

# Prisoners' Legal Services of New York



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## **Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights**

### **TESTIMONY OF PRISONERS= LEGAL SERVICES OF NEW YORK July 19, 2012**

#### **INTRODUCTION**

Prisoners' Legal Services of New York (PLS) would like to thank Senator Durbin, Chair of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights and Senator Graham, as well as the other members of the committee, for holding the first-ever Congressional hearing on solitary confinement, and for the opportunity to submit written testimony on this critical issue. The explosion in the use of solitary confinement in the United States prisons, jails and detention centers over the past thirty years demands an in-depth look into the human, moral, fiscal, and public safety consequences of such confinement, and we applaud this committee's foresight and courage in initiating a public discussion of this topic.

PLS is a nonprofit legal services organization that provides civil legal services to indigent prisoners in New York State correctional facilities on issues associated with their conditions of confinement. PLS was established in 1976 in response to the Attica uprising, a three-day siege that culminated on September 13, 1971, when then-Governor Rockefeller ordered state law enforcement agents to forcibly retake control of the Attica prison.<sup>1</sup> The events at Attica forced public attention on the inhumane treatment and living conditions of New York State prisoners and, as a result, many of those conditions improved. We learned a great deal from "Attica," but with respect to the issue of prolonged solitary confinement, we have lost sight of the most important lesson of all: the need for our criminal justice system to continually assess the effects of the conditions of confinement on prisoners and to consider those effects in light of our evolving standards of decency.

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<sup>1</sup> That day has come to be known as the day when "the bloodiest prison confrontation in U.S. history" occurred. As a result of the uprising, a special state Commission (the McKay Commission) was created to investigate and report on the incident. After dozens of hearings and thousands of pages of testimony, the McKay Commission issued a report chastising New York State prison authorities for: failing to provide adequate programming and education for prisoners; the lack of any procedures for prisoners to air or resolve their grievances; poor conditions in the prisons; and the overall mistreatment of prisoners.

The sordid history of the use of solitary confinement should inform our analysis.<sup>2</sup> This history together with the current, almost daily, reports, across the country, about the effects of prolonged isolation on individual prisoners, requires us to examine whether our evolving standards of decency have brought us to a place where we can no longer tolerate such punishment. This hearing is the first step in that process.

### **SOLITARY CONFINEMENT IN NEW YORK**

In New York, prisoners can be disciplined for a host of prison rule violations ranging from failing to have an identification card, to being out of place, to drug charges of various types, to creating a disturbance, fighting and assaults as well as many others. If a prisoner is charged with such misconduct, a disciplinary hearing is held against him. Although prisoners have some limited rights at these hearings, such as notice of the charges and the right to call (but not cross-examine) witnesses, for prisoners facing disciplinary hearings, there is no right to counsel.

The punishment for violating a prison rule can range from ‘counsel and reprimand’ to placement in solitary confinement, loss of visits with family, recommended loss of good time and loss of packages, phone and commissary privileges. Although New York State’s Department of Corrections and Community Supervision (DOCCS) has internal “guidelines” for imposing solitary confinement,<sup>3</sup> these “guidelines” are applicable only to a few offenses, are not mandatory, and are often exceeded. In fact, there is no limit to the length of time a prisoner in New York State can be placed in solitary confinement.<sup>4</sup> Whether DOCCS follows its existing guidelines, however, is not really the issue; the research on the effects of solitary confinement on humans demonstrates that even the application of DOCCS’ existing guidelines can result in conditions of confinement that jeopardize the physical and mental health of people so confined. And yet, in New York State, the number of individuals subjected to solitary confinement and the length of the terms of solitary

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<sup>2</sup> See Exhibit A for a brief history of solitary confinement.

<sup>3</sup> For instance, DOCCS’ guidelines for an assault without a weapon and minor or no injury has a guideline range of 3 to 9 months in solitary confinement and 3-6 months loss of good time; an assault with a weapon with serious injury has a guideline range of 12-24 months in solitary confinement and 12-24 months loss of good time.

<sup>4</sup> Due to litigation by PLS, Prisoners’ Rights Project and Disability Advocates, Inc., and legislative efforts by various advocacy groups, there has been a movement in New York State to reduce the amount of time a mentally ill prisoner might face in solitary confinement, but there is no such limit for other prisoners. In 2008, New York passed what is referred to as the SHU Exclusion law (McKinney’s Correction Law §137), a law that requires that inmates diagnosed with serious mental illness be removed from segregated confinement and placed into residential mental health treatment units (RMHTU). The passage of the SHU Exclusion Law recognized that the percentage of individuals in DOCCS’ custody who require mental health care is growing –10% in 2000, 11% in 2003, 13.9% in 2009, 14.5% in 2011 – and that these individuals should be provided treatment for their mental illness rather than punished for conduct that is a result of that mental illness. The SHU Exclusion Law, which expands on reforms that occurred due to extensive litigation on this issue, helps to ensure that inmates with serious mental illness will not languish in segregated confinement, but instead be provided proper therapeutic care.

confinement have increased, rather than decreased, over the past thirty years.

