.S. 493 (2011).
[17] On deaths in restraints, see, e.g.,: Josh Kovner, "Inmate who died after restraint at New Haven jail had rigor mortis by the time he was brought to the hospital," *Harford Courant*, Oct. 21, 2019, https://www.courant.com/news/connecticut/hc-news-prisoner-restraint-death-medical-20191020vs5g7bkydfhwxm7oehest3wakq-story.html; Christopher Zoukis, "$5 Million Settlement After Mentally Ill Prisoner Dies in Restraint," Prison Legal News, Mar. 6, 2018, https://www.prisonlegalnews.org/news/2018/mar/6/5-million-settlement-after-mentally-ill-prisoner-dies-restraint/. On executions of people who were teenagers at the time of their crime, see, e.g., Death Penalty Information Center, "Alabama Prisoner Seeks Stay, Reprieve to Challenge the Death Penalty for 19-year-old offenders," May 14, 2019, https://deathpenaltyinfo.org/news/alabama-

scholars and advocates tend to have a broader conception of infamy beyond actually discredited practices or values. In the prisoners' rights canon, more subtle forms of infamy earn attention as catalyzing, if not always hopeful, reference points, for example: when a court simply acknowledges the horrible treatment a prisoner has received (infamous facts), where a prisoners' claim has been established to have been completely misinterpreted (infamous myths), and when principles that would seem unjust in any non-prison context remain good law in the prison context (infamous principles).

Hope v. Peltzer (2002), one of a small handful of prisoners' rights cases to be heard by the Supreme Court in the past few decades,[18] exemplified infamous facts: an African American prisoner was chained to a hitching post for seven hours straight, not in 1890, 1920, or 1950, but in 1995. The Supreme Court noted the "obvious" brutality of this practice, though the officers imposing the punishment were never held responsible.[19]

"The Peanut Butter Case" exemplifies infamous myths: it was a case in which a prisoner complained about receiving the wrong peanut butter from his "commissary" order, returning the incorrect item, and never receiving the $2.50 (at best, a day's wages in prison) credit for the return on his prison books. But Senator Dole complained that the prisoner had brought a lawsuit complaining about "being served chunky peanut butter instead of the creamy variety," a sound bite that was repeated again and again in defense of federal legislation sharply constraining the rights of prisoners to bring any lawsuits challenging the conditions of their confinement.[20]

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prisoner-seeks-stay-reprieve-to-challenge-the-death-penalty-for-19-year-old-offenders. On COVID-19, *see, e.g.,* Cary Aspinwall and Joseph Neff, "These Prisons Are Doing Mass Testing For COVID-19—And Finding Mass Infections," Apr. 24, 2020, https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections.

[18] Margo Schlanger, "Inmate Litigation," *Harvard Law Review*, Vol 116.6 (2003): 1555-1706, at 1570-73.

[19] *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

[20] Robert Dole, "Hearings on 'Prisoner Litigation Reform Act,'" Congressional Record, September 27, 1995, quoted online here: http://jthomasniu.org/class/Papers/prisdrew.txt; Jon O. Newman, "Not All Prisoner Lawsuits are

Farmer v. Brennan (1994) exemplifies and infamous principle: a transwoman, who had undergone hormonal and surgical treatment was placed in a male federal prison facility, beaten, and raped. The Supreme Court held that in order for Dee Farmer to receive either retrospective (damages) or prospective (an injunction preventing future harm) relief, she would have to prove "deliberate indifference": proving not only substantial harm she experienced, but also that prison officials were subjectively aware of the existence of the risk of that substantial harm – a rather difficult fact for a prisoner to establish.[21]

Ashker v. Brown could be infamous by all the standards of prisoners' rights cases. It includes infamous facts about prisoners spending decades in long-term solitary confinement, with limited human contact, missing seeing the moon above, feeling grass under their feet, patting a dog. It arguably includes infamous myths about prisoners whom the prison system asserted (and in some cases continues to assert) are too dangerous to have any human contact whatsoever for the rest of their lives, even though hundreds of these prisoners are released annually into our communities without incident (unless their ongoing struggles with the psychological effects of solitary confinement count).[22] And, by international law standards, the case even includes an infamous principle: the *Ashker* settlement capped terms of solitary confinement at five years, when the United Nations Special Rapporteur on Torture says that more than 15 days could constitute cruel, inhuman and degrading treatment, if not torture.[23]

Frivolous," *Prison Legal News*, Apr. 1996: 6, https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous/; Keramet Reiter, *Mass Incarceration*, New York: Oxford University Press, 2017.

[21] *Farmer v. Brennan*, 511 U.S. 825 (1994); Sharon Dolovich, "Forms of Deference in Prison Law," *Federal Sentencing Reporter*, 24.4 (2012): 245-59; Keramet Reiter, "Supermax Administration and the Eighth Amendment: Discretion, Deference, and Double-Bunking, 1986–2010," *University of California Irvine Law Review*, Vol. 5.1 (2015): 89–152.

[22] *See* Center for Constitutional Rights, "*Ashker v. Governor of California*" list of legal motions and briefs, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown; Keramet Reiter, *23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement* (New Haven: Yale University Press, 2016).

[23] United Nations General Assembly, 2016. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). A/RES/70/175 [online]. Resolution adopted by the UN General Assembly on 17

But did it actually render the practice of solitary confinement infamous? Advocates and prisoners celebrated it as a triumph, a central case in coordinated advocacy "efforts to challenge mass incarceration, discrimination, and abusive prison policies."[24] The cap of five years in solitary confinement represents a significant improvement over no cap at all, which left hundreds of people languishing in solitary for decades. Other aspects of the *Ashker* settlement increased procedural protections governing placement in solitary confinement and improved conditions of confinement for those ultimately placed in solitary confinement. At best, these reforms rendered the practice of *indefinite* solitary confinement infamous. At worst, the reforms simply perfected an existing practice, functioning, however counterintuitively, to maintain the status quo.

This is an argument I have made previously about prison conditions litigation, and especially solitary confinement litigation: since the 1970s, cases celebrated as reformist have instead contributed to refining solitary confinement and, even, making it more resistant to litigation. For example, 1970s cases requiring segregation cells to be clean, well-lit, and not overcrowded partially inspired poured concrete solitary confinement cells equipped with fluorescent lights that never turn off.[25] And again, following litigation challenging the conditions of confinement at Pelican Bay in the 1990s, "practices were streamlined and sterilized, in a rational and superficially compliant response to the legal oversight."[26] These are examples of Edelman's concept of legal endogeneity: institutions signal compliance with legal orders through

December 2015 on the report of the Third Committee (A/70/490). Available from: https://www.penalreform.org/wp-content/uploads/1957/06/ENG.pdf.

[24] Center for Constitutional Rights, "*Ashker v. Governor of California,*" https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.
[25] Keramet Reiter, "The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006," *Studies in Law, Politics and Society*, Vol. 57 (2012): 69–123.
[26] Reiter, *23/7*: 5.

formal and often superficial regulations that then receive deference in future legal challenges.[27] The *Ashker* settlement, to my interpretation, joins this long tradition of legal challenges to solitary confinement ultimately refining and reinforcing the status quo.

In the following sections, I look not just at the outcomes – a case was litigated; little changed – but at the mechanisms by which those outcomes are achieved (and infamy resisted). By analyzing the aftermath of the *Ashker* settlement, tracing implementation attempts, roadblocks, and reinterpretations, I trace not just how law-in-action differs from law-on-the-books but the specific tools of resistance deployed in California by prison officials, their lawyers, and experts.[28] This analysis ultimately reveals that neither the legal principles upholding some forms of solitary confinement nor the social practices of solitarily confining some people have been fully repudiated. And so solitary confinement, arguably even indefinite solitary confinement, has repeatedly avoided legal infamy. Before analyzing this process of avoidance, though, I provide next a summary of how the *Ashker* case arose, gradually accruing the markers of a classic civil rights case, and seemingly building towards consigning at least the practice of indefinite solitary confinement to infamy.

