

ON LITIGATING CONSTITUTIONAL CHALLENGES TO THE FEDERAL SUPERMAX: IMPROVING CONDITIONS AND SHINING A LIGHT

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ABSTRACT

Prisons and jails are the most invisible part of the American criminal justice system. In this hidden world of punishment, no prison is more shrouded in secrecy than the federal Bureau of Prisons' only "supermax" prison—the U.S. Penitentiary-Administrative Maximum known as ADX. Located in a remote area of Colorado, ADX has been described by one journalist as "a black site on American soil." The men at ADX are held in solitary confinement, locked in cells the size of a parking space for twenty-three hours a day, with little or no contact with other people. Some of them have been there for decades.

This Article describes the work of the men at ADX and their lawyers, including the student attorneys at the University of Denver's Civil Rights Clinic, who have dedicated themselves to bringing the conditions at ADX into compliance with the Constitution, human rights principles, and basic human dignity. While the federal courts have found constitutional violations in some of the ADX cases but not in others, the civil rights litigation undertaken by these lawyers and clients has been instrumental in shining a light into this darkest of places.

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INTRODUCTION

I think most people take it for granted that they are human, but when you get to the ADX, you realize that being human isn't a birthright.¹

Prisons do not disappear social problems, they disappear human beings.²

Perhaps the most oft-quoted description of the federal supermax prison in Florence, Colorado, was uttered by Robert Hood, its former warden, who called it “a clean version of hell.”³ The description is evocative. In historical Christian depictions, “[h]ell was likened to the carnage in which the decayed and putrid bodies of sinners, rotten with wickedness, infected the air . . . [a] pestilential sewer, the muddy bilge, the ‘well’ of the abyss . . . the suffocating drain in which the putrefaction of bodies polluted the air and took one’s breath away.”⁴ This raises the question of what it means to describe the American “version of hell” as “clean.”⁵ Robert Johnson answers: “The pain of the condemned sinner is

1. Eli Hager, *What Life is Like in America’s Highest-Security ‘Supermax’ Prison*, VICE (Jan. 8, 2016, 8:16 AM), https://www.vice.com/en_us/article/gqm384/what-life-is-like-in-americas-highest-security-supermax-prison.

2. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM), <http://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex>.

3. *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007), <https://www.cbsnews.com/news/supermax-a-clean-version-of-hell>.

4. PIERO CAMPORESI, *THE FEAR OF HELL: IMAGES OF DAMNATION AND SALVATION IN EARLY MODERN EUROPE* 15–16 (1987).

5. ROBERT A. FERGUSON, *INFERNO* 149 (2014) (emphasis omitted).

hot and visible; that of the convicted inmate cool and hidden. The emphasis on cleanliness disguises the nature of punishment in a country that does not want it to be seen.”⁶

The nature of punishment dispensed in the U.S. Penitentiary Administrative Maximum (ADX), the federal Bureau of Prisons’ (BOP) only supermax prison, is indeed largely unseen. The men imprisoned there are in solitary confinement, locked in cement and steel cells behind double doors for twenty-three hours a day. Most have been there for years, some for decades. Because BOP policy prohibits visits from anyone a prisoner did not know prior to incarceration, the ADX visiting room is frequently empty; some men have not received visits for years.⁷ Even when visits do occur—or the two fifteen-minute phone calls per month—ADX prisoners are limited in what they are allowed to say about the prison and their conditions.⁸ Mail, too, is censored.⁹ And the prison routinely refuses access to reporters¹⁰ and human rights bodies, including the U.N. Special Rapporteur on Torture, who has made repeated requests to the U.S. government for permission to visit, all of which were denied.¹¹ ADX is, in the words of one journalist, a “black site[] on American soil.”¹²

6. *Id.*

7. AMNESTY INT’L, ENTOMBED: ISOLATION IN THE U.S. FEDERAL PRISON SYSTEM 16 (2014).

8. See, e.g., Alan Prendergast, *Fortress of Solitude*, WESTWORD (Aug. 16, 2007, 4:00 AM), <http://www.westword.com/news/fortress-of-solitude-5094844> (describing the difficulty journalists face in reporting on ADX because the denial of access forces them to rely solely on accounts from the prisoners themselves, “and the view from lockdown can be quite limited”). Additionally, Prendergast notes that ADX prisoners “can be punished if they write too freely. They are not supposed to mention other prisoners or provide physical details that might mess with the good order and security of the institution.” *Id.*

9. See, e.g., *Prison Legal News v. Fed. Bureau of Prisons*, No. 15-CV-02184 (D. Colo. filed Oct. 1, 2015) (lawsuit filed by legal news magazine asserting that ADX illegally censored it in violation of the First and Fifth Amendments, the Administrative Procedure Act, and BOP regulations).

10. Alan Prendergast, *Inside ADX: The Federal Supermax Locks Inmates Down and Shuts Reporters Out*, WESTWORD (July 14, 2015, 12:06 PM), <http://www.westword.com/news/inside-adx-the-federal-supermax-locks-inmates-down-and-shuts-reporters-out-6908944> (“[C]ontrary to the U.S. Bureau of Prisons’ own stated policies, which indicate that media interview requests are to be evaluated on a case-by-case basis, ADX officials have routinely rejected every journalist’s effort to obtain face-to-face interviews with supermax prisoners for the past fourteen years, citing unspecified ‘security concerns.’”); Prendergast, *supra* note 8 (characterizing ADX as “media-proof” and describing requests made by CNN, The Washing Post, 60 Minutes, and Newsday to interview prisoners at ADX, all of which “were turned down flat”).

11. Juan E. Méndez (Special Rapporteur), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/25/60/Add.2, at 124 (2013), http://antitorture.org/wp-content/uploads/2014/03/Report_Observations_Govt_Communications_Replies_2014.pdf; see also Stephanie Nebehay, *U.N. Torture Investigator Accuses U.S. of Delaying Prison Visits*, REUTERS (Mar. 11, 2015, 8:14 AM), <http://www.reuters.com/article/us-usa-torture/u-n-torture-investigator-accuses-u-s-of-delaying-prison-visits-idUSKBN0M71J820150311>.

12. *Amnesty International Challenges America’s Most Restrictive Prison*, NBC NEWS (July 6, 2014, 2:46 AM), <http://www.nbcnews.com/news/us-news/amnesty-international-challenges-americas-most-restrictive-prison-n156586>; see also James Ridgeway, *Fortresses of Solitude*,

The secrecy surrounding ADX not only makes it hard to obtain reliable information about the prison's conditions and their effect on the men confined there, the nature of those conditions also makes it exceptionally difficult to effect change inside the walls. Precisely because of that secrecy and resistance to change, conditions of confinement litigation by the men who are imprisoned there has taken on a critically important role. Those who are or have lawyers (jailhouse or otherwise) sometimes win their cases, bringing critical—though often incremental—relief from constitutional violations.¹³ But even when plaintiffs do not prevail in their lawsuits against ADX, the litigation still can serve a critical function, chiefly (though by no means solely) by providing increased visibility into a prison where the conditions and their effects on its inhabitants are shrouded in secrecy.

This Article proceeds in three parts. Part I discusses the invisibility of incarceration and gives a brief overview of some of the reasons why we know so little about conditions in American prisons. Part II provides some of the history and context in which the BOP created ADX and attempts to capture some of the experience of being incarcerated there. Part III describes the heightened secrecy that enshrouds ADX and the important role that federal civil rights litigation has played in exposing the conditions of confinement in the prison, including cases brought by the University of Denver's Civil Rights Clinic.

I. PRISON: THE INVISIBLE PART OF THE CRIMINAL JUSTICE SYSTEM

When a sheriff or a marshall takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.¹⁴

Although the United States currently incarcerates 2.3 million people,¹⁵ the jails and prisons in which they serve their sentences are the most invisible aspect of the American justice system.¹⁶ As Andrea

COLUM. JOURNALISM REV. (Mar./Apr. 2013), http://archives.cjr.org/cover_story/fortresses_of_solitude.php (describing supermax prisons and solitary confinement units as “our domestic black sites—hidden places where human beings endure unspeakable punishments, without benefit of due process in any court of law”).

13. See *infra* Part III.

14. Warren Burger, *Address by the Chief Justice*, 25 REC. ASS'N BAR CITY N.Y. 14, 17 (Supp. Mar. 1970).

15. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

16. See Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. J.L. & POL'Y 435, 436 (2014); Bernard Harcourt, *The Invisibility of the Prison in Democratic Theory: A Problem of “Virtual Democracy,”* in 23 THE GOOD SOCIETY 6 (2014).

Armstrong has observed, “While we, as a society, may have participated in the reporting, investigation, or prosecution of the crime, society is practically barred from evaluating the punishment itself.”¹⁷ Indeed, unless they have a family member or friend who is incarcerated,¹⁸ many Americans know very little about what happens in prison.

This is unsurprising for several reasons. First, prisons are often built in geographically remote locations, making it difficult even for those who want to know about prison conditions to learn much about them.¹⁹ And this is even more true of federal prisons since it is possible—even likely—for a person to be designated to a prison that is far from his family, community, or both. It is a truism that “[p]risons are built to be out of sight and are, thus, out of mind.”²⁰

In addition to the geographic barriers that inhibit public access to prisons, there are also attitudinal barriers. Though exceptions exist, state and federal prisons are typically secretive places.²¹ Michele Deitch demonstrates that very few states involve members of the general public

17. Armstrong, *supra* note 16, at 437.

18. See, e.g., Tia Zheng et al., *How Many People Do You Know in Prison?: Using Overdispersion in Count Data to Estimate Social Structure in Networks*, 101 J. AM. STAT. ASS’N 409, 409 (2006) (In 2006, a survey was taken of Americans asking, among other things, “[H]ow many males do you know incarcerated in state or federal prison?” The mean of the responses to this question was 1.0. To a reader of this journal, that number may seem shockingly high. We would guess that you probably do not know anyone in prison. In fact, we would guess that most of your friends do not know anyone in prison either. This number may seem totally incompatible with your social world. So how was the mean of the responses 1? According to the data, 70% of the respondents reported knowing 0 people in prison. However, the responses show a wide range of variation, with almost 3% reporting that they know at least 10 prisoners. Responses to some other questions of the same format, for example, ‘How many people do you know named Nicole?’ show much less variation.”).

19. See, e.g., MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 13:1 (4th ed. 2009); Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 197 (Marc Mauer & Meda Chesney-Lind eds., 2002).

20. Heather Ann Thompson, *What’s Hidden Behind the Walls of America’s Prisons*, SALON (Jun. 8, 2017, 4:30 AM), https://www.salon.com/2017/06/08/what-will-hidden-behind-the-walls-of-americas-prisons_partner/; see Phillippe Brault, *Welcome to Prison Valley: Fremont County, Colorado Has Made Incarceration a Local Specialty Industry*, TIME, <http://content.time.com/time/photogallery/0,29307,2009197,00.html> (last visited Oct. 25, 2017) (showing an evocative photo essay depicting Fremont County, Colorado, home to thirteen prison complexes). One of the women depicted in the photos, the wife a man incarcerated in Fremont County, notes, “If the prisons weren’t here, there wouldn’t be anything or anyone here, because they don’t have anything to offer.” *Id.*

21. The aftermath of Hurricane Harvey, which devastated Beaumont, Texas, including several prisons in the area, provides a recent illustration of how difficult it can be for the public to obtain information about prison conditions. Days after the hurricane, a few prisoners finally were able to contact their family members. They reported knee-high flooding in cells, toilets so backed up that that prisoners were forced to defecate in bags distributed by prison staff, and dehydration caused by a lack of clean drinking water. After these descriptions began trickling out, prison officials put some of the prisons on lockdown, preventing the men inside from calling or e-mailing family members. Reports of retaliation followed. During this time, journalists from *The Houston Chronicle* made requests to visit prisons in Beaumont—to “see with their own eyes what’s happening at the facilities.” All were denied. See *Texas Prisoners Are Facing Horrid Conditions After Hurricane Harvey & Retaliation for Reporting Them*, DEMOCRACY NOW! (Sept. 8, 2017), https://www.democracynow.org/2017/9/8/texas_prisoners_are_facing_horrid_conditions.

in oversight or even have any external oversight mechanism at all beyond general authority granted to the state department of corrections agency.²² While some prisons give tours to the public upon request, these are usually carefully scripted and orchestrated to show only the things that prison staff want the public to see.²³ And media access is limited and discretionary.²⁴

Open records requests are occasionally a useful vehicle for obtaining information about prison conditions, but “[t]he response to the requests is almost always the same: Public access to the requested documents would threaten the security of the institution,” with corrections officials taking the position that releasing the information could result in “prison riots, public disturbances, and increases in violent crime within prison walls.”²⁵ When one group tried to get documents from the BOP, for example, it was denied access to files for fourteen years and obtained them only after litigation.²⁶

Nor have the Supreme Court’s decisions about public access—particularly media access—to prisons and prisoners helped to increase transparency. In 1974, the Court ruled in *Pell v. Procunier*²⁷ that prisoners’ First Amendment rights to communicate with the press could be limited to written correspondence, and that the press has no First Amendment right to interview any prisoner who is willing to speak with them in the absence of an individualized determination that an interview would not jeopardize security.²⁸ Although the Court noted that “the conditions in this Nation’s prisons are a matter that is both newsworthy

22. Armstrong, *supra* note 16, at 462 (citing Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010)). David Fathi attributes some of this to the fact that incarceration in the United States is wholly decentralized, noting “with each of the 50 states, the federal government, and most of the nation’s more than 3000 counties operating its own detention or corrections system,” oversight is “spotty and in many jurisdictions nonexistent.” David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1460 (2010).

23. See, e.g., Davis Harper, *Notable Narrative: Shane Bauer and “My Four Months as a Private Prison Guard,”* NIEMANSTORYBOARD (July 21, 2016), <http://niemanstoryboard.org/stories/notable-narrative-shane-bauer-and-my-four-months-as-a-private-prison-guard> (“It’s really hard to get information from prisons, or to really have a good idea of what’s happening inside. If you get inside, it’s for a carefully scripted tour, and if you are concerned with going in and wanting to come back, you have a lot of issues that access journalism faces.”).

24. Armstrong, *supra* note 16, at 462; Ridgeway, *supra* note 12 (“With few exceptions, solitary confinement cells have been kept firmly off-limits to journalists—with the approval of the federal courts, who defer to corrections officials’ purported need to maintain ‘safety and security.’ If the First Amendment ever manages to make it past the prison gates at all, it is stopped short at the door to the isolation unit.”).

25. Armstrong, *supra* note 16, at 464.

26. Derek Gilna, *After Fourteen Years, BOP Settles Prison Legal News FOIA Suit for \$420,000*, PRISON LEGAL NEWS (May 5, 2017), <https://www.prisonlegalnews.org/news/2017/may/5/after-fourteen-years-bop-settles-prison-legal-news-foia-suit-420000>.

27. 417 U.S. 817 (1974).

28. *Id.* at 824, 835.

and of great public importance,”²⁹ it held that journalists, the people who might hear prisoner accounts of abuse and share them with the public, “have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.”³⁰ As Senator Ted Kennedy predicted to his colleagues in the Senate, the *Procunier* decision would impact the transparency and accountability of prisons since, as he pointed out, “the public cannot regularly tour the prisons and interview inmates.”³¹

Just as prisons are motivated to keep the public out, so too has the public not been especially motivated to go *in*. While society’s interest in prison conditions is occasionally piqued when someone is convicted of a high-profile crime and the public wants to know where and under what conditions they will serve their sentence, for the most part, Americans have been remarkably disinterested in this aspect of our justice system.³² Some have hypothesized that one reason for this is the deeply retributive philosophy that animates our justice system, and in turn, society’s indifference to prison conditions—the mentality of “Don’t do the crime if you can’t do the time”³³ and “lock ‘em up and throw away the key.” “By keeping those in prison securely hidden from public view and by making sure that the criminals who perform serious crimes never reappear,” Ferguson writes, “society confirms that it does not want to think about whatever suffering takes place behind jailhouse walls even if it knows that humiliation, discomfort, crime and physical abuse are prevalent there.”³⁴

29. *Id.* at 836 n.7.

30. *Id.* at 834; see also *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (holding that BOP policy prohibiting personal interviews between reporters and prisoners in federal medium- and maximum-security prisons did not violate the First Amendment).

31. Thompson, *supra* note 20. Another significant blow to the public’s access came in 1987 when the Court decided *Turner v. Safley*, in which it held that prisoners’ right to speak to the media existed only to the extent that prison authorities did not have a reasonable justification for restricting those rights. 482 U.S. 78, 89 (1987). See also J.M. Kirby, *Graham, Miller, & The Right to Hope*, 15 CUNY L. REV. 149, 166–69 (2011) (describing the decline in media use of prisoners’ voices and narratives).

32. Heather Ann Thompson, author of *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, said of the public’s lack of interest in recent prison uprisings, “it’s a little disheartening; we don’t see the public banging on the door, saying what is happening inside?” Janine Jackson, *The Public Has a Right to Know About Atrocities Happening Behind Prison Walls*, TRUTHOUT (Aug. 25, 2017), <http://fair.org/home/access-is-about-knowing-how-to-get-the-future-right>. See also Jeff Spross, *Why No One Knows About the Largest Prison Strike in U.S. History*, WEEK (Oct. 18, 2016), <http://theweek.com/articles/655609/why-no-knows-about-largest-prison-strike-history>.

33. SAMMY DAVIS, JR., KEEP YOUR EYE ON THE SPARROW (BARETTA’S THEME) (Universal Music Corp. 1976); see also Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/10/violence_silence.html.

34. FERGUSON, *supra* note 5, at 93. This is as true for lawyers as it is for the general public. In his address to the American Bar Association, Justice Anthony Kennedy recognized as much when he told his audience,

[t]he focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and

II. ADX

As soon as they come through the door . . . you see it in their faces,” former ADX warden Robert Hood said. “That’s when it really hits you. You’re looking at the beauty of the Rocky Mountains in the backdrop. When you get inside, that is the last time you will ever see it.”³⁵

There may be no prison in the country where the conditions are more draconian—and more hidden—than ADX. On any given day, about 430 men are incarcerated there, all of them in solitary confinement.³⁶ ADX opened in 1994, one of four prisons in the BOP’s Florence Correctional Complex in Fremont County, Colorado.³⁷ In 1988, when the BOP was exploring options for where to locate the prison complex, the citizens of Florence (population 2,700), believing that the new prison complex would bring jobs to the town and stimulate its economy, conducted a campaign to raise over \$100,000 to buy 600 acres of land at the edge of town to donate to the federal government.³⁸ The BOP accepted the donation and after conducting an environmental impact statement and participating in several public forums, the federal government began construction on the four prisons in the summer of 1990.³⁹

ADX was the first prison in America built specifically as a supermax, and it remains the only federal supermax.⁴⁰ The BOP

the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case.

Anthony Kennedy, Assoc. J., U.S., Speech at ABA Annual Meeting (Aug. 9, 2003) (transcript available at <https://www.documentcloud.org/documents/325931-dcom5.html>).

35. Ray Sanchez & Alexandra Field, *What’s Life Like in Supermax Prison?*, CNN (June 25, 2015, 8:21 PM), <http://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison>.

36. In the ADX Step-Down Unit Program, prisoners are allowed a few hours out of their cells each day. Additionally, in the last two years, the BOP has created the “Adult Supervision Unit” at ADX with more out-of-cell time and other “privileges” for those men who the BOP does not believe will ever leave ADX.

37. ERIC WILLIAMS, *THE BIG HOUSE IN A SMALL TOWN: PRISONS, COMMUNITIES, AND ECONOMICS IN RURAL AMERICA* 56–57 (2011).

38. *Id.* at 55 (explaining that the citizens of Florence took “individual donations, had a competition between local businesses, held a carnival, and polished the whole thing off with a 24-hour radiothon” which ultimately raised \$126,000). While the town had hoped the federal prison complex would bring jobs and revitalize its economy, this was not to be. Although federal officials promised that sixty percent of jobs at the prisons would go to the local community, many people in Florence were not qualified for those positions due to age and education restrictions as well as an examination that applicants had to pass to be considered for employment. *Id.* at 86–87. Similarly, “the town’s business leaders had expected that the government would spend more money in the town on supplies, but the Bureau of Prisons (BOP) has contracts with big firms for almost everything they buy.” *Id.* at 47. Asked about the prisons’ economic impact on the town, a former warden at the Florence Correctional Complex observed that “very few prison employees live in Florence and the prison does not buy many goods from local businesses,” but noted, “that Texaco on the corner of Highways 67 and 115 must make a killing. I stop there all the time on my way home.” *Id.* at 26.

