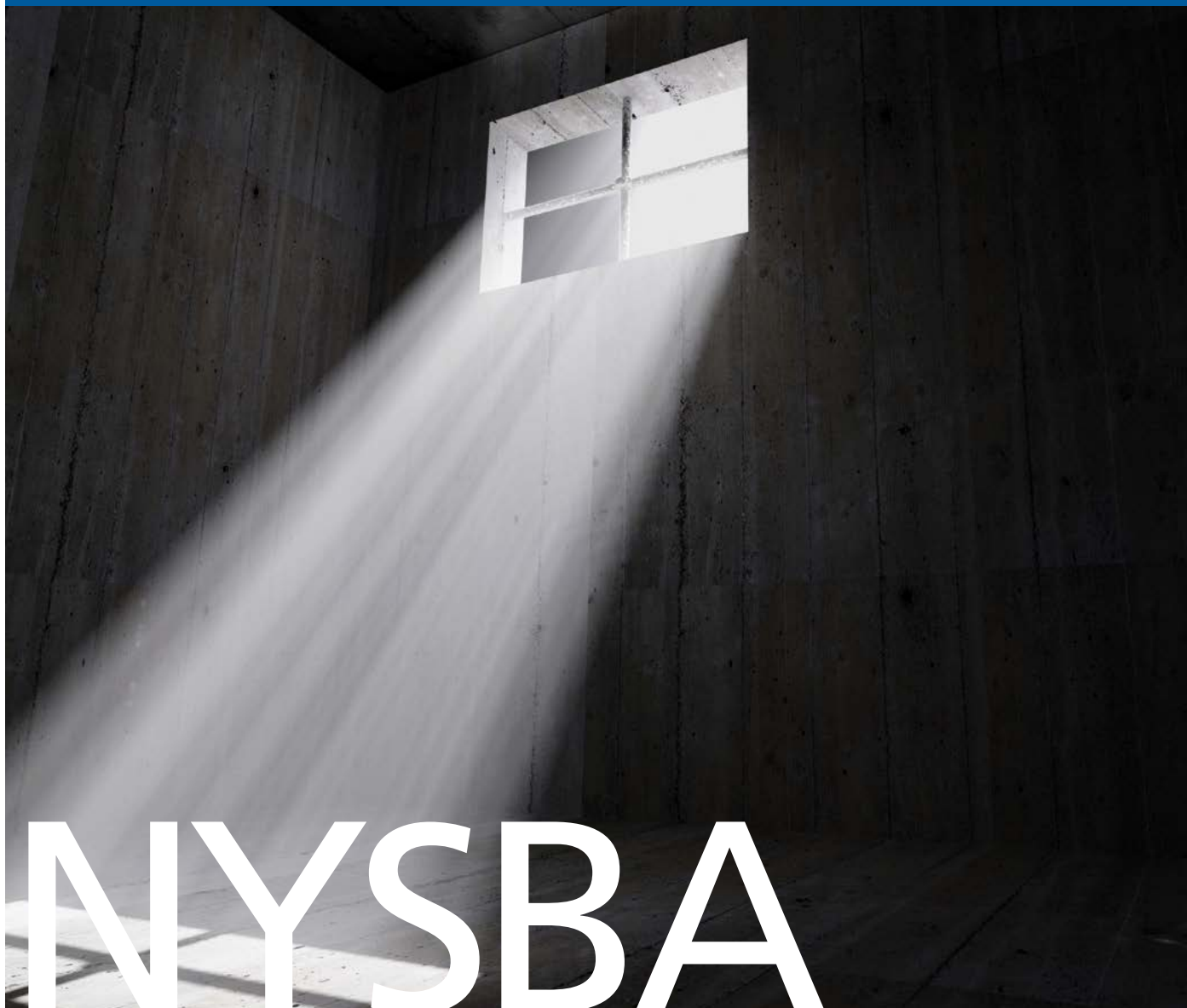


NEW YORK STATE BAR ASSOCIATION



Committee on Civil Rights
Report to the House of Delegates
Solitary Confinement in
New York State

Presented to and approved by the New York State
Bar Association House of Delegates

January 25, 2013



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COMMITTEE ON CIVIL RIGHTS
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IN NEW YORK STATE**

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The committee is grateful for the assistance of Mr. Craig Mackey, Albany Law School Class of 2013, for his initial draft of the report's resolutions.

RESOLUTION

Whereas, on October 18, 2011, the United Nations Special Rapporteur on torture, Juan E. Méndez, called on all countries to ban the use of solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible. Noting that such confinement can amount to torture when used as punishment or for an indefinite or prolonged period of time because of the severe mental pain or suffering it may cause, the Special Rapporteur recommended that solitary confinement in excess of 15 days should be completely prohibited.

Whereas, on October 2, 2012, the New York Civil Liberties Union issued a 64-page report titled, *"Boxed In: The True Cost of Extreme Isolation in New York's Prisons"* on the use of solitary confinement in New York State's prisons. The report, based on a year of study and analysis, explored the history that led to the use of solitary confinement in New York State and compared New York's use of solitary confinement with that of other states. It analyzed both whether the use of solitary confinement violates current legal standards, and whether reforming solitary confinement in New York State would adversely impact prison or public safety. The report concluded that New York's use of solitary confinement is arbitrary and unjustified, harms prisons and corrections staff and negatively impacts prison and community safety.

Whereas, according to the report, last year alone, New York issued more than 13,500 extreme isolation sentences; about one for every four people incarcerated. Just over eight percent of New York's prison population is in isolation at any given time - the vast majority for non-violent offenses. Only 16 percent of isolation sentences from 2007 to 2011 were for assault or weapons. About half of the 4,500 prisoners in solitary confinement spend 23 hours a day in an isolation cell completely alone. The other half are confined in an isolation cell the size of a parking spot with another prisoner, a practice that forces two strangers into intimate, constant proximity for weeks, months and even years on end. A 2003 report by the Correctional Association of New York found that the average sentence in disciplinary segregation was 5.3 months but hundreds of inmates spent an average of three years in isolation and several prisoners in administrative segregation have been isolated for more than 20 years.

Whereas, extreme isolation is different than prisoner separation, which has long been an accepted corrections practice. Corrections officials can separate and remove violent or vulnerable prisoners from the general prison population without subjecting them to the punishing physical and psychological deprivation of extreme isolation - a point of consensus among corrections officials in other states, legal scholars and international human rights bodies.

Whereas, based upon the recommendations of the United Nations Special Rapporteur, the comprehensive report of the New York Civil Liberties Union and the plethora of historic and scientific evidence set forth in this report, all of which demonstrate the damage caused by prolonged solitary confinement and the ability to ensure prison and public safety without resorting to its use.

Whereas, the Committee on Civil Rights has prepared a report analyzing the use of solitary confinement and recommending that the use of solitary confinement be profoundly restricted; it is therefore

RESOLVED, that the New York State Bar Association hereby approves the report and recommendations of the Committee on Civil Rights.

FURTHER RESOLVED, that the New York State Bar Association calls upon all governmental officials charged with the operation of prisons and jails throughout New York State to profoundly restrict the use of long-term solitary confinement, by adopting clear and objective standards to ensure that prisoners are separated from the general prison population only in very limited and very legitimate circumstances and only for the briefest period and under the least restrictive conditions practicable.

FURTHER RESOLVED, that the New York State Bar Association calls upon such officials to adopt stringent criteria, protocols and safeguards for separating violent or vulnerable prisoners, including clear and objective standards to ensure that prisoners are placed in solitary confinement only in limited and legitimate circumstances for the briefest period and under the least restrictive conditions practicable; and auditing the current population in extreme isolation to identify people who should not be in the Special Housing Unit, transitioning them back to the general prison population, and reducing the number of Special Housing Unit beds accordingly.

FURTHER RESOLVED, that the New York State Bar Association urges that the imposition of long-term solitary confinement on persons in custody beyond 15 days be proscribed.

FURTHER RESOLVED, that the New York State Bar Association calls upon the State Legislature to hold public hearings to inquire into the harmful effects of long-term solitary confinement and to solicit both professional and academic commentary on the matter and comments from persons who have been placed in long-term solitary confinement, and to otherwise conduct these hearings in a manner that will best inform lawmakers and the public at large regarding the effects of long-term isolation and to adopt appropriate legislation to address the use of solitary confinement in New York facilities.

FURTHER RESOLVED, that the officers of the Association are hereby empowered to take such other and further action as may be required to implement this resolution.

REPORT

“Please torture me in the old way ... Here they destroy people mentally and physically without leaving marks.”

Shaker Aamer, the last remaining British citizen detained at Guantanamo Bay.