Unsettling Solitary Confinement: The Unusual Litigation History of Ashker v. Brown

Ashker v. Brown began in a rather unusual way. Prisoners' rights cases often begin when enough prisoners file substantively similar *pro se* (on their own behalf, usually handwritten)

[27] Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. "The Endogeneity of Legal Regulation: Grievance Procedure as Rational Myth." *American Journal of Sociology* 105, no. 2 (1999): 406–54.
[28]For more general discussions of the forces that produce the "transformation of law and the state overtime," in law and society scholarship, *see* L. Mather, "Law and Society," *The Oxford Handbook of Political Science*, Robert E. Goodin, ed. (2013), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-015; Bryant Garth & Joyce Sterling, "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State," *Law & Society Review*, Vol. 32.2: 409-72 (1998).

petitions to score the attention of a sympathetic judge, or when civil rights lawyers investigate a series of individual complaints and build a case. Sometimes prisoners' rights cases begin more like other civil rights cases, like *Brown v. Board of Education* or *Roper v. Simmons*, when lawyers look for sympathetic litigants to represent in order to challenge an unjust legal decision and turn it into an infamous one.[29] The *Ashker* case, however, became relevant through a massive, statewide hunger strike, initiated by prisoners who had apparently given up hope on resolving their grievances through the courts.

Todd Ashker, a white prisoner and alleged Aryan Brotherhood (AB) hitman, and Danny Troxell, another alleged AB leader, were two of the hunger strike leaders. Together, the two had filed a pro se petition in 2009 complaining about the conditions of their confinement in the Pelican Bay SHU, but it had gone nowhere. In 2009, they had been held continuously in the SHU for 19 years and 23 years respectively, and Ashker had already filed dozens of lawsuits complaining about his treatment and his conditions of confinement.[30] So on April 1, 2011, Ashker and Troxell, along with nine other prisoners identifying as African American and Latino, as well as white, and all alleged leaders of different, rival prison gangs (AB, Black Guerilla Family, Mexican Mafia, and Nuestra Familia), signed a letter committing to begin an indefinite hunger strike on July 1, unless the CDCR (state prison officials) acceded to their demands.

Each signatory was serving an indefinite term in the Pelican Bay SHU because he had been labeled as a gang member. At the time, a "gang validation" required only three pieces of evidence: a letter from another known or alleged gang member, drawings or tattoos associated with gang symbols (including otherwise innocuous things like Aztec mandelas or Irish

[29] *Brown v. Board of Education*, 347 U.S. 483 (1954); *Roper v. Simmons*, 543 U.S. 551 (2005).
[30] Reiter, *23/7*: 11.

shamrocks), books associated with gang leaders (including *The Autobiography of Malcolm X* and George Jackson's book of letters *Soledad Brother*), and other forms of expression protected – but only for non-prisoners – by the First Amendment.

The signatories' demands were distressingly simple: punish prisoners with solitary confinement only for specific, individual acts (rather than status-based assumptions about "safety and security" risks); abolish the opaque, discretionary process by which prison administrators permanently labeled prisoners as gang members and sent them to solitary confinement indefinitely; comply with nationally and internationally recognized best practices about conditions of and limitations on periods in solitary confinement; provide "wholesome, nutritional meals;" and provide constructive programming, including specific requests like allowing: prisoners to take one photo of themselves per year, a calendar, a cap to be worn on the cold exercise yards, and participation in proctored exams for correspondence courses.[31] As simple as the demands were, they sounded far-fetched to me, to prisoners' rights advocates, and, I suspect, to the prisoners themselves.

The prisoners' eloquent critiques of confinement conditions, as both unfair and unimaginably harsh, had already been assessed, by an unusually liberal judge, and dismissed. Thelton Henderson, a progressive federal district court judge based in San Francisco had recently closed a 1990s case, *Madrid v. Gomez,* after finding that conditions of confinement at Pelican Bay had been consistently meeting minimum constitutional standards for years. That case had originally alleged unconstitutional conditions of confinement at the Bay, and especially in the SHU, and generated decades of close monitoring.[32]

[31] Prisoner Hunger Strike Solidarity, "Prisoners' Demands," Apr. 3, 2011, https://prisonerhungerstrikesolidarity.wordpress.com/education/the-prisoners-demands-2/.
[32] *Madrid v. Gomez* 889 F. Supp. 1146 (1995); Reiter, *23/7*.

Like the initial demands, the prisoners' outside supporters were also radical, explicitly abolitionist groups: California Prison Focus, Critical Resistance, and Legal Services for Prisoners with Children.[33] Ashker and Troxell had sent multiple copies of their neatly handwritten demand letter out to advocates across the state, and those advocates, in turn, had helped to spread the word about the planned July 1 strike.

And the prisoners themselves, though both eloquent and seemingly forsaken, were not, at first glance, especially sympathetic. State prison officials considered SHU prisoners to be the "worst of the worst" most dangerous prisoners in the sprawling state system of more than 100,000 prisoners and 34 state facilities. Among the more than 4,000 people in long-term solitary confinement in the state in 2011, the signatories on the demand letter were some of the most reviled gang leaders in the state, at least according to corrections department officials. Officials had kept seven of the demand letter signatories alone together for years on the "short corridor," a special cellblock within the SHU designated for the extra layer of isolation imposed by being surrounded by enemies. Most of the prisoners signing onto the letter had been detained in the Pelican Bay SHU at least 10 years, if not since the archetypal supermax had opened, in 1989 – more than two decades earlier. A corrections department spokeswoman accused the strike leaders of coercing prisoners into refusing food as a publicity stunt to manipulate their way into dangerously lax conditions of confinement for themselves and other gang leaders.[34]

In sum, in light of the legal landscape in California, their allies, their criminal histories, their alleged gang leadership, Todd Ashker, Danny Troxell, and the other prisoners seeking significant improvements in both the conditions of their confinement and the policies and

[33] Reiter, *23/7*.
[34] Reiter, *23/7*.

procedures keeping them in those conditions indefinitely, seemed unlikely to see much change in their lifetimes. At least the strike, and crafting their demands, gave them something to do with the endless hours, and, even, something to live for. On July 1, 2011, more than 5,000 prisoners across the state started refusing their meals. The strike went on for three weeks – until the undersecretary of corrections in the state agreed to sit down, in person, with the strike leaders. At that meeting, Undersecretary Scott Kernan agreed to reconsider many of the policies prisoners were protesting.[35] Major national newspapers covered the prisoners' demands and coordinated, nonviolent action, and Amnesty International and the United Nations Special Rapporteur on Torture started asking questions about the conditions of confinement in the Pelican Bay SHU.[36] Over the next year, the conditions of the prisoners' confinement and their individual stories continued to receive national and international attention.

One story, published by KPCC, a Southern California subsidiary of NPR, on August 23, 2011, exemplifies the power of this increased scrutiny. Julie Small, the author of the story, published a small bar graph online showing how long the 1,111 prisoners then housed in the Pelican Bay SHU has been in solitary confinement: 95 percent had been in the SHU for at least 5 years; nearly half (513) had been in the SHU at least ten years.[37] This was data I had been asking the Department of Corrections to produce for years; I had been told that the Department "counted beds, not people."[38] Even Julie Small, who finally successfully obtained the aggregated snapshot data on lengths of confinement, noted that "prison officials won't say how long [specific] inmates in the SHU have been there, how long they might stay, or who they are."[39]

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[35] Reiter, "The Pelican Bay Hunger Strike."
[36] Reiter, "After Solitary."
[37] Julie Small, "Under Scrutiny Pelican Bay Officials Say They Target Only Gang Leaders," *KPCC*, Aug. 23, 2011, https://www.scpr.org/news/2011/08/23/28382/pelican-bay-prison-officials-say-they-lock-gang-bo/.
[38] Reiter, *23/7*: 167.
[39] Id.

Still, Julie Small's KPCC graph of the SHU population broken down by time served changed the conversation around long-term solitary confinement in California. First, the graph made public and obvious something I had only accidentally learned through my data requests: Californians knew shockingly little about their prisons – understanding neither how their tax dollars were being spent nor how prisoners were being treated in the most secure and hidden prison in the state. Second, in the context of so little knowledge, a single statistic (513 people; 10 years) galvanized change: raising questions about what else was unknown, providing sufficient detail to identify subjects of potentially unconstitutional policies, and establishing benchmarks for reform (capping solitary confinement terms at 5 years would affect hundreds, if not thousands, of California state prisoners). Indeed, Julie Small's graph and the single statistic about those 513 people in the SHU for more than 10 years was the fuel Todd Ashker, Danny Troxell, and their collaborators needed in both their public campaign to bring attention to the conditions in solitary confinement and their legal campaign to assert a violation of their constitutional rights inherent in those conditions. Julie Small's graph provided proof that a significant number of people (513) were in conditions similar to that of Ashker and Troxell, a critical fact in the class certification process, and, in turn, a critical step in prison conditions reform litigation.[40]

By June of 2013, Ashker and Troxell's lawyers had sought and won class certification on behalf of all 500-plus prisoners who had been in solitary confinement for ten years or more. A northern district of California federal court judge agreed that the named plaintiffs had "raised viable questions about the constitutionality of the SHU," which deserved a legal hearing.[41] Litigation (and inside prisoner organizing) continued. In July of 2013, the state filed declarations