39. *Id.* at 56. The money raised by the town was eventually used to extend utility lines to the prison complex, rather than for the land itself.

40. There may soon be another federal supermax, as the BOP purchased Thomson Correctional Center, a “state-of-the-art, maximum security prison” from the State of Illinois for \$165

describes ADX as “the most secure prison in the federal system” which “is designed to house inmates who require an uncommon level of security.”⁴¹ The men confined there are described as so dangerous that “video footage of the exterior of the institution would negatively affect the security and orderly operation of the facility.”⁴²

Many of the first men who were transferred to ADX came from the federal penitentiary in Marion, Illinois.⁴³ The BOP opened the Marion penitentiary in 1963, the same year the government closed Alcatraz, and within a few years, it had become a replacement for Alcatraz.⁴⁴ Alcatraz, a maximum security prison built to deal with “the most incorrigible inmates in [f]ederal prison,”⁴⁵ is described by the BOP as a place “where the highly structured, monotonous daily routine was designed to teach an inmate to follow rules and regulations.”⁴⁶ Marion, where some of the men who had been at Alcatraz were sent, employed a similar philosophy; according to congressional testimony in 1971 by George Picket, then-superintendent of Marion, the prison was constructed to hold 500 “adult male felons who are difficult to control.”⁴⁷

In 1968, Marion implemented a behavior modification program called Control and Rehabilitation Effort (CARE), in which “prisoners were put in solitary confinement and otherwise coerced into participating in group ‘therapy,’ which consisted of intense psychological ‘attack sessions.’ The purpose was to bring prisoners under the staff’s control as

million in 2012. Aviva Stahl, *New Federal Supermax Prison Will Double Capacity for Extreme Solitary Confinement*, SOLITARY WATCH (Jan. 15, 2015) <http://solitarywatch.com/2015/01/15/new-federal-supermax-prison-will-double-capacity-for-extreme-solitary-confinement>. While the BOP has provided little direct information about its plans for the prison, the Justice Department referred to the facility as “ADX USP Thomson” in its FY 2014 budget request, an indication that “the prison would function at least in part as a second Administrative Maximum Facility (along with ADX Florence).” *Id.* Additionally, the Morrison Chamber of Commerce now has a page on its website devoted to “The Administrative Maximum Security United States Penitentiary, ADX USP, Thomson, Illinois – Relocation and Employment Information.” *AUSP Thompson*, MORRISON CHAMBER OF COM. (last visited Oct. 31, 2017), <http://morrisonchamber.com/about-morrison/bop-ausp-thomson>. Projected to open at the end of 2017, Thomson will have 1,900 “high-security” beds. *Thomson Prison on Track for 2017 Reopening*, CORRECTIONAL NEWS (Oct. 26, 2016) <http://correctionalnews.com/2016/10/26/thomson-prison-track-2017-reopening>.

41. Affidavit of ADX Unit Manager Kenneth Fulton, Aug. 6, 2014, United States. v. Ali Charaf Damache, No. 11-420, (E.D. Pa. 2011) (on file with author).

42. Susan Greene, *The Gray Box: The Inhumanity of Solitary Confinement*, COLO. INDEP. (Sept. 25, 2017), <http://www.coloradoindependent.com/166847/colorado-solitary-confinement-gray-box-isolation>.

43. Marion was built to replace Alcatraz, which closed in 1963.

44. STEPHEN C. RICHARDS, *THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT AND THE SUPERMAX MOVEMENT 12* (Stephen C. Richards ed., 2015).

45. *Alcatraz Origins*, FED. BUREAU PRISONS (last visited Oct. 31, 2017), <https://www.bop.gov/about/history/alcatraz.jsp>.

46. *Id.*

47. Comm. to End the Marion Lockdown, *From Alcatraz to Marion to Florence – Control Unit Prisons in the United States*, U. MASS (1992), http://people.umass.edu/~kastor/ceml_articles/cu_in_us.html.

totally as possible and turn them against other prisoners.”⁴⁸ After a series of protests by men in the CARE program, the BOP created the Marion Control Unit, in which it confined prisoners from throughout the BOP “whose behavior seriously disrupted the orderly operation of the institution.”⁴⁹ These men were in “administrative”—as opposed to disciplinary—segregation, meaning there was no limit on the amount of time they could be held in solitary confinement; administrative segregation was considered by the BOP to be “an administrative response to the prison’s purported inability to manage the prisoner by normal means.”⁵⁰

Following a series of strikes by the prisoners to protest their forced participation in Marion’s “behavior modification experiment,”⁵¹ the BOP decided to convert all of the Marion housing units to total isolation control units, a plan it implemented in 1983 following the murders of two correctional officers by two prisoners in the control unit.⁵² Conditions at Marion during the twenty-three year lockdown were brutal; men were held in isolation in six-by-eight-foot cells with concrete slabs for beds that had rings at each corner that were used to four-point them, sometimes for days at a time.⁵³ They ate all meals alone in their cells, and their sole educational opportunities were tapes played via closed-circuit television. The only time men left their tiny cells was to exercise in the narrow hallway—alone—for ninety minutes a day.⁵⁴ Some units were even more restrictive.⁵⁵ In a 1987 report about the conditions at Marion, Amnesty International found that “there is hardly a rule in the

48. *Id.*; see also RICHARDS, *supra* note 44, at 13 (describing techniques used to brainwash the men at Marion including “severing the inmate’s ties with family, complete isolation, character invalidation, and thought reform” as well as forced use of chemotherapy, Valium Librium, Thorazine, and other “chemical billy-clubs”).

49. Comm. to End the Marion Lockdown, *supra* note 47; Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill. 1973). For a series of firsthand accounts from people incarcerated at Marion during the lockdown, see, for example, COMM. TO END THE MARION LOCKDOWN, REFLECTIONS ON TEN YEARS OF THE LOCKDOWN AT USP MARION (1993).

50. Comm. to End the Marion Lockdown, *supra* note 47.

51. For a profoundly disturbing account of the Marion Behavior Modification Experiment, see RICHARDS, *supra* note 44, at 11–14; Eddie Griffin, *Breaking Men’s Minds: Behavior Control and Human Experimentation at the Federal Prison in Marion*, 4 J. PRISONERS ON PRISONS, no. 2, 1993, at 1–7.

52. One of those prisoners, Tommy Silverstein, is a client of the Civil Rights Clinic. See *infra* Section III.B.1.

53. Fay Dowker & Glenn Good, *The Proliferation of Control Unit Prisons in the United States*, 4 J. OF PRISONERS ON PRISONS, no. 2, 1993, at 1, 3. “Four-pointing” refers to the practice of chaining a person to a bed by his wrists and ankles. Media accounts during the Marion lockdown report that “guards have the power to chain a man spread-eagled and naked to a concrete bunk for days at a time.” Stephen C. Richards, *USP Marion: A Few Prisoners Summon the Courage to Speak*, 4 LAWS 91, 99 (2015) (citing Jackie Leyden, “Marion Prison: Inside the Lockdown!” All Things Considered, National Public Radio (Oct. 28 & Nov. 1, 1986)).

54. Comm. to End the Marion Lockdown, *supra* note 47.

55. *Id.* There were also severe beatings, druggings, forced rectal searches, and other mistreatment in the wake of the murders.

[United Nations] Standard Minimum Rules [for the Treatment of Prisoners] that is not infringed in some way or other.”⁵⁶

Reflecting on his decision to institute the permanent Marion lockdown, then-BOP Director Norman Carlson stated, “I decided I had no alternative but to bite the bullet and do it and hope the courts would understand.”⁵⁷ (They did.⁵⁸) But Marion was not built to be a supermax prison, and operating it as one presented a set of challenges. For example, men had to leave their cells for showers, which meant prison staff had to escort them.⁵⁹ And, except for a couple of units, the cell doors had bars (as opposed to solid steel doors), which permitted some conversation between prisoners.⁶⁰ Carlson is credited with persuading the federal government to build a new prison that would more effectively isolate prisoners from each other and, for the most part, from prison staff.⁶¹ The result was ADX.

The *New York Times* described ADX as “the apogee of a particular strain of the American penal system, wherein abstract dreams of rehabilitation have been entirely superseded by the architecture of control.”⁶² According to media reports at the time ADX was being built, a BOP spokesman claimed “that ADX would be ‘a more humane environment’ than Marion,” though a former associate warden conceded that “prisoners might perceive the isolation as a negative.”⁶³ Indeed, when ADX prisoners complained to then-Warden Robert Hood about their conditions, he would tell them, “this place is not designed for humanity.”⁶⁴

Tommy Silverstein, one of the Civil Rights Clinic’s clients who has been held in ADX since 2005 (and in solitary confinement at other federal prisons since 1983), described his conditions in ADX in a declaration filed as part of his lawsuit against the BOP:

56. DAVID MATAS, AMNESTY INT’L, ALLEGATIONS OF ILL-TREATMENT IN MARION PRISON, ILLINOIS, USA 14 (May 1987), https://www.freedomarchives.org/Documents/Finder/DOC3_scans/3.allegations.ill.treatment.marion.5.1987.pdf.

57. Michael Taylor, *The Last Worst Place/The Isolation at Colorado's ADX Prison is Brutal Beyond Compare. So Are the Inmates*, SFGATE (Dec. 28, 1998, 4:00 AM), <http://www.sfgate.com/news/article/The-Last-Worst-Place-The-isolation-at-2970596.php>.

58. See *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988).

59. Alan Prendergast, *End of the Line*, WESTWORD (July 12, 1995, 4:00 AM), <http://www.westword.com/news/end-of-the-line-5055302>.

60. *Id.*

61. John Edgar Wideman & Peter Annin, *Doing Time, Marking Race and Inside the New Alcatraz*, in *BUILDING THE NATION: AMERICANS WRITE ABOUT THEIR ARCHITECTURE, THEIR CITIES, AND THEIR LANDSCAPE* 359–60 (Steven Conn & Max Page eds., 2003).

62. Mark Binelli, *Inside America’s Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html>.

63. Prendergast, *supra* note 59.

64. Binelli, *supra* note 62.

I am confined in a cell that is bright all the time since the lights in the hallway never go off, surrounded by walls on all four sides almost all the time, including showers and meals. From my cell, I cannot see or talk to another person, although I can communicate a little by yelling through the vents. I never see another inmate face-to-face without a barrier of some kind separating us. . . . It is spooky how isolated you can be, while still being in such close physical proximity to someone. I know there are other men nearby on my range, I just can't see them.⁶⁵

My cell is approximately 87 sq. feet and contains a concrete bed, concrete desk, shower, sink and toilet. My cell is separated from the hallway by two doors, one of which is solid steel. There is very little natural light in my cell. I am usually confined to my cell for twenty-two hours a day, five days a week, and twenty-four hours a day the other two days a week. I take all of my meals alone in my cell. I am supposed to have outside recreation two or three times a week. Outside recreation . . . takes place inside a small metal cage at the bottom of a poured concrete pit. Inside the cages, there is not enough room to take more than a few steps in any direction.⁶⁶

For 28 years, I have been entombed in concrete and steel, and have not enjoyed anything even remotely resembling open space. I am barely even allowed outside. When outside, I am surrounded by 20' high walls that allow me to view no more than a sliver of sky and nothing of the surrounding landscape. The mental anguish of 28 years of solitary confinement is worse than any physical pain I have ever suffered or imagined.⁶⁷

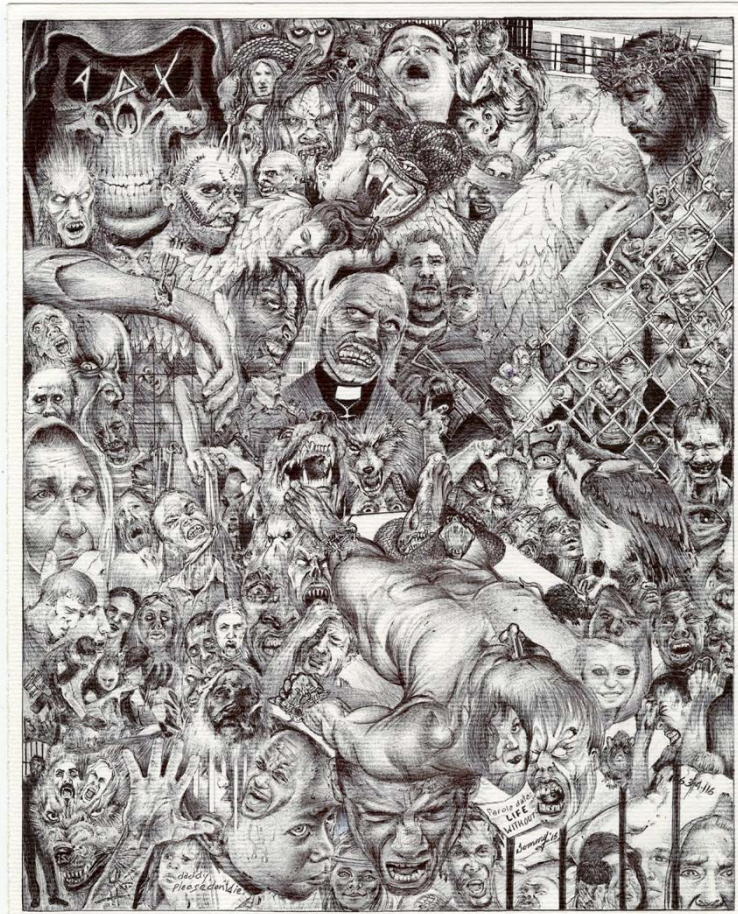
Frustrated with the difficulty of capturing his experience of ADX in words, Mr. Silverstein, an accomplished artist, drew it:⁶⁸

65. Declaration of Thomas Silverstein ¶¶ 208, 212, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 320.

66. *Id.* ¶¶ 215–19.

67. *Id.* ¶¶ 240–41.

68. This drawing is reprinted here with Mr. Silverstein's permission (and my gratitude).



There are echoes of Mr. Silverstein’s words—and his drawing—in those of former ADX Warden Robert Hood, who said of the prison, “This place is not designed for humanity. . . [t]he Supermax is life after death. It’s long term. . . . In my opinion, it’s far much worse than death.”⁶⁹

Other survivors of long-term isolation at ADX have described their experience (when they are able to do so) in similar ways.⁷⁰ Anthony McBayne, who spent eight years in ADX, describes being confined to his cell twenty-three hours a day with no meaningful or face-to-face contact

69. Ray Sanchez & Alexandra Field, *What’s Life Like in Supermax Prison?*, CNN (June 25, 2015, 8:21 PM), <https://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/index.html>.

70. There are too many to recount here. For a sample of others, see, for example, SARAH SHOURD, *HELL IS A VERY SMALL PLACE*, (Casella, Ridgeway & Shourd eds., 2016); JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST* (1981); WILBERT RIDEAU, *IN THE PLACE OF JUSTICE* (2010); *Voices from Solitary*, SOLITARY WATCH, <http://solitarywatch.com/category/voices> (last visited Oct. 31, 2017).

with other people. As a result, “I became increasingly withdrawn to the point where the only people I interacted with were the television characters on ‘Seinfeld.’ I watched ‘Seinfeld’ four times a day. ‘Jerry,’ ‘Elaine,’ ‘George,’ and ‘Kramer’ became my best friends, I felt like part of their family. They were the only friends I had.”⁷¹ After his release from prison, he was effectively unable to function. He couldn’t travel to work because the subway had too many people, causing him panic attacks. Even one-on-one conversations with other people were difficult and confusing for him because he had lost the ability to regularly interact with people. He missed Jerry, Elaine, George, and Kramer.⁷² Eventually, when the struggle of being outside became too much, he robbed a bank and went back to prison. Though the BOP put him in an open-population prison this time, he describes avoiding the chow hall and spending most of his time in his cell as he still felt the need to be alone.⁷³

Sarah Shourd, held in isolation in an Iranian prison for 410 days, provides one of the most haunting and evocative descriptions of solitary confinement: “At some point you’re going to snap. This might be after one week or one year, depending on how you’re wired.”⁷⁴ Explaining that at first, “the scream ripping through your throat” is a “welcome release,” she describes being unable to stop until the guards arrive “with tear gas, batons drawn. They come to make you choke on your screams.” She continues:

Days later you’ve appeared to calm down. To settle in. Yet the scream doesn’t stop. You try not to hear it as you brush your teeth, take your meds, force yourself to do push-ups, or attempt to focus on reading a magazine. As long as you’re stuck in this coffin that silent scream becomes the backdrop of every moment of your waking life. It could last a month, a decade, or the rest of your life, yet no one will ever hear it but you.⁷⁵

She concludes, “the cruelty—the torture—of solitary confinement targets a part of us perhaps more essential than even our physical bodies: the part that makes us human.”⁷⁶

III. SHINING A LIGHT: THE IMPORTANCE OF LITIGATION

The law does forbid the methodological use of torture. . . .
[B]ut how can anyone prove such practices exist when only
convicts witness it?⁷⁷

71. Declaration of Anthony McBayne at 2, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 319-65.

72. *Id.* at 3–4.

73. *Id.*

74. SHOURD, *supra* note 70, at vi.

75. *Id.*

76. *Id.* at ix.

77. ABBOTT, *supra* note 70, at 58.

We inmates look to the public as sheep look toward their shepherd, we're crying wolf but you don't see him. That doesn't mean the wolf's not there. He's just wearing sheep's clothing so you don't see him. We can't understand why you don't see him but we see him and we smell him, and he stinks like death and repression.⁷⁸

For members of the public seeking to learn about the conditions in ADX, reliable information can be hard to come by. When BOP officials speak about ADX, they do so in a combination of technical language and euphemism that obscures rather than illuminates. For example, at a 2014 Senate subcommittee hearing about solitary confinement, then-director Charles Samuels testified that solitary confinement does not exist in the BOP—including at ADX:

Inmates placed in restrictive housing are not 'isolated' as that term may be commonly understood. All inmates have daily interactions with staff members who monitor for signs of distress. In most circumstances, inmates placed in restrictive housing are able to interact with other inmates when they participate in recreation and can communicate with others housed nearby. They also have other opportunities for interaction with family and friends in the community (through telephone calls and visits), as well as access to a range of programming opportunities that can be managed in their restrictive housing settings.⁷⁹

Five years earlier, the then-warden of ADX testified in a deposition that he did not even know what solitary confinement is. When asked if he considered ADX to be solitary confinement, he answered,

I do not. . . . I don't have a definition of solitary confinement. I just know what I see on TV. And when they say solitary confinement on TV, they generally have a person in a place that's dark and no contact with anyone. And they open a little slot and slide in a tin plate or something with bread and water or something like that. That's my only frame of reference for solitary confinement. So based on that. My only knowledge of it, at the ADX, those are the differences.⁸⁰

78. Scott A. Routledge, *Scott A. Routledge/a.k.a Fountain, #02158-090*, in *REFLECTIONS ON TEN YEARS OF THE LOCKDOWN AT USP MARION*, *supra* note 49, at 9, 9.

79. *Hearing on Reassessing Solitary Confinement: The Human Right, Fiscal, and Public Safety Consequences Before the S. Comm. On the Constitution, Civil Rights, and Human Rights* (2014) (statement of Charles E. Samuels, Jr., Director of Fed. Bureau of Prisons). Samuels' credibility about solitary confinement in the BOP was further undermined by his inability to answer Senator Franken's question about the size of a typical segregation cell. Samuels appeared so confused by the question that Franken turned to his colleagues on the subcommittee to ask, "Am I asking this wrong?" *Size of Solitary Confinement Cell*, C-SPAN (Feb. 25, 2014), <https://www.c-span.org/video/?c4485257/size-solitary-confinement-cell>.

