

Punishment In Prison: The Law And The Practices Of Solitary Confinement

prepared for

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Punishment's Purposes

per U.S. constitutional law

punishment cannot be **“totally
without penological justification”**

Gregg v. Georgia, 428 U.S. 153, 183 (1976)
(Stewart, J., plurality opinion)

Licit Purposes

Incapacitation

Retribution

Deterrence

Rehabilitation

Institutional safety

Cost reduction

Unconstitutional Punishments

Punishments of “**unnecessary cruelty**” are forbidden by the Eighth Amendment.

Wilkerson v. State of Utah, 99 U.S. 130, 136 (1878)
(Clifford, J., for the Court)

“[A] precept of justice [is] that punishment for crime shall be **graduated and proportioned** to [the] offense,” not **excessive** nor “**unusual in its character.**”

Weems v. United States, 217 U.S. 349, 367, 377 (1910)
(McKenna, J., for the Court)

Punishment must comport with “**evolving standards of decency** that mark the progress of a maturing society.”

Trop v. Dulles, 356 U.S. 86, 101 (1958)
(Warren, C.J., plurality opinion)

“A penalty . . . should be considered ‘unusually’ imposed if it is administered **arbitrarily or discriminatorily.**”

Furman v. Georgia, 408 U.S. 238, 249 (1972)
(Douglas, J., concurring)

“Deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’”

Estelle v. Gamble, 429 U.S. 97, 104 (1976)
(Marshall, J., for the Court)

“[T]he government “should not deprive a wrongdoer of his livelihood” nor use its sanctioning power to cause “the ruin of the criminal.”

Timbs v. Indiana, 139 S. Ct. 682, 694 (2019)
(Thomas, J., concurring)

Mr. Justice BLACK, Mr. Justice HARLAN, and Mr. Justice STEWART, concurring in *Lee v. Washington*, 390 U.S. 333 (1968).

“In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court’s opinion. This is that **prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. . . .**”

Solitary and Intense Isolation

“[A]lmost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure **7 by 14 feet**, for 23 hours per day. **A light remains on** in the cell at all times

Incarceration . . . is synonymous with extreme isolation. . . . It is fair to say [supermax] inmates are **deprived** of almost any environmental or **sensory stimuli and of almost all human contact**.

Aside from the severity of the conditions, placement at [the supermax] is for an **indefinite** period of time, limited only by an inmate’s sentence.”

Wilkinson v. Austin, 545 U.S. 209,
214-215
(2005)(Kennedy, J.)

Given that the institution was “imperiled by the brutal reality of prison gangs, . . . clandestine, organized, fueled by race-based hostility, and committed to fear and violence,” the “harsh conditions [of supermax] may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.”

“Prolonged confinement in Supermax may be the State’s only option for the control of some inmates”

Wilkinson v. Austin, 545 U.S. 209, 211-12, 229 (2005)
(Kennedy, J.)

“[This Court’s test of when prisoners have **liberty interests triggering due process protections**] requires us to determine if assignment to [Ohio State Penitentiary] ‘imposes **atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.**’

. . . Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the **duration**. . . . [which] is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that **placement disqualifies** an otherwise eligible inmate **for parole** consideration. . . . [T]aken together they impose an **atypical and significant hardship within the correctional context.**”

Wilkinson v. Austin,
545 U.S. 209, 214-215 (2005)

CLA (ASCA)-Liman Research Projects

2012

Prison Visitation Policies: A Fifty-State Survey

2013

Administrative Segregation, Degrees of Isolation, and Incarceration:
A National Overview of State and Federal Correctional Policies

2014

Time-In-Cell: The ASCA-Liman 2014 National Survey of
Administrative Segregation in Prison

2016

Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on
the Numbers of Prisoners in Restricted Housing and on the Potential of
Policy Changes to Bring about Reforms

Rethinking “Death Row”: Variations in the Housing of Individuals
Sentenced to Death

2018

Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide
Survey of Time-in-Cell

Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to
Make Changes

2020

Time-In-Cell: A 2019 Snapshot of Restrictive Housing Based on
Nationwide Surveys of U.S. Correctional Facilities

2022

Time-In-Cell: A 2021 Snapshot of Restrictive Housing Based on
a Nationwide Survey of U.S. Prison Systems