[40] Order Granting in Part Motion for Class Certification; Denying Motion to Intervene, *Ashker v. Brown,* Case No. 09-5796CW, Jun. 2, 2014, https://ccrjustice.org/sites/default/files/assets/6.2.14%20Order%20Granting%20Class%20Cert.pdf.
[41] Reiter, *23/7*: 197.

from former gang members claiming that the strike leaders were active gang members, that the SHU successfully stifled gang activity, and that the conditions in the SHU neither constituted torture nor were as bad as the *Ashker* plaintiffs claimed.[42] The declarations punctuated the third, largest, and longest statewide hunger strike orchestrated by the *Ashker* plaintiffs between July and September of 2013. The strike went on for more than 60 days, prompting the state to seek and obtain an order "authorizing refeeding."[43] Litigation continued. In March of 2015, plaintiffs' lawyers filed ten reports from leading experts (cum critics) including: correctional leaders from other states condemning the extremity of policies in place in California's Pelican Bay SHU;[44] doctors documenting physical impacts of social isolation, like brain changes and cardiovascular problems;[45] and psychologists documenting the relationship between conditions in the SHU, like lack of touch, and both physical and mental health symptoms.[46] A few months later, in August of 2015, the *Ashker* settlement officially "prohibited the assignment of prisoners to the SHU based solely on their status as gang members, capped all stays in the SHU at five years, made the provisions retroactive, and required prison officials to provide prisoners' lawyers monthly data reports for two years about the characteristics of the SHU population."[47]

In the end, the *Ashker* case accrued all the characteristics of a classic civil rights case: at least potentially sympathetic litigants, who had attempted to file a lawsuit *pro se,* on their own behalf, ultimately attracted the attention of judges and lawyers (albeit through a massive,

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[42] See, e.g., Declarations of J. Zubiate and J. Bryan Elrod, *Ashker v. Brown,* Case No. 09-5796CW, Jul. 18, 2013. On file with author.
[43] Reiter, SAQ, 603.
[44] Expert Reports of Terry J. Collins, Emmitt L. Sparkman, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.
[45] Expert Report of Louise C. Hawkley, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.
[46] Expert Reports of Dacher Keltner, Matthew D. Lieberman, Craig Haney, and Terry Kupers, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.
[47] Reiter, 23/7: 202.

statewide hunger strike) who investigated their claims, and magnetized a team of advocates looking to confront, and even abolish, the practice of long-term solitary confinement through the litigation. At first, the settlement seemed like a triumph. Todd Ashker and Danny Troxell moved out of the SHU after a quarter-century: they not only got to see the sky, but they had achieved acquiescence to each and every one of the initial, summer 2011 demands that had touched off the first hunger strikes. A year after the settlement, the Center for Constitutional Rights celebrated that indefinite solitary confinement was down 99 percent, and the overall solitary population (including definite terms) had fallen by 65 percent in California.[48] The Pelican Bay SHU has largely been converted into a minimum-security facility, the doors to the individual cells and isolation pods, like the "short corridor," thrown open, letting sunlight stream in from the outside. The blank concrete walls, which prisoners like Todd Ashker and Danny Troxell spent decades staring at, are now covered in colorful murals. Oprah Winfrey even filmed a *60 Minutes* episode sitting in a now-empty Pelican Bay cell, interviewing former SHU prisoners enrolled as college students within the University of California.[49] The images make for a feel-good encapsulation of drastic reform. But how much actually changed, below the surface, for non-named class members?

Settling Solitary Confinement: The Not-So-Unusual Implementation Story of Ashker v. Governor of California

[48] Center for Constitutional Rights, "California Solitary Confinement Settlement: Year One after landmark settlement," Oct. 18, 2016, https://ccrjustice.org/california-solitary-confinement-statistics-year-one-after-landmark-settlement.

[49] CBS News, "Oprah Winfrey Goes Inside Pelican Bay State Prison," Oct. 18, 2017, https://www.cbsnews.com/news/oprah-winfrey-goes-inside-pelican-bay-state-prison/.

In spite of the clear terms of the *Ashker* settlement, solitary confinement has persisted in California for the past five years, carried on behind closed doors, for long durations, with little public oversight. During the peak period of litigation in California, between 2013 and 2015, correctional officials initially sought to avoid the *Ashker* litigation simply by moving prisoners around, out of Pelican Bay, where all of the attention was focused, into other facilities.[50] At the time, I wrote that this attempt to moot the claims of the *Ashker* plaintiffs (along with declarations filed by former prison gang members accusing named *Ashker* class members of "advancing agendas of violence") suggested California prison officials were likely to resist full implementation of the *Ashker* settlement.[51] Indeed, they have.

Members of the *Ashker* class have experienced three new forms of de facto solitary confinement, about which they and their lawyers have complained. First, some class members have been placed in the highest security general population facilities in the state ("Level IV facilities"), where they have as little as one hour per day out of their cells, less time than they had out of their cells in the Pelican Bay SHU.[52] Second, some other class members have been placed in an RCGP (Restricted Custody General Population) unit, designed as a transition from the SHU to general prison population, but functioning as a highly restrictive indefinite confinement space. Third, still other class members have been placed in administrative segregation, pending investigation of confidential information about security threats and potential attacks.

[50] Order Granting Motion for Leave to File a Supplemental Complaint at 2, 16, Ashker v. Brown, No. 4:09-cv-05796-CW (N.D. Cal. Mar. 9, 2015), https://ccrjustice.org/sites/default/files/attach/2015/06/Order%20on%20Motion%20to%20Supplement%20Complaint.pdf [https://perma.cc/K63V-6KNT]. *See also* Reiter, "Lessons and Liabilities in Litigating Solitary Confinement," 1187.
[51] Reiter, "Lessons and Liabilities in Litigating Solitary Confinement," 1187.
[52] Victoria Law, 'As Long as Solitary Exists, They Will Find a Way to Use It," *The Nation*, Jul. 13, 2018, https://www.thenation.com/article/archive/long-solitary-exists-will-find-way-use/.

Lawyers in the *Ashker* suit have sought, with limited success, to challenge these new iterations of solitary confinement, re-packaged as Level IV lockdowns, RCPGs, and administrative segregation. In October of 2017, plaintiffs' lawyers filed an enforcement motion arguing against the first form of de facto solitary confinement. The Level IV conditions of confinement, the *Ashker* lawyers argued, violated the principles of the *Ashker* settlement, "failing to meet the ordinary meaning of general population" conditions assumed by the terms of the settlement, providing formerly segregated SHU prisoners with even fewer privileges in the general prison population, and creating similar risks of serious harm to health as the SHU.[53] The court "declined to intervene" in the matter.[54]

Early in 2018, plaintiffs' lawyers sought to address both the RCGP and the administrative segregation forms of confinement, arguing that California prison officials continued to "violate the due process clause" by (1) "placing and retaining class members in the RCGP without adequate procedural protections" and (2) systematically using confidential information to return *Ashker* class members to solitary confinement."[55] On the basis of reviews of "about 40" files, details of which were (ironically) largely redacted even from the plaintiffs' published motion, lawyers from the Center for Constitutional Rights concluded that prison officials had both "fabricated or improperly disclosed confidential information" and repeatedly failed to ensure that "confidential information is accurate [and] reliable."[56] As a remedy, lawyers asked the court to

[53] "Plaintiffs' Enforcement Motion Regarding Violation of Settlement Agreement Provision Requiring Release of Class Members to General Population," *Ashker v. Brown,* Case No. 09-5796CW, Nov. 28, 2017, https://ccrjustice.org/sites/default/files/attach/2018/02/Pltfs'%20Enf%20Mtn%20re%20Violation%20of%20SA%20Level%20IV%20conditions%202017%2010%2013.pdf.

[54] Center for Constitutional Rights, "Ongoing Isolation in CA Prisons Not Governed by Settlement, Judge Rules," Mar. 28, 2018, https://ccrjustice.org/home/press-center/press-releases/ongoing-isolation-ca-prisons-not-governed-settlement-judge-rules.

[55] Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations," *Ashker v. Brown,* Case No. 09-5796CW, Feb. 6, 2018, https://ccrjustice.org/sites/default/files/attach/2017/11/Mot%20to%20Extend%20Settlement%20REDACTED.pdf.