80. Deposition of Ron Wiley at 43:5-7, *Saleh v. Fed. Bureau of Prisons*, 2010 WL 5464295 (D. Colo. Nov. 23, 2010) (No. 05-CV-02467).

Similarly, in his deposition, a BOP psychologist disavowed any knowledge of the use of solitary confinement in the BOP, and when asked to define the term responded, “Well . . . if we break the words into pieces, [confinement] would mean that a person was confined in a space. And solitary would mean by himself, absent all other engagements.”⁸¹ Given that these are the sorts of interpretations BOP officials employ when describing ADX, there is significant risk that the public will be misled as to the actual conditions in the prison.

But accessing the sources necessary to learn about ADX can be exceedingly difficult. For example, in its 2014 report examining the use of solitary confinement in the federal prison system, Amnesty International condemned both the conditions in ADX and “the lack of detailed publicly available information on the facility.”⁸² In a section entitled, “Restrictions on Access to ADX: Lack of Transparency Regarding BOP Use of Isolation,” the report describes repeated requests from both Amnesty International and the U.N Special Rapporteur on Torture to visit the prison, all of which were refused by the BOP.⁸³ Indeed, in writing its report, Amnesty International relied primarily on “court documents available through lawsuits and other information provided by attorneys representing ADX inmates,” because of “a lack of detailed publicly available information on the facility.”⁸⁴

Journalists similarly have been prevented from accessing ADX. The Amnesty International report, citing a *Westword* article from 2007, noted that “from January 2002 through May 2007, officials denied every single media request for face-to-face interviews with ADX prisoners, or tours of the facility. . . .”⁸⁵ Only after mounting “criticism of lack of access” did the BOP arrange a restricted tour of the prison in 2007 for some journalists with major media outlets. But, the Report noted, “no similar tours are believed to have been arranged since then.”⁸⁶

In 2015, when it became known that Boston Marathon bomber Dzhokhar Tsarnaev could be held in ADX, the *Boston Globe* sought to visit the prison.⁸⁷ The BOP denied the request and refused to answer any questions about the prison: ““As our primary focus at the ADX is on the day to day operations of the institution, there is, consequently, no allotted time for additional activities, to include personal interviews or tours,”

81. Deposition of Donald Denney at 22–23, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471).

82. AMNESTY INT’L, *supra* note 7, at 5.

83. *Id.*

84. *Id.*

85. *Id.* at 42, n.13.

86. *Id.* (citing Prendergast, *supra* note 8).

87. David Abel, *Colorado Prison ‘a High-Tech Version of Hell,’* BOS. GLOBE (Apr. 26, 2015), <https://www.bostonglobe.com/metro/2015/04/25/the-alcatraz-rockies/a0BWzRjRpmQatMsfm8FUOL/story.html>.

wrote John Oliver, ADX's warden, in a letter to the *Globe*.⁸⁸ Nor is direct communication between journalists and ADX prisoners a viable substitute. The news media is not permitted to communicate with ADX prisoners by phone, and letters between ADX prisoners and journalists are "heavily censored or commonly disappear altogether."⁸⁹

Families and friends of those in ADX often fare no better in learning about their loved ones' conditions; they too find that obtaining information directly from the men incarcerated in ADX is extremely difficult.⁹⁰ A visit is necessary for all but the briefest of conversations, as telephone calls are limited to fifteen minutes.⁹¹ But ADX policy prohibits a prisoner from having a visit from anyone he did not know prior to incarceration, which significantly limits the number of people who can learn about the conditions at ADX directly from the prisoner himself.⁹² Additionally, the remote location of the prison makes it hard for the families and other loved ones who are allowed to visit to actually get there; the closest airport is an hour away and flights can be prohibitively expensive. And some ADX prisoners and their families are reluctant to have visits at all, given that all physical contact—even a brief hug—is strictly prohibited, and visits take place with a thick glass wall separating the prisoner and his visitor, sometimes with the prisoner in full shackles.⁹³

Even when visits do occur, ADX prisoners and their families censor the content of their conversations, knowing that all visits are closely monitored by prison staff, the Federal Bureau of Investigation (FBI), or both and that a visit can be terminated if a monitor deems a topic of discussion off-limits.⁹⁴ Monitoring takes place on phone calls as well, which are similarly subject to termination based on the monitor's judgment.⁹⁵ Mail, too, is censored.⁹⁶

88. *Id.*

89. Susan Greene, *Federal Supermax in Colo Condemned as Torturous*, COLO. INDEP. (July 16, 2014), <http://www.coloradoindependent.com/148263/federal-supermax-in-colo-condemned-as-torturous>. Journalist Susan Greene, describing her repeated unsuccessful efforts to interview ADX prisoners or tour the prison: "Years ago, while assigned to cover Area 51 in Nevada, I had better access to a federal airbase that didn't officially exist." Greene, *supra* note 42.

90. Sometimes the reason is self-censorship. As one person in supermax explained, "My philosophy is, I don't care if you have a knife stuck in your back, you tell your mom that you're okay. Seeing how they looked at me on visits, handcuffed, shackled, chained to the floor and behind glass, killed me inside." Greene, *supra* note 42.

91. Additionally, most ADX prisoners are limited to two phone calls per month.

92. FED. BUREAU OF PRISONS, 5267.08, PROGRAM STATEMENT: VISITING REGULATIONS, at 6 (May 11, 2006) ("The visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution.")

93. Over the years, several men in ADX have told us that they are reluctant to have family members visit because they don't want their families to see them in these conditions.

94. Declaration of Nidal Ayyad ¶ 164, *Ayyad v. Holder*, No. 05-CV-02342 (D. Colo. Aug. 12, 2013).

95. *Id.* ¶ 165.

An additional level of secrecy exists for the men at ADX who are under Special Administrative Measures (SAMs), severe confinement and communication restrictions imposed by the Attorney General himself and carried out by the BOP.⁹⁷ SAMs drastically limit a prisoner's communication and contact with the outside world.⁹⁸ Originally, the federal government created SAMs to target gang leaders and prisoners in cases in which "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons."⁹⁹ The government initially instituted this ban on communication for prisoners with a demonstrated reach beyond prison.¹⁰⁰ In the wake of 9/11, however, the Justice Department substantially changed the standard for imposing and renewing SAMs. Finding the SAMs application and renewal process burdensome and "unnecessarily static," DOJ relaxed the standards considerably and expanded their use.¹⁰¹

Since October 2001, the Attorney General has had the ability to authorize the director of the BOP to implement SAMs upon written notification "that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would

96. In an article about reporters' access to supermax prisons, including ADX, James Ridgeway recounts a story told to him by journalist Susan Greene about her attempts to send copies of an article she wrote to some of the men inside ADX. "Ironically, once her article was published, she could not send it to her correspondents in ADX, due to a policy against allowing prisoners' names in an article. 'So I redacted all the prisoners' names,' she said, 'and then it came back saying something like, 'You can still see it if you hold it up to the light.' Out of frustration and wanting to be a pain in the ass, I Exacto-knifed out all the names and sent it, and it still didn't get through.'" Ridgeway, *supra* note 12.

97. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2012).

98. *Id.*

99. Scope of Rules: Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. 25,120, (May 17, 1996) (interim rule with request for comments); *see also* Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 84 (2003) (noting SAMs first appear in case law in the context of a case involving the leader of the Latin Kings).

100. For example, in *United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998), the Second Circuit cited 28 C.F.R. § 501.3 in upholding the extraordinarily restrictive conditions of confinement imposed on a leader of the Latin Kings who had a documented history of directing murderous conspiracies from prison and communicating with an extensive network of coconspirators inside and outside of prison. *Id.* at 110. Felipe's communication restrictions, however, were not SAMs, nor were they imposed pursuant to 28 C.F.R. § 501.3. *See id.* at 109. Rather, the restrictions on his conditions of confinement were imposed by the sentencing court pursuant to 18 U.S.C. § 3582(d), which "allows district courts to limit the associational rights of defendants convicted of racketeering offenses." *Id.*; *see also* 18 U.S.C. § 3582(d) (2012).

101. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (Oct. 31, 2001) (extending the maximum initial period for which SAMs can be authorized from 120 days to one year and expanding the category of inmates covered by the rule). The government now had the ability to impose SAMs for a year, whereas previously the period was limited initially to 120 days. *Id.* For renewals, the government did not have to demonstrate that the original reason the person was put under SAMs still existed, just that there was a reason to maintain the measures. 28 C.F.R. § 501.3.

entail the risk of death or serious bodily injury to persons.”¹⁰² SAMs “may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism.”¹⁰³ A prisoner’s SAMs recite in detail the nature of this isolation, including, for example, how many pages of paper he can use in a letter or what part of the newspaper he is allowed to have and after what sort of delay.¹⁰⁴ Of the fifty or so people with SAMs who are serving their sentences in federal prisons, the majority are believed to be in ADX.¹⁰⁵

For ADX prisoners on SAMs, it is even more difficult to learn about the conditions of confinement in which they are held. This is because the SAMs themselves prohibit the prisoner from communicating with anyone other than his lawyer and his immediate family (usually defined to include parents and siblings, as well as a spouse and children).¹⁰⁶ Detailed description of the impact of the SAMs is illegal because everyone in contact with a person on SAMs becomes subject to the SAMs by virtue of the requirement that they not divulge any communication with that person to a third party.¹⁰⁷ As a condition of being allowed to represent a prisoner on SAMs, the Justice Department requires lawyers to sign an affirmation acknowledging the SAMs and agreeing not to repeat publicly anything the lawyer talks about with her client.¹⁰⁸ The same is true for the family members of the person on SAMs; they are also forbidden from talking about their conversations

102. *Id.* The authority for the SAMs derives mainly from two statutory provisions. *See* 5 U.S.C. § 301 (2012); 18 U.S.C. § 4001 (2012). First, 5 U.S.C. § 301 grants the directors of executive departments the power to create regulations designed to assist them in fulfilling their official functions and those of their departments. Second, 18 U.S.C. § 4001 vests the Attorney General with authority to control federal prisons and allows him to promulgate rules governing those prisons.

103. 28 C.F.R. § 501.3(a).

104. *See, e.g.*, Memorandum for Harley G. Lappin, Dir., Fed. Bureau of Prisons, from the Acting Att’y Gen., *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 16, 2008), ECF No. 21-2 [hereinafter Hashmi’s SAMs Document] (limiting Hashmi’s correspondence only to immediate family members in letters of no more than three pieces of paper) (on file with author).

105. I say “believed to be” because of the difficulty of obtaining a list of the people who are on SAMs. *See generally* ALLARD K. LOWENSTEIN INT’L HUMAN RIGHTS CLINIC & CTR. FOR CONSTITUTIONAL RIGHTS, YALE LAW SCH., *THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS* (Sept. 2017), https://law.yale.edu/system/files/area/center/schell/sams_report.final_.pdf. That said, a 2014 declaration from a BOP official states that as of that date, fifty-five prisoners are on SAMs, of which thirty-five are incarcerated at ADX. Declaration of Christopher Synsvoll, *United States v. Damache*, No. 11-420 (E.D. Pa. Aug. 6, 2014).

106. *See, e.g.*, Hashmi’s SAMs Document, *supra* note 104.

107. *See, e.g., id.* at 9, 11–12 (setting out nondivulgence requirement for Hashmi’s legal and nonlegal contacts).

108. *See, e.g., id.* at 1–3. The required attorney affirmation, especially for pretrial defendants under SAMs, has been the subject of some litigation. *See United States v. Reid*, 214 F. Supp. 2d 84, 92–94 (D. Mass. 2002) (defense counsel not required to sign affirmation because to do so conflicts with the Sixth Amendment, even though government modified affirmation requirement to make it subject to judicial determination).

with their relative on SAMs, even with their shared extended family.¹⁰⁹ Lawyers and family members face prosecution if they provide details of any conversation or interaction with the person on SAMs.¹¹⁰

The SAMs operate to make an already-hidden set of prison conditions even more invisible, as the only people who have access to or knowledge of those conditions are prohibited from disclosing anything about them. The result is that prisoners in ADX—especially, but by no means exclusively, those with SAMs—are effectively disappeared. For the men at ADX, out of sight can easily lead to out of mind.

A. Prison-Conditions Litigation: A Valuable Tool for Transparency if Litigants Can Navigate the Obstacles

But as Justice Kennedy remarked at his 2003 address to the American Bar Association: “Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States.”¹¹¹ With respect to the particular role of lawyers in contributing to this problem, he observed:

The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.¹¹²

Not only are there few incentives for lawyers to “think about what is behind” the prison door, there are significant disincentives for them to become involved in challenging unconstitutional prison conditions. Prisoners are, as a group, unpopular clients. Lawyers who represent them risk opprobrium from the public, who often do not understand why “those people” have any rights at all—especially if the prisoner has been convicted of anything more serious than a nonviolent drug offense. Representing incarcerated clients is logistically difficult, too, given the barriers that exist to even basic communication between lawyers and clients. For example, telephone calls can take days to arrange, and e-mail—if it is available—is not confidential.¹¹³ Letters can take weeks to

109. Hashmi’s SAMs Document, *supra* note 104, at 11–12.

110. See *United States v. Stewart*, 590 F.3d 93, 105, 110 (2d Cir. 2009) (observing that after a sentencing court implements SAMs, an attorney representing that prisoner who has agreed to comply with the SAMs limitations can be prosecuted for disclosing information obtained from the prisoner in the course of representation).

111. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

112. *Id.*

113. See Editorial, *Prosecutors Snooping on Legal Mail*, N.Y. TIMES (July 23, 2014), <https://www.nytimes.com/2014/07/24/opinion/24thu3.html> (describing the practice of federal prosecutors to review emails between prisoners and their attorneys and noting that “[i]n one case,

arrive. And an in-person meeting with a client is often an all-day (or even a multi-day) commitment, given how far away from metropolitan areas most prisons are coupled with the inevitable delays¹¹⁴ that are part and parcel of visiting a client in prison (not to mention the searches of lawyers¹¹⁵ and their belongings).

Especially after Congress passed the Prison Litigation Reform Act (PLRA) twenty years ago, even fewer lawyers are willing to represent clients in conditions of confinement litigation due to caps placed on attorneys' fees,¹¹⁶ the prohibition against compensatory damages for emotional harm absent proof of a physical injury,¹¹⁷ the requirement that a prisoner flawlessly exhaust all administrative remedies prior to filing suit,¹¹⁸ and the ability of defendants to terminate injunctions after two years absent a court finding that there is a "current and ongoing violation" of federal law.¹¹⁹

If all this were not enough of a deterrent, judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win. Under the Eighth Amendment, a prison condition is not unconstitutional unless it amounts to "the wanton and unnecessary infliction of pain."¹²⁰ The Supreme Court created a two-pronged test for determining when this standard is met, holding that a plaintiff must show both that he has been deprived of a "basic human need[]"¹²¹ or "the minimal civilized measure of life necessities"¹²² (the objective prong) and that prison officials acted with "deliberate indifference"—a mental state that the Supreme Court has likened to "criminal recklessness" (the

prosecutors read more than 12,000 pages of emails sent by an imprisoned former Pennsylvania senator, and included them in its argument for a harsher resentencing").

114. For an illustration of these kinds of delays, see Rebecca Boucher, *Hell Is Trying to Visit My Jailed Client*, MARSHALL PROJECT (July 28, 2017, 6:00 AM), <https://www.themarshallproject.org/2017/07/27/hell-is-trying-to-visit-my-jailed-client>.

115. Nearly every prisoners' rights lawyer I know—especially women—has at least one story of prison staff trying to force them to submit to invasive searches of themselves or their belongings as a condition of seeing their incarcerated clients. *See, e.g.*, Deborah Becker & Rachel Paiste, *Female Lawyers Allege Improper Searches on Prison Visits*, WBUR BOS. (Feb. 27, 2015), <http://www.wbur.org/news/2015/02/27/woman-lawyers-prison-visits> (describing experience of female attorney who was required to lift up her shirt and shake her bra out because prison staff did not believe her underwire bra caused the metal detector alarm to sound). Of course, male lawyers are not immune to this treatment—especially men of color. *See, e.g.*, BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 194 (2014) (correctional officer forces African-American capital defense attorney Bryan Stevenson to submit to strip search as condition of seeing his client).

116. Hourly rates for lawyers are limited to 150% of the Criminal Justice Act rates for criminal defense representation set in 18 U.S.C. § 3006A, which are much lower than market rates that lawyers charge in nonprisoner cases. 18 U.S.C. § 300A(d) (2012).

117. 42 U.S.C. § 1997e(e).

118. *Id.* § 1997e(a).

119. 18 U.S.C. § 3626(b)(1)(3) (2012).

120. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

121. *Rhodes*, 452 U.S. at 347. In cases alleging inadequate medical care, the prisoner-plaintiff must show that he has a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

122. *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 347).

subjective prong).¹²³ Using this formulation of the objective prong, some of the conditions that federal courts have upheld as constitutional include: double-celling in fifty to fifty-five square foot cells designed for one prisoner;¹²⁴ denial of visiting rights for two or more years;¹²⁵ being confined in a cell with virtually no running water and a leaking toilet¹²⁶ or a flooded cell without a working toilet;¹²⁷ six months confinement under conditions of vermin infestation, cells smeared with human waste, and flooding from toilet leaks;¹²⁸ deprivation of toilet paper;¹²⁹ two days in a strip cell without clothing;¹³⁰ deprivation of underwear as part of a “progressive 4-day behavior management program;”¹³¹ and leaving a prisoner who had been attacked in proximity to the eighteen others who attacked him, one of whom stabbed him.¹³² Most relevant to the conditions at ADX, several courts have held that long-term or indefinite solitary confinement does not violate the Eighth Amendment.¹³³

Prisoners challenging deprivations of civil liberties face an equally difficult standard. Despite the Supreme Court’s pronouncement that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country”¹³⁴ and that prisoners do not shed all of their fundamental rights such as freedom of speech, freedom to exercise religion, and freedom from unreasonable searches and seizures “at the prison gate,” the Court held in *Turner v. Safley*¹³⁵ that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹³⁶ The

123. *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994).

124. *Rhodes*, 452 U.S. at 348; *Benjamin v. Fraser*, 343 F.3d 35, 53 (2d Cir. 2003) (reversing order that beds be spaced so that detainees’ heads are six feet apart for protection from contagion because there was no showing of “actual or imminent substantial harm”).

125. *Overton v. Bazzetta*, 539 U.S. 126, 134, 136 (2003).

126. *Wilson v. Cooper*, 922 F. Supp. 1286, 1292 (N.D. Ill. 1996).

127. *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001).

128. *Beverati v. Smith*, 120 F.3d 500, 504–05, 505 n.5 (4th Cir. 1997).

129. *Citro v. Zeek*, 544 F. Supp. 829, 830 (W.D.N.Y. 1982).

130. *Seltzer-Bey v. Delo*, 66 F.3d 961, 963–64 (8th Cir. 1995).

131. *O’Leary v. Iowa State Men’s Reformatory*, 79 F.3d 82, 83–84 (8th Cir. 1996).

132. *Fisher v. Lovejoy*, 414 F.3d 659, 661 (7th Cir. 2005).

133. *Silverstein v. Fed. Bureau of Prisons*, 559 Fed. Appx. 739, 763 (10th Cir. 2014); *In re Long Term Admin. Segregation*, 174 F.3d 464, 472 (4th Cir. 1999); *Bruscino v. Carlson*, 854 F.2d 162, 164–65 (7th Cir. 1988) (holding that conditions in Marion control unit and permanent lockdown were “sordid and horrible” but not unconstitutional); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (supermax confinement only violates Eighth Amendment for prisoners with mental illness). *But see* *Settlement Agreement, Ashker v. Governor of California*, No. C 09-05796 CW ¶ 26 (N.D. Cal. 2015) (transforming California’s use of solitary confinement from a status-based system to a behavior-based system and limiting duration and conditions of isolation), https://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf; *Shoatz v. Wetzel*, No. 2:13-CV-0657, 2016 WL 595337, at *12 (W.D. Pa. Feb. 12, 2016) (denying prison officials’ summary judgment motion on Eighth Amendment claim challenging twenty-two years in solitary confinement).

134. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

135. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

136. *Id.* The Court established a four-factor test for assessing the reasonableness of a prison restriction: (1) whether there is a “valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it,” (2) whether a prisoner has “alternative

only constitutional issues to which the *Turner* standard does not apply are claims governed by the Eighth Amendment's Cruel and Unusual Punishments Clause, procedural due process issues,¹³⁷ or claims of race discrimination.¹³⁸ In applying the standard, the Supreme Court has been extremely deferential to prison officials, noting the "complex and intractable" problems of American prisons and its belief that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."¹³⁹

Applying *Turner*, courts have upheld the following restrictions: denial of all magazines, newspapers and photographs to prisoners in a segregation unit;¹⁴⁰ restrictions on incoming correspondence;¹⁴¹ prisoner-to-prisoner correspondence for the purpose of providing legal assistance;¹⁴² bans on "sexually explicit [but non-obscene] materials," including depictions of nudity in artistic and scientific journals,¹⁴³ a rule prohibiting "blatantly homosexual materials";¹⁴⁴ a prohibition against Satanist literature;¹⁴⁵ a ban on solicitation for prison union meetings and union membership;¹⁴⁶ rules barring visits by minors except for children, grandchildren, or siblings of the prisoner;¹⁴⁷ a prohibition against all visiting for indefinite period for prisoners with two disciplinary violations for substance abuse;¹⁴⁸ statutes disenfranchising prisoners;¹⁴⁹ a prohibition against allowing death row prisoner contact visits with his priest and requirement that he take communion through the bars of his cell;¹⁵⁰ a requirement that prisoner in a sex offender treatment program

means of exercising the right," (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) "the absence of ready alternatives" to the challenged restriction. *Id.* at 90–91 (citing *Block v. Rutherford*, 468 U.S. 576, 686 (1984)).

137. See *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005).

138. *Johnson v. California*, 543 U.S. 499, 510–14 (2005).

139. *Turner*, 482 U.S. at 84–85, 90 ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of prison officials."); *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (describing standard as a "unitary, deferential standard"); see also *Beard v. Banks*, 548 U.S. 521, 530 (2006).

140. *Beard*, 548 U.S. at 533.

141. *Thornburgh v. Abbott*, 490 U.S. 401, 412–14 (1989).

142. *Shaw*, 532 U.S. at 231–32.

143. *Mauro v. Arpaio*, 188 F.3d 1054, 1060 n.4 (9th Cir. 1999).

144. *Willson v. Buss*, 370 F. Supp. 2d 782, 790–91 (N.D. Ind. 2005).

145. *Carpenter v. Wilkinson*, 946 F. Supp. 522, 531 (N.D. Ohio 1996).

146. *Jones v. N. C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977).

147. *Overton v. Bazzetta*, 539 U.S. 126, 132–33 (2003).

148. *Id.*

149. *Richardson v. Ramirez*, 418 U.S. 24, 53–54 (1974); see also *Simmons v. Galvin*, 575 F.2d 24, 44–45 (1st Cir. 2009) (explaining that Massachusetts' constitutional amendment disqualifying prisoners from voting did not violate the Ex Post Facto clause).

150. *Card v. Dugger*, 709 F. Supp. 1098, 1111 (M.D. Fla. 1988), *aff'd*, 871 F.2d 1023 (11th Cir. 1989). That said, prisoners have been more successful under RFRA and RLUIPA in challenging policies and practices that burden the exercise of religion.

submit to use of penile plethysmograph,¹⁵¹ a prohibition against prisoners covering their cell windows for privacy while undressing or using the toilet;¹⁵² and a prohibition against allowing prisoners to procreate (either through conjugal visits or via artificial insemination);¹⁵³ and other restrictions on prisoners' constitutional rights.

Procedural due process claims for deprivations of prisoners' liberty or property interests are also hard to win due to the standard that prisoners must meet to show both that a given liberty or property interest is protected, and the comparatively low level of process that is due in prison, even where a protected interest is found to exist. In *Sandin v. Conner*,¹⁵⁴ the Supreme Court restricted the legal definition of "liberty" for prisoners to three circumstances: (1) when the right at issue is independently protected by the Constitution; (2) when the challenged action causes the prisoner to spend more time in prison; and (3) when the action imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹⁵⁵ Since *Sandin*, the most significant area of prison due process litigation has involved the use of solitary or supermax confinement, and courts examining due process claims assess whether the plaintiff's conditions of confinement are "atypical and significant" relative to ordinary prison conditions.¹⁵⁶ The Supreme Court revisited a procedural due process challenge to segregated confinement in *Wilkinson v. Austin*.¹⁵⁷ Because the Court did not articulate a baseline for "the ordinary incidents of prison life," holding that the conditions in the Ohio supermax that were at issue in *Wilkinson* were "atypical and significant under any plausible baseline,"¹⁵⁸ the lower courts continue to wrestle with what baseline to use to determine whether a liberty interest in segregated confinement exists and under what circumstances.¹⁵⁹

Even where a prisoner-plaintiff is able to establish a liberty interest in his conditions of confinement, the process that is due cannot fairly be described as robust—particularly if the plaintiff is in administrative (rather than disciplinary) segregation, as is the case with the men at ADX (with the possible exception of those in the Control Unit).¹⁶⁰ For prisoners in administrative segregation, the Supreme Court held that due

151. *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1063–64 (D. Kan. 2000).

152. *Birdine v. Gray*, 375 F. Supp. 2d 874, 879 n.14 (D. Neb. 2005).

153. *Gerber v. Hickman*, 291 F.3d 617, 623 (9th Cir. 2002) (en banc).

154. 515 U.S. 472, 484–86 (1995).

155. *Id.*

156. *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005).

157. *Id.*

158. *Id.* at 223.

159. *See, e.g., Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir. 2009); *Harden-Bey v. Rutter*, 524 F.3d 789, 792–93 (6th Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 161 (2d Cir. 2007), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007).

160. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

process requires only “an informal, non-adversary review of the information supporting [the prisoner’s] administrative confinement,”¹⁶¹ including “some notice of the charges,” “an opportunity for the prisoner to present his views” to the decision-maker (orally or in writing) within a reasonable time after the confinement, and “some sort of periodic review” to determine if there is a need for continued segregation.¹⁶²

Considering the difficulty of winning a constitutional claim on behalf of a prisoner coupled with the other challenges of prisoners’ rights litigation, it is not hard to understand why many lawyers eschew these cases. Justice Kennedy urges against that instinct. Exhorting lawyers to “stay tuned in” to prisons and corrections, he asserts: “The subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons.”¹⁶³ He continued: “The Gospels’ promise of mitigation at judgment if one of your fellow citizens can say, ‘I was in prison, and ye came unto me,’ does not contain an exemption for civil practitioners, or transactional lawyers, or for any other citizen.”¹⁶⁴

This is all the more necessary when the prison in question is, like ADX, so deeply shrouded in secrecy. Historian Heather Ann Thompson has argued that “throughout American history[,] unspeakable abuse of men and women has been allowed to happen behind prison walls because the public had no access. And, if we pay close attention to what has been happening much more recently behind bars, it is clear that the closed nature of prisons remains a serious problem in this country.”¹⁶⁵ It is for that reason that litigation, however difficult or imperfect a tool, is a critically important one, not only as a mechanism for vindicating rights violations, but also because of its capacity to bring some of what has been kept in darkness into the light.¹⁶⁶ Journalist Andrew Cohen, who has reported extensively on the litigation challenging the adequacy of mental health care at ADX,¹⁶⁷ noted as much in writing about a case involving the suicide of a mentally ill man at ADX, explaining that the

161. *Id.*

162. *Id.* at 476, 472, 477 n.9. Such reviews, however, must be “meaningful and not a sham or fraud.” *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986); *McClary v. Coughlin*, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000), *aff’d*, 237 F.3d 185 (2d Cir. 2001).

163. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

164. *Id.*

165. Heather Ann Thompson, *What’s Hidden Behind the Walls of America’s Prisons*, CONVERSATION (June 4, 2017, 9:45 PM), <https://theconversation.com/whats-hidden-behind-the-walls-of-americas-prisons-77282>.

166. As Andrea Armstrong has argued, however, transparency does not automatically produce accountability. “Underlying a broad idea of transparency is an assumption that information, once set free, will produce an informed and engaged public that will hold officials accountable,” but “this broad version of transparency assumes public interest and ready availability of the desired information. Still,” she notes, “transparency, in its most limited form, can foster attention.” Armstrong, *supra* note 16, at 460.

167. *See infra* note 401.

case “represents an enormous opportunity for all of us to gain some rare insight into one of the most secret places in America, a prison where hundreds of men go and are never heard from again.”¹⁶⁸

B. The University of Denver’s Civil Rights Clinic

In the Civil Rights Clinic (CRC) at the University of Denver College of Law, students and faculty have represented many prisoners challenging their conditions of confinement at ADX. The CRC is one of five clinics comprising the Student Law Office, the College of Law’s in-house clinical program.¹⁶⁹ The CRC is an intensive, year-long program in which second- and third-year law students represent clients in civil rights cases in federal court under the supervision of clinic faculty.¹⁷⁰

Like other law school clinics, the CRC has two primary goals: providing students the opportunity to become responsible, reflective lawyers through working with clients to help solve their legal problems; and providing high-quality legal services to individuals and groups who are otherwise unable to secure representation elsewhere.¹⁷¹ For the past decade, the focus of the CRC’s docket has been on the rights of prisoners confined in state and federal prisons, including ADX.

In representing their clients, CRC student attorneys have taken Justice Kennedy’s words to heart, honoring the principle that “this is your justice system; these are your prisons.”¹⁷² In keeping with that ideal, they have, through their work with their clients at ADX, sought to change conditions that violate their clients’ constitutional rights. While we have not always been successful in the eyes of the courts, through their work, the CRC and its clients have helped to illuminate the inhumane conditions at ADX. Not content to allow “the problems of those who are found guilty and subject to criminal sentence” to be “brush[ed] under the rug,” CRC students have worked compassionately

168. Andrew Cohen, *Death, Yes, but Torture at Supermax?*, ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/death-yes-but-torture-at-supermax/258002>.

169. For more about the Student Law Office, see *Clinical Programs*, U. DENV. STURM C.L., <http://www.law.du.edu/index.php/law-school-clinical-program> (last visited Jan. 1, 2018).

170. CRC students also participate in a seminar designed to help them develop their litigation skills and understanding of the law, as well as the political and social contexts of civil rights litigation. *Id.*

171. To that end, the CRC is a member of the U.S. District Court for the District of Colorado’s Pro Bono Panel, a program “consisting of volunteer attorneys willing to represent individuals of limited financial means (not strictly limited to the “indigent”) in civil matters whenever requested by the Court and without compensation. As a means to assist attorneys in providing pro bono services, the court has established a panel of attorneys who are members in good standing of the Bar of the district court and who have agreed to accept pro bono appointments to represent pro se litigants (plaintiff or defendant) in civil cases.” *Civil Pro Bono Panel*, U.S. DISTRICT Ct. DISTRICT COLO.: ATT’Y INFO., <http://www.cod.uscourts.gov/AttorneyInformation/CivilProBonoPanel.aspx> (last visited Oct. 14, 2017).

172. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

and relentlessly against the government's efforts to "remove the problem from public consciousness."¹⁷³

Much of the CRC's litigation about ADX conditions has challenged the long-term or indefinite solitary confinement to which many of the men there are subjected.¹⁷⁴ CRC student attorneys have represented clients in claims asserting that the regime at ADX violates their clients' rights to due process under the Fifth Amendment, and to be free from cruel and unusual punishment pursuant to the Eighth Amendment. Some of those cases, and the conditions that have been illuminated through the litigation, are discussed below.

1. Due Process – *Saleh v. Fed. Bureau of Prisons* and *Rezaq v. Fed. Bureau of Prisons*

In 2007, the CRC began litigating two separate lawsuits on behalf of four men who had been held in solitary confinement at ADX for years and who seemingly had no hope of transfer to a less-restrictive prison. In the first case, *Saleh v. Fed. Bureau of Prisons*,¹⁷⁵ three Muslim men—Mohammed Saleh, El-Sayyid Nosair, and Ibrahim Elgabrownny—were transferred from high-security open-population prisons to ADX in the wake of the 9/11 attacks.¹⁷⁶ None of them knew why the BOP chose to move them from the open-population prisons in which they had been serving their sentences without incident, nor were they told what they needed to do to get out of ADX. The second case, *Rezaq v. Fed. Bureau of Prisons*,¹⁷⁷ was similar. Omar Rezaq, like the *Saleh* plaintiffs, had initially been designated to an open-population penitentiary by the BOP, but upon his arrival, the prison's captain (supervisor) told him that he did not want Muslims there.¹⁷⁸ Several days later, Mr. Rezaq was transferred to ADX.¹⁷⁹ Like the *Saleh* plaintiffs, Mr. Rezaq never knew why he was put in ADX or what, if anything, he could do to be returned to a regular penitentiary.¹⁸⁰

173. Warren E. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972).

174. *Civil Rights Clinic Cases*, U. DENV. STURM C.L., <http://www.law.du.edu/index.php/law-school-clinical-program/civil-rights-clinic/civil-rights-clinic-cases> (last visited Oct. 14, 2017).

175. No. 05-CV-02467, 2010 WL 5464295 (D. Colo. Nov. 23, 2010), *report and recommendation adopted*, No. 05-CV-02467, 2010 WL 5464294 (D. Colo. Dec. 29, 2010), *aff'd sub nom.* *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012). The plaintiffs in the case had each filed a separate pro se lawsuit in 2005. When the CRC began representing them, we consolidated their cases.

176. Plaintiff's Motion for Partial Summary Judgment at 26, *Saleh*, 2010 WL 5464295 (No. 05-CV-02467), ECF No. 296.

177. No. 07-CV-2483, 2010 WL 5157317 (D. Colo. Nov. 23, 2010), *report and recommendation adopted*, No. 07-CV-02483, 2010 WL 5157313 (D. Colo. Dec. 14, 2010), *aff'd*, 677 F.3d 1001 (10th Cir. 2012).

178. Plaintiff's Response to Defendants' Supplement to Motion for Summary Judgment at 15, *Rezaq*, 2010 WL 5157317 (No. 07-CV-02483), ECF No. 148.

179. *Id.*

180. *Rezaq v. Nalley*, No. 07-CV-02483, 2008 WL 5172363, at *11 (D. Colo. Dec. 10, 2008).

None of the four men was provided with a hearing or other opportunity to be heard prior to his transfer to ADX, and all were held at ADX for an extraordinarily long time—the shortest for seven years and the longest for nearly fourteen years.¹⁸¹ During that time, the BOP repeatedly denied them entry into the ADX Step-Down Program, the sole program that would (purportedly) permit them to leave ADX.¹⁸²

During the litigation of both cases, the BOP provided conflicting information about the purpose of ADX and the type of prisoners it is designed to house. BOP policy states that ADX is intended for male “inmates who have demonstrated an inability to function in a less restrictive environment” because they have threatened others or disrupted the orderly running of the institution.¹⁸³ According to the BOP, “the main mission of ADX is to affect inmate behavior” and allow inmates to “demonstrate non-dangerous behavior.” This is, as our litigation demonstrated, simply untrue: all four of our clients were placed at ADX despite clear conduct in prison and without any evidence that they had an inability to function in less restrictive, open-population prisons.

Discovery in the cases revealed the following conditions at ADX:

Individuals housed at ADX are in near-total isolation, spending 95% of their lives alone in their small, concrete cells. In the “general population” unit of ADX, individuals are confined alone for 23 hours a day in cells that measure 87 square feet (approximately the same space as two king-sized mattresses.) In this small space, each cell contains a bed, desk, sink, toilet, and shower, all made from poured concrete. Individuals eat all meals alone inside their cells, within arm’s length of their toilet. Each cell has one small window to the outside; however, the only view is of the cement “yard.” Prisoners at ADX cannot see any nature, not the surrounding mountains or even a patch of grass. . . .

Contact with others is extremely restricted at ADX. The ADX facility is specifically designed to limit all communication between the individuals that it houses. Accordingly, the cells have thick concrete walls and two doors, one with bars and a second which is made of solid steel. The only “contact” Appellants had with other inmates while housed in the “general population” unit was attempted conversations with prisoners in adjacent cells that took place through the thick cell walls and doors.

Interaction with staff is negligible. Prison staff only speak to a prisoner for a few minutes each week, and prisoners often go for days

181. Defendants-Appellees’ Response Brief at 46, *Rezaq v. Nalley*, No. 11-1069 (10th Cir. July 4, 2011).

182. *Id.* at 19.

183. FED. BUREAU OF PRISONS, DEP’T OF JUSTICE, P5100.08, PROGRAM STATEMENT: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION 17 (Sept. 12, 2006).

at a time without having more than a few words spoken to them. . . . Any actual interaction usually lasts only seconds and takes places through an inmate's solid steel cell door. Contact beyond a merely functional provision of meals and escort to recreation is not a daily occurrence.

Each and every time an ADX prisoner is permitted to leave his cell, he is restrained with leg irons, handcuffs, and a belly chain. Even on the rare occasions when a prisoner receives a visitor, these restraints must remain on during the entire visit despite the fact that the visit is non-contact, meaning the prisoner and visitor are separated by a plexi-glass barrier. Prisoners in ADX "general population" units are eligible to receive five social visits a month. Yet, due to the remote location of ADX, three of the four [men in the Rezaq and Saleh cases] never received a social visit during the years they were confined at ADX. [The fourth] received only two social visits in the thirteen years he spent at ADX. Even if their families were able to visit them, they would not be able to shake hands, hug, or touch in any way, as no human contact is permitted. Not being able to touch their loved ones, even for a moment, makes the idea of visiting so painful for both the prisoner and his family members that many elect to forego visits altogether.

Formal opportunities for rehabilitation are extremely limited. All educational programming occurs via closed-circuit television in the prisoners' cells. The programming consists of shows being broadcast on the television (sample titles include, "World of Byzantium," "Parenting I and II," and "Peloponnesian War I and II") and the prisoner filling out a short quiz. There is no interaction with an educator or other students for these "classes." The only job available is a three-month orderly position, which entails cleaning the tier. Some prisoners apply for this coveted position repeatedly, but are denied without explanation.

Religious practice is severely curtailed. The only religious services are shown on the closed-circuit television. Group prayer, an essential tenet of Islam [our clients' faith], is strictly forbidden.¹⁸⁴

For many years, the *Saleh* plaintiffs and Mr. Rezaq were repeatedly denied access to the ADX Step-Down Program, the only means by which a prisoner can transfer out of ADX to an open-population institution.¹⁸⁵ BOP policy states that prisoners will require, at minimum, three years to progress out of ADX.¹⁸⁶ Evidence produced in discovery revealed that most of the men in ADX, including our clients, spend far longer there;

184. This description of the conditions in ADX is taken from the appellate brief of Mr. Rezaq and the *Saleh* plaintiffs. Appellants' Br. at 4–7, *Rezaq v. Nalley*, No. 11-1069 (10th Cir. July 4, 2011) (internal citations omitted).

185. *Rezaq v. Nalley*, 677 F.3d 1001, 1006 (10th Cir. 2012).

186. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, FLM 5321.07(1)B, GENERAL POPULATION AND STEP-DOWN UNIT OPERATIONS 6 (Sept. 1, 2015).

fewer than five percent were permitted to complete the program in three years.¹⁸⁷

During litigation, we also learned there is no maximum amount of time that a person can be confined at ADX.¹⁸⁸ Thus, a prisoner can indefinitely and repeatedly be denied entry into the Step-Down Program, even if he had not received any disciplinary reports. Further, even if a person is in the Step-Down Program, he can be removed and put back in the ADX “general population” for any reason, such as speaking in a tone of voice that the ADX warden finds disrespectful.¹⁸⁹ No hearing or other process is required for removing the prisoner from the Program.¹⁹⁰

ADX prisoners have no opportunity to participate in the decision of whether they are admitted to the Step-Down Program or allowed to progress through it.¹⁹¹ Those decisions are made by a committee, and ADX prisoners receive no notice of the committee reviews, nor are they permitted to be present at the committee’s meetings or to give input prior to the review.¹⁹² Even if our clients could have participated, however, it became clear that the decision is predetermined, based on factors outside their control. At the time we began litigating the case, the main inquiry of the Step-Down committee was whether the prisoner had “sufficiently mitigated” the reasons for his placement at ADX.¹⁹³ Additionally, the lawsuits revealed that “denial can be based on other factors outside of the prisoners’ control, such as notoriety, media coverage, or world events.”¹⁹⁴ ADX prisoners, including our clients, received no explanation of the reason for a decision to permit or deny them progression into and through the phases of the Step-Down Program. Instead, they received notices containing formulaic language, including that their “reasons for placement have not been mitigated” or that “safety and security” prevented them from being progressed.¹⁹⁵ They therefore had no idea how to alter their behavior in the future to move through the Program and out of ADX.

187. Appellants’ Br., *supra* note 184, at 10.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 10–11.

192. *Id.* at 11.

193. Over the course of the litigation, the BOP attempted to moot our clients’ cases in several different ways, one of which was to modify the policies governing admission to and through the Step-Down Program—twice. (The second modification was made on the eve of the summary judgment deadline.) In discovery conducted after these policy changes, however, BOP staff testified that the actual processes and considerations of the Step-Down Committee had not changed.

194. Appellants’ Opening Br. at 12, *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012) (No. 11-1069).

195. *Id.* at 13.

After several years in isolation at ADX, the *Saleh* plaintiffs and Mr. Rezaq filed lawsuits alleging, among other things,¹⁹⁶ that they were transferred to ADX without due process; and that they continued to be confined in ADX without due process, in violation of the Fifth Amendment. Shortly after the men filed their lawsuits in the U.S. District Court for the District of Colorado, the BOP suddenly began to admit them into the Step-Down Program, despite no changes in their behavior or (obviously) their crimes of conviction.¹⁹⁷

Additionally, on the eve of the summary judgment deadline, the BOP decided to give retroactive “transfer hearings” to our clients and other men who had been moved to ADX years before without process. The BOP then cited to the hearings to assert that our clients’ claims should be dismissed as moot.¹⁹⁸ As we learned in discovery, however, the BOP conducted these retroactive transfer hearings specifically because of our clients’ pending litigation.¹⁹⁹ Based on the circumstances of the hearings, including their timing and that every retroactive hearing resulted in a recommendation of continued ADX placement, our clients asserted that the outcomes were predetermined and that the hearings were a sham.

The BOP moved for summary judgment in both the *Rezaq* and *Saleh* cases, asserting that even if our clients had a liberty interest in their lengthy confinement at ADX, they had been provided sufficient process for their transfers to and progression through ADX.²⁰⁰ Both district courts ruled in favor of the BOP, never analyzing the adequacy of the process because they held that our clients’ conditions of confinement at ADX did not give rise to a liberty interest within the meaning of the Due Process Clause of the Fifth Amendment.²⁰¹

Since *Sandin* and *Wilkinson*, courts reviewing procedural due process claims have determined whether a prisoner-plaintiff has established the existence of a liberty interest by assessing whether his conditions are “atypical and significant . . . in relation to the ordinary

196. The *Saleh* plaintiffs also alleged that the BOP violated their right to exercise their religion (Islam) under the First Amendment and the Religious Freedom Restoration Act, 24 U.S.C. §§ 2000bb *et seq.* Those claims were settled.

197. When asked the reason Mr. Saleh was now eligible for the program, the BOP stated only that “the factors which originally led to Mr. Saleh’s placement had been sufficiently mitigated.” No explanation was provided as to what the reasons were or as to how that mitigation had occurred. *Rezaq v. Nalley*, Appellants’ Opening Br. at 14.

198. Defendant’s Motion for Summary Judgment at 2, *Saleh v. Fed. Bureau of Prisons*, 2010 WL 5464295 (D. Colo. Nov. 23, 2010) (No. 05-CV-02467), ECF No. 295.

199. Appellants’ Opening Br., *supra* note 194, at 15–16.

200. Defendant’s Motion for Summary Judgment, *supra* note 198; Defendant’s Motion for Summary Judgment at 2–4, *Rezaq v. Fed. Bureau of Prisons*, 2010 WL 5157317 (D. Colo., Nov. 23, 2010) (No. 07-CV-02483), ECF No. 112.

201. *Saleh*, 2010 WL 5464295, at *17; *Rezaq*, 2010 WL 5157317, at *14.

incidents of prison life.”²⁰² In *Wilkinson*, the Supreme Court considered whether the conditions in the Ohio supermax prison (OSP) gave rise to a liberty interest.²⁰³ Observing that OSP is “synonymous with extreme isolation,” the Court cited the following conditions in concluding that confinement in OSP constituted a liberty interest: cells with solid metal doors to prevent communication; prisoners take all meals alone in their cells; visitation is rare and physical contact is not allowed; prisoners are deprived of almost any environmental or sensory stimuli and almost all human contact.²⁰⁴ The Court also noted that placement at OSP was for an indefinite period and that those otherwise eligible for parole lose their eligibility while incarcerated at the prison.²⁰⁵ While recognizing that in *Sandin*’s wake, the courts of appeals had not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system, the Court declined to do so in *Wilkinson*, concluding that the conditions of the Ohio supermax “impose an atypical and significant hardship under any plausible baseline.”²⁰⁶

In holding that Mr. Rezaq and the *Saleh* plaintiffs had no liberty interests in their years of ADX confinement, the district courts relied on the Tenth Circuit’s decision in *Estate of DiMarco v. Wyoming Dep’t of Corrections*.²⁰⁷ Like the other circuits that wrestled with the baseline question in the wake of *Wilkinson*, the Tenth Circuit was also forced to confront the question in the context of litigation about segregated confinement.²⁰⁸ Unlike its sister circuits, however, the Tenth Circuit approached the question by creating a nondispositive list of four factors to determine whether a prisoner has a protected liberty interest: (1) whether the segregation furthers a legitimate penological interest; (2) whether the conditions of placement are extreme; (3) whether the placement increases the duration of confinement; and (4) whether the placement is indeterminate.²⁰⁹ Finding that all four of the factors weighed in favor of the BOP²¹⁰ in the *Rezaq* and *Saleh* cases (and that there were

202. See, e.g., *Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir. 2009); *Harden-Bey v. Rutter*, 524 F.3d 789, 792–93 (6th Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 161–63 (2d Cir. 2007), *rev’d on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007).

203. *Wilkinson v. Austin*, 545 U.S. 209, 210 (2005).

204. *Id.* at 214–15, 223.

205. *Id.* at 215.

206. *Id.* at 223.

207. *Saleh v. Fed. Bureau of Prisons*, No. 05-CV-02467, 2010 WL 5464295, at *16 (D. Colo. Nov. 23, 2010); *Rezaq v. Nalley*, No. 07-CV-02483, 2010 WL 5157317, at *14 (D. Colo. Nov. 23, 2010).

208. *Estate of DiMarco v. Wyo. Dep’t of Corr., Div. of Prisons*, 473 F.3d 1334, 1339 (10th Cir. 2007).

209. *Id.* at 1342.

210. Federal prisoners, unlike their state counterparts, are not eligible for parole because in the Sentencing Reform Act of 1984, Congress eliminated federal parole for everyone convicted of a crime after 1987. For that reason, we argued that this third *DiMarco* factor (whether the placement increases the duration of confinement) did not weigh against our clients because unlike the plaintiff

no genuine issues of material fact as to any of them), the district courts granted summary judgment against our clients. Because we believed both that the *Rezaq* and *Saleh* courts incorrectly applied the four-factor test and that the test itself contravened the Supreme Court's holding in *Wilkinson*, we appealed the decisions.²¹¹

On appeal, we argued that the *DiMarco* test conflicts with Supreme Court precedent and that of other circuits in several ways.²¹² First, and most significantly, *DiMarco*'s direction to consider the government's "legitimate penological interest" to determine if a liberty interest exists directly conflicts with *Wilkinson*'s holding that the penological justification for placement of a prisoner in segregation is irrelevant to the liberty interest inquiry: "OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners . . . That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance."²¹³ Prison officials' penological interest in placing prisoners in the challenged conditions is irrelevant to the liberty interest inquiry because it has no effect on the severity of restraint imposed by those conditions or the duration of time spent in them.²¹⁴ Rather, the penological interest in transferring a prisoner into segregation and the legitimacy of that interest is only relevant *after* a liberty interest is found, during any actual due process hearing.²¹⁵ Thus, we argued that

in *Wilkinson*, supermax confinement did not render them ineligible for parole as they were already "ineligible." Nevertheless, the district courts held that this factor weighed in favor of the BOP. *Saleh*, 2010 WL 5464295, at *14; *Rezaq*, 2010 WL 5157317, at *12.

211. The *Rezaq* and *Saleh* cases were consolidated on appeal. *Rezaq v. Nalley*, 677 F.3d 1001, 1004 (10th Cir. 2012). Yale Law School's Allard K. Lowenstein International Human Rights Clinic filed an excellent amicus brief supporting our clients on behalf of a group of social psychologists, criminologists, and behavioral scientists who study the dynamics of authority and cooperation in group settings, and who have "examined how perceptions of fairness or unfairness in group rulemaking and processes, including punishment and criminal lawmaking, influence behavior." Corrected Brief of Behavioral Scientists et. al. as Amici Curiae in Support of Plaintiffs-Appellants, Urging Reversal at 9, *Rezaq v. Nalley*, 677 F.3d 1001, 1004 (10th Cir. 2012) (No. 11-1069).

212. By the time of oral argument, only one of the four men was still in ADX; the BOP had transferred the others to Communication Management Units (CMU's) in other prisons, and used those transfers as the basis for a motion to dismiss the appeal. Finding that "other than ADX, the CMUs are the most restrictive facilities in the federal system," the Tenth Circuit observed that "if the inmates' current conditions are a byproduct of their initial transfers to ADX, then long-term consequences may persist and an injunction may serve to eradicate the effects of the BOP's past conduct." *Rezaq*, 677 F.3d at 1009. The court therefore declined to dismiss the appeal as moot, holding that if our clients proved a violation of their due process rights, there was still relief that could be granted "because they have never been returned to their pre-ADX placements" in open-population penitentiaries. *Id.* at 1008.

213. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

214. Appellants' Opening Br. at 21 (citing *Wilkinson*, 545 U.S. at 223–24) (holding that the touchstone of the existence of a liberty interest is the nature of the conditions).

215. The incompatibility of *DiMarco*'s inclusion of legitimate penological interest in the liberty interest inquiry is further demonstrated by the absence of such a consideration in other circuits' post-*Wilkinson* liberty interest tests. *See, e.g., Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir. 2009); *Harden-Bey v. Rutter*, 524 F.3d 789, 792–93 (6th Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 161–63 (2d Cir. 2007), *rev'd on*

the penological interest the BOP asserted for transferring our clients to ADX—that they were convicted of terrorism-related crimes—should be considered only during the actual due process hearing itself, not as part of the liberty interest inquiry.

We also argued that the *DiMarco* test does not provide a baseline for comparison, which has resulted in lower courts—including the *Rezaq* and *Saleh* district courts—erroneously using the conditions in the Ohio supermax at issue in *Wilkinson* as a baseline. And we asserted that *DiMarco*—and, by extension, the *Rezaq* and *Saleh* district courts—ignored *Wilkinson*'s direction to give weight to the duration of confinement in segregated conditions.

Unfortunately, and—we believe—erroneously, the Tenth Circuit upheld the district courts' decisions.²¹⁶ Finding that it was bound by *DiMarco*'s inclusion of the “legitimate penological interest” factor (despite characterizing the *DiMarco* factors as only “potentially relevant” and “nondispositive” and stating that “we have never suggested that the factors serve as a constitutional touchstone”),²¹⁷ the panel found that the BOP's assertions of “national security” and “institutional safety” were sufficient to justify our clients' placement in ADX.²¹⁸ The court's holding was partially grounded in its erroneous belief that the liberty interest inquiry is entitled to *Turner*-type deference, as evidenced by its statement that “federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”²¹⁹ The panel therefore concluded that “the BOP should not have to prove segregated confinement is essential in every case,” and that this *DiMarco* factor (the legitimacy of the proffered penological interest) weighed in favor of the BOP.²²⁰

Perhaps the most disturbing part of the court's holding, however, was its determination that “the conditions . . . at ADX are not extreme as a matter of law.”²²¹ The conclusion is understandable only by considering the conditions the court used as a comparator: other supermax confinement.²²² Rather than finding that the similarity to the *Wilkinson* conditions weighed in favor of finding that the conditions are extreme, the court inexplicably found that those conditions weighed

other grounds sub nom. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007).

216. *Rezaq*, 677 F.3d at 1004.

217. *Id.* at 1012.

218. *Id.* at 1013.

219. *Id.* at 1014 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)).

220. *Id.*

221. *Id.* at 1015.

222. *Id.*

against such a finding.²²³ Under the panel’s holding, it is unlikely that any conditions in the country would qualify as “extreme.”

In retrospect, the Tenth Circuit’s holding, while profoundly troubling from doctrinal and human rights perspectives, was perhaps foreseeable given that the prison in question was not just any supermax facility—it was ADX. The *Rezaq* court highlighted that fact in several places in its opinion, explaining that “[t]he government opened ADX to house inmates who, like plaintiffs, pose unusual security and safety concerns[,]” which “stem from a uniquely federal penological interest in addressing national security risks by segregating inmates with ties to terrorist organizations.”²²⁴ It is telling that in another due process case involving Colorado’s *state* supermax prison decided less than a year before *Rezaq*, the Tenth Circuit held that the plaintiff *did* establish a liberty interest in a seven-year period of confinement in administrative segregation—a considerably shorter period than some of the men challenging their confinement in ADX.²²⁵

2. Eighth Amendment – *Silverstein v. BOP*

At the same time the CRC was representing the men in the *Rezaq* and *Saleh* cases in their due process litigation against ADX, we also represented another client—Tommy Silverstein—in a lawsuit claiming that by holding him in solitary confinement for thirty years, the BOP violated his Eighth Amendment right to be free from cruel and unusual punishment.²²⁶

The BOP put Mr. Silverstein in solitary confinement following his murder of a correctional officer at the Marion penitentiary in 1983.²²⁷ In the decades that followed, Mr. Silverstein was subjected to a degree and duration of isolation that is almost incomprehensible.²²⁸ He begins his thirty-fifth year of solitary confinement this year. He is sixty-five years old.

In the aftermath of the murder, then-BOP Director Norman Carlson issued a directive that Mr. Silverstein be placed on “non-contact”

223. *Id.*

224. *Id.* at 1014.

225. *Toeys v. Reid*, 646 F.3d 752, 756–57 (10th Cir. 2011), *amended by* 685 F.3d 903 (10th Cir. 2012). That said, the court did not go so far as to hold that the plaintiff had “established a liberty interest” because the Colorado Department of Corrections did not appeal the district court’s conclusion that the plaintiff showed that “the conditions of his confinement” were “an atypical and significant hardship.” *Id.* at 911.

226. *Silverstein v. Fed. Bureau of Prisons*, No. 07-CV-02471, 2011 WL 4552540, at *1, *7 (D. Colo. Sept. 30, 2011).

227. *Id.* at *1–2.

228. While the CRC was litigating Mr. Silverstein’s case, there would come a point each year when the students who were representing him realized that Mr. Silverstein had been in solitary confinement for longer than they had been alive. The realization never failed to be jarring—for the students or for me.

status.²²⁹ The BOP transferred him from Marion to the federal penitentiary in Atlanta, where he was put in a tiny, windowless steel cell in the basement of the prison referred to as the “side pocket cell”—a cell so small that Mr. Silverstein could stand in one place and touch both walls with outstretched arms.²³⁰ It had nothing in it besides a bunk and a Bible.²³¹ Shortly after putting him in the side pocket cell, prison staff began construction on it, welding more bars across the front of it while Mr. Silverstein was inside the cell.²³² It felt, he said, “like I was being buried alive.”²³³ During his first year in the side pocket cell, Mr. Silverstein was completely isolated and had nothing to occupy his time or his mind.²³⁴ BOP staff did not allow him to have a watch or clock and “bright, artificial lights remained on in the cell” at all times, making it impossible to tell if it was day or night, or what day it was.²³⁵ The only time he was allowed out of the cell was for one hour a week of outdoor exercise, though he could not see anyone or anything of the surrounding landscape.²³⁶

The BOP held Mr. Silverstein in the side pocket cell for four years before transferring him to the federal penitentiary in Leavenworth, Kansas.²³⁷ He remained there, in extraordinary isolation, for the next eighteen years.²³⁸ While at the United States Penitentiary (USP) Leavenworth, the BOP put him in cells specially constructed to remove him as fully as possible from all human contact—he could not see or hear “any sign of other prisoners,” though he knew they must be elsewhere in the prison.²³⁹ Mr. Silverstein’s cell was separated from his indoor and outdoor exercise areas by solid steel doors.²⁴⁰ To permit him to move between areas, prison staff would remotely open the doors so that he could pass through with no human interaction.²⁴¹ Prison staff installed cameras in the cells and kept Mr. Silverstein under twenty-four-hour video surveillance, even while he was showering or using the

229. *Silverstein*, 2011 WL 4552540, at *1.

230. Declaration of Thomas Silverstein, *supra* note 65, ¶ 66.

231. *See id.* ¶¶ 67, 73.

232. *Id.* ¶¶ 70–71.

233. Declaration of Thomas Silverstein, *supra* note 65, ¶ 72.

234. *Id.* ¶ 73.

235. *Id.* ¶¶ 74–75.

236. *Id.* ¶ 80.

237. *Silverstein*, 2011 WL 4552540, at *2. He might have remained there even longer except that in 1987, Cuban prisoners at USP-Atlanta rioted, taking prison staff hostage and seizing control of the prison for seven days. During that time, Mr. Silverstein could “move about the prison and interact with other people,” even persuading rioters to allow an older correctional officer who was having a heart attack to leave the prison “so he could receive medical attention.” “[T]he FBI and the BOP negotiated with the Cuban rioters to turn [Mr. Silverstein] over as a gesture of goodwill,” and he was ultimately drugged, seized, and given to BOP officers. Declaration of Thomas Silverstein, *supra* note 65, ¶¶ 96, 98, 100–02, 105–06.

238. *Silverstein*, 2011 WL 4552540, at *2.

239. Declaration of Thomas Silverstein, *supra* note 65, ¶ 126.

240. *Id.* ¶¶ 144–45.

241. *Id.* ¶ 145.

toilet.²⁴² The cell was illuminated all the time with artificial light.²⁴³ During this time, Mr. Silverstein did not have access to a mirror; only years later when he saw a photo of himself did he know what he looked like.²⁴⁴ He didn't recognize himself.²⁴⁵

Unsurprisingly, over the course of his two decades of isolation in USP Leavenworth, Mr. Silverstein's mental state began to deteriorate.²⁴⁶ The BOP's own psychological records documented Mr. Silverstein's increasing depression and anxiety, declining cognitive and social skills, and his attempt to live in "near darkness" by covering the light in his cell with whatever he could, behavior that a BOP psychologist described as "sensory deprivation" that was "not a positive indicator."²⁴⁷ Dr. Craig Haney, one of the expert witnesses in the case, commented that the BOP's psychological records provided "a contemporaneous record of a man in psychological pain, suffering under the conditions of his confinement and struggling to adapt and adjust to the extraordinarily severe deprivations that they imposed on him. Indeed, at times Mr. Silverstein appeared to come dangerously close to—and perhaps sometimes to cross over into—suffering from serious psychological problems that could incur disabling long-term consequences."²⁴⁸

In July 2005, the BOP transferred Mr. Silverstein to ADX.²⁴⁹ By this time, he had been in solitary confinement under a no-human contact order for twenty-one years.²⁵⁰ During that entire time, Mr. Silverstein had only one disciplinary infraction—a 1988 sanction for not wiping soap off the camera in his cell at Leavenworth. He hoped that his decades of clear conduct would lead to an easing of his isolation. It did not.²⁵¹

At ADX, Mr. Silverstein was put on Range 13, the most restrictive area of the most restrictive prison in the country.²⁵² The BOP confined

242. *Id.* ¶ 118.

