



**Testimony of Marc A. Levin, Esq.
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Foundation Before the U.S Senate Judiciary Subcommittee on The
Constitution, Civil Rights and Human Rights**

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A. INTRODUCTION

The Texas Public Policy Foundation (TPPF) is a conservative think tank. Our mission is to promote and defend liberty, personal responsibility, and free enterprise, and in 2005 the Foundation launched the Center for Effective Justice, which has worked with all three branches of Texas government to advance solutions that emphasize offender and system accountability, empowerment and restoration for victims of crime, and fiscal responsibility. We've assisted with reforms in Texas that have led to the closing of 10 juvenile and adult correctional facilities while at the same time achieving crime reductions that have surpassed the overall national decline. Texas now has its lowest crime rate since 1968.¹ In 2010, the Texas Public Policy Foundation launched Right on Crime, which is a national clearinghouse for conservative criminal justice reforms. The Right On Crime Statement of Principles has been signed by many of the country's most prominent conservative leaders.

As conservatives, we are appropriately skeptical of government that is too large, too intrusive, and too costly, and we insist on accountability and transparency. Government is at its most restrictive when it imposes solitary confinement so it is only appropriate that we bring a critical focus to this issue rather than succumb to an out of sight, out of mind mentality. While we recognize solitary confinement is needed in some instances, policies and practices must be implemented to ensure it is not unnecessarily used to the detriment of public safety, taxpayers, and justice.

The U.S. Bureau of Prisons (BOP) maintained approximately 12,400 inmates in solitary confinement at the time of the May 2013 General Accounting Office (GAO) report, although BOP officials claim the segregated population has declined since then. Many more inmates are so housed in state prisons, which typically means 23 hours alone in a small cell with no stimulation or interaction with other people. The GAO report found that the use of solitary confinement has been growing in the federal prison system despite a lack of any available evidence that this practice was increasing safety for inmates and staff.² The GAO report also for the first time revealed the actual cost of solitary confinement on the federal level, finding that it amounts to \$78,000 per inmate per year, nearly three times that of housing inmates in the general population.³ Since the time of the last Senate hearing on solitary confinement, BOP has agreed

to begin an audit that will, for the first time, lead to some outside scrutiny of BOP's use of segregation.

The research in this area and the recent successes that several states have achieved in both reducing solitary confinement and improving order in their correctional facilities suggests that there are changes in policies and practices from which both the BOP and state prison systems can benefit.

B. SOLITARY CONFINEMENT CAN ENDANGER PUBLIC SAFETY

While often viewed primarily as a moral issue, solitary confinement has significant implications for public safety. First and foremost, prisons must discontinue the practice of releasing inmates directly from solitary confinement to the public.

A study in Washington state found that inmates released directly from the Supermax prison, which consists entirely of solitary confinement, committed new felonies at a rate 35 percent greater than that for inmates of the same risk profile released from the general population.⁴ Additionally, a greater percentage of the new crimes committed by those released from solitary confinement were among the most serious violent felonies.⁵

Despite this finding, many states continue to release inmates directly from solitary confinement, with more than 1,300 such releases in 2011 in Texas alone.⁶ In 2013, a Colorado inmate released directly from solitary confinement murdered the state's director of corrections, Tom Clements. Alarming, dating back to 2002, half of those released from Colorado prisons who subsequently committed murder served time in solitary confinement, with some discharged directly to the street. However, as documented below, major changes are underway that are significantly reducing overall solitary confinement in Colorado and those discharged directly from this custody level, with the latter figure falling from 221 in 2004 to 70 in 2013.⁷

The average American may understandably wonder, if an inmate is too dangerous for the general population of a prison, how can they live next to me the next day? While inmates who have served their entire sentence must by law be released, this date is not a mystery to corrections officials. Stepping them down to a lower level of custody at least several months prior to release is not too much to ask.

While it is commonsensical to most people that someone who was subjected to 23 hours a day in a cell with no stimulation will have great difficulty reentering society the next day, the negative effects of solitary confinement on those who were mentally ill even prior to entering solitary confinement are well documented. *The Journal of the American Academy of Psychiatry Law* noted: "The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison."⁸ One study found that 45 percent of prisoners in

solitary confinement suffered from serious mental illness, marked psychological symptoms, psychological breakdowns, or brain damage.⁹

C. JURISDICTIONS HAVE PROVED SOLITARY CONFINEMENT CAN BE SAFELY REDUCED

One of the most stunning examples of downsizing solitary confinement comes from Mississippi. In 2007, Mississippi had 1,300 inmates in solitary confinement while today there are only 300.¹⁰ This downsizing has saved Mississippi taxpayers \$6 million, because solitary confinement costs \$102 per day compared to \$42 a day for inmates in the general population.¹¹ Most importantly, violence within Mississippi's prisons and the recidivism rate upon release are both down, with violence dropping nearly 70 percent.¹²

Maine is a similar success story. In 2011, the state prison in Warren instituted a plan to reduce long-term segregation which has resulted in a decline in the segregated population from 139 in August 2011 to between 35 and 45 inmates just a year later.¹³ Importantly, Maine Corrections Commissioner Joseph Ponte said the downsizing of solitary confinement has led to “substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up — which was an event that happened every week or at least every other week...The cutting has] almost been totally eliminated as a result of these changes.”¹⁴

Some of the changes involved reducing the duration of solitary confinement – for example, those segregated for drugs can now graduate out of confinement and stay in the general population as long as they pass drug tests. Moreover, there was a change in the chain of command. Rather than the shift captain being able to place an inmate in segregation for more than three days, the segregation unit manager and the housing unit manager must agree after this period to continue the segregation and that decision must be ratified by the Commissioner.