[56] Id: 7.

extend the settlement agreement one more year beyond the initial two-year term, to allow for further implementation monitoring. Following months of back-and-forth motion-filing about the extension, the court ordered a one-year extension, from January 15, 2019.[57] As of 2020, the parties were still litigating the district court's finding that prison officials breached the terms of the settlement agreement; the state attorney general, facilitating prison officials' continued resistance to implementing *Ashker*, appealed that decision to the Ninth Circuit court of appeals.[58]

The ongoing litigation in *Ashker* confirms that solitary confinement persists in California because of both continued opacity in who experiences solitary confinement, why, and for how long, along with continued total administrative control over not just information but also the placement process. Lawyers in the *Ashker* case have now asked for "more long-term remedies that go beyond continued monitoring," including an appointed official who reviews all solitary confinement placements based on confidential information and a procedural right for prisoners to appeal such placement decisions before an independent reviewer, rather than before a prison official.[59] Even these remedies, however, are limited: incremental checks on both the total opacity and total discretion defining solitary confinement in California (and elsewhere).

Indeed, at each step in the *Ashker* litigation, prison officials and state lawyers have engaged in resistance and obfuscation that is tediously familiar in the context of the history of solitary confinement reform: coming up with new names for old practices, like the RCPG; re-asserting the critical importance of the practice; maintaining discretionary control. As I wrote

[57] Order, *Ashker v. Brown,* Case No. 09-5796CW, Jan. 25, 2019, https://ccrjustice.org/sites/default/files/attach/2019/01/1122%202019-01-25%20Order%20Granting%20MTN%20to%20Extend%20SA%20for%2012%20Months.pdf.
[58] Maria Endicott, "A 2015 Case Was Supposed to Overhaul California's Solitary Confinement. The Reality Is Much More Complicated," *Mother Jones*, Feb. 13, 2019, https://www.motherjones.com/crime-justice/2019/02/california-ashker-brown-solitary-confinement-status-appeal/.
[59] Id.

with colleague Ashley Rubin, reviewing the history of solitary confinement reform attempts over two centuries in the United States: "In each historical era we examine, prison administrators reinvented solitary confinement, following critiques of the practice as a failed social experiment … administrators' claims of reinvention, however, imply a kind of novelty aimed at legitimizing the [continued] use of solitary."[60] *Ashker v. Brown* has provided just one more historical example of exactly this pattern. However, two new mechanisms of solitary confinement persistence have become visible over the course of the implementation (or non-implementation) of the *Ashker* settlement.

Ongoing Demonization

Criminalization, or demonization, of prisoners in solitary confinement is a longstanding correctional tactic for initially justifying and subsequently legitimizing solitary confinement practices. In California, correctional officials, who designed the Pelican Bay SHU (the archetypal American supermax) in the 1980s, explained the facility was a necessary response to an earlier, 1970s era of collective organizing in prison (or, according to prison officials, an era of uncontrollable violence), led by George Jackson and Black Panther affiliates.[61] And external critiques of California's SHUs, leveled by investigative journalists and lawyers in the 1990s, generated correctional attempts to "prove" how dangerous SHU prisoners actually were: correctional officers set up gladiator fights between rival gang members and orchestrated riots in front of visiting prison monitors.[62] These gladiator fights, while deeply disturbing, were not an

[60] Ashley T. Rubin & Keramet Reiter, "Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement," *Law & Social Inquiry*, 43.4 (2018): 1604-32, 1606. See also, Reiter, "The International Persistence & Resilience of Solitary Confinement."
[61] Reiter, *23/7*: 34-58.
[62] Reiter, *23/7*: 121-44.

isolated example of correctional resistance to external oversight of internal correctional dangerousness assessments. The gladiator fights were, rather, representative of a persistent mechanism of correctional resistance to oversight and reform: when correctional officials disagree with critiques of their tools of control, or do not buy into reform principles like the terms of the *Ashker* settlement, they tend to proactively undermine prisoners' claims and advocates' reform goals through demonization of solitarily confined prisoners.[63] Given the opacity and administrative discretion characterizing solitary confinement practices, such correctional resistance tends to be remarkably successful.

Consigning the practice of indefinite solitary confinement to legal infamy would seemingly require directly addressing the tactic of demonization. The terms of the *Ashker* settlement sought to do exactly this. While the settlement only gingerly addressed other mechanisms of solitary confinement persistence, like opacity and administrative control, with data collection limited to class members and data details sealed in litigation, it directly confronted the problem of demonization. The settlement explicitly stated, first, that the very *Ashker* class members prison officials had asserted were irredeemably dangerous would be released from the Pelican Bay SHU into the general prison population and, second, that prison officials would be trained to better assess the accuracy of confidential information used against prisoners.[64] Together, these provisions clearly communicated that the *Ashker* class members were not all so excessively dangerous as prison officials had previously asserted. California correctional officials explicitly and publicly admitted this downgrading in their dangerousness assessment, too. For instance, in 2017, then-CDCR Director Scott Kernan (who, as

[63] *See* Rubin & Reiter, "Continuity in the Face of Penal Innovation."
[64] "Notice of Joint Motion," Case No. 09-5796CW, Sept. 1, 2015 (on file with author).

Undersecretary of Corrections, had instituted some small reforms in 2011 following the first Pelican Bay hunger strikes) told Oprah, on *60 Minutes*, that the state's prior solitary confinement use and policies had been "a mistake."[65]

By the time Scott Kernan made that statement in 2017, California had released thousands of people from long-term solitary confinement. Any correctional official interested in rolling back the reforms would have had every incentive to identify, as publicly as possible, prisoners who had been released from the Pelican Bay SHU and messed up – committed a violent act in prison, trafficked drugs within prison, systematically violated other prison rules, or committed a new crime outside of prison. And yet no such stories made headlines, or even back-page special interest stories. Other reforms in the state, around reducing prison sentences, for instance, generated plenty of public comments and complaints from police leadership alleging (with little evidentiary basis) a connection to rising crime.[66] Over the first few years of the implementation of the *Ashker* settlement, though, no such links were publicly made between the initially drastic reductions in the use of solitary confinement within CDCR and any negative consequences for prison or public safety. The one violent incident associated with a release from the Pelican Bay SHU actually took place two weeks before the finalization of the *Ashker* settlement: alleged George Jackson co-conspirator, Hugo Pinnell, who had served the longest period of time in solitary confinement in California as of 2015 (45 years), was released from the Pelican Bay SHU and transferred to a general population yard at California State Prison, Sacramento. Within days, fellow prisoners stabbed Pinell to death. Prisoners and prison staff alike had something to prove by enacting or permitting violence against a prisoner as well-known as Pinell.[67] Still, Pinell's

[65] Law, "As Long As Solitary Exists."
[66] *See, e.g.* Tim Johns, "Are California's criminal justice reforms actually working?" *Bakersfield Now,* Feb. 20, 2019, https://bakersfieldnow.com/news/local/are-californias-criminal-justice-reforms-actually-working.
[67] Reiter, "(Un)Settling Solitary in California."

death neither slowed down the settlement negotiations nor, remarkably, foreshadowed more such violence.

The direct attack on demonization as a mechanism of persistence, through release of demonized prisoners and external oversight of demonization tools (like the use of confidential information), however, was unsuccessful. Three recent notable examples of demonization have surfaced in the ongoing battle to compel implementation of the *Ashker* settlement: the (mis)use of confidential information in order to return *Ashker* class members to some form of solitary confinement; the (mis)use of "gang validation" information and status to disqualify *Ashker* class members from consideration for parole; and the filing of a formal criminal complaint (relying on the very same questionable confidential information and gang validation evidence challenged in the prior two examples) against Danny Troxell, one of the named *Ashker* class members.

First, in the order to extend the *Ashker* settlement agreement and court-ordered monitoring for an additional year, the judge noted that "systemic and ongoing due process violations exist—namely, the systemic misuse of confidential information in what appear to be meaningless disciplinary hearings such as to return class members to solitary confinement."[68] Such due process violations directly contradict the *Ashker* settlement's central requirement that prisoners only be sent to solitary confinement for fixed periods of time, following specific rule violations, rather than for indefinite periods of time, based on their status as alleged gang members. Judge Illman based his finding about systemic misuse of confidential information on individual disciplinary file reviews conducted by the prisoners' lawyers as part of the monitoring of settlement implementation. In fact, the judge reviewed in detail seven different cases in which prisoner class members received rule violation reports stating that confidential information

[68] Endicott, …

existed or was reliable, when in fact no such information existed, the information had already been determined to be unreliable, or contradictory evidence existed and had not been disclosed to the prisoner.[69] In all, almost half of 110 reviewed disciplinary cases exhibited these sorts of problems. Similarly, the judge reviewed in detail nine cases in which prisoner class members were transferred into the RCGP based on claims that they constituted a general threat to institutional security, essentially restricting a class member's liberty based on their status, rather than based on a specific rule violation, as required by the terms of the *Ashker* settlement.[70]

Of course, prisoners' lawyers only had access to reviewing the files of *class members* incurring disciplinary infractions or placement in RCGP, so the small subset of reviewed cases were ones in which prison officials knew their actions would subsequently be closely scrutinized by an adversarial party. This leaves open the disturbing question of what might have been or be happening in other cases where prison officials know no such scrutiny exists. In sum, even under known close scrutiny, CDCR officials continued to rely on vague, false, and unreliable claims about the unruliness and dangerousness of *Ashker* class members to justify continued placement in highly restrictive conditions of confinement.