Methodology

Definition of restrictive housing:
“separating prisoners from the
general population and holding them
in cell for an **average of 22 or more
hours** per day, for **15 or more
continuous days**”

170 questions on total custodial and
restrictive housing populations (as of
July 2021) sent to 50 states and
Federal Bureau of Prisons

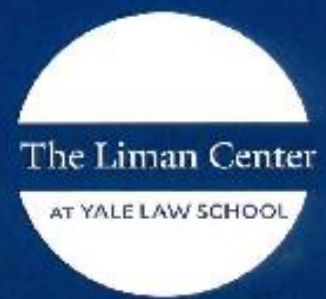
Follow-ups: December 2021 – March 2022

Draft Report: July 2022

Definitional Challenges

Solitary = ?

- 24 hours in a cell?
- 17 hours in a cell?
- 10 hours in a cell?
- 5 hours in a cell?
- 1 hour in a cell?



TIME-IN-CELL: A 2021 SNAPSHOT OF RESTRICTIVE HOUSING

Based on a Nationwide Survey of U.S. Prison Systems

CORRECTIONAL LEADERS ASSOCIATION

**ARTHUR LIMAN CENTER
FOR PUBLIC INTEREST LAW
AT YALE LAW SCHOOL**

Jurisdictions Reporting Data

36 jurisdictions responded; the “n” varies by question

35 jurisdictions (34 states + the Federal Bureau of Prisons reported numbers of people in restrictive housing)

These **35** jurisdictions reported about **731,200 individuals** in total custodial populations under their “direct control” – or **~61%** of the U.S. prison population (1.2 million).

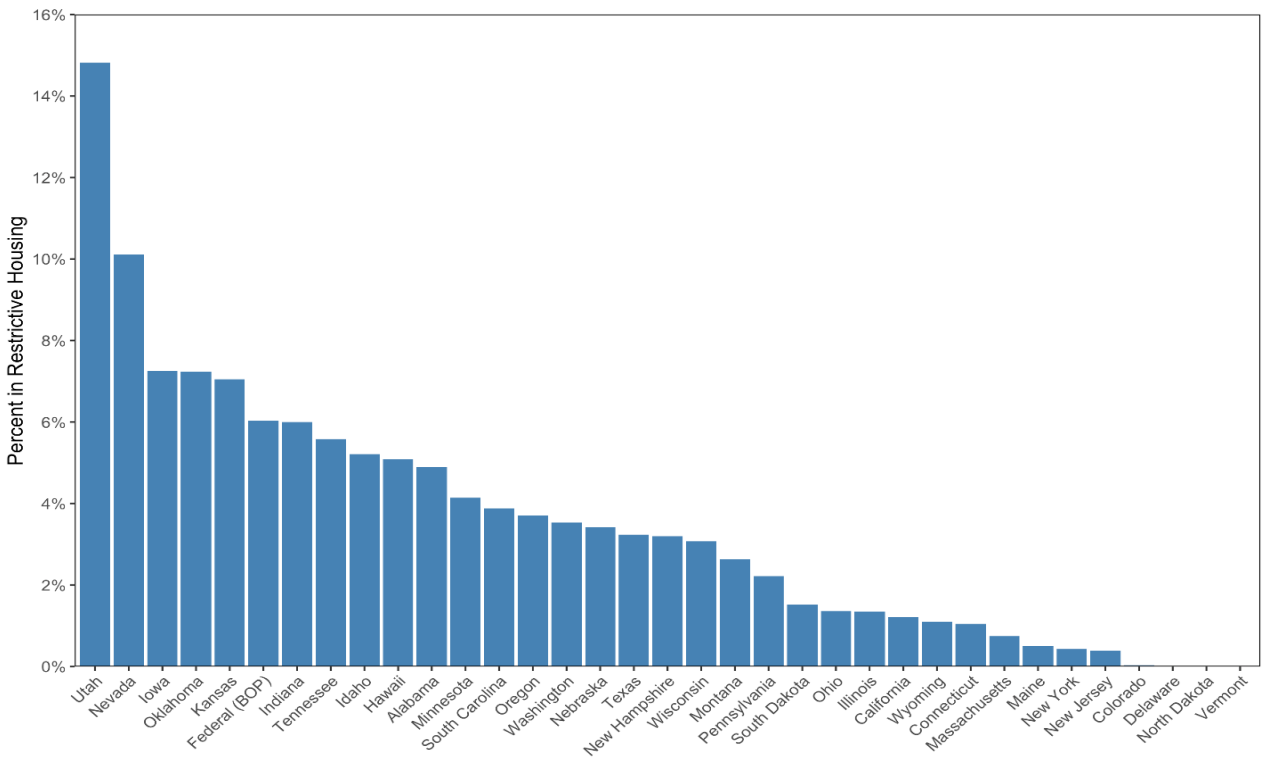
Number and Percentage of Prison Population reported to be in Restrictive Housing 2021