A. Introduction

The origins of solitary confinement in the United States are often placed in the early nineteenth century, as an outgrowth of the prison reform movement led by Pennsylvania Quakers.¹ However, examples of solitary confinement in America range at least as far back as 1787.² Advocates for solitary confinement originally thought it was rehabilitative in nature.³ The reasoning was that prisoners, left alone with only their conscience and a Bible, would have time to reflect on their bad deeds, and come to see the nature of their crimes; after which the prisoners would voluntarily reform themselves into normal, law-abiding citizens.⁴ Indeed, reformers in 18th century Britain believed that solitary confinement provided “the most terrible penalty short of death that a society could inflict,”⁵ while at the same time being the most humane.⁶

Over time, experience contradicted the conviction of the reformers. Jurists in the late 18th century came to recognize solitary confinement as a “greater evil than certain death.”⁷ It was reported in late 18th century American newspapers that prisoners housed in solitary confinement “[begged], with the greatest of earnestness, that they be hanged out of their misery[.]”⁸ Similar results were had in Britain: the “rigid system of perfect order and perfect silence” in operation at Pentonville prison in London resulted in “twenty times more cases of mental disease than in any other prison in the country.”⁹ In the Netherlands, solitary confinement fared no better: “[a]gain and again reports of insanity, suicide, and the complete alienation of prisoners from social life seriously discredited the new form of punishment.”¹⁰ Prison reformers in Auburn, New York, who implemented their own “rigid system,” encountered similar failures. The account of Beaumont and Tocqueville, who traveled to the prison as observers, was especially damning:

1. Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 574 (1999).

2. See *In re Medley*, 134 U.S. 160, 168 (1890) (describing conditions in a Philadelphia Penitentiary circa 1787).

3. *Id.*

4. See SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 2 (2008); see, e.g., Craig Haney & Mona Lynch, *Regulating Prisoners of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 481–82 (1997).

5. Haney & Lynch, *supra* note 4, at 482.

6. *Id.*

7. *Id.* at 483. Haney & Lynch also note that “[e]arly modern judges had fewer scruples about meting out physical punishments, but they found solitary confinement an unbearable torment.” *Id.* at 482 (quoting DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* 150 (Glynis Cousin trans., Barnes & Noble Books) (1981)).

8. *Id.*

9. *Id.* at 481; see, e.g., Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV., 725, 788 (1994); Christopher Hibbert, *THE ROOTS OF EVIL: A SOCIAL HISTORY OF CRIME AND PUNISHMENT* 160 (1963).

10. Haney & Lynch, *supra* note 4, at 482 (quoting Herman Franke, *The Rise and Decline of Solitary Confinement: Socio-Historical Explanations of Long-term Penal Changes*, 32 BRIT. J. CRIMINOLOGY 125, 128 (1992)).

This experiment, of which the favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away. . . .¹¹

Additionally, Charles Dickens, in 1842, described conditions of prisoners under solitary confinement in Pennsylvania: “[T]here is a depth of terrible endurance in it which none but the sufferers themselves can fathom . . . this slow and daily tampering with the mysteries of the brain [is] immeasurably worse than any torture of the body.”¹² The nearly universal consensus of observers that solitary confinement was both inhumane and ineffective as a corrections tool led to its general abandonment in America for at least a century.¹³ Only recently has it begun to come into regular use again as a tool for managing prison populations.¹⁴

Despite the seemingly unqualified failure of solitary confinement as a correctional tool during the 18th and 19th century, it nonetheless remains a common practice in America today. The birth of the “supermax” prison, a correctional facility that utilizes the highest level of custodial restriction available in modern prisons, is perhaps the most relevant factor explaining solitary confinement’s continued use in America.

The first modern supermax prison might be said to have “occurred” at a federal penitentiary in Marion, Illinois in 1983.¹⁵ That year, an isolation wing of the penitentiary erupted into violence after an inmate managed to obtain a weapon and killed a correctional officer.¹⁶ Upon quelling the violence, prison administrators confined prisoners to their cell for twenty-three hours a day.¹⁷ Inmates were served food in their cells, and were subject to “strict security measures.”¹⁸ Thereafter, supermax facilities began popping up in various states. As of 1999, thirty-four states either “had a supermax facility or were in the process of building one.”¹⁹ Currently, there are at least 25,000 inmates in supermax facilities in the United States, with upwards of 80,000 being held in some form of segregated isolation.²⁰

Supermax confinement is sometimes referred to by the acronym “SHU,” which stands in most cases for Secure Housing Unit, or Security Housing Unit.²¹ One commentator defined a supermax prison as follows:

[A] highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behavior, the threat of escape or actual escape from high-custody facility(s), or inciting or threatening to incite disturbances in a correctional institution” . . . It is assumed that such a facility would be operated with the majority of services and programs provided at cell front, that move-

11. Haney & Lynch, *supra* note 4, at 483. Another commenter observed that the prison reforms at Auburn, New York were a “hopeless failure that led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement.” *Id.* at 484.

12. NEW YORK CITY BAR ASSOC., COMM. ON INT’L HUMAN RIGHTS, SUPERMAX CONFINEMENT IN U.S. PRISONS 6 (2011) (hereafter ‘NYCBA COMM.’).

13. *Id.*

14. *Id.*; see also discussion *infra* at 3.

15. H. Daniel Butler et al., *Supermax Prisons: Another Chapter in the Constitutionality of the Incarceration Conundrum*, 9 RUTGERS J.L. & PUB. POL’Y, 1, 25 (2012).

16. *Id.* at 25.

17. *Id.*

18. *Id.*

19. *Id.* at 27.

20. NYCBA COMM., *supra* note 12, at 3, note 7; Atul Gawande, *Hellhole*, NEW YORKER (March 30, 2009), http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande.

21. Cf. David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 675 (2004); Butler et al., *supra* note 15, at 30.

ment from the cell would be in restraints with multiple-officer escort, and that overall security would be the highest level available in an institution or the corrections system.²²

A federal judge summarized conditions at a Wisconsin supermax thusly:

Inmates on Level One at the State of Wisconsin's Supermax Correctional Institution in Boscobel, Wisconsin spend all but four hours a week confined to a cell. The "boxcar" style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate's movements. Visits other than with lawyers are conducted through video screens.²³

The purpose of supermax confinement, then, is to reproduce the conditions that prison reformers sought to produce in the late 18th and early 19th century, but without the pretense of rehabilitating or "reforming" the prisoners. Today, supermax prisons exist chiefly for the ostensible purpose of isolating dangerous, problematic, or otherwise unmanageable inmates from the rest of the prison population. But extreme isolation and/or solitary confinement is different than prisoner separation, which has long been an accepted corrections practice. Corrections officials can separate and remove violent or vulnerable prisoners from the general prison population without subjecting them to the punishing physical and psychological deprivation of extreme isolation - a point of consensus among corrections officials in other states, legal scholars and international human rights bodies.

The question of why supermax facilities, as modern heirs to the isolation experiments of 18th and 19th century reformers, recently regained popularity is a subject of some debate; but many commentators have pointed to "mass incarceration" as one of the largest contributing factors to the renewed popularity of supermax prisons.²⁴ The United States, by far, incarcerates more of its own citizens than any other nation in the world.²⁵ As a result, prisons have become more crowded, and prison administrators with limited resources pursued harsh measures in an attempt to maintain control over the prison population.²⁶ At least one national survey of prison wardens showed that a majority of them believed supermax facilities increase "institutional safety, order and control."²⁷ However, the prison wardens acknowledged that "funding, correctional officer retention, and ensuring ethical behavior by prison staff" may inhibit the operation of supermax facilities.²⁸ The wardens also acknowledged that alternative means were available to deal with problematic inmates.²⁹

22. *Id.* (quoting CHASE RIVELAND, U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 5 (1999), available at <http://www.fedpubs.org/pubs/1999/014937.pdf>).

23. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

24. NYCBA COMM., *supra* note 12, at 7-9.

25. *Id.* at 8; see, e.g., Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik; AMERICAN CIVIL LIBERTIES UNION, MASS INCARCERATION PROBLEMS 1 (2011), available at https://www.aclu.org/files/assets/massincarceration_problems.pdf.

26. Haney & Lynch, *supra* note 4, at 480.

27. Butler et al., *supra* note 15, at 27.

28. *Id.* at 27-28.

29. *Id.* at 28.

B. Solitary Confinement in New York State

There are 60 state prisons in New York State that house approximately 56,000 prisoners.³⁰ There are solitary confinement cells, or what the Department of Corrections and Community Supervision refers to as “special housing units” or “SHUs” or as prisoners refer to it “the box,” at all of these facilities but two of those facilities, Upstate, in Malone, NY and Southport, in Elmira, NY are entirely solitary confinement facilities.³¹ Southport contains 789 SHU beds and Upstate has 1,040 beds. There are eight additional SHU buildings, referred to as SHU 200s because they each have 200 beds, located on the grounds of medium-security prisons. All SHU cells are single cells except for Upstate which was built to be a double-celled solitary confinement facility. Upstate, Southport and the SHU 200s were all built in the 1990s.