Second, in the same 2019 order that extended the *Ashker* settlement agreement and court-ordered monitoring for an additional year, the judge noted that, even for those class members who avoided the expanding range of mechanisms by which they might have been returned to solitary confinement (especially convictions for disciplinary infractions based on confidential information or placement in the RCGP without disciplinary infraction), they remained ineligible for parole based on "gang validation" records officially discredited and renounced by the terms

[69] Order, *Ashker v. Brown*, Jan. 25, 2019: 7-10.
[70] Order, *Ashker v. Brown*, Jan. 25, 2019: 11-12.

of the *Ashker* settlement. Specifically, prisoners with disciplinary records indicating that they had previously been housed in the SHU because they had been labeled a gang member (through the repudiated, proven to be error-prone, three-pieces-of-evidence policy), were systematically being denied parole. If these prisoners attempted to explain the repudiation of the gang validation process, parole commissioners interpreted these "defenses" as dishonest, lacking both credibility and remorse.[71] Of course, CDCR officials had maintained these records in prisoners' files and transmitted the files to the parole commissioners, so prisoners claiming the records were discredited, when no such acknowledgement existed in their official files, did, indeed seem unremorseful, at best. This process provides another example of how CDCR officials continued to assert, defend, and leverage vague, false, and unreliable claims about prior gang membership to justify class members' continued incarceration.

The re-deployment of discredited information to re-demonize former SHU prisoners at parole hearings reveals the limitations of even the most direct and forceful provisions of the *Ashker* settlement. In order to truly present an existential threat to the practice of indefinite solitary confinement, the litigation will have to guarantee not just the release of demonized prisoners from solitary confinement into the general prison population but also their release from the general prison population onto parole. Indeed, prisoners, who have previously spent an extended period in the SHU, but are subsequently released to the streets and thrive beyond the prison gate, forcefully de-legitimize the entire institution of indefinite solitary confinement.

As one example, Oprah interviewed eloquent and poised University of California, Berkeley undergraduate Steven Czifra and recent Berkeley graduate Danny Murillo on her 2017 *60 Minutes* episode about the Pelican Bay SHU reforms. Both Cizfra and Murillo had spent

[71] Order, *Ashker v. Brown*, Jan. 25, 2019: 15.

extended periods in the Pelican Bay SHU, under the gang validation policy repudiated by the *Ashker* settlement. Czifra and Murillo's post-incarceration lives highlight the logical and financial absurdity of confining alleged gang members to solitary confinement indefinitely. First, Czifra and Murillo, by not just leading non-violent, law-abiding lives but by also attending and succeeding at an internationally renowned university, conclusively discredit their prior labels as indefinitely (and implicitly irredeemably) dangerous gang members. Second, the annual cost of educating Czifra and Murillo at U.C. Berkeley is less than half the annual cost of keeping them locked in the SHU: an estimated $35,000 for tuition, fees, and campus housing compared to an estimated $90,000 for maintaining a prisoner in the SHU. Such dramatic numbers raise an obvious question for tax payers: How can the cost of $90,000 per person per year to keep someone like Czifra or Murillo locked away in solitary confinement for years on end be justified? If successful release stories, like Czifra's and Murillo's, undermine correctional claims about dangerousness and the necessity of the SHU, they may also galvanize prison officials to generate confidential informants and prison disciplinary records that discourage such releases in the first place.

Consigning indefinite solitary confinement to infamy, then, requires not just getting prisoners out of solitary but getting formerly solitarily confined prisoners out of prison. This continues to be an apparent goal of the *Ashker* litigation and a potential avenue for rendering indefinite solitary confinement infamous, but neither goal has yet been achieved. Meanwhile, in addition to continuing to mis-use of confidential information in disciplinary infractions and continuing to mis-use prior gang validation information in parole hearings, both fairly generalized tactics, applied broadly to all *Ashker* class members, California correctional officials have also deployed this information in more individualized cases.

On May 21, 2019, the U.S. attorney's office in Sacramento, California filed a formal criminal complaint against 11 alleged Aryan Brotherhood prison gang members from across the state prison system, including, most notably, Danny Troxell. Troxell was both one of the named plaintiffs in the *Ashker* case and Ashker's co-signatory on the initial 2011 hunger strike demand letter. The 2019 *U.S. v. Yandell* complaint alleges that the defendants, including Troxell, had been involved in conspiracies to commit murder and traffic drugs. Conveniently, the investigation began in 2014, just after the hunger strikes, led by Ashker and Troxell, had raised awareness of the conditions of confinement in the SHU and called into question the gang validation policies justifying indefinite periods of confinement in the SHU. The 2019 complaint makes no attempt to obfuscate the connection.

In fact, in the affidavit supporting the complaint, Brian Nehring, a special agent with the Drug Enforcement Administration (DEA), directly connects the hunger strikes and *Ashker* litigation to the criminal conspiracy to murder and traffic drugs, which his investigation purports to uncover: "both were effective achieving Ashker's goal of changing the confinement conditions of extraordinarily dangerous inmates."[72] The *Ashker* settlement, the complaint goes on to assert, "required CDCR to release extraordinarily dangerous prison gang members from the Pelican Bay SHU into less-stringent California prison environments" and subsequently "created a growth opportunity for the Aryan Brotherhood."[73] The first named defendant, Yandell, the complaint concludes, is "a direct beneficiary of the *Ashker* settlement."[74]

DEA Special Agent Nehring's affidavit provides a battery of details about the alleged conspiracies, from "cooperating witness" evidence to tapped phone call transcripts, "CDCR

[72] "Affidavit in Support of Criminal Complaint," *US v. Yandell*, Case No. 2:19-MJ-0080-CKD, May 21, 2019: 24.
[73] *U.S. v. Yandell* Affidavit: 25.
[74] *U.S. v. Yandell* Affidavit: 26.

documentation," and surveillance agents. It reads like a convincing episode of the acclaimed HBO crime drama *The Wire*. But in light of the substantial body of evidence gathered by the *Ashker* plaintiffs in the ongoing litigation regarding settlement implementation, the complaint is, potentially, less convincing. "Cooperating witness" evidence and "CDCR documentation" are both, as Center for Constitutional Rights lawyers have painstakingly argued and local federal court judges have repeatedly agreed, unreliable at best, if not in some cases entirely fabricated.

Indeed, one line in Nehring's affidavit calls into question the reliability of the key cooperating witness referred to throughout. According to the affidavit, the "purported hunger strike was mostly an illusion," and, according to the key cooperating witness, "striking inmates did not risk their own health." A broad body of evidence – from the United Nations Special Rapporteur on Torture, Amnesty International, and individual interviews with *Ashker* class members to the fact that the state was worried enough about hunger striking prisoners to publicly seek a controversial "force feeding order" – suggests that the 2011-13 hunger strikes were hardly just "an illusion." Still, the acceptance of the cooperating witness's statement, and the inclusion of the claim that the hunger strikes were an illusion, suggests an about-face from both the *Ashker* settlement and Scott Kernan's acknowledgement on *60 Minutes* to Oprah Winfrey that, although the policy of validating gang members and keeping them in the Pelican Bay SHU indefinitely "was intended to save lives and make prisons safer across the system," that policy "*was* a mistake."[75]

In light of the history of criminalization and demonization as mechanism of persistence of solitary confinement, perhaps this about-face is not surprising. But it does represent a failure

[75] Oprah Winfrey, "Reforming Solitary Confinement at an Infamous California Prison," Jul. 22, 2018, https://www.cbsnews.com/news/60-minutes-reforming-solitary-confinement-at-an-infamous-california-prison/.

of the *Ashker* settlement to achieve even those reforms it explicitly and proactively sought: to humanize the class members and eliminate the mis-use of confidential information. Importantly, while litigation in the *Ashker* case is ongoing around mis-use of confidential information to re-impose solitary confinement and mis-use of gang validation evidence to preclude releases onto parole, confronting the evidence leveraged in the *Yandell* complaint and affidavit is beyond the scope of the *Ashker* litigation. This suggests that California prison officials may well be winning the battle, resisting the consignment of the practice of indefinite solitary confinement to infamy.