	(n = 35)
Total Custodial Under Direct Control	731,202
Total Restrictive Housing	25,083 (3.4%)

The estimate is that between **41,000** and **48,000 people** were in restrictive housing across the U.S. in the summer of 2021.

Percentage of People reported in Restrictive Housing

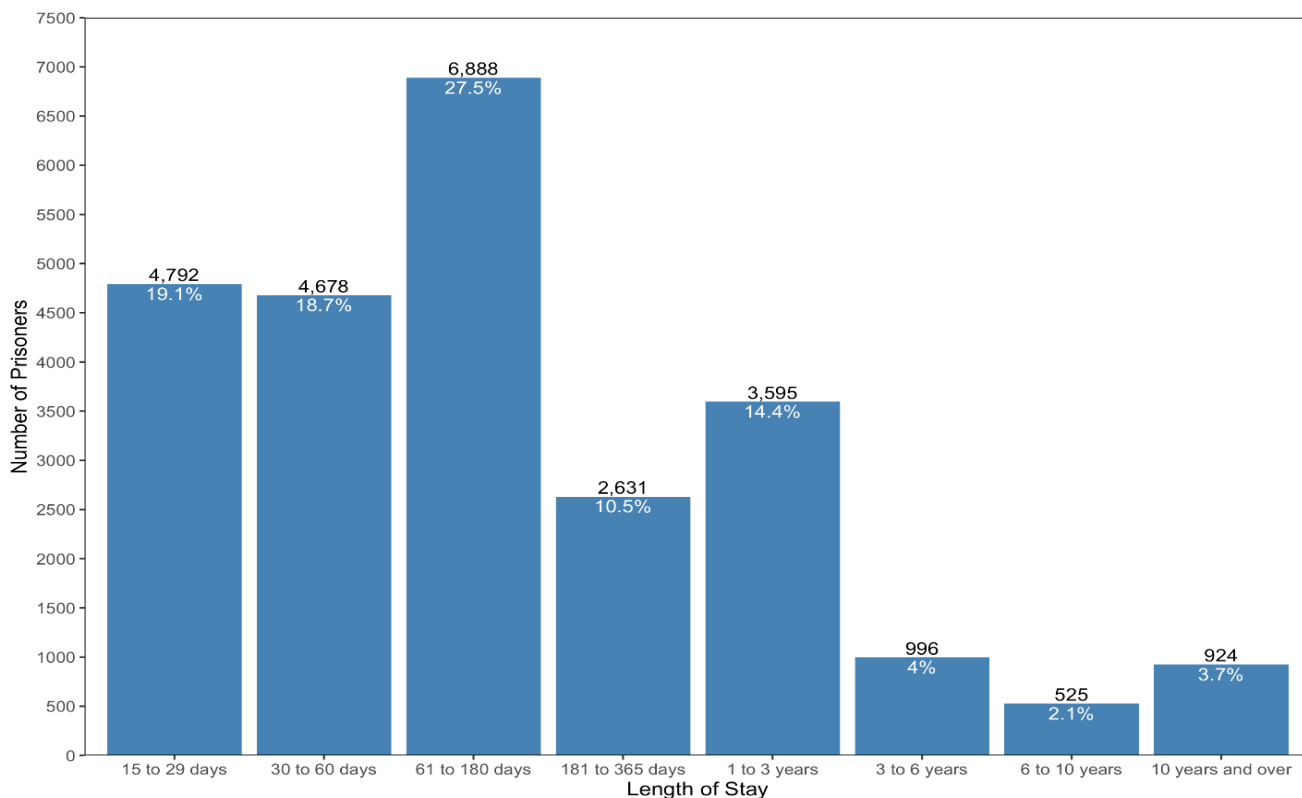
From 0 to 14.8%
(n=35)