Currently there are approximately 4500 prisoners being held in solitary confinement in New York State’s prisons.³² Half of them are in single cells, the other half are in double cells. Single cell SHU’s are generally 56 square feet.³³ Double celled SHU’s are the size of a parking space.³⁴ SHU cells generally have solid steel doors or Plexiglas covered bars with a slot in the middle to push food through, a toilet and a cot. Double celled SHUs also have showers. Those prisoners in double cells have no privacy whatsoever even when it comes to using the toilet. All SHU prisoners are allowed one hour a day recreation which, for most, consists of exiting through a door in the back of the cell into another segregated secluded small cage. If a prisoner does leave his/her cell, he/she is typically restrained with handcuffs attached to a waist chain and leg shackles.³⁵ The Correctional Association of New York in its 2003 report entitled “Lockdown New York: Disciplinary Confinement in New York State Prisons,” found that “[t]he enforced idleness and reduced environmental stimulation can last for months or years and lead to severe psychological debilitation.”³⁶

Prisoners’ Legal Services of New York³⁷ (PLS), a state-wide agency created to provide legal representation and assistance to indigent prisoners regarding conditions of their confinement, often represents prisoners who are sentenced to periods of extreme isolation. A PLS client who has spent 6 and ½ years in solitary confinement describes solitary as follows: “[W]e are not allowed anything besides limited books and magazines. We are not allowed phone calls, or more than one visit a week. We are cuffed whenever we leave our cells, and are subjected to 3 small portions of food a day. We are only allowed one hour of outside recreation, which is similar to a cage at a zoo. We are not given any type of programs that may help us with our anger, drug, mental or behavior issues. We are simply placed in a cell, where we are subjected to extreme isolation for years. A place where we slowly deteriorate (some faster than others,) and become products of our environment. If the purpose of [solitary confinement] is to fix someone, then this purpose is defeated, because the only thing this environment breeds is hopelessness, depression, anger, loss of impulse control, anxiety, distorted thinking and mental illness. Spending years in extreme isolation and then being released back out to general population or society is similar to leaving a hungry dog in a cage and then releasing it. There is nothing beneficial or therapeutic regarding this confinement.” And yet, twenty-five thousand prisoners are released into our communities ever year and over 2000 of them are released directly into our communities from the

30. <http://www.doccs.ny.gov/>

31. New York Civil Liberties Union, “Boxed In – The True Cost of Extreme Isolation in New York’s Prisons” p. 8. (Oct. 3, 2012) available at: <http://www.nyclu.org/publications/report-boxed-true-cost-of-extreme-isolation-new-yorks-prisons-2012>

32. *Id.* at 1.

33. The Correctional Association of New York, “Mental health In The House of Corrections – A Study of Mental Health Care in New York State Prisons by the Correctional Association of New York” p. 47 (June 2004).

34. NYCLU “Boxed In” *supra* note 31, at p. 5.

35. Correctional Association, “Mental health In The House of Corrections” *supra* note 33, at p. 47.

36. Correctional Association, “Lockdown New York: Disciplinary Confinement in New York State Prisons” p. 2 (October 2003).

37. PLS was founded in 1976 under the sponsorship of the New York State Bar Association in response to the 1971 devastating Attica riot, also referred to as “the bloodiest prison confrontation in U.S. history.” The PLS founders sought to address one of the major reasons for the riot; the lack of access of prisoners to the courts and the almost complete absence of attorneys to present their complaints in a legal forum.

box without any transitional services, education or programming thus raising significant community health and safety issues.³⁸

A person can end up in solitary confinement for disciplinary, prison security or even personal safety reasons.³⁹ Disturbingly, however, there is no limit on the amount of solitary confinement time that can be imposed and the length of isolation appears to be steadily increasing. In 1983, the average box SHU sentence was 2.5 months, it is now 5 months.⁴⁰ Over 2,782 incarcerated New Yorkers are currently serving more than a year in solitary confinement.⁴¹ In speaking about solitary confinement at the New York State Bar Association Civil Rights Panel on Solitary Confinement in January 2012, DOCCS Commissioner Brian Fischer stated: “I’ll be the first to admit – we overuse it.”⁴²

It is estimated that roughly 14% of those in isolation are on the NYS Office of Mental Health caseload, meaning that they have been diagnosed with a mental illness.⁴³ As noted in the NYCLU report, “the number of people in extreme isolation with mental health problems would likely be greater if DOCCS was not subject to an important limitation on who it can place in the SHU – prisoners diagnosed as “seriously mentally ill”.⁴⁴ But there are many prisoners who suffer from mental illness but have slipped through the cracks and, as a result, have not yet been identified as suffering from a mental illness, and there are still others who have no history of mental illness prior to being placed in solitary confinement, but once there, begin to exhibit symptoms of mental illness. And yet, as was found in the NYCLU report, many of those prisoners are often neglected, ignored or labeled as manipulators.⁴⁵ In addition, the report noted that the provision of medical and mental health care to those in isolation is made even more difficult due to the lack of confidentiality and other barriers. When medical personnel come to the cells of prisoners who are being held in isolation, prisoners are required to talk to them through the steel door, within earshot of corrections personnel, and for those in double cells, their bunk mate.⁴⁶ Because of this, prisoners who need treatment, often fail to request it.

A short poem, written by a PLS client who has spent over 1200 days in solitary confinement highlights the mental deterioration and concomitant lack of rehabilitation caused by extreme isolation.

FRACTURING

By Jeffrey B.

Haunted by specters of alternate selves
My mind begins to crumble.

Living on multiple planes of existence,
My thoughts fall to pieces.

Sitting on the ledge of the abyss,
My sanity shatters.

38. NYCLU “*Boxed In*” *supra* note 31, at p. 32.

39. See Title 7 New York Code, Rules & Regulations, Chapter VI.

40. NYCLU “*Boxed In*” *supra* note 31, at p. 21.

41. *Id.*

42. *Id.* at inside cover page.

43. *Id.* at p. 24.

44. *Id.* at p. 23. See also, *infra*, p 14 and *infra* note 95.

45. *Id.* at pp. 40-42.

46. *Id.*

Unable to distinguish fantasy from reality,
Shadows descend upon me.

Bear witness to my unraveling,
As the darkness I've brought forth consumes me.

In addition to those suffering from mental illness, juveniles and the elderly are also subjected to the same form of isolation as adult prisoners.⁴⁷ As far as juveniles are concerned, current scientific research suggests that juveniles lack the culpability of adults because they lack fully developed frontal lobes required for impulse control⁴⁸ and because their brain structure is fundamentally and significantly different from that of adults.⁴⁹ General principles of child development show that adolescents process thoughts, feelings and information in qualitatively different ways than adults and that they are psychologically very different from adults. Because juveniles lack a developed frontal lobe, they tend to process emotional decisions in the limbic system, the part of the brain responsible for instinctive (and often impulsive) reactions.⁵⁰ An adult's fully developed frontal lobe typically allows the adult to curb impulsive decisions coming from other parts of the brain such as the limbic system.⁵¹ As such, normal juveniles cannot be expected to operate with the level of maturity, judgment, risk aversion or impulse control of an adult.⁵² This is particularly true in stressful situations, where juvenile brain circuitry is not sufficiently established to sustain adult-level cognitive control of their behavior in the face of heightened states of affect or motivation.⁵³

In the correctional setting, there is no harsher punishment than solitary confinement. Imposing solitary confinement on a child is particularly harsh. Because of how they experience time, juveniles subjectively perceive the duration of a sanction as lasting longer than an adult would experience a sanction of the same duration.⁵⁴ In practical terms, sentencing juveniles to prolonged isolation is harsher than an equivalent sentence is for an adult.

Moreover, from a developmental point of view, prolonged isolation is problematic because juveniles are undergoing developmentally important phases of life in an institutional setting with idiosyncratic demands particular to that setting.⁵⁵ Depriving them of normal developmental opportunities, such as social contact, physical exercise and intellectual stimulation for prolonged periods of time, will irreparably damage any prospect they may have for normal development.

Punishing a child whose brain is not fully developed by placing him in solitary confinement for any length of time clearly violates our contemporary standards of decency as evidenced by a plethora of data on child development. New York State has recognized the vulnerable stage of development of the adolescent by establishing standards for the treatment of juveniles in detention which include a prohibition on the use of solitary confinement in the discipline of children.⁵⁶ The American Correctional Association (ACA) standards for juvenile justice detention facilities limit the isolation of juveniles to a

47. *Id.* at p. 22.

48. David A. Arredondo, M.D., *Principles of Child Development and Juvenile Justice – Information for Decision-Makers*, Journal of the Center for Families, Children & the Courts, 2004, p. 129.

49. Tracy Ritmer, *Arrested Development: Juvenile's Immature Brain's Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L.J. 1, (2005) p. 4.

50. Arredondo *supra* note 48, at p.129.

51. Ritmer *supra* note 49, at p.24.

52. *Id.* at p.23.

53. *Id.* at p.27.

54. Arredondo *supra* note 48, at p.131.

55. *Id.* at p.132.

56. Title 9 New York Code Rules, Regulations §180.9(c)(10)(iii), Discipline of Children.

maximum of five days. These prohibitions and limits are in place because both New York lawmakers and the major national correctional organization in the U.S. recognize the unique physical and developmental status of juveniles and their concurrent needs.