Insider Expertise and Social Science Research

If demonization is one critical mechanism of solitary confinement's persistence, opacity is another.[76] The power of Julie Small's single statistic from 2011 – 513 prisoners had been in solitary confinement for more than ten years in California – exemplifies both how little we knew about solitary confinement practices in California ten years ago and what a difference a small amount of knowledge made in thinking about how to reform those practices (at least systematically and incrementally reducing the duration of time people spend in solitary). As with demonization, much of the *Ashker* litigation sought to directly address opacity as a mechanism of persistence: generating new data about the impacts of solitary confinement on individuals as part of the pre-settlement litigation, and requiring collection of data about the use of solitary confinement (albeit limited in scope and public accessibility) as part of the post-settlement implementation. As with demonization, however, these attempts to address opacity met with both direct and indirect resistance, which, in turn, thwarted any conclusive consignment of the practice of indefinite solitary confinement to infamy. Unlike the resistance to addressing

[76] *See generally* Reiter, *23/7*; Rubin & Reiter, "Continuity in the Face of Penal Innovation."

demonization, though, which happened in individual cases and through institution and state-level policies, the resistance to addressing opacity involved a more diverse set of agents from a broader, more national pool of institutions.

Before a settlement was ever reached in the *Ashker* litigation, lawyers from the Center for Constitutional Rights were working hard to systematically increase knowledge about the practice of solitary confinement (especially for long and indefinite terms) in California and nationally. Prior to the Pelican Bay hunger strikes, the field of solitary confinement studies was finite: it included sensory deprivation studies conducted in labs in the 1960s and 1970s; research conducted largely in the course of litigation by psychologists documenting a constellation of psychological symptoms that arise and are exacerbated in solitary confinement dubbed "SHU syndrome"; and one quasi-experimental and heavily criticized study, funded by the National Institute of Justice and conducted in collaboration with the Colorado Department of Corrections in 2011, which found that "psychological disturbances are not unique" to the solitarily confined population and sometimes even improve over time in solitary confinement.[77]

The prisoners' lawyers in *Ashker*, however, set a new standard for the caliber and role of expertise and research in the solitary confinement context. They solicited and filed ten detailed expert reports both attacking the necessity of long-term solitary confinement for maintaining

[77] The NIJ study quoted is: Maureen O'Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, Document No. 232973 (Washington, D.C.: National Criminal Justice Research Service, National Institute of Justice, 2011), www.ncjrs.gov/pdffiles1/nij/grants/ 232973.pdf. On sensory deprivation studies, *see* Richard E. Brown & Peter M. Milner,"The Legacy of Donald O. Hebb: More Than the Hebb Synapse," *Nature Reviews: Neuroscience 4* (Dec. 2003): 1013–19; Alfred W. McCoy, "Science in Dachau's Shadow: Hebb, Beecher, and the Development of CIA Psychological Torture and Modern Medical Ethics." *Journal of the History of the Behavioral Sciences* 43, no. 4 (2007): 401–17; and Reiter, *23/7*: 180-82 (discussing these and other studies). On SHU Syndrome, *see* Stuart Grassian, "Psychiatric Effects of Solitary Confinement," *Washington Journal of Law and Social Policy*, 22 (2006): 325-83; Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement." *Crime and Delinquency* 49, no. 1 (Jan. 2003): 124–56.

institutional safety and security and documenting the serious mental and physical health consequences of long-term solitary confinement. Three *Ashker* expert reports attacked the necessity of long-term solitary confinement. Correctional leaders from outside of California, including the former director of the Ohio Department of Corrections, who had never before served as an expert in court; a retired prison warden, who had overseen prisons in Texas, Kentucky, and Mississippi; and a retired British prison warden, authored these reports.[78] In addition to the three *Ashker* expert reports written by insider correctional experts, three reports brought additional medical and psychological experts into the debate about the effects of solitary confinement: one report documented the increased prevalence of hypertension in solitary confinement; one documented the health problems associated with deprivations of human touch; and a third documented the neuroscientific connection between social and physical pain.[79] The other four reports included two reports by existing experts in "SHU Syndrome" summarizing and updating the state of the knowledge about the psychological impacts of long-term solitary confinement, including drawing on recently updated longitudinal interviews with prisoners at Pelican Bay; a report from a sociologist and nationally recognized expert in "correctional planning and research;" and a report from the United Nations Special Rapporteur on Torture concluding that conditions in the Pelican Bay SHU amounted to cruel, inhuman, and degrading

[78] Expert Reports of Terry J. Collins, Emmitt L. Sparkman, Andrew Coyle, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown; Lobel, "Litigation to End Indeterminate Solitary," 363.

[79] Expert Reports of Louise C. Hawkley, Dacher Keltner, Matthew Lieberman, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown; Lobel, "Litigation to End Indeterminate Solitary," 360-62.

treatment under international law.[80] The case settled within weeks of this barrage of expert evidence.[81]

The filing of the expert reports in *Ashker* also marked the beginning of an explosion of both litigation (nationally and internationally) and research about solitary confinement.[82] The *Ashker* expert reports seem at first like both a forceful blow against opacity around solitary confinement practices in California and a significant step towards rendering the practice of indefinite solitary confinement infamous. After all, the reports include statements that long-term solitary confinement is institutionally unnecessary, causes physical and psychological harm, and constitutes cruel, inhuman, and degrading treatment. However, as the prior two sections on thwarted settlement implementation and demonization revealed, long-term solitary confinement has hardly been abandoned in California. In fact, the practice has persisted, often in ways that are difficult to identify and track.

Perhaps the *Ashker* reports were only a first step towards greater transparency and more robust critiques of long-term solitary confinement, and more steps need to be taken to further develop the arguments framed in those expert reports. The *Ashker* settlement itself could have facilitated ongoing transparency by both requiring more data collection about prisoners in and out of the SHU and by insisting on provisions that this data would be made public.[83] Even absent such provisions, though, the expert reports in *Ashker*, along with the drastic changes in conditions the settlement did require, seemed, at first, to provide an ideal opportunity for further

[80] Expert reports of Craig Haney, Terry Kupers, James Austin, and Juan Mendez, *Ashker v. Brown,* Case No. 09-5796CW, Mar. 2015, https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown.
[81] Lobel, "Litigation to End Indeterminate Solitary," 369.
[82] Keramet Reiter, The International Persistence & Resilience of Solitary Confinement," *Oñati International Series in Law & Society*, Vol. 8.2 (2018): 247-66; Judith Resnik et al., "Punishment In Prison: Constituting the "Normal" and the "Atypical" in Solitary and other Forms of Confinement" (forthcoming).
[83] Reiter, "(Un)Settling Solitary Confinement."

research, which would have at least facilitated transparency, if not also contributed to existing critiques of indefinite solitary confinement.

Specifically, CDCR's willingness to commit to at least some reform of solitary confinement practices, as evidenced in their agreement to the *Ashker* settlement, in combination with the fact that carefully planned policy changes can provide opportunities for robust evaluations of the impacts of those changes, would have seemed to have created a natural opportunity for data collection and analysis. A number of natural experiments ripe for systematic analysis arose. I describe just two of many possibilities. First, some prisoners, who would have been placed in solitary confinement just months prior to the *Ashker* settlement (especially prisoners labeled as gang members without having committed specific rule violations), were no longer eligible for placement in solitary confinement. Did those prisoners not placed in solitary confinement after the settlement fare differently in terms of their rates of violence in prison, rates of recidivism after release, and rates of health problems in and out of prison from similarly situated prisoners, who had been placed in solitary confinement prior to the settlement? Second, *Ashker* class members were released gradually from solitary confinement, into different contexts, like the RCPG, Level IV institutions, and lower security general population prisons. How did these similarly-situated groups fare in these different conditions of confinement?