243. *Id.* ¶ 120.

244. *Id.* ¶ 125.

245. *Id.*

246. See Report or Affidavit of Craig William Haney, Ph.D., J.D. at 29–43, *Silverstein v. Fed. Bureau of Prisons*, No. 07-CV-02471, 2009 WL 8514046 (D. Colo. Apr. 13, 2009).

247. See *id.*

248. *Id.* at 43.

249. *Silverstein*, 2011 WL 4552540, at *2.

250. *Id.* at *1–2.

251. Declaration of Thomas Silverstein, *supra* note 65, ¶ 170. If anything, his clear conduct record was used against him by the BOP. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 52. As Dr. Haney noted in his report, BOP records from Leavenworth "acknowledged Mr. Silverstein's "'positive level of adjustment" during the past 9 years' but attributed that positive adjustment primarily to 'his limited contact with others and the avoidance of interpersonal conflict.' Without any apparent hint of irony, however, the Report went on to assert that '[t]o accurately assess his level of change in this area would require additional interpersonal interaction'—precisely the interpersonal interaction that Mr. Silverstein had repeatedly asked to have but which the BOP was refusing to allow." *Id.* (citing SHU Review, March 11, 1997) (citation omitted).

252. *Silverstein*, 2011 WL 4552540, at *2.

only one other person on Range 13, and he and Mr. Silverstein tried to shout to each other for the first few days.²⁵³ Shortly afterward, prison staff constructed a soundproof, solid steel door in the hallway to further isolate each of them from the sound of the other's voice.²⁵⁴ As at Leavenworth, Mr. Silverstein was allowed access to a cement-enclosed outdoor exercise pit, which he accessed via remote-operated doors, once again eliminating even this limited source of human contact.²⁵⁵ Indeed, while he was confined in Range 13, invasive strip searches and infrequent haircuts were the only physical contact Mr. Silverstein experienced with other human beings.²⁵⁶ Dr. Craig Haney, an internationally recognized expert on the psychological effects of solitary confinement, stated that Mr. Silverstein's conditions were "the most isolated form of confinement I have ever encountered."²⁵⁷ Similarly, our correctional expert observed that "the near total isolation from all human contact is unprecedented in my 38 years of experience in corrections."²⁵⁸

Mr. Silverstein's conditions on Range 13 were, if possible, even worse than those at USP Leavenworth.²⁵⁹ His cell was smaller.²⁶⁰ And many of the privileges he earned over time at Leavenworth, such as phone calls and art supplies, were taken away.²⁶¹ As he had at Leavenworth, Mr. Silverstein repeatedly asked BOP staff what, if anything, he needed to do to be moved out of this extreme isolation.²⁶² In response, he was told to "just keep doing what you're doing."²⁶³ In the meantime, Mr. Silverstein's cognitive and emotional state continued to deteriorate.²⁶⁴ As one journalist wrote in 2007, Silverstein's fate "may be the prototype of what the government has in mind for other infamous prisoners—to bury them in strata of supermax security to the point of oblivion."²⁶⁵

In November 2007, the CRC filed suit on Mr. Silverstein's behalf, asserting that by confining him in extreme and indefinite isolation for a quarter century, the BOP violated his Eighth Amendment right to be free from cruel and unusual punishment.²⁶⁶ Five months after we filed the

253. Declaration of Thomas Silverstein, *supra* note 65, ¶ 175.

254. *Id.* ¶ 177.

255. *Id.* ¶¶ 188–89.

256. *Id.* ¶¶ 196–97.

257. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 4.

258. Declaration of Steve J. Martin ¶ 6, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 320-6.

259. See Declaration of Thomas Silverstein, *supra* note 65, ¶¶ 179, 185–87.

260. Declaration of Thomas Silverstein, *supra* note 65, ¶ 179.

261. *Id.* ¶¶ 185–87.

262. *Id.* ¶ 203.

263. *Id.*

264. See Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 59–64.

265. Alan Prendergast, *The Caged Life*, WESTWORD (Aug. 16, 2007, 4:00 AM) <http://www.westword.com/news/the-caged-life-5094837>.

266. Complaint ¶¶ 181–84, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 1. We also asserted a Fifth Amendment procedural

lawsuit, the BOP moved Mr. Silverstein from Range 13 to the ADX “general population” unit.²⁶⁷ He is still in solitary confinement in ADX today.

Seven generations of CRC student attorneys litigated Mr. Silverstein’s case before both the U.S. District Court for the District of Colorado and the U.S. Court of Appeals for the Tenth Circuit. After defeating the BOP’s motion to dismiss, the students conducted extensive discovery and motion practice, including responding to the BOP’s motion for summary judgment. In that motion, the BOP argued that Mr. Silverstein’s Eighth Amendment claim should be dismissed because the BOP provided Mr. Silverstein “the minimal civilized measure of life’s necessities,” which it defined as “food, clothing, shelter, sanitation, medical care, mental health care and reasonable safety from serious bodily harm.”²⁶⁸ The BOP also claimed that holding Mr. Silverstein in extreme isolation for nearly thirty years did not constitute deliberate indifference to a substantial risk of serious mental or physical harm to him.²⁶⁹

In response to the BOP’s motion, we argued that human interaction and environmental stimulation (as well as sleep) are basic human needs, and that by confining Mr. Silverstein in extreme isolation for thirty years, the BOP deprived him of those things, causing him psychological pain and distress and putting him at substantial risk of serious future harm.²⁷⁰ Through discovery, we learned that over the course of his three decades in isolation, Mr. Silverstein developed an anxiety disorder and also suffered “cognitive harms, including memory loss and an inability to concentrate and communicate.”²⁷¹ We also discovered that the BOP knew of these effects of isolation on people in general—and Mr. Silverstein in particular—for the prior fifteen to twenty years.²⁷²

In analyzing Mr. Silverstein’s Eighth Amendment claim, the district court found that because Mr. Silverstein was permitted to make two

due process claim. *Id.* ¶¶ 171–79. Because the analysis of the due process claim largely mirrors that of the Rezaq and Saleh cases discussed supra, I omit discussion of Mr. Silverstein’s Fifth Amendment claim here.

267. *Silverstein*, 2011 WL 4552540, at *2.

268. Defendants’ Motion for Summary Judgment at 2, *Silverstein*, 2011 WL 4552540 (No. 07-CV-02471), ECF No. 296.

269. *Id.* at 3.

270. Plaintiff’s Response to Motion for Summary Judgment at 21–23, *Silverstein*, 2011 WL 4552540 (No. 07-CV-02471), ECF No. 319.

271. *Id.* at 16.

272. *Id.* at 16–17. We also argued that pursuant to *Hope v. Pelzer* and *Rhodes v. Chapman*, the BOP did not have a legitimate purpose for continuing to isolate Mr. Silverstein, given his age and long period of clear conduct. Instead, a reasonable factfinder could conclude that the BOP was instead motivated by revenge for the officer who Mr. Silverstein killed in 1983 (citing to evidence that prison staff stated that Mr. Silverstein would not leave isolation “until he takes his last breath,” and because he could not be executed, the BOP has “no choice but to make his life a living hell”) *Id.* at 25–27.

fifteen-minute phone calls per month, have five hours of exercise per week alone in a steel cage or a cement enclosure, and could communicate, on average, one minute per day with prison staff through the solid steel door of his cell, no reasonable factfinder could conclude that he was deprived of social interaction and environmental stimulation.²⁷³ The district court therefore granted the BOP's motion for summary judgment.²⁷⁴

We appealed to the Tenth Circuit, asserting that the district court erred by resolving two factual disputes in favor of the BOP: first, whether thirty years of isolation from human contact and environmental stimulation had harmed Mr. Silverstein, and second, whether continuing to hold him in solitary confinement placed him at risk of future harm.²⁷⁵ Rather than allowing these factual disputes to go to trial, the district court erroneously resolved them in favor of the moving party, finding that Mr. Silverstein was neither harmed by such unprecedented isolation nor was he at risk of future harm.²⁷⁶

In an unpublished opinion, the Tenth Circuit upheld the district court's decision that Mr. Silverstein's thirty-year confinement in extreme isolation did not constitute cruel and unusual punishment.²⁷⁷ Despite recognizing that the conditions in which Mr. Silverstein was confined were the most isolating in the entire federal prison system and that his three decades of solitary confinement was extraordinary,²⁷⁸ the court nevertheless held that his conditions did not violate the Eighth Amendment.²⁷⁹

Most of the court's rationale for its holding was based on security concerns: Mr. Silverstein was convicted of killing two prisoners while in custody in addition to the murder of a correctional officer while he was in custody in 1983, and in the 1980s, had been affiliated with the Aryan Brotherhood.²⁸⁰ Although thirty-one years passed since the murders, Mr.

273. *Silverstein*, 2011 WL 4552540, at *20.

274. *Id.* at *23.

275. Appellant's Opening Brief at 8, *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014) (No. 12-1450).

276. *Silverstein*, 559 F. App'x at 739.

277. *Id.* at 764. The Tenth Circuit denied the U.S. Attorney's Office motion to publish the decision.

278. *Id.* at 743, 759. The Tenth Circuit ignored evidence of twenty-two years of Mr. Silverstein's isolation because it (like the district court) limited its consideration to Mr. Silverstein's conditions at ADX. *Id.* at 751-52.

279. *Id.* at 763.

280. *Silverstein*, 559 F. App'x at 759-62. In so doing, the panel went beyond the record and imported information about the Aryan Brotherhood from other cases, improperly relying on this information to resolve a disputed issue in favor of the moving party. *See id.* at 744 n.5 (citing *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983)) ("While Mr. Silverstein was not convicted of these two murders, they nevertheless are indicative of the type of gang conduct the BOP believes Mr. Silverstein is involved in.").

Silverstein had been in isolation during that entire time,²⁸¹ had clear conduct for nearly twenty-five years, and was in his sixties, the court nevertheless deferred completely to prison officials' claim that *no* lessening of his isolation was possible without threatening institutional safety.²⁸² Indeed, the court's deference to prison officials was so absolute that it denied Mr. Silverstein a trial in which the district court could consider evidence that there were ways to ease his isolation without jeopardizing security.²⁸³ The beginning and end of the Tenth Circuit's inquiry into the BOP's penological justifications for thirty years of isolation can be summed up by its statement that "the opinion of a prison administrator on how to maintain internal security carries great weight and the courts should not 'substitute their judgment for that of officials who have made a considered choice.'"²⁸⁴

The Tenth Circuit's decision conflicts with Supreme Court precedent holding that the limits imposed on the other constitutional rights of prisoners do not apply to claims of cruel and unusual prison conditions because to do so would thwart the entire purpose of the Eighth Amendment: protecting those who are incarcerated.²⁸⁵ Accordingly, the Supreme Court held that affording "[m]echanical deference to the findings of state prison officials in the context of the Eighth Amendment would reduce that provision to a nullity in precisely the context where it is most necessary."²⁸⁶ Despite this, the *Silverstein* court deferred entirely to the BOP's proffered reasons for holding Mr. Silverstein in indefinite isolation, even to the extent of profoundly minimizing or ignoring evidence that conflicted with those judgments.

In addition to the deference the Tenth Circuit gave to the BOP's asserted penological interest in continuing to hold Mr. Silverstein in solitary confinement into his fourth decade, the court also found that the mental health issues he developed during his time in solitary—including an anxiety disorder, cognitive impairment, hopelessness, inability to concentrate, memory loss, and depression—were "minor mental health symptoms" and therefore his thirty years of isolation was not

281. In his declaration, Mr. Silverstein stated, "I do not consider myself to be part of any prison gang. I just want to serve out the remainder of my time peacefully with other mature guys doing their time." Declaration of Thomas Silverstein, *supra* note 65, ¶ 14.

282. *Silverstein*, 559 F. App'x at 744–45, 762–63.

283. *Id.* at 762–63.

284. *Id.* at 754 (quoting *Whitley v. Albers*, 475 U.S. 312, 322 (1986)). In making this statement, the Court quoted from an Eighth Amendment use of force case, which employs a different—and more deferential—standard. *See Whitley*, 475 U.S. at 320–21.

285. *Johnson v. California*, 543 U.S. 499, 511 (2005).

286. *Id.* at 511 (quoting *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979)) ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment."); *see Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

“sufficiently serious so as to deprive him of the minimal civilized measure of life’s necessities.”²⁸⁷

Not only did the Tenth Circuit disregard the harm Mr. Silverstein had already suffered, it also disregarded the risk of harm that indefinite solitary confinement posed to Mr. Silverstein in the future. In *Helling v. McKinney*,²⁸⁸ the Supreme Court expressly recognized the “risk of harm” formulation of the objective prong, holding that “[t]he Amendment . . . requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’ . . . [A] remedy for unsafe conditions need not await a tragic event.”²⁸⁹ The Court went on to explain:

[T]he Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused. . . . It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.²⁹⁰

One of the reasons the Tenth Circuit held that indefinite solitary confinement did not pose a constitutionally significant risk of harm to Mr. Silverstein in the future was its determination that in conditions of confinement cases where a plaintiff asserts a future risk of mental harm, “[t]he actual extent of any . . . psychological injury is pertinent in proving a substantial risk of serious harm.”²⁹¹

Framing the inquiry this way allowed the panel to disregard extensive evidence of the negative psychological effects of solitary confinement. That evidence included studies documenting a recurring cluster of harms suffered by people in long-term isolation, including “ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory” as well as “a constellation of symptoms indicative of mood or emotional disorders . . . emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away.”²⁹² Those studies document that over and over again, people who have spent long periods in solitary report the same symptoms of harm—so much so that researchers refer to this cluster as

287. *Silverstein*, 559 F. App’x at 758.

288. 509 U.S. 25 (1993).

289. *Id.* at 30, 33–34.

290. *Id.*

291. *Silverstein*, 559 F. App’x at 754.

292. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 5.

“SHU syndrome.”²⁹³ Harvard psychiatrist, Dr. Stuart Grassian, published research in 1983 (the year Mr. Silverstein was put in solitary) documenting brain function abnormalities of people held in isolation.²⁹⁴ And, as Dr. Haney noted in his expert report, studies from all over the world detail the “psychologically precarious state of persons confined under penal isolation, [including] the pain and suffering that isolated prisoners endure.”²⁹⁵ Further, “[t]he data that establish these harmful effects have been collected in studies conducted over a period of several decades, by researchers from several different continents who had diverse academic backgrounds and a wide range of professional expertise.”²⁹⁶

Despite this overwhelming body of evidence, the Tenth Circuit found that there was no triable issue of fact as to whether Mr. Silverstein faced a substantial risk of future harm as he entered his fourth decade of indefinite and extreme isolation— isolation that continues to this day. Moreover, the court’s approach to its analysis shifted the inquiry away from the core constitutional question of whether such confinement is inconsistent with the “evolving standards of decency that mark the progress of a maturing society.”²⁹⁷

3. First Amendment – *Jordan v. Pugh*

In addition to litigation challenging the isolating conditions of ADX, the CRC also has litigated other types of constitutional challenges on behalf of men confined there. The first of these cases was *Jordan v. Pugh*,²⁹⁸ which involved a First Amendment challenge to a BOP regulation that impermissibly restricted our client’s speech.²⁹⁹ While the case did not challenge the conditions of confinement at ADX, I include it here because it illustrates the lengths to which the BOP will go to prevent prisoners from describing those conditions to the outside world.

Our client, Mark Jordan, was in solitary confinement in ADX for three years when he wrote an essay entitled, *The Social Bonds of the Have-Nots*, which described his prison routine at ADX, the crimes that led to his imprisonment, and his pending murder charges.³⁰⁰ He mailed the manuscript to *Off!* Magazine, which published the essay under his

293. GREG NEWBOLD, *Foreword: The Phenomenon of USP Marion, in THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT AND THE SUPERMAX MOVEMENT* viii (Stephen C. Richards ed., 2015).

294. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

295. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 2.

296. *Id.* at 4.

297. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

298. 504 F. Supp. 2d 1109 (D. Colo. 2007).

299. *Id.* at 1110.

300. *Id.* at 1115.

name.³⁰¹ A copy of the magazine (described by the ADX officer who reviewed it as a “pamphlet”) was sent to Mr. Jordan at ADX, and prison staff read it as is customary for all incoming mail.³⁰² When the article was discovered, Mr. Jordan was issued a disciplinary report for violating a BOP regulation that prohibited prisoners from “act[ing] as a reporter or publish[ing] under a byline.”³⁰³ A few months later, Mr. Jordan wrote another essay entitled, *Beware! Surveillance Society*, in which he criticized the DNA Analysis Backlog Elimination Act of 2000, prison officials, and law enforcement generally, and again submitted it to *Off! Magazine*.³⁰⁴ This time, however, Mr. Jordan asked the magazine to refrain from using his byline and to instead use a pseudonym so that he would not be disciplined again.³⁰⁵ Once again, however, when ADX staff discovered he “published under a byline”—albeit not his own—Mr. Jordan received another disciplinary sanction for violating the same regulation.³⁰⁶

Mr. Jordan filed suit pro se in the U.S. District Court for the District of Colorado, asserting, among other things, that the regulation prohibiting federal prisoners from acting as a reporter or publishing under a byline violated the First Amendment and was facially overbroad in that it violated not only Mr. Jordan’s rights, but also those of publishers and members of the public.³⁰⁷ An accomplished jailhouse lawyer, Mr. Jordan litigated the case himself for over four years, including discovery, an appeal, remand to the district court, and summary judgment. After denying the BOP’s motion for summary judgment, U.S. District Judge Marcia Krieger appointed the CRC to represent Mr. Jordan at trial.

Ten days before trial, the U.S. Attorney’s Office forwarded to us a memorandum authored by the Assistant Director/General Counsel of the BOP, which purported to “clarify the Bureau of Prisons’ position on when to seek disciplinary action against inmates for publishing under a byline.”³⁰⁸ The memo made clear that it “had no effect on the regulation itself” but that the BOP’s “current position” was not to discipline a prisoner for per se violations of the regulation, but instead to discipline when there is a “factual basis for concluding the inmate’s actions

301. *Id.* Off! Magazine was the official publication of Off Campus College Meeting at the State University of New York at Binghamton.

302. The only exception to this is mail from a prisoner’s lawyer. 28 C.F.R. § 540.18 (2017).

303. 28 C.F.R. § 540.20(b) (2010); *Jordan*, 504 F. Supp. 2d at 1112.

304. *See Jordan*, 504 F. Supp. 2d at 1115.

305. *See id.*

306. *Id.*

307. Plaintiff’s Response to Order to Show Cause and Request for Oral Argument at 4, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 297.

308. Memorandum from Kathleen M. Kenney to the Regional Directors (Oct. 20, 2006) (on file with author).

jeopardize the Bureau's legitimate penological interests."³⁰⁹ Significantly, the memo also recited that the BOP's new guidance on enforcement of the regulation was created with the express purpose of "address[ing] a litigation situation in the District of Colorado" and avoiding "having the regulation invalidated by the court."³¹⁰ The court rejected the BOP's claim that the memo rendered Mr. Jordan's claims moot, ruling that "[a]lthough it is clear that the Defendants do not desire a trial on the Plaintiff's facial challenge to the constitutionality of 28 C.F.R. § 540.20(b), and have twice tried to render such claim moot," a trial on the merits was necessary to determine the constitutionality of the regulation.³¹¹

At trial, the BOP asserted three security-related justifications for the regulation. First, they claimed that if a prisoner published under his byline, he might "gain undue stature and power, thereby becoming a 'big wheel,' which creates supervisory and management problems."³¹² The BOP also claimed that because the content of published material could be "controversial," it could result in violence, and that prison staff might be unwilling to perform their duties out of fear that they might be included in a prisoner's bylined publication.³¹³

The court examined these proffered justifications in light of the *Turner* factors and found them wanting.³¹⁴ First, the court considered "whether there is a rational connection between the regulation and a legitimate, neutral penological interest."³¹⁵ Observing that "the BOP presented no evidence of any instance where an inmate who published under a byline in the news media became a 'big wheel,' or more importantly, became a security risk," and that there are other BOP-sanctioned activities that encourage prisoners to write and publish in a variety of venues, the court found that "the existence of a 'big wheel' security risk arising from an inmate's bylined publication . . . is undocumented and speculative."³¹⁶ Thus, while the court accepted that maintaining prison security is a legitimate and neutral penological interest, it concluded that there was no "logical connection between the

309. *Id.*

310. *Id.*

311. Order Setting the Matter for Trial at 6, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 301.

312. Memorandum Opinion and Order at 5, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 354.

313. *Id.*

314. *Id.* at 17. As the court recognized, for outgoing correspondence, the Supreme Court has held that the analytical framework set forth in *Martinez* applies rather than the *Turner* framework. *Id.* (explaining the test in *Procunier v. Martinez*, 416 U.S. 396, 413–14 (1974) in comparison to the test in *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)). The court therefore analyzed Mr. Jordan's claim under both the *Martinez* and *Turner* tests, and "reache[d] the same conclusion under both analyses." *Jordan*, 504 F. Supp. 2d at 1120.