In 1983, the New York State prison population was 33,000 and there were 32 adult prisons. Solitary confinement, or what is referred to as “the special housing unit” (SHU) or “the box” was used as punishment, but a typical box term was 30 to 60 days. A 90 day term was given out for relatively serious misbehavior, a 6 month box term was for very serious misbehavior and a year or more in the box was, for the most part, unheard of. There were no facilities that were built solely to house prisoners in solitary confinement. Eighteen years later, in 2001, there were approximately 70,000 prisoners and 70 prisons. The average box term had increased from 2 months to 5 months and 6.7 percent of the prison population was being held in solitary confinement.

Today the prison population has actually decreased to 55,000, but box terms have continued to increase with 18 months to 2 year box terms being far from uncommon. Over 4,300 prisoners, or 7.6% of the prison population, are currently being held in solitary confinement.

### **CASE STUDIES**

Each year, PLS receives and responds to more than 12,000 requests for assistance and many of those requests involve issues associated with prisoners being held in solitary confinement for prolonged periods of time. Some of those prisoners suffered from mental illness when they were initially placed in solitary confinement, while others develop mental illness as a result of the prolonged isolation. Very few are able to tolerate prolonged isolation without suffering some damage to their physical, emotional or mental health.

The steady increase in the amount of box time that is imposed for various misbehaviors appears to have resulted in desensitization to the purpose and effects of solitary confinement by hearing officers and DOCCS officials. Because of this, prisoners are often given months or years of time in solitary confinement without any regard to whether such prolonged isolation will have any positive effect on prison security or the individual’s future conduct. Below are a few cases that we have recently reviewed at PLS that demonstrate the lengthy solitary confinement sentences presently being imposed by DOCCS.

#### **Case No. 1**

Our client was charged with drug use based on a positive urinalysis test for “cannabinoids.” The hearing officer found him guilty and found that the prisoner’s prior guilty dispositions for drug use in 2007, 2009 and 2010 “displays a propensity for illegal drug use and blatant disregard of NYS rules.” Rather than ordering participation in a drug treatment program, the hearing officer imposed a penalty of **12 months solitary confinement** and 36 months loss of other privileges.

#### **Case No. 2**

Our client was charged with drug use based on a positive urinalysis for cannabinoids. He pled not guilty, but stated that he is addicted to cannabinoids and he was on a waiting list for the Alcohol and Substance Abuse Treatment (ASAT). While acknowledging that our client was on the waiting list, the hearing officer noted that the ASAT manual states that inmates with 12 months to earliest release date will be given preference.” Our client, who was more than 12 months before his earliest release date, was given **18 months solitary confinement** and loss of privileges.

### **Case No. 3**

Our client was given **one year in solitary confinement** and one year recommended loss of good time for Misleading/False Information and Interference with Employee. Our client claimed she was assaulted by another inmate who coerced her into making a false statement, alleging sexual misconduct, by a Correction Officer.

### **Case No. 4**

Our client was given **15 months solitary confinement** and 15 months recommended loss of good time for possessing a cell phone.

### **Case No. 5**

Our client, with significantly below average intellectual capacity, assaulted another prisoner who died as a result of the assault. Our client attempted to explain that he was being forced to smuggle drugs into the facility through extortion and threats against his family but his limited intellectual capacity made it difficult for him to present this defense. He was given **99 months in solitary confinement** and recommended loss of good time.

### **Case No. 6**

Our client was in a work release program at a DOCCS facility. He and other inmates were drinking alcohol with the knowledge and consent of the dorm officer. Our client claimed that the officer gave him and another inmate permission to leave the facility, as long as they were back in time for the 9:30 p.m. count. The officer did not dispute this. The two prisoners left the facility and went bar-hopping. Our client got drunk, fell in a ditch, and apparently passed out. Documents show that the state police apprehended him at about 10:45 p.m. He was charged with escape, temporary release violation, leaving assigned area, causing a miscount and alcohol. At the hearing he pled guilty to alcohol and to temporary release violation, but not guilty to the other charges because he insisted that a CO allowed him to leave. He was found guilty of all of the charges and given a penalty of **87 months solitary confinement** and 87 months recommended loss of good time. We appealed and the penalty was administratively reduced to 43 months SOLITARY CONFINEMENT.

### **Case No. 7**

Our client is transgender and has been held under the label of ‘involuntary protective custody’ **in solitary confinement for over 7 years**. She has mentally deteriorated in solitary confinement and has attempted self-castration.