Not only were there obvious new opportunities for robust evaluations of solitary confinement practices in California following the *Ashker* settlement, but many individuals should have had incentives to pursue these opportunities. While California prison officials had not historically collected robust data on solitary confinement use, doing so following the *Ashker* settlement could have provided both opportunities to prove their fears around the implications of the settlement correct and to generate insights about how to mitigate these fears. External

researchers, too, had incentives to pursue research in California prisons. The National Institute of Justice (NIJ) put out the first federally-funded application specifically focused on studying solitary confinement in 2015, just after *Ashker* settled, following a conference on solitary confinement at which a number of NIJ-commissioned white papers were presented arguing just how little was known about the practice.[84] A private foundation in New York City, Langeloth, likewise funded large research and policy efforts around solitary confinement.[85] And the Vera Institute of Justice, a major criminal justice policy research organization, made solitary confinement a central area of research, partnering with multiple states across the United States to better understand (and reform) the practice.[86] Many researchers approached California seeking research partnerships, but as yet, no systematic, independent analysis of the impacts of solitary confinement and its reform on individuals and institutions, using department of corrections data, has been conducted or published.

One of the few reports evaluating any part of California's solitary confinement reform process was conducted by Stanford University's Human Rights in Trauma Mental Health Laboratory (the Stanford Lab), "a multidisciplinary collaboration between Stanford University's School of Medicine, Law School, and the WSD Handa Center for Human Rights and International Justice . . . composed of … academic clinicians, lawyers, and policy experts with special knowledge in the area of trauma mental health," on the request of the Center for Constitutional Rights, the public interest law firm representing the *Ashker* class members. The Stanford Lab interviewed 29 randomly selected members of the *Ashker* class and found that

[84] National Institute of Justice, "Exploring the Use of Restrictive Housing in the U.S. Issues, Challenges, and Future Directions," NCJ Number 250523, Nov. 2016, https://nij.ojp.gov/library/publications/exploring-use-restrictive-housing-us-issues-challenges-and-future-directions.
[85] *See* Langeloth Foundation, "Grants: Justice Reform," https://www.langeloth.org/funding-priorities/justice-reform.
[86] "Rethinking Restrictive Housing," Vera Institute of Justice, May 2018, https://www.vera.org/publications/rethinking-restrictive-housing.

"most of the men experienced severe psychological disturbances with lasting detrimental sequelae."[87] The fact that the Center for Constitutional Rights requested this report suggests that legal pressure was required to gain even enough access for this litigation-oriented, small-scale, qualitative study. This ongoing resistance to research within CDCR is yet another example of the persistence of opacity and administrative control around solitary confinement in the state.

Neither the expert reports initially filed in *Ashker* nor the terms of the settlement facilitated the kind of research around solitary confinement reform in California that might have signaled either a move away from opacity and towards transparency, or a willingness, on the part of CDCR, to objectively reconsider the fundamental justifiability of the practice of long-term solitary confinement. The expert reports and litigation in *Ashker*, however, did mark the beginning of an explosion of research about solitary confinement practices outside of California. This research has included articles about the medical and public health implications of solitary

[87] Jessie Brunner, Katie Joseff, Ryan Matlow, Jessica Rahter, Daryn Reicherter, Beth Van Schaack, *Mental Health Consequences Following Release from Long-Term Solitary Confinement in California Consultative Report Prepared for the Center for Constitutional Rights* (Stanford, CA: Human Rights in Trauma Mental Health Lab, Stanford University, 2017), https://ccrjustice.org/solitary-report.

confinement,[88] criminological implications in terms of institutional effects on violence and recidivism,[89] and even meta-analyses about the impacts of the practice.[90]

The expert reports in *Ashker*, which highlighted clear knowledge gaps in our understanding of solitary confinement, from its medical and psychological to its criminological effects, at least partially inspired this explosion of social science research. (Additional funding opportunities, like the 2016 National Institute of Justice program solicitation described above, certainly also contributed to the creation of what amounts to a new sub-field of research on the effects of solitary confinement.) For instance, my own work in public health journals was certainly influenced by the arguments in the *Ashker* expert reports (and funded by the Langeloth Foundation, referenced above); the Morgan and Labrecque metanalysis referenced above has been cited in multiple subsequent expert reports, filed by Morgan himself (who also testified as

[88] *See, e.g,* L. Brinkley-Rubinstein, J. Sivaraman, and DL Rosen et al., "Association of restrictive housing during incarceration with mortality after release," *JAMA* 2.10 (2019); B.O. Hagan E.A. Wang, J.A. Aminawung, et al., "History of solitary confinement is associated with post-traumatic stress disorder symptoms among individuals recently released from prison," *Journal of Urban Health*, 95.2 (2018):141-8; Keramet Reiter, Joseph Ventura, David Lovell, et al., "Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence, United States, 2017-18; C. Wildeman and LH Andersen, "Solitary confinement placement and post-release mortality risk among formerly incarcerated individuals: a population-based study," *The Lancet Public Health*, 5.2 (2020): 107-13; B.A. Williams, A. Li, C. Ahalt et al., "The Cardiovascular Health Burdens of Solitary Confinement," *Journal of general internal medicine*, 34.10 (2019):1977-80; MJ Zigmond and RJ Smeyne, "Use of Animals to Study the Neurobiological Effects of Isolation. Solitary Confinement: Effects, Practices, and Pathways toward Reform," in *Solitary Confinement: Effects, Practices, and Pathways toward Reform*, Jules Lobel and Peter Scharff Smith, eds, Oxford University Press, 2019.

[89] *See, e.g.,* H.D. Butler, B. Steiner, M.D. Makarios, L.F. Travis III, "An Examination of the Influence of Exposure to Disciplinary Segregation on Recidivism," *Crime & Delinquency*, 0011128719869194 (2019); M.F. Campagna, M.A. Kowalski, M.A. Drapela, et al., "Understanding Offender Needs Over Forms of Isolation Using a Repeated Measures Design," *The Prison Journal*, Vol. 99.6 (2019): 639-661; R.M. Labrecque, D.P. Mears, P. Smith, "Gender and the Effect of Disciplinary Segregation on Prison Misconduct," *Criminal Justice Policy Review*, 0887403419884728 (2019); R.M. Labrecque & P. Smith, "Assessing the impact of time spent in restrictive housing confinement on subsequent measures of institutional adjustment among men in prison," *Criminal Justice and Behavior*, 46.10 (2019): 1445-1455; J.W. Lucas, & M.A. Jones, "An analysis of the deterrent effects of disciplinary segregation on institutional rule violation rates," *Criminal Justice Policy Review*, 30.5 (2019): 765-787; L.M. Salerno & K.M. Zgoba, "Disciplinary Segregation and Its Effects on In-Prison Outcomes," *The Prison Journal*, 0032885519882326 (2020); C. Wildeman, & L.H. Andersen, "Long-term consequences of being placed in disciplinary segregation" *Criminology* (2020).

[90] *See e.g.,* Morgan RD, Smith P, Labrecque RM, et al., "Quantitative syntheses of the effects of administrative segregation on inmates' well-being," *Psychol Public Policy Law*, 22.4 (2016):439–461.

an expert for the state in the *Ashker* case), in cases considering the legality of solitary confinement,[91] and a number of other social science analyses cited above were collected in a 2019 anthology co-edited by Jules Lobel, President of the Center for Constitutional Rights and lead counsel in the *Ashker* case.[92]

This increased research attention to evaluating the practice of solitary confinement seems at first like a mechanism for greater transparency. More data collection, analysis, and dissemination of results about the effects of solitary confinement seems intuitively like it would at least hinder the kind of administrative obfuscation described in the preceding two sections. And to the extent research findings confirm the claims of the *Ashker* expert reports, they seem likely to contribute to consigning the practice of solitary confinement to infamy. But every new study just seems to bring more debate, about just how harmful solitary confinement is, and whether it works or not. In fact, although solitary confinement policies, post-*Ashker*, are facing challenges across the United States in individual and class action lawsuits, through legislative reforms, and by administrative oversight bodies, like Protection and Advocacy Systems, social science evidence is being leveraged not just by prisoner plaintiffs to condemn the practice of solitary confinement, but also by prison official defendants to vindicate the practice.

The explosion of social science attention to the impacts of solitary confinement, in turn, may be contributing to legal and policy debates that ultimately legitimize the practice. First, to the extent solitary confinement becomes a central area of study, researchers might be indirectly legitimizing the practice by treating it as a neutral subject of evaluation rather than an

[91] *See, e.g.,* expert reports and testimony in Vermillion v. Levenhagen, Case No. 1:15-CV-0605-RLY-TAB (S.D. Ind. May 21, 2019); *Brazea v. Atty. Gen. of Canada,* Court File# CV-15-53262500-C (Ontario Sup. Ct. Dec. 12, 2017).
[92] *See* Jules Lobel and Peter Scharff Smith, eds. *Solitary Confinement: Effects, Practices, and Pathways toward,* Oxford University Press: 2019.

ethically unacceptable practice to be abandoned, whether or not its theoretically negative impacts can be empirically confirmed. Alternatively, to the extent research, as in the expert reports of both Haney and Morgan in the *Ashker* case, is generated in the service of litigation, otherwise objective empirical analyses might be colored by policy agendas, like the goals of solitary confinement abolition, or maintenance. Second, researchers might accept the data they collect from correctional officials at face value, even if the data was generated on the basis of flawed assumptions, about, for instance, the inherent violence, riskiness, or criminality of prisoners confined in solitary (i.e. the kind of flawed assumptions established in the *Ashker* litigation). Analyzing this flawed data, in turn, might produce findings that focus on individuals and distract from institutional practices (focusing on individual measures of misbehavior rather than on institutional patterns of punishment, for instance).