People reported in Restrictive Housing by Length of Stay

From 15 days to 10 years or more

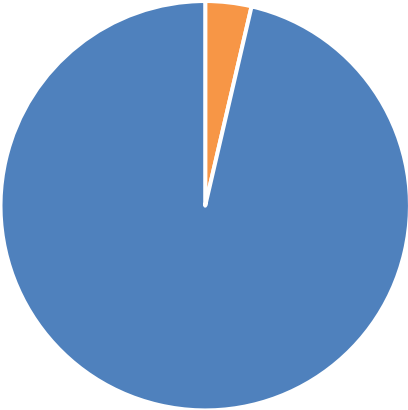
(n=34)



Restrictive Housing by Sex/Gender

Men's Prisons

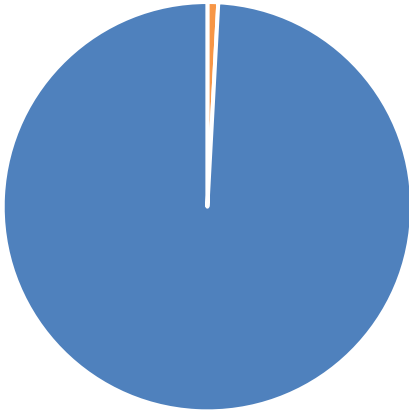
3.6% (24,679) in restrictive housing



Median: 3.3%

Women's Prisons

0.8% (404) in restrictive housing



Median: 0.5%

Pregnant and Transgender Individuals

33 jurisdictions reported on numbers of pregnancies

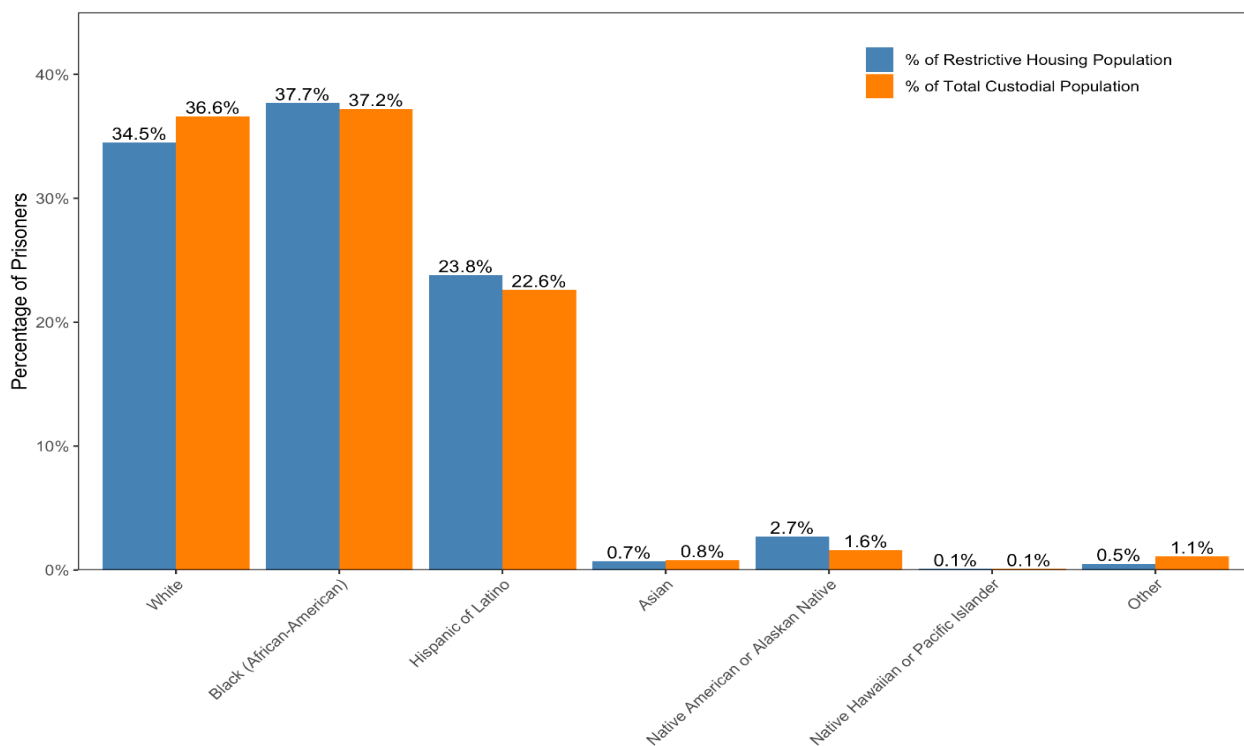
- 234 pregnancies in total custodial
- 0 pregnancies in restrictive housing