In addition, the U.S. Department of Justice, Chief of the Special Litigation Section, Civil Rights Division has remarked that “the wholesale adoption of many adult practices without taking adequate account of the relevant differences between adults and adolescents, has often resulted in operational difficulties and violations of juvenile’s federal rights. The use of extended isolation as a method of behavior control, for example, is an import from the adult system that has proven both harmful and counterproductive when applied to juveniles. It too often leads to increased incidents of depression and self-mutilation among isolated juveniles, while also exacerbating their behavior problems.”⁵⁷

But in New York State, juveniles can be sent to state prison and the regulations that apply to juvenile facilities will not apply to them while they are there. As of December 2010, there were 689 individuals in DOCCS custody between the ages of 16-18 and 2,064 between the ages of 19 and 20. Any of those individuals can be placed in prolonged isolation.

Those with substance dependency are also all routinely sentenced to extreme isolation.⁵⁸ Instead of providing treatment, New York turns to punishment. In a March 2009 report entitled “Barred From Treatment” Human Rights Watch found that while three out of four prisoners are in need of substance abuse treatment, DOCCS fails to ensure access to such treatment but instead pursues “a program of harsh punishment for drug use that bars prisoners from treatment as part of the disciplinary sanction.”⁵⁹ The report found that:

[P]unishment for drug use in the New York State prisons is severe and out of proportion to the seriousness of the offense. Thousands of New York State prisoners, many of them struggling with addiction, are sentenced to “the box”—a disciplinary sanction that removes them from the general population, restricts many activities of daily life, and where they have no access to drug dependence treatment. In New York State prisons, drug users are locked in “the box” for months, even years, barred from treatment. New York’s severe punishment of drug use in prison, while delaying or denying access to treatment and harm reduction services, violates prisoners’ right to health and the right to be free from cruel and inhuman treatment under international law.⁶⁰

The NYCLU report highlights the lack of programming and treatment to address the underlying misbehavior⁶¹ along with other disturbing facts regarding the use of solitary confinement in NYS prisons such as: “the lack of mandatory standards and little detailed guidance” on the type of rule infraction that can result in a sentence of solitary confinement;⁶² the bias that can corrupt the disciplinary process;⁶³ the inconsistency in “box hits” penalties;⁶⁴ the difficulty in getting out of solitary confinement once you get in;⁶⁵ and the racial disparity that results in a disproportionate number of black prisoners in SHU resulting in a concurrent rise in racial tension in isolation settings.⁶⁶ While blacks represent about

57. Remarks of Steven H. Rosenbaum, Chief, Special Litigation Unit, Civil Rights Division, United States Department of Justice, before the Fourteenth Annual National Juvenile Corrections and Detention Forum at Long Beach, California, May 16, 1999.

58. *Id.* at p. 22-24.

59. Human Rights Watch, “Barred From Treatment - Punishment of Drug Users in New York State Prisons” March 2009, p. 1.

60. *Id.* at p. 2

61. NYCLU, “Boxed In” *supra* note 31, at p. 21.

62. *Id.* at p. 18.

63. *Id.* at p. 19.

64. *Id.* at p. 20.

65. *Id.* at p. 22.

66. *Id.* at p. 24-25.

14 percent of the state's population, they account for nearly 50 percent of the prison population and 59 percent of the population in extreme isolation.⁶⁷ A similar disturbing statistic exists for Latino prisoners. While Latino's account for 17.6% of the New York State's population, they represent 24.6% of the general prison population and 24.7% of those held in extreme isolation.

Comparing these figures with those of whites who make up for 58.3% of New York State's population, 23.3% of the general prison population and only 14.6% of the extreme isolation population helps to explain the racial tension that exists in extreme isolation, but another statistic in this area is just as important: the disparity between the racial make-up of prisoners in solitary confinement and the staff who guard them.⁶⁸ At Southport (a maximum security facility opened in 1998 dedicated solely to solitary confinement) and Upstate (a maximum security facility opened in late 1990s with only double-celled solitary confinement cells) Correctional Facilities, the staff is approximately 80% white and the prisoner population is about 12 percent white.⁶⁹ Black prisoners there report the use of "virulent racial epithets by corrections staff . . . [with] [s]everal Southport prisoners report[ing] that staff use the prison's internal public address system to broadcast racially charged insults or jokes." ⁷⁰

The majority of responses to the NYCLU report have been widespread and extremely supportive with the expressed hope by almost all who commented on it that the report would spur lawmakers in New York State and the DOCCS to severely limit the use of solitary confinement in New York's prisons.⁷¹ While, as stated earlier, the Commissioner of DOCCS, Brian Fischer, has admitted to the overuse of solitary confinement by DOCCS⁷² he does not agree that it is "arbitrary, inhumane and unsafe."⁷³ In a statement released on the same day as the NYCLU report, Commissioner Fischer asserted that those held in solitary confinement "see and interact with numerous facility staff who provide services . . . including: medical, mental health, religious counseling, education and person hygiene." ⁷⁴ In further defending the use of solitary confinement, Commissioner stated:

As society removes those individuals who commit crimes, so too must we remove from general population inmates who violate the Department's code of conduct and who threaten the safety and security of our facilities. . . .

It is our duty to protect those in our custody, as well as our employees. If we fail to protect everyone in our facilities, we fail to maintain the task that has been placed in our trust. The use of disciplinary segregation is important to the overall well-being of any of our prisons.⁷⁵

67. *Id.*

68. *Id.* at p. 25.

69. *Id.*

70. *Id.*

71. Casella & Ridgeway, *Unlock The Box: The Fight Against Solitary Confinement in New York*, THE NATION (Oct. 2, 2012) <http://www.thenation.com/article/170276/unlock-box-fight-against-solitary-confinement-new-york#> (noting that the release of the NYCLU report on solitary confinement in New York should provide a powerful boost to those concerned about the use of solitary confinement in our New York State prisons); NEWSDAY editorial, *NY Right to Review Solitary Confinement* (Oct. 16, 2012, 7:43 PM) <http://www.newsday.com/opinion/editorial-ny-right-to-review-solitary-confinement-1.4122694> (the NYCLU report "makes a persuasive argument that it's time for the state to examine the costs and consequences of excessive use of extreme isolation as a disciplinary tool.") Mosi Secret, *Prisoners Letters Offer a Window Into Lives Spent Alone in Tiny Cells*, NEW YORK TIMES (Oct. 1, 2012) <http://www.nytimes.com/2012/10/02/nyregion/prisoner-letters-offer-glimpses-of-life-in-solitary-confinement.html> (providing an overview of "[l]etters written by New York State prisoners and sent to the New York Civil Liberties Union over several months vividly detail[ing] the psychological effects of long-term solitary confinement.")

72. NYCLU, *"Boxed In"* *supra* note 31, at inside cover.

73. <http://polhudson.lohudblogs.com/2012/10/02/corrections-department-responds-to-nyclu-report/>

74. *Id.*

75. *Id.*

That being said, Commissioner Fischer acknowledged “the need to constantly review our policies to determine if what we’re doing is effective and beneficial to everyone.”⁷⁶ Along those lines, Commissioner Fischer disclosed that in September 2012, DOCCS created a SHU task force whose responsibility it is to review DOCCS’s solitary confinement policies and provide recommendations “based upon sound penological principles, as well as practical experience, that will further the goal of ensuring a safe and humane correctional setting while enabling offenders to better themselves during their incarceration to increase the chances of them leading law abiding lives upon their release into the community.”⁷⁷

Hopefully the DOCCS’s SHU task force will quickly come to the same conclusion that has been reached by numerous other states who have recently reviewed their use of solitary confinement and determined that loosening restrictions, rather than tightening them, results in improved behavior and rehabilitation and thus actually increases prison safety.⁷⁸ As a result of such findings, states such as Mississippi,⁷⁹ Colorado,⁸⁰ Illinois,⁸¹ Maine,⁸² Ohio⁸³ and Washington⁸⁴ have either significantly decreased or completely abandoned the use of solitary confinement without any negative consequences in terms of prison safety. (*See pp. 19-21 Infra*).

C. Long Term Solitary Confinement Frequently and Predictably Results in Psychological and Physical Damage, both temporary and permanent, to the Individual Being Confined

The injury done to human beings by subjecting them to solitary confinement has been well documented across multiple forums. Aside from the historical accounts heretofore cited, courts of law, legal scholars, medical commentators, and independent observers have documented the wide range of deleterious effects that solitary confinement can have on the confined individual. “Just about everyone who has taken a serious look at long-term isolated confinement (as in supermaximum security or long-term administrative segregation) has concluded there is serious harm from long-term isolated confinement.”⁸⁵ Craig Haney, a renowned expert in the area of the effects of solitary confinement on one’s mental health has noted that:

[T]here is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects. The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.⁸⁶

76. *Id.*

77. *Id.*

78. Erica Goode, *Rethinking Solitary confinement*, N.Y. TIMES, Mar. 11, 2012, at A1. This article is available online under the title, “Prisons Rethink Isolation, Saving Money lives and Sanity,” available at <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all>.

79. *Id.*

80. *Solitary Confinement Decreased by Hundreds in Colorado*, HUFFINGTON POST (June 5, 2012, 5:25 p.m.) http://www.huffingtonpost.com/2012/06/04/solitary-confinement-decr_n_1571919.html.

81. Goode, *supra* note 78.

82. The Crime Report, *Maine’s Dramatic Reduction of Solitary Confinement* (July 20, 2011, 11:51 p.m.) <http://www.thecrimereport.org/archive/2011-07-maines-dramatic-reduction-of-solitary-confinement>.