My argument is not one against solitary confinement research; the footnotes in this piece alone suggest that would be hypocritical, at best. Rather, my argument is that, although social science research may mitigate opacity, it may also interact with administrative discretion and criminalization to become another mechanism of persistence of the practice, serving a variety of legitimizing roles, even when critical.

Ashker *as an Archetype of Reform Challenges*

While this paper has focused in (excruciating) detail on the implementation of the *Ashker* settlement, the Pelican Bay hunger strikes and the ensuing litigation was one of only dozens of attempts to reform, and especially constrain the use of, solitary confinement across the United States. Many of these reform efforts have been both inspired by the litigation and settlement in *Ashker* and thwarted by the same mechanisms of persistence identified in the *Ashker*

implementation efforts: opacity, administrative discretion, ongoing criminalization, and legitimizing expertise and social science.

Even if *Ashker* failed to consign the practice of indefinite solitary confinement to infamy in California, it certainly contributed to the initiation of litigation challenging the practice of long-term solitary confinement in jurisdictions across the United States. In a recent article, for instance, Judith Resnik lists off systemwide settlements limiting solitary confinement use in New York, Illinois, Arizona, Pennsylvania, and Virginia.[93] While these settlements represent a changing consensus against solitary confinement, they do not necessarily represent a changing practical experience for prisoners. In New York, officials report that many vulnerable populations, like juveniles, continue to end up in solitary confinement in spite of clear prohibitions on placing such vulnerable people in solitary confinement. In Arizona, a case with provisions for limiting the placement of mentally ill prisoners in solitary confinement and for implementing other fundamental improvements to the conditions of solitary confinement, was settled in 2014.[94] But as in *Ashker*, Arizona prisoners continue to complain of reforms being superficially implemented.

Examples of prison systems creatively avoiding implementation of policy reforms and settlement agreements, much as prison officials in California have done in the *Ashker* case, abound. For instance, in the federal prison system, prisoners with disabilities are precluded from solitary confinement placements, but prison officials still "find ways to disappear disabilities,

[93] Judith Resnik, Hirsa Amin, Sophie Angelis, et al. "Punishment In Prison: Constituting the "Normal" and the "Atypical" in Solitary and other Forms of Confinement," (forthcoming; on file with author); *Peoples v. Annucci*, 180 F.Supp.3d 294 (S.D.N.Y. 2016); *Davis v. Baldwin*, 1:2019cv02270 (S.D. Ill. 2017); *Parsons v. Ryan*, 16-17282 (9th Cir. 2018); *Reid et al. v. Wetzel*, 1:18-CV-00176-JEJ (M.D. Pa. 2018); *Porter v. Clarke,* 923 F.3d 348 (4th Cir. 2019), *rehearing en banc denied* (Jul. 26, 2019); *Reyes v. Clark,* 2019 WL 4044315 (E.D. VA 2019); Reynolds v. Arnone, 402 F. Supp 3d 3 (D. Conn. 2019) (appeal pending).

[94] "Parsons v. Ryan," https://www.safealternativestosegregation.org/resource/parsons-v-ryan/.

coerce people not to identify as disabled or make it dangerous for people to identify as disabled," like removing mentally ill prisoners from their medications in order to neutralize their mental health diagnoses. The American Civil Liberties Union is seeking to preclude anyone with a Serious and Persistent Mental lllness (SPMI) from placement in solitary confinement, but Talila Lewis, a local disability rights attorney, pointed out "systems have figured out ways around federal disability rights laws and legal judgments."[95] Indeed, Rhode Island is placing prisoners in solitary confinement for 31 days or more for disciplinary violations, contradicting a 30-day cap that had been in place in state regulations for almost 50 years.[96] Likewise, Texas, in 2014, created a "a mental health therapeutic diversion program" as part of a statewide initiative to reduce solitary confinement use. But in 2019, the *Texas Tribune* reported that "the program largely operates as a rebranded version of the isolated conditions they were already living in," not unlike the new RCPG unit at Pelican Bay, functioning as a re-branded SHU.[97] Like California prison officials, Texas prison officials resist collecting and sharing data about solitary confinement practices. A more recent *Texas Observer* investigation concluded that Texas prison officials "track[] very little about the effects of this extreme practice," not even the frequency of suicide attempts and tear-gassings in solitary confinement.[98]

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[95] Ella Fassler, "Disabled People Are Tortured in Solitary Confinement, But Tides May Be Turning," *Truthout*, Jan. 25, 2020, https://truthout.org/articles/disabled-people-are-tortured-in-solitary-confinement-but-tides-may-be-turning/?eType=EmailBlastContent&eId=d9dfee74-6ebd-40af-a963-f54cf2e89a5c.

[96] Katie Mulvaney, "U.S. District Court Chief Judge John J. McConnell rules that 15 years ago the Rhode Island Department of Corrections unilaterally raised the limit on punitive solitary confinement from 30 days to a year," *Providence Journal*, Jan. 29, 2020, https://www.providencejournal.com/news/20200129/court-ri-prisons-violated-order-capping-solitary-confinement-at-30-days.

[97] Jolie McCullough, "Solitary confinement worsens mental illness," *Texas Tribune*, Apr. 23, 2019, https://www.texastribune.org/2019/04/23/texas-prisons-solitary-confinement-mental-health-program/.

[98] Michael Barajas, "The Prison Inside Prison," *Texas Observer,* Jan. 2020, https://www.texasobserver.org/solitary-confinement-texas/.

In other countries, too, solitary confinement persists in spite of reform efforts. In Canada, where courts in Ontario and British Columbia have declared solitary confinement unconstitutional and the federal government has passed legislation claiming to abolish solitary confinement, practical conditions of solitary confinement persist, simply with more robust procedural protections preceding placement in those conditions. As Canadian legal scholar Lisa Kerr noted, "It is the end stage of solitary, but the question is what will arrive in its place."[99] Likewise, historian and criminologist Peter Scharff Smith has documented how solitary confinement has persisted in Denmark, in pre-trial and post-conviction settings, in spite of reform efforts designed to abolish the practice.[100]

Conclusion

The analysis here has been unrelentingly critical of the *Ashker* settlement and its implementation failures, arguing that indefinite solitary confinement in California has not yet achieved the legal infamy the case sought (and has been heralded for achieving). But I do not mean to suggest either that the prisoners and lawyers could have done a better job with the tools they had at the time of litigation, nor that reform is hopeless. Rather, I hope that by tracing the patterns of resistance to reform – re-packaging discredited practices under new names; demonizing the beneficiaries (and instigators) of reforms; and co-opting knowledge production into a tool of legitimation, new mechanisms of reform, and even abolition, might become more visible. Tracing these patterns provides a better of idea where to look for resistance in the future,

[99] Lisa Kerr, "The End Stage of Solitary Confinement," 55 C.R. (7th) 382 (2019).
[100] Peter Scharff Smith, "Punishment Without Conviction? Scandinavian Pre-trial Practices and the Power of the Benevolent State," In Peter Scharff Smith & Thomas Ugelvik (ed.), *Scandinavian Penal History, Culture and Prison Practice: Embraced By the Welfare State?* (New York: Palgrave Macmillan, 2017): 129 – 156.

the need to identify new tools for counteracting demonization, and the risks of conducting policy-relevant social science research without a critical eye to its legitimizing power.

In 2020, with a conservative and increasingly politicized federal judicial bench in place, the list of unjustly decided cases from which American democracy has somehow recovered – *Plessy v. Ferguson*, *Lochner v. New York, Stanford v. Kentucky* – to name just a few now-overturned and repudiated decisions – provide some comfort. There is hope that cases now being decided – limiting a woman's right to abortion, permitting discrimination in voting, minimizing rights to organize in labor and litigation – will eventually be overturned. There is hope, too, that cases like *Ashker* will eventually stand for a policy (solitary confinement) that has become infamous not just on paper but in practice, too.

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