29 jurisdictions reported on numbers of transgender people

- 5,822 transgender people in total custodial
- 293 transgender people in restrictive housing

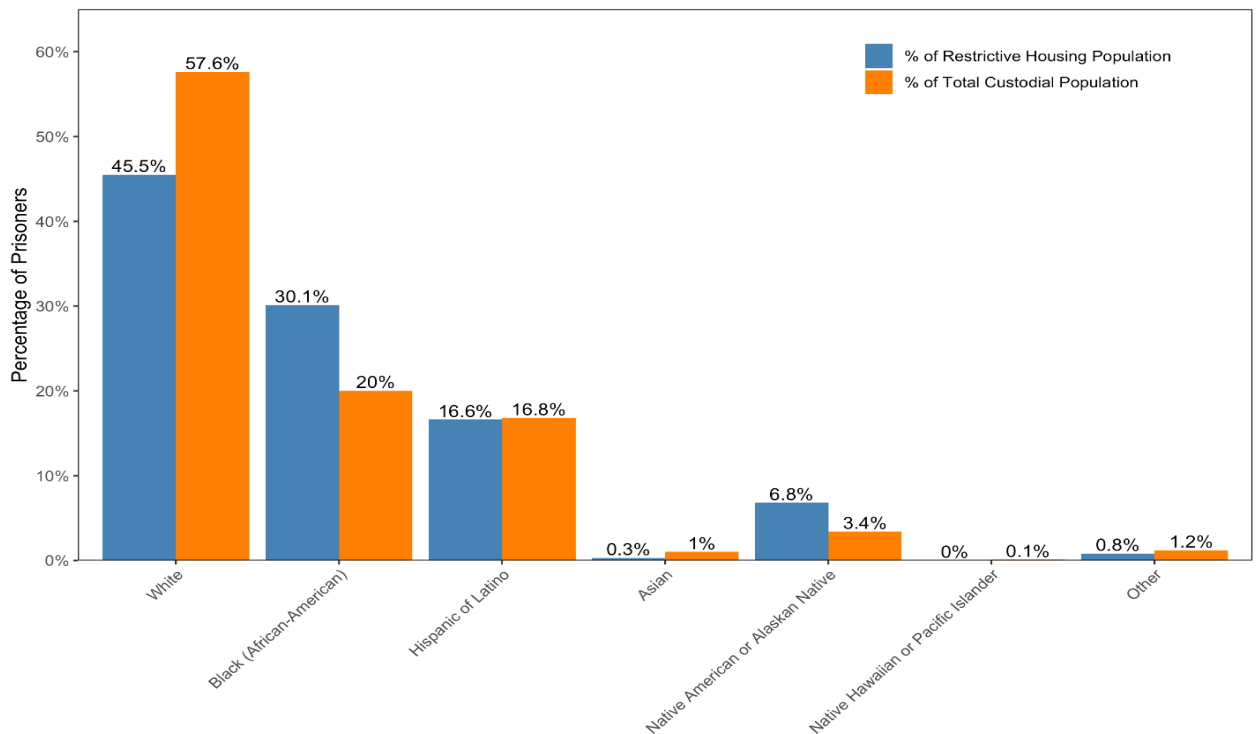
Race/Ethnicity in Total Custodial and Restrictive Housing: Men's Prisons

(n=33)



Race/Ethnicity in Total Custodial and Restrictive Housing: Women's Prisons

(n=33)



Different Definitions of Serious Mental Illness

33 jurisdictions provided definitions, such as

“Serious mental illness is defined as Major Depression, Schizophrenia, Bipolar, and Organic Mental Disorders (Dementia).”