83. Goode, *supra* note 78.

84. Axelis Krell, *Isolating Prisoners Less Common in Washington Than in Most Places*, THE NEWS TRIBUNE (July 10, 2012, 8:21 p.m.) <http://www.thenewstribune.com/2012/07/10/2210762/isolating-prisoners-less-common.html>.

85. Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, CORRECTIONAL MENTAL HEALTH REPORT, Vol. 13, No. 1 (May/June 2011), at 1, 9.

86. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 143 (Jan. 2003); *see, e.g.*, Butler et al., *supra* note 15, at 28–29 (quoting Haney).

Other afflictions include self-mutilation,⁸⁷ heightened neuroticism,⁸⁸ and dissociative episodes followed by amnesia.⁸⁹ A study published in April 2007 noted that almost all suicides that happen in state prison occur in single-unit isolation cells.⁹⁰ The study surveyed prisoners placed in “single-cell disciplinary housing” in New York State from 1993–2003. Over that period, thirty-two inmates in the single-cell disciplinary housing committed suicide.⁹¹ The median time in confinement before inmates committed suicide was only sixty-three days.⁹² The study also took note of a 1995 U.S. Department of Justice report, in which “[a] primary recommendation, based chiefly on overwhelming consistent research, [was] that isolation should be avoided whenever possible.”⁹³

The suicide issue cannot be overstated. “In 2010, twenty inmates committed suicide in state correctional facilities - twice the number of suicides that occurred in 2009 and the highest prison suicide rate since 1982. Eleven of these suicides were committed by inmates who had previously been diagnosed with a mental illness.”⁹⁴ Although significant progress has been made over the last several years due to litigation and legislation that has limited DOCCS ability to place seriously mentally ill individuals in solitary confinement,⁹⁵ a special report on prison suicide rates in the Poughkeepsie Journal in April 2011 found that 33% of all prison suicides in New York State are committed by individuals who are in solitary confinement and less than 8% of the total prison population is in solitary confinement.⁹⁶

It is difficult to convey the actual suffering that people placed in long term solitary confinement incur with sterile medical terminology and statistics. Anecdotes from individuals who have actually endured long term solitary confinement demonstrate just how profoundly injurious it can be and often is to those who are subjected to it. On March 30, 2009, The New Yorker published an article by Atul Gawande entitled, “Hellhole” where Gawande questioned whether solitary confinement is torture. In the article Gawande described the plight of Terry Anderson, a Chief Middle East Correspondent for

87. Rebman, *supra* note 1, at 577.

88. Cf. Gawande, *supra* note 20 (describing the solitary confinement experience of journalist Terri Anderson while in Lebanon) (“He observed himself becoming neurotically possessive about his little space, at times putting his life in jeopardy by flying into a rage if a guard happened to step on his bed.”).

89. Rebman, *supra* note 1, at 577.

90. Bruce B. Way et al., *Inmate Suicide and Time Spent in Special Disciplinary Housing in New York State Prison*, 58 PSYCH. SERV.’S. 558 (2007), available at <http://ps.psychiatryonline.org/data/Journals/PSS/3799/07ps558.pdf>.

91. *Id.*

92. *Id.*

93. *Id.*

94. Assembly Sanding Committee on Correction & Assembly Standing Committee on Mental Health, Notice of Public Hearing, Dec. 6, 2011, <http://assembly.state.ny.us/comm/Correct/20111031/>.

95. Prisoners’ Legal Services of New York (PLS) has worked on mental health issues for over thirty-five years and has been instrumental in improving the treatment of the mentally ill in our prisons. In the 1980s, PLS litigated a number of cases involving the issue of whether a prisoner’s mental illness should be considered when imposing punishment for misconduct if that misconduct was a result of the prisoner’s mental illness. In *Batthany v. Scully*, 139 Misc.2d 605 (Sup. Ct. Dutchess Co. 1988), we were successful in obtaining a court order holding that mental illness is evidence of mitigating circumstances and is “relevant in a prison disciplinary proceeding.” That holding was made applicable to the entire State in 1990, when PLS brought the case *Huggins v. Coughlin*, 76 N.Y.2d 904 (1990), in which the Court of Appeals held that “. . . in the context of a prison disciplinary proceeding in which the prisoner’s mental state is at issue, a Hearing Officer is required to consider evidence regarding the prisoner’s mental condition.” In *Eng v. Goord*, 80 CV 385S (W.D.N.Y.), we challenged the lack of adequate mental health treatment for prisoners in solitary confinement and the settlement in this case resulted in New York’s first SHU treatment program, the Special Treatment Program (“STP”). In *Anderson v. Goord*, 87 CV 141 (N.D.N.Y.), PLS and the Prisoners’ Rights Project (PRP) of The Legal Aid Society joined in litigating the issue of what relevance an inmate’s mental condition should have in a prison disciplinary hearing. As a result, DOCCS agreed to amend its regulations governing when mental health must be considered and what a hearing officer must do if mental health is an issue at a disciplinary hearing. In 2002, PLS, together with PRP, Disabilities Advocates, Inc. (DAI) and the law firm of Davis, Polk, filed the case of *Disability Advocates, Inc. v. New York State Office of Mental Health*, S.D.N.Y. 02-CV-4002 (Lynch, J.), on behalf of prisoners with mental illness in New York. The lawsuit alleged that such prisoners are denied adequate mental health care, harshly punished for the symptoms of their mental illnesses and frequently confined under conditions amounting to cruel and unusual punishment. As a result, the suit charged, the mental health of mentally ill prisoners routinely deteriorates, sometimes to the point that the prisoners engage in self-mutilation or suicide. A private settlement agreement was reached in this case that included, *inter alia*, using diagnostic criteria to define serious mental illness (SMI), adding hundreds of treatment beds, offering the possibility of time cuts to SMI prisoners in long-term SHU or keeplock, and placing limits on the types of misconduct for which SMI prisoners may be punished.

96. Mary Beth Pfeiffer, *Special Report: Prison Suicides Rates Rise; Solitary Confinement Adds to Risk*, POUGHKEEPSIE JOURNAL (April 11, 2011, 11:49 a.m.) <http://www.poughkeepsiejournal.com/article/20101017/NEWS01/112030002/SPECIAL-REPORT-Prison-suicide-rates-rise-solitary-confinement-adds-risk>

the Associated Press who was captured in March of 1985 in Beirut, Lebanon.⁹⁷ Anderson's experience demonstrates with vivid, descriptive clarity the lasting and unrelenting suffering that individuals in long term solitary confinement must cope with. Gawande describes Anderson's experience:

[Anderson] was despondent and depressed...with time, he began to feel something more. He felt himself disintegrating. It was as if his brain were grinding down. A month into his confinement, he recalled in his memoir, "The mind is a blank. Jesus, I always thought I was smart. Where are all the things I learned, the books I read, the poems I memorized? There's nothing there, just a formless, gray-black misery. My mind's gone dead. God, help me."

He was stiff from lying in bed day and night, yet tired all the time. He dozed off and on constantly, sleeping twelve hours a day. He craved activity of almost any kind. He would watch the daylight wax and wane on the ceiling, or roaches creep slowly up the wall. He had a Bible and tried to read, but he often found that he lacked the concentration to do so. He observed himself becoming neurotically possessive about his little space, at times putting his life in jeopardy by flying into a rage if a guard happened to step on his bed...⁹⁸

Anderson was removed from solitary confinement for a brief time, only to find himself returned in September, 1986:

In September, 1986, after several months of sharing a cell with another hostage, Anderson was, for no apparent reason, returned to solitary confinement, this time in a six-by-six-foot cell, with no windows, and light from only a flickering fluorescent lamp in an outside corridor. The guards refused to say how long he would be there. After a few weeks, he felt his mind slipping away again. . . "I find myself trembling sometimes for no reason," he wrote. "I'm afraid I'm beginning to lose my mind, to lose control completely."

One day, three years into his ordeal, he snapped. He walked over to a wall and began beating his forehead against it, dozens of times. His head was smashed and bleeding before the guards were able to stop him.⁹⁹

Gawande also wrote of then-Presidential hopeful John McCain's experience in solitary confinement as a prisoner of war in Vietnam where he spent five and a half years in isolation in a fifteen-by-fifteen-foot cell. McCain stated: "It's an awful thing, solitary . . . [i]t crushes your spirit and weakens your resistance more effectively than any other form of mistreatment." Gawande commented saying, "And this comes from a man who was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again. A U.S. military study of almost a hundred and fifty naval aviators returned from imprisonment in Vietnam, many of whom were treated even worse than McCain, reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered."¹⁰⁰

Another more recent account from a New York inmate confined to SHU housing is telling:

I've been in the S.H.U. for over 6 1/2 years where I've been locked in a cell for 23 to 24 hour[s] a day 7 days a week. In March of 2002 I had a mental breakdown because of being in S.H.U. and I attempted suicide by swallowing 150 pills. I was saved and sent to Central

97. Gawande, *supra* note 20.

98. *Id.*

99. *Id.*

100. *Id.*

New York Psychiatric Center for treatment where I stayed for about 7 weeks. I was then discharged and sent to Wende Correctional Facility...