## JUVENILES IN SOLITARY CONFINEMENT

The Supreme Court categorically presumes juveniles to be less culpable for their actions than adults<sup>5</sup> and has recognized at least two fundamental differences between adults and juveniles that support a finding of diminished juvenile culpability.<sup>6</sup> First, a lack of maturity and an underdeveloped sense of responsibility are more typical of youth than adults. Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, than are adults.

Current scientific research suggests that juveniles should not be held culpable for their conduct to the same degree that adults are because juveniles lack fully developed frontal lobes required for impulse control<sup>7</sup> and because their brain structure is fundamentally and significantly different from that of adults.<sup>8</sup> General principles of child development show that adolescents process thoughts, feelings and information in qualitatively different ways than adults do 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.<sup>9</sup> 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.<sup>10</sup> As such, the average juvenile cannot be expected to demonstrate the same level of maturity, judgment, risk aversion or impulse control that we expect from the adult.<sup>11</sup> 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.<sup>12</sup>

In the correctional setting, there is no harsher punishment than solitary confinement. Imposing solitary confinement on a child is particularly cruel. 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.<sup>13</sup> 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.<sup>14</sup> Depriving them of normal developmental

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<sup>5</sup> Roper v. Simmons, 543 U.S. 541, 570 (2005).

<sup>6</sup> Id.

<sup>7</sup> *Principles of Child Development and Juvenile Justice – Information for Decision-Makers*, David A. Arredondo, M.D., Journal of the Center for Families, Children & the Courts, 2004, p. 129.

<sup>8</sup> Tracy Ritmer, *Arrested Development: Juvenile's Immature Brain's Make Them Less Culpable Than Adults*, 9 Quinipiac Health L.J. 1, (2005) p. 4.

<sup>9</sup> Arredondo at p.129

<sup>10</sup> Ritmer at p.24

<sup>11</sup> Ritmer at p.23

<sup>12</sup> Ritmer at p.27

<sup>13</sup> Arredondo at p.131.

<sup>14</sup> Arredondo at p.132.

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.

In New York State, juveniles between the ages of 16 and 18 who have committed certain offenses will be housed in adult correctional facilities. 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. The 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,<sup>15</sup> but those rules do not apply to adult facilities. The American Correctional Association (ACA) standards for juvenile justice detention facilities limit the isolation of juveniles to a 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 related 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.”<sup>16</sup>

Below are two examples describing the placement of juveniles in isolation:

#### **Case No. 1**

Our client is a **16 year old youthful offender who was sentenced to three years in solitary confinement** and loss of privileges for running away from a “shock” facility. He claimed he ran away because he was being abused by corrections officers – abuse that included being locked in a janitor’s closet overnight for the three nights prior to his attempt to run away. We appealed the disposition and received a decision from DOCCS reducing the solitary confinement time from three years to six months.

#### **Case No. 2**

Our client is **17 year old and was given 4 years in solitary confinement** with 4 years loss of good time, phones, packages and commissary for allegedly assaulting a corrections officer. The

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<sup>15</sup> Title 9 N.Y.C.R.R. §180.9(c)(10)(iii), Discipline of Children.

<sup>16</sup> 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.

standard at disciplinary hearings is “substantial evidence” which means “some evidence.” He will spend from age 17 to age 21 confined to a small cell for 23 hours per day, 7 days per week.

Based upon the scientific evidence regarding a juvenile’s brain development, the regulations in NYS that prohibit the use of solitary confinement for juveniles detained in juvenile detention facilities, the ACA standards for juvenile justice detention facilities, the U.S. Department of Justice Civil Rights Division’s position on the use of solitary confinement when dealing with juveniles and our own contemporary standards of decency, we should immediately prohibit the use of solitary confinement in cases where the individual is under 21 years old.

### **SOLITARY CONFINEMENT AND SENSORIALLY DISABLED INDIVIDUALS**

In New York State, DOCCS places both deaf and blind inmates who engage in misconduct in solitary confinement for significant lengths of time without consideration of how their disability may affect their ability to cope with solitary confinement. Below is one example of such a case:

Our client is an intelligent, humorous man who has been profoundly deaf since birth. **He has already spent a total of over seven years in solitary confinement** for disruptive behaviors of many kinds. He has significant difficulty communicating with DOCCS’ staff and the lack of competent translation services leads to his frustration and resulting disciplinary charges. As a result he continues to receive additional solitary confinement penalties. **Presently he is scheduled to be held in solitary confinement until 2017.** The time he has spent in solitary confinement has caused severe mental deterioration and as a result he has engaged in self-harming behaviors.

One can only imagine the profound isolation that our client, and others like him, experience. As with juveniles who engage in misconduct while in prison, the specific issues associated with disabled prisoners cry out for the use of a different prison management tool.

