

Legislating LGBT-Inclusive Solitary Confinement Reform: Strategies, Successes, and Future Pathways

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Abstract

This paper argues that success in reforming solitary confinement for LGBT individuals through legislation is based on both broader success in the movement to end solitary (propelled by international standards and interest group and civil society campaign activity) and on specific steps taken within the legislative process, such as the framing of the issue within the bill text itself and involvement by interest groups, including corrections unions. The first part of this paper addresses the role of international law and interest groups in the success of the movement to reform solitary confinement more generally and highlights the ways in which these factors have (or have not) played a role in reforms aimed at helping LGBT people. The second part of this paper is a case study examining the impact of the legislative process itself and hypothesizing that legislative efforts with less restrictive limitations on the use of solitary confinement and supported by powerful interest groups will be more successful than those with stronger protections and less support from interest groups. In order to test this hypothesis, this paper compares a successful 2019 solitary restriction law in New Jersey and an unsuccessful one from the same year in New York and finds that key differences in the bill's framing and circumstances underscore the significant role that corrections workers and unions as well as civil rights groups play in the legislative process. The paper concludes that support from powerful interest groups is essential to the success of solitary reform bills and that increased activity from LGBT-focused interest groups and from the United Nations on LGBT-focused solitary reform would likely lead to more bills including provisions protecting LGBT people.

Introduction

Time in solitary confinement has severe psychological and physical health effects and may even alter the human brain. In the most general terms, solitary confinement is defined by the United Nations as “the confinement of prisoners for 22 hours or more a day without meaningful human contact,” although the amount of time necessary for isolation to be considered solitary confinement and the activities that constitute “meaningful human contact” vary across the United States and are often debated.¹ Lesbian, gay, and bisexual people are more likely to be placed in solitary confinement than their straight counterparts. Bills restricting or eliminating the use of solitary confinement have been proposed many times at both the state and federal levels in the past several years, with varying degrees of success. Understanding the factors that make a bill successful or unsuccessful will be key to further restricting or eliminating the practice of solitary confinement. To this end, this paper asks the question: What factors make legislation intended to reduce the unequal use of solitary confinement on LGBT people more likely to be enacted?

Methods: Interest Groups and International Law

Because LGBT protections are typically part of more general reform bills, the success of the larger movement against solitary confinement has been essential to their enactment. I therefore examine interest groups and international law with regard to both general solitary reform and LGBT-focused efforts. In order to explore the impact of interest group initiatives and civil society campaigns, I trace involvement by key groups such as the American Civil Liberties Union (ACLU), Lambda Legal, and other actors over the years via publications, public statements, and the formation of specific solitary reform action groups.

Regarding international law, the most important document for limiting solitary confinement is the Mandela Rules, which limit solitary confinement to 15 days. In order to evaluate the extent to which the introduction of the Mandela Rules has influenced the movement to end solitary confinement, I use data compiled by The Liman Center at Yale Law School. The report “Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019” provides an overview of state and federal legislation regarding solitary confinement enacted between January 2018 and July 2019, while the report “Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell” outlines earlier legislation.



Fig. 1

Methods: Case Study

My case study comparison includes New Jersey's Isolated Confinement Restriction Act, which was signed into law in July 2019, and New York's Humane Alternatives to Long-Term Solitary Confinement Act (HALT), which failed after pushback from corrections unions and workers led Governor Andrew Cuomo and legislators implement less expansive administrative changes instead. In order to compare these two cases, I use bill texts, media coverage, and statements from organizations involved in their passage to determine key differences between the bills and the circumstances behind them and to consider whether those differences played a significant role in bill success or failure.

Results: Interest Groups and International Law

Civil society campaigns and well-known interest groups have worked to promote reform efforts to legislatures and raise public awareness of those efforts. These groups, particularly the ACLU, have published influential reports calling for reform. Interest groups focused on LGBT rights have worked to make legislators aware of the unequal use of solitary confinement on LGBT incarcerated people and the specific harm that solitary confinement causes to LGBT people through public statements and reports.