Upon my arrival at Wende I was put in an observation cell in the mental health unit where I was kept for 25 days in a strip cell. I was mistreated and denied everything. There was no heat in the place. I was put in a dirty, bloody cell. I was jumped and assaulted by correctional officers, and was left unattended to by the mental health staff. In the time I was there I continually requested to be sent back to CNYPC for further treatment because I went into a relapses [sic] and could not bare [sic] being locked in a cell 24/7 again. Instead the mental health staff took me off my mental health anti-depression medication and told me that they was not going to send me back to CNYPC no matter what I did or said.

In the course of the 25 days I spent in M.H.U. I attempted suicide 3 times. Twice I was rushed to Erie County Medical Center for treatment and sent back to Wende where I was again placed in M.H.U. and left without any kind of further medical or mental health care. I told the head mental health staff that I can't stay locked in a cell 24/7 anymore and that if they sent me back to S.H.U. that I'll kill myself. They said I'll just have to do that and they sent me back to S.H.U. and I was taken to E.C.M.C. for treatment again and then sent back to Wende and put back in S.H.U.

Right now I don't know what more to do. I'm writing this letter in hopes that someone will do something about the way these people in the mental health department here treats people, after I'm gone because I simply cannot carry on no more like this[.] I hope that my death will bring about some good, if not at least I'll finally find some peace.¹⁰¹

The anecdotes, scholarly material, and medical evidence presented in this report are hardly exhaustive.¹⁰² But in conjunction with the historical accounts previously cited in this report, they paint a stark, consistent picture of solitary confinement as a frequent and predictable cause of significant, often severe psychological injury and suffering on the part of individuals so confined.

D. Long Term Solitary Confinement is Contrary to Human Dignity and Has Been Largely Abandoned by the International Community

The Supreme Court of the United States has yet to speak with a firm voice on the constitutional boundaries of solitary confinement. However, there is currently consensus around the idea that seriously mentally ill prisoners may not be placed in solitary confinement. As of 2004, "every federal court to consider the question has held that supermax confinement of the seriously mentally ill is unconstitutional."¹⁰³ Federal courts have also held that the psychological harm visited upon prisoners in solitary confinement is no less cruel and unusual than 'conventional' physical torture. The United States District Court for the Southern District of Texas articulated the seriousness of psychological deprivation more than a decade ago:

101. NEW YORK STATE BAR ASSOC. COMM. ON CIVIL RIGHTS, ANNUAL MEETING, PROGRAM MATERIALS (Jan. 2012), at 82 (re-printing a letter from inmate "C.X.," written July 28, 2002) (hereafter "NYSBA COMM.>").

102. The American Civil Liberties Union has an excellent resource page on its website, including state-specific materials. See *Stop Solitary – The Dangerous Overuse of Solitary Confinement in the United States* (last visited Mar. 15, 2012), <https://www.aclu.org/stop-solitary-dangerous-overuse-solitary-confinement-united-states>; see also SOLITARYWATCH.COM, *Voices from Solitary* (last visited Mar. 15, 2012), <http://solitarywatch.com/solitary-voices/>.

103. Fathi, *supra* note 21, at 676.

As the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are *equally, if not more, cruel and unusual*. The wounds and resulting scars, while less tangible, are no less painful and permanent when they are inflicted on the human psyche.¹⁰⁴

The United States District Court for the Northern District of California, describing the conditions of inmates housed at Pelican Bay State Prison in California, noted in *Madrid v. Gomez* that:

[D]ry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake. The anguish of descending into serious mental illness, the pain of physical abuse, or the torment of having serious medical needs that simply go unmet is profoundly difficult, if not impossible, to fully fathom, no matter how long or detailed the trial record may be.¹⁰⁵

While the *Madrid* court did not hold that solitary confinement violated the Eighth Amendment *per se*,¹⁰⁶ the court did hold that it was cruel and unusual for inmates with serious mental illnesses to be placed in solitary confinement.¹⁰⁷ The court also qualified its holding by noting that the conditions in the SHU at Pelican Bay State Prison "may well hover on the edge of what is humanly tolerable for those with normal resilience[.]"¹⁰⁸ The *Madrid* court's assessment of the law is typical of the current trend in federal courts that have considered the issue.¹⁰⁹

While federal courts in America have been reluctant to declare that supermax confinement constitutes cruel and unusual punishment *per se*, the international community has not been as modest. Article Seven of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. in 1992,¹¹⁰ prohibits "cruel, inhumane, or degrading treatment or punishment."¹¹¹ Article Ten states that "all persons deprived of their liberties shall be treated with humanity and with respect for the inherent dignity of the human person," and that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their *reformation and social rehabilitation*."¹¹² The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), ratified by the United States in 1990,¹¹³ defines torture as:

An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person committed or is suspected of having committed or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹¹⁴

104. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999).

105. *Madrid v. Gomez*, 899 F. Supp. 1146, 1280 (N.D. Cal. 1995).

106. *Id.*

107. *Id.* at 1265.

108. *Id.* at 1280.

109. See NYCBA COMM., *supra* note 12, at 2 ("Courts in recent years have largely deferred to prison administrators with regard to the implementation and expansion of supermax confinement, stretching the limits of constitutionality so that supermax is largely immunized from judicial review. Indeed, as long as a prisoner receives adequate food and shelter, the extreme sensory deprivation that characterizes supermax confinement will, under current case law, almost always be considered within the bounds of permissible treatment.")

110. 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

111. See International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

112. ICCPR, art. 10(3) (emphasis added).

113. See NYCBA COMM., *supra* note 12, at 18.

114. Convention Against Torture [and Other Cruel, Inhumane or Degrading Treatment or Punishment], art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

In May of 2000, the U.N. Committee against Torture issued a report expressing concern over “[t]he excessively harsh regime of the ‘supermaximum’ prisons” in the United States.”¹¹⁵ In 2008, United Nations Special Rapporteur to the Human Rights Council on torture, Juan E. Mendez noted that “the use of prolonged solitary confinement may amount to a breach of article seven of the International Covenant on Civil and Political Rights,”¹¹⁶ and that it “should be strictly and specifically regulated by law.”¹¹⁷ On October 18, 2011, the U.N. Special Rapporteur called on all countries to ban the use of solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible. Noting that such confinement can amount to torture when used as punishment, or for an indefinite or prolonged period of time because of the severe mental pain or suffering it may cause, the Special Rapporteur recommended that solitary confinement in excess of 15 days should be completely prohibited.

In Europe, solitary confinement has rarely been used since a 1982 decision from the European Commission stated that “[c]omplete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason.”¹¹⁸ Conditions at supermax facilities in the United States have also allowed prisoners to successfully resist extradition to the United States from foreign nations.¹¹⁹ Unfortunately, international treaties, most notably the ICCPR and CAT, have had little effect on prison litigation in the United States, in light of reservations adopted by the United States upon ratifying both treaties.¹²⁰

Legal organizations in America have also begun to adopt stances critical of solitary confinement and supermax facilities. In 2011, the New York City Bar Association Committee on International Human Rights (NYCBA), whose work has been cited in multiple areas of this report, recognized that the state of the law is increasingly critical of solitary confinement, and took a strong stance against it:

The policy of supermax confinement, on the scale which it is currently being implemented in the United States, violates basic human rights. We believe that in many cases supermax confinement constitutes torture under international law according to international jurisprudence...[t]he time has come to critically review and reform the widespread practice of supermax confinement.¹²¹

The authors of the NYCBA report took note of the Constitutional dimensions as well:

Although the Constitution “does not mandate comfortable prisons,” it does require humane prisons that comport with the Eighth Amendment’s prohibition against punishments that are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society’” or which “involve the unnecessary and wanton infliction of pain.”¹²²

115. U.N. Comm. against Torture, *Report of the Committee against Torture*, Supp. No. 44, U.N. Doc. A/55/44, May, 2000, at 32, available at <http://www.un.org/documents/ga/docs/55/a5544.pdf>.

116. See NYCBA COMM., *supra* note 12, at 18.

117. *Id.*

118. *Id.* at 20 (quoting) *Krocher v. Switzerland*, 34 Eur. Comm’n H.R. Dec. & Rep. 24, 53, P 62 (1982); see, e.g., Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails*, 21 AM. U. INT’L L. REV. 71, 93-94 (2005).

119. NYCBA COMM., *supra* note 12, at 20-21 (“In the 1989...the European Court refused extradition to the United States based on the extreme psychological effects of confinement on death row. . . . The European Court is also considering whether supermax conditions in US prisons violate Article 3 of the European Convention, which prohibits the extradition to a state where the prisoner is at risk of inhuman and degrading treatment. Babar Ahmad, a British citizen, and three others, were indicted in the US on terrorism charges. The Court blocked the extraditions and as of July 2011 was considering whether the defendants’ post-trial confinement to the federal supermax prison amounts to a violation of Article 3 of the European Convention.”) (internal citations omitted).

120. *Id.* at 19.

121. *Id.* at 2 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Estelle v. Gamble*, 429 U.S. 97 (1976) (internal citations omitted)).