“any diagnosed mental disorder (excluding substance abuse disorders) currently associated with serious impairment in psychological, cognitive, or behavioral functioning that substantially interferes with the person's ability to meet ordinary demands of living and requires an individualized treatment plan by a qualified mental health professional(s).”

“A mental illness that is prolonged and recurrent, impairs activities of daily life and requires long-term treatment.”

See Appendix D

Staffing

13 of 29 responding jurisdictions reported that working in restrictive housing required additional qualifications

Examples of additional qualifications: special training on mental health (7), conflict management (5), and de-escalation techniques (6)

19 of 29 responding jurisdictions reported that they rotated staff out of restrictive housing after specified time or by request

Comparing Restrictive Housing Numbers from 2014 to 2021

	2014 ASCA-Liman Survey	2015 ASCA-Liman Survey	2017 ASCA-Liman Survey	2019 CLA-Liman Survey	2021 CLA-Liman Survey
Number of Jurisdictions Providing Restrictive Housing Data	34 jurisdictions, or 73% of prison population of 1.6 million people	48 jurisdictions or 96.4% of prison population of 1.5 million people	43 jurisdictions or 80.5% of prison population of 1.5 million people	39 jurisdictions or 58% of prison population of 1.4 million people	35 jurisdictions or 61% of prison population of 1.2 million people
# Prisoners Reported in Restrictive Housing	66,000+	67,442	50,422	31,542	25,083
Estimated Total Prisoners in Restrictive Housing in all U.S. Jurisdictions	80,000-100,000	not estimated given substantial reporting	61,000	55,000-62,000	41,000-48,000

Restrictive Housing as Percent of Total Custodial Population from 2015 to 2021

(n=25)*

	2015	2017	2019	2021
Total Custodial Population	606,801	587,767	561,458	456,183
Restrictive Housing Population	27,697	20,785	18,583	13,371
% in Restrictive Housing	4.6	3.5	3.3	2.9

*Using data from the 25 jurisdictions which responded to full set of 2015, 2017, 2019 & 2021 Surveys

Legislation Addressing Restrictive Housing, 2018 to 2020

29 jurisdictions considered or enacted legislation limiting the use of restrictive housing

15 states and the federal government enacted provisions — some comprehensive and others targeted to subpopulations and/or requiring reporting

8 states and the U.S. Congress had pending bills as of the spring of 2020

Legislation Update, 2020 to 2022

In 2021, legislators in more than **30** states introduced bills to regulate the use of restrictive housing. At least **7** states enacted legislation.

As of April 2022, **19** bills and **6** resolutions that referenced “solitary confinement” had been introduced in the House of Representatives and the Senate.

Enacted Legislative Reforms in 2021: Subpopulations

7 of the states that enacted bills or resolutions in 2021 addressing the use of isolation included limits for at least one subpopulation

Youth	Pregnancy	Individuals with serious mental illness, disability, or substance use disorder
5 states: Arkansas Colorado New York Tennessee Louisiana	5 states: Arkansas Colorado Kentucky New York North Carolina	2 states Colorado New York

Reports Filed

5 states (Michigan, Minnesota, Nebraska, New Mexico, and Virginia) submitted reports in compliance with recently enacted reporting requirements

The BOP reported data on people in “solitary confinement” or “restricted housing” collected in compliance with the First Step Act of 2018:

Year	Total in Segregated Housing	Special Housing Units	Special Management Units	Administrative Maximum
2018	11,675	10,214	1,054	407
2019	12,035	10,649	1,000	386
2020	11,703	10,236	1,094	373

Limiting and Ending Restrictive Housing as of July 2021

3 jurisdictions reporting holding **0** people

2 reported holding **under 10** people

10 reported holding **0** people in women's prisons

17 reported altering their restrictive housing policies

4 reported aiming to reduce or eliminate restrictive housing

The jurisdictions referenced above include: Alabama, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Wyoming, and Washington

Prison Conditions, California, 2008



Brown v. Plata, 563 U.S. 493 (2011)
(Justice Kennedy's opinion for the Court,
Appendix B.)