Prison unions and corrections officials have generally had a negative impact on reform efforts, with some notable exceptions. Fearing for their members' job security and safety, prison unions have fought for the continued use of solitary confinement. Prison officials have historically relied upon solitary confinement as a method of maintaining control and, rather than seeking more humane alternatives, they have simply enacted slight revisions to the practice that, in effect, maintain solitary conditions under another name.

The Mandela Rules, while non-binding, have legitimized reform efforts and provided a natural starting point for reform in the United States. While many state-level bills do not directly point to the Mandela Rules, 15-day limitations have become increasingly common in reform bills. Content from interest groups advocating for these bills also explicitly mentions the Mandela Rules.

International law, however, has played a less active role in efforts for reforms specifically for LGBT people. The Mandela Rules and other relevant treaties such as the Convention Against Torture do not include provisions for the protection of LGBT people regarding solitary confinement.



Fig. 2

Results: Case Study

The bills contain three key differences in their substantive provisions.

First, the New York bill requires more diversion efforts and additional programming. Second, the New York bill is far more restrictive regarding behavior that warrants placement in solitary. Finally, the New Jersey bill includes LGBT people in its list of vulnerable groups for which solitary confinement is prohibited, while New York does not. Also noteworthy is the fact that New York's bill, which limits solitary to 15 consecutive days, is in line with the Mandela Rules, while New Jersey's, which limits it to 20 consecutive days, is not.

Discussion

Regarding the role of successes in the general movement against solitary confinement in LGBT-specific reform, my findings that international law and interest groups have been key in recent successes suggest that increased emphasis on LGBT-specific reform by the UN and LGBT interest groups could help LGBT protections gain traction. While advocacy from LGBT-rights groups has been essential, some groups, such as the Human Rights Campaign (HRC), the largest advocacy group for LGBT people in the United States, have not been actively involved in lobbying on this issue. Increased attention to solitary confinement from groups like the HRC, which was one of the most prominent advocates for marriage equality and the repeal of Don't Ask Don't Tell, could be immensely influential, especially as efforts to reform solitary confinement on a federal level gain traction.

The differences between the successful New Jersey bill and the failed New York bill suggest that the views of corrections unions, officials, and leaders heavily influence success. The fact that New Jersey's bill contains less strict rules about the reasons why one might be placed in solitary confinement than New York's bill might also have led to less pushback from corrections officials and unions. Because of their reliance on solitary confinement as a control measure, corrections officers and unions are more inclined to support legislation that leaves the reasoning behind placement as open as possible.

Conclusion

On March 31, 2021, the Governor Andrew Cuomo signed the HALT Act after continued campaigning from activists. In his signing of the bill, however, Governor Cuomo wrote that amendments would be necessary to protect both corrections workers and incarcerated individuals, without giving specifics about what those amendments might be. The fact that the HALT Act finally succeeded despite resistance from the Governor and disapproval from corrections unions is a testament to the power of the interest groups and civil society campaigns, which fought for years to spread awareness about the campaign and to press New York legislators to support the bill.

My findings leave many questions unanswered. First, it is difficult to know whether my case study findings are generalizable to other reform bills, as reform bills have taken many different forms ranging from blanket limitations, to restrictions for vulnerable groups only, to increased data collection only, making it difficult to directly compare them to one another. Second, the success of a more limited bill and the failure of a more expansive one presents a major dilemma for activists: is success on some level better than no success at all or should only the most expansive reforms be sought? Further research should investigate, through longer term studies, the efficacy of legislative reform and ways to improve legislation and understand which provisions are most essential in helping the most people.

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Fig. 1: Solitary Confinement Cell at Waupun Correctional Institution in Wisconsin (WPR)
Fig. 2: Logos of several interest groups involved in solitary confinement reform efforts

Reference

1. “United Nations Standard Minimum Rules for the Treatment of Prisoners,” adopted by the General Assembly on 17 December 2015.