122. *Id.* at 5.

Other professional organizations, as well as numerous advocacy groups, both secular and religious, have followed suit.¹²³ Meanwhile, public opinion on the issue of solitary confinement has become decidedly negative, with numerous commentators from various backgrounds speaking out against it with greater frequency in recent years.¹²⁴ In June, 2012, this chorus of disapproval culminated in a hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights regarding the use of solitary confinement in our prisons.¹²⁵ Although many had voiced concern about our nation's use of prolonged solitary confinement prior to the Senate Judiciary hearing, the testimony submitted by the 100 plus people and organizations at that hearing helped bring the issue to light nationally.¹²⁶

The testimony from these individuals and groups, together with hundreds of published articles on the issue and the international law regarding the use of solitary confinement, as well as the customs of other civilized nations, make a compelling case that long term solitary confinement no longer falls within the ambit of "evolving standards of human decency that mark the progress of a maturing society."¹²⁷ Furthermore, it is becoming increasingly clear that long term solitary confinement is not only unnecessary, but counterproductive as a means of maintaining institutional protection, discipline and safety in correctional facilities (as laid out in Part C of this report). As such, the continued use thereof constitutes an "unnecessary and wanton infliction of pain," which ought to be rejected, both in law and morality.

E. Long Term Solitary Confinement is Counterproductive to the Goals of Prisoner Protection, Discipline, Rehabilitation, and Reintegration, Which Can Be Achieved Through Other Means

The most common reason that prisoners are placed in solitary confinement is to remove them from the rest of the prison population for discipline or protection. Regardless of the reason, however, the deleterious effects of solitary confinement are the same and it is becoming increasingly clear that certain barriers must be drawn, and certain amenities must be provided, in some minimally decent com-

123. See, e.g., Nat'l Comm'n Assoc., Resolution Regarding Extended Solitary Confinement and Torture, Nov. 2010, available at http://www.natcom.org/uploadedFiles/About_NCA/Leadership_and_Governance/Public_Policy_Platform/PDF-PolicyPlatform-Resolution_Regarding_Extended_Solitary_Confinement_and_Torture.pdf; NAT'L RELIGIOUS CAMPAIGN AGAINST TORTURE (NRCAT), *Statement Against Prolonged Solitary Confinement* (last visited Mar. 15, 2012), http://www.nrcat.org/index.php?option=com_content&task=view&id=546&Itemid=396; Tanya Greene, *ACLU To United Nations: Solitary Confinement Violates Human Rights*, AMERICAN CIVIL LIBERTIES UNION (Mar. 5, 2012), <http://www.aclu.org/blog/prisoners-rights/aclu-unit-ed-nations-solitary-confinement-violates-human-rights>.

124. In addition to works already cited, see, e.g., Locke Bowman, *Gov. Quinn's Proposal to Close Tamms Supermax Prison Got It Right*, HUFFINGTON POST (Mar. 13, 2012, 4:28 PM), http://www.huffingtonpost.com/locke-bowman/gov-quinn-s-tamms-supermax-prison_b_1342135.html (condemning conditions at Tamms Prison in Illinois); Bill Quigley, *Bradley Manning, Solitary Confinement, and Occupy 4 Prisoners*, HUFFINGTON POST (Feb. 23, 2012, 3:43 PM), http://www.huffingtonpost.com/bill-quigley/bradley-manning-solitary-_b_1296141.html (referring to solitary confinement of Bradley Manning as "torture"); James Ridgeway, *Bradley Manning's Tortuous Treatment Met by Growing Resistance*, MOTHER JONES (Mar. 18, 2011, 9:02 AM), <http://mother-jones.com/mojo/2011/03/bradley-mannings-solitary-confinement-meets-growing-resistance> (describing protests against Bradley Manning's conditions of confinement); Susan Greene, *The Gray Box: An Investigative Look at Solitary Confinement*, DART SOCIETY (Jan. 24, 2012, 9:53 PM), <http://www.dartsocietyreports.org/cms/2012/01/the-gray-box-an-original-investigation/>; *The Abuse of Private Manning*, N.Y. TIMES (Mar. 14, 2011), http://www.nytimes.com/2011/03/15/opinion/15tue3.html?_r=1; Stephen F. Eisenman, *The Resistable Rise and Predictable Fall of the U.S. Supermax*, MONTHLY REVIEW (Nov. 2009), <http://monthlyreview.org/2009/11/01/the-resistable-rise-and-predictable-fall-of-the-u-s-supermax> (noting that some prisoners intentionally hurt themselves in order to be taken out of their isolation cells); Joseph B. Allen, *Applying Graham v. Florida to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217 (2011) (seeking to expand the scope of the Eighth Amendment protection offered to prisoners in solitary confinement); Kiilu Nyasha, *America's Supermax Prisons do Torture*, OPEDNEWS.COM (Nov. 22, 2009, 9:52 PM), <http://www.opednews.com/articles/America-s-Supermax-Prisons-by-Kiilu-Nyasha-091122-501.html>; *Supermax: A Clean Version of Hell*, CBS NEWS (Oct. 14, 2007), <http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml?tag=contentMain;contentBody>; Laura Sullivan, *As Populations Swell, Prisons Rethink Supermax*, NPR (July 27, 2006), <http://www.npr.org/templates/story/story.php?storyId=5587644> (mentioning warden of Oregon State penitentiary); Maria Godoy, *Q&A: Solitary Confinement and Human Rights*, NPR (July 27, 2006), <http://www.npr.org/templates/story/story.php?storyId=5586937> (interviewing Jamie Fellner of Human Rights Watch); Julia Dahl, *Is it Time to Ban Solitary Confinement?*, THE CRIME REPORT (Oct. 12, 2009), <http://www.thecrimereport.org/archive/is-it-time-to-ban-solitary-confinement/#>; Lance Tapley, *Torture in Maine's Prison*, PORTLAND PHOENIX (Nov. 11, 2005), http://www.portlandphoenix.com/features/top/ts_multi/documents/05081722.asp.

125. <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6517e7d97c06eac4ce9f60b09625ebe8>

126. <http://solitarywatch.com/resources/testimony/>

127. *Gamble*, 429 U.S. at 102.

bination, in order to avoid inflicting harm on inmates that serves “no legitimate penological interest,”¹²⁸ and to avoid setting up a prison regime in which administrators inflict psychological harm on inmates that only makes them more erratic, more mentally unstable, and more dangerous to both themselves and others than they were prior to being segregated from the rest of the prison population.

These deleterious effects were long ago recognized by the Supreme Court of the United States as counter-productive from a corrections standpoint. In 1890, the Court recounted the profound psychological injury that manifested among prisoners who were substantially isolated and segregated from other human beings while in custody:

The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction... experience demonstrated that...[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; *while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.*¹²⁹

The conditions of solitary confinement in today’s prisons are not all that different from those that existed in 1890. Modern advances in technology, if anything, have only aggravated the conditions of solitary confinement by replacing *in personam* interactions with video-screen interactions.¹³⁰ This is problematic, in part, because not every prisoner who is subject to long term solitary confinement is serving a lengthy prison sentence. If these inmates are to be rehabilitated in any meaningful sense, subjecting them to conditions that may literally drive them crazy is in no one’s best interest.

Although there is no national recidivism data on people who are released directly from solitary confinement to the community, there was one large study of a former prisoner in the state of Washington that indicates that the odds of successful rehabilitation in such circumstances are extremely poor:

Researchers tracked rearrest rates among people released from prison in 1997 and 1998, a total of 8,000 former prisoners. Two hundred and forty-two of them had spent at least three continuous months in segregation, and most had been housed in segregation for much longer. Those who had been segregated were somewhat more likely than the others to commit new felonies. And among the repeat offenders, formerly segregated prisoners were much more likely to commit violent crimes. At first glance, this seems to make sense: People who are violent before being incarcerated, which is true of many but not all prisoners in segregation, may resume violent behavior after release. But an additional finding from the study throws that conclusion into doubt. People who were released *directly* from segregation had a much higher rate of recidivism than individuals who spent some time in the normal prison setting before returning to the community: 64 percent compared with 41 percent. That finding suggests a link between recidivism and the difficult living conditions in segregation, where good rehabilitative and transitional programming are less available.¹³¹

128. *Berge*, 164 F. Supp. 2d at 1117 (granting preliminary injunction to mentally ill inmates seeking relief from conditions of solitary confinement).

129. *Medley*, 134 U.S. at 168 (emphasis added).

130. *Berge*, 164 F. Supp. 2d at 1098 (noting that prisoners are monitored by video-camera rather than in person, and all other interactions take place through video screens).

131. Vera Institute, *From Solitary Confinement Straight to the Streets*, available at: http://www.vera.org/download?file=2845/Confronting_Confinement.pdf citing: Lovell & Johnson, “*Felony and Violent Recidivism Amount Supermax Prison Inmates in Washington State*,” available at: <http://www.son.washington.edu/faculty/fac-page-files/Lovell-SupermaxRecidivism-4-19-04.pdf>.