315. *Jordan*, 504 F. Supp. 2d. at 1119 (citing *Turner*, 482 U.S. at 89–90).

316. *Id.* at 1120, 1122.

blanket restriction on outgoing news media correspondence and prison security.”³¹⁷ Similarly, the court concluded that there was insufficient evidence that outgoing news media correspondence has or will result in a prisoner conducting a business that could not be adequately addressed by other regulations.³¹⁸

As for the remaining *Turner* factors, the court found that those also weighed in favor of Mr. Jordan. Regarding the impact of accommodating the asserted right on prison resources, staff, and other prisoners, the court found that any burden on the BOP would be from incoming rather than outgoing publications and that the BOP had presented “no evidence that even offers a guess as to how many inmate submissions might be published, how many *more* publications might have to be reviewed by prison officials or at what cost.”³¹⁹ And in considering whether there were obvious, easy alternatives to the regulation suggesting that the regulation may not be reasonable and instead an “exaggerated response to prison concerns,” the court pointed to existing BOP regulations that provide for screening of incoming publications and prohibiting a prisoner from conducting a business.³²⁰ The court therefore held that the regulation violates the First Amendment rights of Mr. Jordan, other federal prisoners, and the press, and issued an order declaring the byline provision of the regulation unconstitutional and enjoining the BOP from punishing any inmate for violation of 28 C.F.R. § 540.20(b)’s provision that “[t]he inmate may not . . . publish under a byline.”³²¹

That the BOP saw fit to discipline Mr. Jordan—twice—for publishing articles about his experiences in federal prison is profoundly troubling. As the district judge noted in her opinion, other prisoners—even some at ADX—published articles, essays, and even books under their names without receiving any sort of sanction from the BOP.³²² Tellingly, though, those other writings did not concern the prison itself.³²³ Nor did the BOP punish Mr. Jordan for other articles he had published that did not discuss the conditions at ADX or elsewhere in the BOP.³²⁴ The BOP’s decision to sanction Mr. Jordan for publishing these particular articles is indicative of the culture of secrecy that pervades and surrounds ADX.

317. *Id.* at 1125.

318. *Id.* at 1125–26.

319. *Id.* at 1126 (emphasis in original).

320. *Id.* at 1125–26 (citing *Turner*, 482 U.S. at 89–90).

321. *Id.* at 1126.

322. *Id.* at 1115.

323. Plaintiff’s Motion for Leave to Present Testimony of Theodore Kaczynski and Thomas Silverstein at Trial, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-01239), ECF No. 320.

324. *Jordan*, 504 F. Supp. 2d at 1115.

C. Cunningham v. Fed. Bureau of Prisons

I thought I might be missing something, because it was inconceivable to me that the Bureau of Prisons could be operating in such a blatantly illegal and unconstitutional manner.³²⁵

A final example of litigation that has been critically important in exposing brutal conditions of confinement at ADX is *Cunningham v. Fed. Bureau of Prisons*,³²⁶ a putative class action lawsuit concerning the diagnosis and treatment of men with mental illness at ADX. The lawsuit, brought by the law firm of Arnold & Porter, LLP³²⁷ and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, asserted two Eighth Amendment claims: first, that the BOP subjected the plaintiffs to a substantial risk of serious harm by failing to adequately screen and diagnose prisoners at ADX for serious mental illness; and second, that the BOP failed to provide adequate mental health treatment to a subclass of men with serious mental illness.³²⁸

The complaint is excruciating to read. It tells the stories of five named plaintiffs and six interested persons,³²⁹ all of whom have various forms of serious mental illness, including schizophrenia, bipolar disorder, major depression, schizoaffective disorder, post-traumatic stress disorder, and significant intellectual disabilities.³³⁰ The lawsuit alleges that many had been confined at ADX for months or years “with predictably devastating results” as the prison’s conditions exacerbate their mental illness.³³¹ The 143-page complaint describes their suffering in brutal detail:

Many prisoners at ADX interminably wail, scream, and bang on the walls of their cells. Some mutilate their bodies with razors, shards of glass, sharpened chicken bones, writing utensils, and whatever other objects they can obtain. A number swallow razor blades, nail clippers, parts of radios and televisions, broken glass, and other dangerous objects. Others carry on delusional conversations with voices they hear in their heads, oblivious to reality and to the danger

325. Binelli, *supra* note 62 (quoting Deborah Golden, one of the lawyers for the plaintiff class in *Cunningham v. Fed. Bureau of Prisons*, 222 F. Supp. 3d 959 (D. Colo. 2015)).

326. 222 F. Supp. 3d 959 (D. Colo. 2015), *approving settlement*, 2016 WL 8786871 (D. Colo. 2016), *aff'd*, 2017 WL 4176203 (10th Cir. 2017).

327. As of January 1, 2017, the firm’s name is Arnold & Porter Kaye Scholer.

328. Complaint ¶¶ 3–4, *Cunningham*, No. 12-CV-01570 (D. Colo. June 18, 2012), ECF No. 1. For a more detailed discussion of the case, including the pre-filing investigation, see Deborah Golden, *The Federal Bureau of Prisons: Willfully Ignorant or Maliciously Unlawful?*, 18 MICH. J. RACE & L. 275, 276–77 (2013).

329. The interested persons could not serve as plaintiffs at the time of filing because it was not clear that they had exhausted their administrative remedies as required by the Prison Litigation Reform Act.

330. Complaint, *supra* note 328, ¶ 51.

331. *Id.* ¶ 52.

that such behavior might pose to themselves and anyone who interacts with them. Still others spread feces and other human waste and body fluids throughout their cells . . . Suicide attempts are common; many have been successful.³³²

The complaint alleges that one of the men, Jack Powers, spent nearly ten years in the Control Unit at ADX, where he

slowly descended into madness, horribly mutilating himself . . . repeatedly ramming his head into a metal door frame, amputating two fingers, a testicle and his scrotum, tattooing his entire body with a razor blade and carbon paper dust, trying to inject bacteria into his own brain, and slashing his wrist severely enough that he lost consciousness.³³³

Mr. Powers subsequently amputated his earlobes using pencils as tourniquets, and “sawed through his Achilles tendon with a sharp piece of metal, nearly severing it.”³³⁴

Another plaintiff, Michael Bacote,³³⁵ is described as having severe major depressive disorder with psychotic features as well post-traumatic stress disorder. He also is described as “mentally retarded, functionally illiterate, and may be suffering the long-term effects of a serious closed head injury.”³³⁶ While in BOP custody, Mr. Bacote has been prescribed medication to treat major depressive disorder and antipsychotic medication for his paranoid ideation.³³⁷

The complaint also recounts the situation of David Shelby, another prisoner at ADX, who tried to commit suicide for the first time at age sixteen.³³⁸ Almost from that point on, he has continually been in state or federal prison for a variety of crimes, including attempting to mail a package to the President of the United States containing “a modified lightbulb . . . filled with smokeless gunpowder, a pocket knife, and a note reading, ‘I think you are doing a good job and I am sending you the pocket knife as a gift and a light bulb so that you won’t strain your eyes.’”³³⁹ While undergoing a court-ordered mental health evaluation at the Medical Center for Federal Prison in Springfield, Missouri, Mr. Shelby tried to kill himself again “by ingesting a mouthful of Lysol” and

332. *Id.* ¶ 5.

333. *Id.* ¶ 54.

334. *Id.* ¶¶ 231–32.

335. Mr. Bacote withdrew as a named plaintiff after the lawsuit was filed. Order Dismissing Claims of Michael Bacote Without Prejudice, *Cunningham v. Fed. Bureau of Prisons*, 222 F. Supp. 3d 959 (D. Colo. 2015), ECF No. 39.

336. Complaint, *supra* note 328, ¶ 125. Mr. Bacote’s Full Scale IQ score was 61, with Verbal and Performance IQs in the first percentile. *Id.* ¶ 129.

337. *Id.* ¶¶ 130–31.

338. *Id.* ¶¶ 279–80.

339. *Id.* ¶ 283. He also attempted to send to Charles Manson a revolver with a fork affixed to its end to be used as a bayonet, a straight razor, and two explosive devices.

“a mouthful of Bon Ami cleanser.”³⁴⁰ He has been diagnosed with bipolar disorder, major depressive disorder, schizotypal disorder, alcohol dependence, and history of head injury (among other conditions).³⁴¹

After being transferred to ADX, Mr. Shelby, who heard the Bob Dylan song *Knocking on Heaven’s Door* on the radio and believed it to be a message “calling him home,” sat down in the shower in his cell and severely cut “both arms, both legs, and his belly using glass from a broken television.”³⁴² ADX staff bandaged him up and returned him to a solitary cell in the prison.³⁴³ Later that year, Mr. Shelby heard what “he took to be God’s voice commanding him to eat his finger.”³⁴⁴ “In response, Mr. Shelby amputated his left pinky finger and cut it into small pieces, which he added to a bowl of ramen soup and ate. When ADX staff discovered him bleeding in his cell, one officer asked him how his finger tasted.”³⁴⁵

At the time the lawsuit was filed, the federal courts had long held that people with serious mental illnesses could not be constitutionally housed in supermax confinement.³⁴⁶ Indeed, even the BOP’s own policies prohibit the placement of people with serious mental illness in ADX,³⁴⁷ and federal regulations prohibit confining any person with serious mental illness in a control unit: “prisoners requiring . . . psychotropic medication are not ordinarily housed in a control unit.”³⁴⁸

The BOP claims that it follows the law and its own regulations. In sworn statements and in international proceedings, the BOP has repeatedly asserted that there are no men with serious mental illness housed at the ADX. For example, in 2012, just after the *Cunningham* case was filed, a Congressional subcommittee held hearings about solitary confinement. Testifying under oath, Charles Samuels, then-director of the BOP, engaged in the following colloquy with Senator Durbin:

SENATOR DURBIN: Mr. Samuels, let me ask you a couple of questions. First, it is my understanding that those who are seriously mentally ill are not supposed to be assigned to supermax facilities, like Florence, Colorado. Is that true?

340. *Id.* ¶ 285.

341. *Id.* ¶¶ 291–92.

342. *Id.* ¶ 294.

343. *Id.*

344. *Id.* ¶ 296.

345. *Id.*

346. See David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 677 (2004) (citing *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1126 (W.D. Wis. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995)).

347. FED. BUREAU OF PRISONS, *supra* note 183, ch. 7, at 18.

348. 28 C.F.R. § 541.41(c)(1) (2017); Complaint, *supra* note 328, ¶ 48 (quoting 28 C.F.R. § 541.46(i)).

SAMUELS: You are correct. Our policy prohibits any inmate who suffers from a serious psychiatric illness to be placed in that confinement.³⁴⁹

And this, later in the hearing:

SENATOR DURBIN: Let me get down to some of the more graphic, and I will not go into detail here in the hearing, but it is there on the record. I have read stories about federal inmates and inmates at State facilities in isolation who have clearly reached a point where they are self-destructive. They are maiming themselves, mutilating themselves, doing horrible things to themselves. They are in an environment within that cell that is awful by any human standard. What happens next in the Federal Bureau of Prisons when someone has reached that extreme?

SAMUELS: If an individual is exhibiting that type of behavior due to suffering from, you know, serious psychiatric illness, those individuals are not, within our policy, individuals that we would keep at the ADX or in restrictive housing. These individuals are referred to our psychiatric medical centers for care, and we believe that is important, and we would never under any situation believe that those individuals should be continued to be housed in that type of setting.³⁵⁰

Nevertheless, the *Cunningham* complaint alleged that “it is common for the BOP to place an incoming prisoner with an existing prescription for psychotropic medication in the Control Unit, where the BOP refuses to administer such medication.”³⁵¹ The BOP justified the refusal “in Orwellian fashion: it discontinues the prisoner’s medication, thereby making the now non-medicated prisoner ‘eligible’ for placement in the Control Unit. Then, when this newly ‘eligible’ prisoner requests medication needed to treat his serious mental illness, he is told that BOP policy prohibits the administration of psychotropic medication to him.”³⁵²

The complaint alleged severe deficiencies in mental health staff at ADX; at the time the lawsuit was filed, only two psychologists and a psychiatrist who spent one half-day per week at ADX, were responsible for the mental health of the 450 men housed there, “many of whom have serious chronic mental health issues and many others of whom experience periodic acute mental health crises.”³⁵³ The inadequate

349. *Reassessing Solitary Confinement, Panel 1: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 8–9 (2012) (statement of Charles Samuels, Dir., Fed. Bureau of Prisons).

350. *Id.* at 16.

351. Complaint, *supra* note 328, ¶ 49.

352. *Id.*

353. *Id.* ¶ 63.

staffing resulted in ADX prisoners not having timely or meaningful access to mental health professionals, especially in times of crisis.³⁵⁴ Mental health counseling (or, as the BOP calls it, “psychology programming”) “consists of distributing to prisoners books with such titles as ‘Anger Management for Dummies,’ ‘Choose Forgiveness – Your Journey to Freedom,’ and ‘Why Zebras Don’t Get Ulcers.’”³⁵⁵ Those who are unable to read “have no meaningful access to [even] the negligible therapeutic information” in these workbooks.³⁵⁶

For some mentally ill prisoners at ADX, the “treatment” they receive is torture:

[M]entally ill prisoners, including those in the throes of a psychotic episode, frequently are subjected to barbaric treatment more suited to the dungeons of medieval Europe than to a modern American prison. For example, mentally ill prisoners are routinely “four pointed” -- chained by the wrists and ankles in either a prone or supine position on top of a concrete platform -- often for extended periods. While chained, mentally ill prisoners sometimes are left to urinate and defecate on themselves, and sometimes are denied basic nutrition.³⁵⁷

According to the complaint, “[s]ince ADX opened in 1994, at least six prisoners have committed suicide there.”³⁵⁸ Despite this,

[s]uicide and mental health crisis services at ADX are systematically deficient. Mentally ill prisoners threatening suicide are often goaded by ADX staff members to kill themselves. Prisoners who take steps to slash their wrists or hang themselves generally receive only minimal medical treatment for acute injuries. And instead of receiving mental health intervention, they are punished: they receive

354. *Id.*

355. *Id.* ¶ 66.

356. *Id.*

357. *Id.* ¶ 70.

In some cases, ADX staff turn the simple (although cruel and unconstitutional) refusal to feed a prisoner into a deceptive hoax. ADX prisoners, including those in four point restraints, sometimes are put on a disciplinary “sack lunch” nutrition program in which they are fed not standard prison trays but a paper bag containing a sandwich or two and a piece of fruit. Many mentally ill prisoners at ADX who are placed on sack lunch restriction have received their sack (suitably videotaped) being delivered to their cells. But when they open the bags (off-camera) they sometimes are empty. Through this ruse ADX staff produce false video evidence of feeding, raise (if only for a minute) the prisoner’s hope for basic nutrition, then smash the often-chained and always hungry prisoner’s hopes with a bag of air. Severely mentally ill prisoners at ADX often live near the edge of their emotional endurance, and the empty sack lunch is one of many cruel ploys that, upon information and belief, are used by certain ADX staff members to torture and provoke such prisoners into outbursts that then are used to justify even harsher discipline.

Id. ¶ 71.

358. *Id.* ¶ 85. A seventh man, Robert Knott, killed himself in 2013, after the complaint was filed.

a disciplinary incident report that sometimes results in a trip to the SHU and loss of privileges.³⁵⁹

The complaint continues with an example:

An ADX prisoner who recently attempted to hang himself in the SHU was violently removed from the room where he tried to commit suicide by a team of correctional officers in riot gear. Incredibly, an ADX psychologist in full riot gear participated in the violent extraction. After a short stay in a “strip cell,” a nearly empty cell in which the prisoner is clothed in what is essentially a paper robe, he was returned to the disciplinary segregation cell that precipitated his despair and suicide attempt only days earlier.³⁶⁰

Another man, Jose Martin Vega, hanged himself in his cell with a bedsheet. In 2004, Mr. Vega had been diagnosed by an ADX psychologist as having paranoid schizophrenia and was sent to the BOP’s medical center in Springfield, Missouri, for a mental health evaluation.³⁶¹ In 2006, the BOP transferred Mr. Vega back to the Control Unit at ADX, despite its written procedures that specify that “prisoners currently diagnosed as suffering from serious psychiatric illnesses should not be referred for placement at . . . ADX.”³⁶² The BOP also prevented him from receiving medication and treatment for his serious mental illness and sometimes chained him for days on end.³⁶³ On May 1, 2010, Mr. Vega was found dead in his cell in the Control Unit at ADX.³⁶⁴ The coroner’s report summarizing Mr. Vega’s autopsy states that Mr. Vega died as a result of hanging.³⁶⁵ It also states that information received from the ADX health administrator indicated that Mr. Vega “had a very long psychiatric history.”³⁶⁶

The BOP filed a motion to dismiss the *Cunningham* complaint, arguing that the allegations did not show “for any plaintiff” that he had a serious mental health need (the objective prong) or that the BOP acted with deliberate indifference to that need (the subjective prong) as

359. *Id.* ¶ 69.

360. *Id.*

361. *Id.* ¶¶ 89–90.

362. *Id.* ¶ 91 (citing Bureau of Prisons, Program Statement 5100.08, *Prisoner Security Designation and Custody Clarification*, ch. 7, p.18).

363. *Id.* ¶¶ 93–94.

364. Complaint and Jury Demand ¶ 36, *Vega v. Davis*, 2012 WL 4812024 (D. Colo. May 1, 2012) (No. 12-CV-01144), ECF No. 1. Mr. Vega’s brother filed his own Eighth Amendment lawsuit claiming that ADX Warden Blake Davis (and others) failed to provide him necessary mental health treatment, resulting in his suicide. The district court granted the defendants’ motion to dismiss, holding that the amended complaint did “not meet the requirements to support a finding that Warden Davis knew that Mr. Vega had a mental condition that required treatment to keep from hanging himself.” *Vega v. Davis*, No. 12-CV-01144, 2015 WL 9583378, at *1 (D. Colo. Dec. 31, 2015). The Tenth Circuit affirmed. *Vega v. Davis*, 673 F. App’x 885, 885 (10th Cir. 2016); *see also* Cohen, *supra* note 168 (describing Mr. Vega’s suicide and the resulting lawsuit).