### **EVOLVING STANDARDS OF DECENCY**

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.<sup>17</sup> In 2008, U.N. Special Rapporteur to the Human Rights Council 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,”<sup>18</sup> and that it “should be strictly and specifically regulated by law.”<sup>19</sup> Presidential hopeful John McCain talked about his experience in solitary confinement as a prisoner of war in

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<sup>17</sup> 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>.

<sup>18</sup> See NYCBA COMM., *supra* note 12, at 18.

<sup>19</sup> *Id.*

Vietnam where he spent five and a half years in isolation in a fifteen-by-fifteen-foot cell.<sup>20</sup> He stated: “It’s an awful thing, solitary . . . [i]t crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”<sup>21</sup>

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.”<sup>22</sup> Conditions at supermax facilities in the United States have also allowed prisoners to successfully resist extradition to the United States from foreign nations.<sup>23</sup> Unfortunately, international treaties, most notably the ICCPR and CAT, have had little effect on prison litigation in the United States, due in part to the reservations adopted by the United States upon ratifying both treaties.<sup>24</sup>

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), 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.<sup>25</sup>

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

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<sup>20</sup> Most, if not all, of New York’s single isolation cells are much smaller than this.

<sup>21</sup> Antul Gwande, “Hellhole,” *New Yorker*, March 2009. “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.”

<sup>22</sup> *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).

<sup>23</sup> 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).

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 2 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Estelle v. Gamble*, 429 U.S. 97 (1976) (internal citations omitted)).

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.”<sup>26</sup>

Other professional organizations, as well as numerous advocacy groups, both secular and religious, have followed suit.<sup>27</sup> 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.<sup>28</sup> These groups, taken together with the international law regarding the use of solitary confinement, as well as the customs of other civilized nations, make

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<sup>26</sup> *Id.* at 5.

<sup>27</sup> *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](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](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-united-nations-solitary-confinement-violates-human-rights>.

<sup>28</sup> 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-tamms-supermax-prison\\_b\\_1342135.html](http://www.huffingtonpost.com/locke-bowman/gov-quinn-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](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://motherjones.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](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](http://www.portlandphoenix.com/features/top/ts_multi/documents/05081722.asp).

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.”<sup>29</sup> 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.<sup>30</sup> As such, the continued use thereof constitutes an “unnecessary and wanton infliction of pain,” which ought to be rejected, both in law and morality.

### **RECOMMENDATION**

The known effects of solitary confinement on an individual’s mental and physical health, mandate congressional reform. That reform should identify solitary confinement as the most extreme form of punishment that should only be used in the most extreme circumstances, for people who pose an active and ongoing threat to the safety of prison staff and other prisoners. Even then, prisoners should be regularly evaluated to ensure that they are being properly treated and that their mental health is not being adversely affected, and there should be systems in place for prisoners to earn their way out of solitary confinement.

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<sup>29</sup> *Gamble*, 429 U.S. at 102.

<sup>30</sup> 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>.

## EXHIBIT A

### A BRIEF HISTORY OF SOLITARY CONFINEMENT

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.<sup>31</sup> However, examples of solitary confinement in America range at least as far back as 1787.<sup>32</sup> Advocates for solitary confinement originally thought it was rehabilitative in nature.<sup>33</sup> The reasoning was that a prisoner, 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.<sup>34</sup>

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.”<sup>35</sup> Indeed, reformers in 18th century Britain believed that solitary confinement provided “the most terrible penalty short of death that a society could inflict,”<sup>36</sup> while at the same time being the most humane.<sup>37</sup> 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[.]”<sup>38</sup> 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.”<sup>39</sup> In the Netherlands, solitary confinement fared no better:

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<sup>31</sup> Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 574 (1999).

<sup>32</sup> See *In re Medley*, 134 U.S. 160, 168 (1890) (describing conditions in a Philadelphia Penitentiary circa 1787).

<sup>33</sup> *Id.*

<sup>34</sup> 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).

<sup>35</sup> *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)).

<sup>36</sup> Haney & Lynch, *supra* note 4, at 482.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *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).

“[a]gain and again reports of insanity, suicide, and the complete alienation of prisoners from social life seriously discredited the new form of punishment.”<sup>40</sup> 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:

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. . . .<sup>41</sup>

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.”<sup>42</sup> 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.<sup>43</sup>

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<sup>40</sup> 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)).

<sup>41</sup> 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.

<sup>42</sup> NEW YORK CITY BAR ASSOC., COMM. ON INTERNAT’L HUMAN RIGHTS, SUPERMAX CONFINEMENT IN U.S. PRISONS 6 (2011) (hereafter ‘NYCBA COMM.’).

<sup>43</sup> *Id.*