When juxtaposed against the fact that over 2000 New York prisoners are released directly into our communities from solitary confinement annually¹³², the projected 23% increase in recidivism for this population raises significant public safety issues.

In addition to making post-incarceration rehabilitation more difficult to achieve and thus increasing the threat to public safety, long term solitary confinement is also counter-productive from a standpoint of maintaining internal prison discipline and safety. The experience of Mississippi Commissioner of Corrections Christopher B. Epps demonstrates that locking prisoners down for extended periods often has the opposite effect it is intended to have. Among Commissioner Epps' charges, up until recently, was Unit 32, a supermax facility in Parchman, Mississippi.¹³³ As recently as 2007, conditions at Unit 32 were typical of a supermax facility:

[Prison inmates were] kept in solitary confinement for up to 23 hours each day, allowed out only in shackles and escorted by guards, they were restless and angry — made more so by the excrement-smearred walls, the insects, the filthy food trays and the mentally ill inmates who screamed in the night, conditions that a judge had already ruled unacceptable.¹³⁴

These conditions, far from keeping the inmates safe and secure, had the exact opposite effect. 2007 was marked at Unit 32 by a handful of violent incidents among the inmates, including two fatal stab-bings, a suicide, and a gang-related killing, all of which occurred in a four-month time frame.¹³⁵

After this string of violence, the reaction of the prison administrators at Unit 32, perhaps counter-intuitively, was to loosen restrictions on inmates.¹³⁶ The reforms were undertaken while Commissioner Epps was fighting an A.C.L.U. lawsuit targeting conditions of confinement at Unit 32.¹³⁷ Instead of being allowed only four hours a week outside their cell, the inmates were given hours-per-day outside their cell; a basketball court was constructed for the inmates to play on, along with a group dining area.¹³⁸ Rehabilitative services were provided, and prisoners were allowed to work towards greater privileges through good behavior.¹³⁹

The results of these reforms at Unit 32 were universally positive. Incidents of violence decreased.¹⁴⁰ The number of prisoners in solitary confinement dropped by more than seventy percent.¹⁴¹ In fact, so many prisoners at Unit 32 were moved into the general population of other correctional facilities that Unit 32 was closed in 2010, saving Mississippi taxpayers millions of dollars.¹⁴² Other states are now looking to follow suit,¹⁴³ pursuing reforms that hold the promise of achieving the same kind of success that Commissioner Epps and his fellow prison administrators in Mississippi were able to achieve at Unit 32.¹⁴⁴

132. NYCLU "Boxed In" *supra* note 31, at p. 2.

133. Goode, *supra* note 78.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*; see, e.g., Butler et al., *supra* note 15, at 11.

138. Goode, *supra* note 78.

139. *Id.*

140. *Id.*

141. *Id.* ("The number of prisoners in isolation dropped to about 300 from more than 1,000.")

142. *Id.*

143. *Id.* ("Colorado, Illinois, Maine, Ohio and Washington State have been taking steps to reduce the number of prisoners in long-term isolation; others have plans to do so...officials in California [have also] announced a plan for policy changes that could result in fewer prisoners being sent to the state's three super-maximum-security units.")

144. It is of note that even Commissioner Epps was surprised by the positive results of his reforms, which took place while he was fighting an A.C.L.U. lawsuit challenging conditions at Unit 32. Epps summed up his change-of-heart with a fitting coda: "If you treat people like animals, that's exactly how they'll behave." *Id.*

The experience of Commissioner Epps in Mississippi demonstrates that even problematic inmates can be dealt with in a more productive fashion than placing them in long term solitary confinement. His experience with prisoner violence at Unit 32 is hardly unique.¹⁴⁵ As Dr. Gawande in his aforementioned 2009 article in the *New Yorker* notes:

Perhaps the most careful inquiry into whether supermax prisons decrease violence and disorder was a 2003 analysis examining the experience in three states—Arizona, Illinois, and Minnesota—following the opening of their supermax prisons. The study found that levels of inmate-on-inmate violence were unchanged, and that levels of inmate-on-staff violence changed unpredictably, rising in Arizona, falling in Illinois, and holding steady in Minnesota.¹⁴⁶

The growing body of evidence on supermax facilities and SHU-style detention points inexorably towards one conclusion: the security gained by isolating prisoners in long term solitary confinement is largely illusory. If it exists, it has yet to be documented in any convincing manner. And the great weight of the evidence demonstrates that alternative measures are not only adequate, but in some cases more effective at addressing the legitimate concerns of institutional safety, security and discipline in corrections facilities across the country.

Substance abuse treatment, mental health care, special needs wards and even pet therapy are successful alternatives to solitary confinement that have been tried by various prison administrators.¹⁴⁷ Additional alternatives include separating but not isolating a prisoner, taking away good time or privileges, such as commissary, phone and packages, or imposing penalties that are specifically related to the offense committed such as restitution for the offence of destruction of state property.¹⁴⁸ Finally, reviewing the cases of those prisoners who are currently being held in long term solitary confinement and assessing whether such continued confinement is necessary for prison safety is an alternative that has been used by a number of states that has resulted in a significant decrease in their solitary confinement population.¹⁴⁹

F. Conclusion

Long term solitary confinement is no longer a useful or productive tool for prison administrators seeking to deal with problematic inmates. Far from furthering legitimate penological objectives, it only serves to aggravate the very conditions it seeks to alleviate. Dangerous inmates are often made more erratic, weak and vulnerable inmates are made more so, and the prospect of meaningful rehabilitation and reentry into society is also rendered more difficult; and in some cases, functionally impossible.

145. See Lance Tapley, *How one State Dramatically Reduced Solitary Confinement*, NIEMAN WATCHDOG (Aug. 1, 2011), <http://niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00567>; see also Sullivan, *supra* note 124 (mentioning warden of Oregon State penitentiary); CAROLINE ISAACS & MATTHEW LOWEN, AMERICAN FRIENDS SERVICE COMMITTEE - ARIZONA, BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA'S PRISONS AND JAILS 35 (2007) (discussing Mississippi warden Don Cabana, who noted that "his biggest regret" was constructing the supermax facility at Parchman, Mississippi); see also Goode, *supra* note 78.

146. Gawande, *supra* note 20.

147. Brenna Davis, *Alternatives to Solitary Confinement*, available at: http://www.ehow.com/info_8720006_alternatives-solitary-confinement.html

148. Mark Mahoney, *All Agree Solitary Confinement Is Not An Ideal Solution*, State Bar News Annual Meeting, (March/April 2012) available at: http://www.doccs.ny.gov/NewsRoom/external_news/2012-03-15_Solitary_State_Bar_Annual_Meeting.pdf.

149. James Ridgeway and Jean Cassella, *New Resource: Solitary Confinement FAQ*, SOLITARY WATCH, (March 19, 2012), available at: <http://solitary-watch.com/2012/03/19/new-resource-solitary-confinement-faq/>. See also: <http://solitarywatch.com/faq/>. The efforts of the Colorado Department of Corrections along these lines is instructive. By reviewing all those cases where prisoners were being held in isolation for more than a year, a total of 870, Colorado found that 37% or 321 of those prisoners were found to be better suited for general population and released all of them into general population over the next two months with no reported increase in violence. Maine slashed its solitary confinement population in nearly half from 132 to 69 by engaging in a similar review and finding that many inmates initially placed in solitary confinement for minor infractions ended up increasing their time in solitary due to lashing out against the conditions of isolation..

For prison administrators and state officials looking to affect policy reforms, it must be remembered that the fulcrum of solitary confinement has less to do with the way the prisoner is treated, and more to do with the way the prisoner is *not* treated. Solitary confinement is a condition of deprivation. Policy makers looking for guidance should first remember that “conditions of confinement that deprive prisoners of the minimal civilized measure of life’s necessities” offend not just the conscience, but the U.S. Constitution.¹⁵⁰ It should be kept in mind that these conditions can easily, perhaps even reliably, lead to legal exposure for prison administrators and state officials who choose to employ it without strict guidelines and significant restrictions on the length of time that inmates can be placed in solitary confinement. In every relevant way, long term solitary confinement is counter-productive to the legitimate penological interests of both state officials and prison administrators and to the public safety interests of the public at large.

In light of the foregoing, solitary confinement, if used at all, should be measured in *days*, not years, months, or even weeks, ensuring that all prisoners, regardless of their conditions of confinement, have some minimal measure of interactive activity so that their psyche does not begin to deteriorate. Preventing psychological harm to inmates encourages institutional safety, security and discipline by preventing the development of serious mental illnesses which exacerbate the problems that supermax and SHU-style detention are intended to solve. Abandoning long term solitary confinement alleviates these problems while ensuring that the health and dignity of prison inmates remains intact.

A pressing need exists for stringent criteria, protocols and safeguards for separating violent or vulnerable prisoners, including clear and objective standards to ensure that prisoners are separated only in limited and legitimate circumstances for the briefest period and under the least restrictive conditions practicable. Further a comprehensive auditing of the current population in extreme isolation must be conducted to identify people who should not be in the SHU, transitioning them back to the general prison population, and reducing the number of SHU beds accordingly.

150. *Berge*, 164 F. Supp. 2d at 1117 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)) (internal quotation marks omitted).



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