365. Complaint and Jury Demand, *supra* note 364, at 9.

366. *Id.*

required by the Eighth Amendment.³⁶⁷ In their motion, the BOP also argued that post-*Ashcroft v. Iqbal*,³⁶⁸ Tenth Circuit law imposes an additional requirement on prisoners' Eighth Amendment claims: that "allegations by inmates must be viewed in light of the special context of prisons," because "[p]risons are a unique environment, and the Supreme Court has repeatedly recognized that the role of the Constitution within their walls is quite limited."³⁶⁹ Part of that "special context," the BOP argued, is that "prisoners claiming constitutional violations by officers within the prison will rarely suffer from information asymmetry" because "[n]ot only do prisoners ordinarily know what has happened to them, but they will have learned how the institution has defended the challenged conduct when they pursue the administrative claims that they must bring as prerequisite to filing suit."³⁷⁰ While this statement is demonstrably false in virtually every conditions of confinement case, it was especially so in *Cunningham* given both the allegations of serious mental illness and intellectual disability of the plaintiffs and the BOP's response to their administrative remedies.³⁷¹

The district court denied the BOP's motion to dismiss.³⁷² Shortly afterward, counsel for the plaintiff class amended their complaint and the Center for Legal Advocacy (CLA), Colorado's Protection and Advocacy organization ("P&A"), moved to intervene in the case.³⁷³ Pursuant to federal statute, P&As protect and advocate for the rights of people with developmental disabilities.³⁷⁴ P&As, and CLA specifically, are charged

367. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) at 1–2, 14, *Cunningham v. Fed. Bureau of Prisons*, No. 12-CV-01570 (D. Colo. Oct. 9, 2012), ECF No. 27.

368. 556 U.S. 662 (2009). The Supreme Court's decision in *Ashcroft v. Iqbal*, and its predecessor, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), imposed on plaintiffs significantly stricter pleading standards than existed previously. *Iqbal*, in particular, requires that in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

369. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), *supra* note 367, at 16–17 (citing *Gee v. Pacheco*, 627 F.3d 1178, 1185 (10th Cir. 2010)).

370. *Id.*

371. *See, e.g.*, Ex. 2 to Plaintiffs' Response to Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), *Cunningham*, No. 12-CV-01570 (D. Colo. Nov. 21, 2012), ECF No. 37-2. This is illustrated by an attempt by David Hearne, another mentally ill man to file a cop-out (a written request) to ADX officials stating that he was being held at ADX without a hearing or psychiatric meeting (the form he submitted actually says: "Why am I over here at the ADX with out a hearing or psy meat ton"). The BOP's response asserted that Mr. Hearne had made "no specific request for relief." First Amended Complaint at 116–17, *Cunningham*, No. 12-CV-01570 (D. Colo. May 24, 2013), ECF No. 67. Subsequently, Mr. Hearne (who had exhibited symptoms of paranoid schizophrenia since age six and who has lived almost continuously in mental hospitals or correctional facilities ever since) submitted a Request for Administrative Remedy to ADX prison officials requesting treatment for his mental illness. The BOP's response stated that "there is no evidence to support [your] contention that [you] ha[ve] a serious mental illness." *Id.* at 111–12, 117.

372. Courtroom Minutes for Motion Hearing at 3, *Cunningham*, No. 12-CV-01570 (D. Colo. Apr. 23, 2013), ECF No. 58.

373. First Amended Complaint, *supra* note 371, at 1–2, 15.

374. *See* Part C of Subchapter I, Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041–45 (2012). Since 1986, the Center for Legal Advocacy has been the

under federal law with investigating allegations of abuse, neglect, and rights violations of individuals with serious or significant mental illness or emotional impairment who reside in Colorado in particular facilities, including federal prisons.³⁷⁵ The amended complaint paints a picture of ADX that is even more horrifying than the first one. In addition to the inclusion of CLA as an entity, the amended complaint sets forth allegations related to CLA's constituents.³⁷⁶ One of the men, Jonathan Francisco, is described as not speaking a word to anyone in the nearly eighteen months since arriving at ADX:

[R]ather, he spends all day, every day, staring at the wall of his cell. He frequently defecates on the floor of his cell or on a food tray, and smears his feces on himself, his cell or his other surroundings. He ignores other prisoners' attempts to help him, does not communicate with staff, and makes no effort to maintain his health or hygiene. As a result, he lives in squalor, rarely eats and is showered only when ADX staff members force him into a shower enclosure.³⁷⁷

According to the complaint, Mr. Francisco's mental illness is so severe that he lacked the capacity even to use the BOP's administrative remedy process—the very process that, according to the BOP, cures any sort of “information asymmetry” between a prisoner and those who incarcerate him.³⁷⁸

Four months later, Mr. Francisco's condition deteriorated so badly that CLA filed an emergency motion for preliminary injunction to transfer Mr. Francisco out of ADX to a mental health facility for evaluation and treatment.³⁷⁹ According to the motion, by then, Mr. Francisco was spending his days standing with his face very near a wall, staring blankly at the surface before him and “obsessively hoard[ing] and handl[ing] his own feces, placing it on food trays, rolling it into balls, making sculptures out of it, and smearing it on his walls and sometimes on his body or in his hair” and, on at least one occasion, consuming it.³⁸⁰ The BOP's only response was to occasionally force him into a shower stall and to pile sandbags outside his door “in a futile effort to prevent the overwhelming smell of feces emanating from his cell from spreading throughout the part of the prison where he lives.”³⁸¹

eligible P&A to protect and advocate for the rights of people with mental illness in Colorado. *See* 42 U.S.C. §§ 10803, 10805.

375. *See* 42 U.S.C. § 10804(c); 42 U.S.C. § 10805(a)(1)(A) – (B); 42 U.S.C. § 10807.

376. First Amended Complaint, *supra* note 371, at 107–26.

377. *Id.* ¶ 322.

378. *Id.* ¶ 326.

379. Emergency Motion by Plaintiff, Center for Legal Advocacy, for a Preliminary Injunction Ordering Defendant To Transfer ADX Prisoner, Jonathan Francisco, for a Med. Evaluation and Treatment at 2–3, *Cunningham v. Fed. Bureau of Prisons*, No. 12-CV-01570 (D. Colo. Sept. 30, 2013), ECF No. 99.

380. *Id.* at 2.

381. *Id.* at 3.

During this same period, *after* the *Cunningham* suit was filed, the BOP allowed another ADX prisoner with psychosis to develop severe malnutrition and systemic staph infections so severe that he almost died by the time the BOP finally evacuated him to a medical facility.³⁸² He, too, had spent months in a “feces-encrusted cell” before the BOP finally attended to him.³⁸³ And just two weeks before counsel filed the emergency motion regarding Mr. Francisco, another ADX prisoner with schizophrenia, who was in acute psychosis, hung himself in his cell.³⁸⁴

After CLA filed the motion for preliminary injunction, the BOP transferred Mr. Francisco to a federal medical center.³⁸⁵ A few weeks later, the parties entered into mediation with U.S. Magistrate Judge Michael Hegarty.³⁸⁶ Settlement discussions proceeded over the course of the next three years. At the same time, litigation of the case continued, including briefing on the plaintiffs’ motion for class certification, a summary judgment motion concerning whether CLA had associational standing, and discovery. In June 2015, three years into the litigation, the plaintiffs filed their Second Amended Complaint.³⁸⁷ That document recited some “preliminary steps” the BOP took to address the constitutional violations that prompted the lawsuit, including mental health screening of the men at ADX, revising the policy for the care and treatment of prisoners with mental illness at ADX, and creating new “secure facilities” for treatment of prisoners with serious mental illness and transferring some of the men at ADX to those facilities.³⁸⁸ But it also noted that the BOP’s compliance with those newly created policies was inconsistent, and that the men who had not been transferred to the new mental health treatment units were still receiving constitutionally inadequate mental health care.³⁸⁹

For example, after purportedly revising the BOP’s suicide prevention policy and distributing to ADX prisoners a memo informing them that “[a]nytime you want to speak with a psychologist, let staff know and they will contact Psychology Services to make the necessary

382. *Id.*

383. *Id.*

384. *Id.*; see also Andrew Cohen, *A Handwritten Letter the Prison System Doesn’t Want You To See*, ATLANTIC (Sept. 18, 2013), <https://www.theatlantic.com/national/archive/2013/09/a-handwritten-letter-the-prison-system-doesnt-want-you-to-see/279751> (describing suicide of Robert Knott at ADX).

385. See Suggestion of Mootness Concerning Emergency Motion by Plaintiff, Center for Legal Advocacy, for a Preliminary Injunction Ordering Defendant to Transfer ADX Prisoner Jonathan Francisco for a Medical Evaluation and Treatment at 2, *Cunningham v. Fed. Bureau of Prisons*, No. 12-CV-01570 (D. Colo. Oct. 23, 2013), ECF No. 114.

386. Order Approving Settlement at *2, *Cunningham v. Fed. Bureau of Prisons*, 2016 WL 8786871 (D. Colo. Dec. 29, 2016) (No. 12-CV-01570), ECF No. 391.

387. Second Amended Complaint, *Cunningham*, No. 12-CV-01570 (D. Colo. June 15, 2015), ECF No. 274.

388. *Id.* ¶¶ 7, 16.

389. *Id.* ¶ 8.

arrangements,” ADX staff ignored one prisoner who requested emergency psychology services for hours.³⁹⁰ The man, who was being medicated for severe depression, attempted suicide, was belatedly discovered in the act, and was later issued a disciplinary incident report for attempting to kill himself.³⁹¹

The Second Amended Complaint also recounts the situation of Richie Hill, a severely mentally ill man who was in solitary confinement at ADX for over six years, including after the lawsuit was filed:

He swallowed objects including rocks, Styrofoam, and radio parts, and was frequently observed eating balls of his own feces. He attempted suicide approximately ten times while at ADX, including once by placing pencil lead, rocks, and pencil particles up his penis. He mutilated his forehead and face by carving pitchforks and ‘cannibal marks’ into it, and also cut his lips open with staples and put flies into the wounds. He also attempted to gouge out his own left eyeball ‘about six times,’ often by pushing rocks into it.³⁹²

After Mr. Hill, who had become severely malnourished, repeatedly begged staff for help with his mental illness and asked to be transferred to “a mental hospital,” the chief ADX psychologist “bribed him to withdraw his transfer request by giving him a radio, which he later smashed and ate.”³⁹³ Later, Mr. Hill developed a life-threatening staph infection in his legs after he was overcome with a persistent delusion that diamond rings were embedded inside them. To remove the rings, he began digging holes in his legs with his fingers. The wounds became so infected that at one point, a worm emerged from one of them.³⁹⁴ After several months, Mr. Hill’s legs had become so swollen that he was reduced to crawling around his cell, naked, in a pool of his waste, and was so severely starved that he was eating pebbles and balls of his own feces that he rolled with his hands.³⁹⁵ BOP staff finally transferred him to a medical center where he was diagnosed with severe multiple systemic infections, chronic and acute sepsis, and multiple draining deep sores so severe that his legs nearly required amputation—all of which was in addition to active psychosis.³⁹⁶

390. *Id.* ¶ 17(a).

391. *Id.*

392. *Id.* ¶ 89.

393. *Id.* ¶¶ 90, 93.

394. *Id.* ¶ 92.

395. Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class at 13, *Cunningham v. Fed. Bureau of Prisons*, No. 12-CV-01570 (D. Colo. Nov. 16, 2016), ECF No. 382.

396. Second Amended Complaint, *supra* note 387, ¶ 95. A BOP mental health record written by the then-chief psychologist at ADX noted nothing out of the ordinary and stated that Mr. Hill “appeared alert and relaxed” and would “continue to be monitored during unit rounds.” Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, *supra* note 395, at 13.

As the Second Amended Complaint noted, “that [this] happened at ADX, which houses fewer than 500 of the most closely monitored prisoners on the planet, reflects the depth and breadth of the mental health catastrophe that precipitated this lawsuit.”³⁹⁷ And “the fact that it happened during the pendency of this case reflects a deliberate disregard of the rights, health, and safety” of the men at ADX, and the need for close and continuing court supervision.³⁹⁸

“Continuing court supervision” is what the court ultimately ordered. Nearly eighteen months later, counsel for the plaintiff class filed a motion requesting supervision of a settlement agreement (Agreement).³⁹⁹ After three years of negotiation, including 200 hours of formal mediation, the parties reached a resolution of the lawsuit.⁴⁰⁰ As counsel for the parties told Judge Matsch at the final fairness hearing:

By any measure, ADX is a different place than it was in 2011. . . . Nearly 100 mentally ill men have been transferred to other facilities. BOP has activated three new high security mental health treatment units in other facilities, which now house and care for many people with mental illness who spent years at ADX.⁴⁰¹

Counsel also noted that “many staff members at ADX and elsewhere within the BOP now understand mental illness better, and deal more humanely with inmates who struggle with mental health problems.”⁴⁰²

The Agreement established two classes for settlement: a “Screening Class” comprised of “all persons who are confined at ADX at any time” during the compliance period; and a “Treatment Subclass” comprised of all persons who are confined at ADX during the compliance period who have a “Covered Mental Illness,” which is in turn defined as “a mental disorder as defined in the most current edition of the *Diagnostic and Statistical Manual of Mental Disorders* that results in classification of the inmate as a CARE2-MH or higher.”⁴⁰³

397. Second Amended Complaint, *supra* note 387, ¶ 96.

398. *Id.*

399. Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, *supra* note 395, at 7.

400. *Id.* at 3, 22.

401. Andrew Cohen, *How America’s Most Famous Federal Prison Faced a Dirty Secret*, MARSHALL PROJECT (Dec. 5, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/12/05/how-america-s-most-famous-federal-prison-faced-a-dirty-secret>.

402. *Id.*

403. Addendum to Joint Motion to Approve Settlement at 12–13, *Cunningham v. Fed. Bureau of Prisons*, No. 12-CV-01570 (D. Colo. Nov. 16, 2016), ECF No. 382-1. The Agreement also established “Mental Health Care Levels”, a parallel program to the BOP’s medical care levels, through a BOP-wide policy. *See generally* FED. BUREAU OF PRISONS, 5310.16, TREATMENT AND CARE OF INMATES WITH MENTAL ILLNESS (2014).

The Agreement also provides for the development and activation of three high-security mental health treatment units at federal prisons in Atlanta, Georgia, Allenwood, Pennsylvania, and Florence, Colorado, for men who have a history of violent behavior resulting in a referral to ADX.⁴⁰⁴ Two of them are “Secure Mental Health Units,” which are residential psychology treatment programs that provide mental health treatment for men with serious mental illness who do not require inpatient treatment but do need enhanced mental health treatment and intensive, specialized psychiatric services or psychological interventions in a residential setting.⁴⁰⁵ The third unit is a “Secure STAGES” program—a residential, unit-based Psychology Treatment Program for people with certain personality disorders who have a chronic history of self-injury.⁴⁰⁶

The Agreement reemphasizes that men with serious mental illness should not be confined at ADX unless they have “extraordinary” security needs.⁴⁰⁷ For those who will remain at ADX, the Agreement requires the hiring of three additional full time psychologists, a psychiatric nurse, and a psychology technician.⁴⁰⁸ It mandates the creation of group therapy facilities and areas for private mental health consultations; it also creates an at-risk recreation program and ensures that staff offer the men twenty hours of therapeutic and recreational out-of-cell time each week.⁴⁰⁹ And it provides for the creation, revision, and implementation of policies concerning the screening and diagnosis of mental illness, provision of mental health care, suicide prevention, and conditions of confinement to reduce the risk of development or exacerbation of mental illness.⁴¹⁰ The Agreement also requires mental health training of BOP staff.⁴¹¹

To ensure compliance with its terms, the Agreement also provides for monitoring by two psychiatrists with correctional mental health expertise.⁴¹² The BOP also must ensure that CLA and the men at ADX know about and are able to communicate with each other, and of the availability of CLA to represent them in connection with complaints concerning compliance with the Agreement.⁴¹³ The obligations under the Agreement are effective for three years, unless the plaintiffs consent to

404. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 18.

405. OFF. OF THE INSPECTOR GENERAL, 17-05, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS (2017).

406. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 18.

407. *Id.* at 5 n.2.

408. U.S. DEP’T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 52 (2016). It also requires the BOP to hire a full-time social worker for the Florence Correctional Complex whose priority is providing re-entry services to the men at ADX who are within one year of their release date. *Id.*

409. *Id.* at 53.

410. *Id.*

411. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 14.

412. *Id.* ¶¶ 14–15.

413. *Id.* ¶ 19.

termination between two and three years or the court grants a one-time, one-year extension.⁴¹⁴

In his order approving the Agreement and certifying the settlement class and subclass, U.S. District Judge Richard P. Matsch described the settlement as “a singular achievement,” and noted that “the programs, policies, and staffing that has been and will be implemented will advance understanding of the complex relationship between criminal conduct and mental illness and provide some measure of human dignity to the confinement of those who have been shown to be too dangerous to live with others in an open population penal institution.”⁴¹⁵ Yet he also observed that “[t]he results that may be achieved by implementing the terms of the settlement agreement will depend upon the willingness of those who are responsible for instituting and abiding by these policies and programs in good faith and the extent to which the tension between inmates and staff is reduced.”⁴¹⁶

In the motion for preliminary approval of the Agreement, counsel for the plaintiffs recounted some of the horrors endured by the mentally ill men at ADX. The motion also describes some of the causes that led to the unspeakable treatment of these men. Chief among them was that ADX staff “were accountable to no one: they ran the prison they proudly called ‘the Alcatraz of the Rockies,’ housed the supposed worst of the worst, had terminated virtually all press access to the facility following the 9/11 attacks, and were convinced they had all the answers and needed not answer to anyone about anything.”⁴¹⁷ Without the *Cunningham* litigation and the extraordinary commitment of effort, time, and resources by plaintiffs’ counsel,⁴¹⁸ the public and the courts would have remained ignorant of the treatment of the mentally ill men at ADX, and their situation would have remained unchanged.

CONCLUSION

We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter

414. *Id.* ¶¶ 80–82.

415. Order Approving Settlement, *supra* note 386, at 8.

416. *Id.* at 9.

417. Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement Terms & Proposed Notice to the Class, *supra* note 395, at 13–14.

418. Arnold & Porter devoted \$17 million in attorney time and \$1 million in expenses to the case. *Id.* at 27.

future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.⁴¹⁹

In discussing some of the litigation involving ADX brought by our clinic and others, I do not mean to suggest that litigation is always—or even frequently—the solution to the myriad problems that exist with the carceral state in general and ADX in particular. Like most public interest lawyers, I know, I have no illusions about the limitations of litigation to bring about social change.⁴²⁰ This is particularly true when it comes to prison litigation, given the courts’ narrowing of constitutional protections for people who are incarcerated.

Chief Justice Burger recognized as much nearly half a century ago when he wrote:

We must, at the very minimum, dedicate the same attention and concern and expense and manpower that we have lavished on the adversary contest between society and the accused to the processes of correctional institutions. It must be ironic to a prisoner to recall that society spared no expense to afford him - as too often happens - three, four, or five trials and appeals, at enormous costs, but then proceeded to forget his plight. We need not diminish the one to expand the other, but we must not continue this illogical allocation of limited resources to the correctional systems.⁴²¹

But even the cases we do not win are worth bringing—and worth fighting. As Jules Lobel explained, while “the prevailing view of the law is utilitarian, as is the dominant American view of success . . . [t]he utilitarian perspective is premised on a sharp divide between winning and losing, which in turn relies on a separation of law and politics.”⁴²² Thus, he wrote of some of the “unsuccessful” cases he brought:

While we believed that the law was on our side and hoped the courts would agree, we used law not merely to adjudicate a dispute between the parties but also to educate the public. Even though the political contexts of our challenges made courtroom success highly improbable, we persevered because our purposes were broader than victory alone. We were speaking to the public, not just to the court.⁴²³

It is my hope and belief that through the cases the CRC litigated with our clients at ADX, we have spoken to the public as well as the

419. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

420. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

421. Warren E. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972).

422. JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 3 (2003).

423. *Id.* at 4; see also Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2001).

courts. Through their work, generations of CRC students have helped bring to light the brutal conditions in which the federal government imprisons those it deems “the worst of the worst.” In doing so, we have won some cases and lost others. But in all of the cases, the students litigated their values by challenging the injustices their clients endured at ADX. In that way, they call to mind Supreme Court Justice William Brennan’s explanation for why he continued to pen dissent after dissent opposing capital punishment: each one constitutes a statement of individual conscience.⁴²⁴ As the newest generation of CRC students prepares for trial later this year in two more ADX cases, I am reminded of and inspired by Norman Cousins’s words: “Nothing is more powerful than an individual acting out of his conscience, thus helping to bring the collective conscience to life.”⁴²⁵

424. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

425. NORMAN COUSINS, *HUMAN OPTIONS* 63 (Penguin 1986).