Similarly, in the last decade, Ohio dramatically reduced its solitary confinement population from 800 to 90 prisoners.¹⁵ Additionally, from September 2011 to September 2013, Colorado cut the number of inmates in solitary confinement from 1,505 to 662. The number of mentally ill offenders in solitary confinement has fallen even more sharply and Colorado Department of Corrections Executive Director Rick Raemisch has proposed that, for those mentally ill offenders who are not redirected to a secure treatment program, they be given at least 20 hours of out-of-cell programming per week.

It is important to note that prison staff do not necessarily want more inmates to be in solitary confinement. In fact, in January 2014, the association representing Texas prison guards, AFSCME Texas Correctional Employees Local 3807, called for reducing the solitary confinement of death row inmates, noting that because “inmates have very few privileges to lose,” staff become easy targets.¹⁶

There have been some incremental advances in improving Texas' use of solitary confinement. In 2013, a provision was enacted requiring an independent study of solitary confinement that is now getting underway. Also, bills that were proposed on this issue in the last several legislative sessions brought the matter to the attention of corrections leaders. At hearings on the legislation, Texas Department of Criminal Justice (TDCJ) officials were called to testify to explain their policies and practices and it was apparent that, while legislators did not want to micromanage the agency, they wanted to see progress. From 2007 to the most recent report, the number of inmates in solitary confinement in Texas prisons, referred to as administrative segregation, has dropped from 9,347 to 8,238.¹⁷ These figures do not include those in "safekeeping," a form of protective custody for vulnerable inmates such as former police officers.

One of the keys to the modest reduction in solitary confinement in Texas has been the elimination of the waiting list for the Gang Renunciation and Disassociation Program (GRAD) where inmates can earn their way out of solitary confinement by renouncing their gang affiliation and receive protection during the process. Notably, none of the inmates who have completed this program have ever returned to solitary confinement.¹⁸ In Texas, unlike many other states, inmates can be placed in solitary confinement not only for disciplinary violations, but also upon initial entry into prison if they are suspected to be gang members. This is why the GRAD program is particularly important.

More broadly, any intervention that reduces prison violence is likely to reduce solitary confinement by avoiding the incidents that often lead to it. One of the best models for promoting order in prisons is the parallel universe model embraced by Arizona in 2004 through the "Getting Ready" program, which won the innovation award from the Harvard University JFK School of Government. The parallel universe model attempts to make prison more like ordinary life in that how the inmate is treated is directly related to their behavior. For example, inmates who are exemplary, both in completing educational and treatment programs, holding a job inside of prison, and maintaining an unblemished disciplinary record, have a longer curfew and receive better food. Since the program was implemented, inmate violence has decreased by 37 percent, inmate-on-staff assaults by 51 percent, and inmate suicides by 33 percent.¹⁹ So many inmates are working through the program that they have contributed more than \$1 million to a fund for victims of crime, and recidivism rates of participants are 35 percent lower than for similar inmates.²⁰

By the same token, the swift and certain sanctions model that is so successful in the HOPE Court certainly has a place inside prisons. It is a bit more challenging to apply a matrix of intermediate sanctions in prison because there are fewer privileges that inmates have that can constitutionally be withheld, as compared with those on probation or parole. However, such sanctions can include withholding access to the commissary, withholding access to the phone and mail except to communicate with an attorney, relocation to a less desirable cell or higher security unit and away from any inmate with whom they have a dispute, and even short stints in solitary confinement of 24 to 72 hours. Required anger management programming should also be

available as a response to misconduct. While inmates who instigate force causing serious bodily harm to a staff member or other inmate should be placed in solitary confinement for a significant period of time rather than dealt with through intermediate sanctions, these intermediate sanctions can address the more common, less severe disciplinary infractions before they escalate to that point.

However, perhaps the most effective sanction is sometimes not available due to policies that result in a large share of inmates serving all or nearly all of their sentence behind bars, regardless of their behavior. Those inmates eligible for parole typically realize that their record of behavior inside prison will be a major factor in whether they will be approved for parole. In those states with good time or earned time policies, the only way an inmate can earn time off their sentence is through good behavior, though under earned time policies they often must go beyond that by completing treatment, educational, and vocational programs. Yet, the federal government and many states abolished parole in the 1990's, even for nonviolent offenders. Some of these same states such as Florida also adopted so-called truth-in-sentencing policies that require even nonviolent offenders to serve 85 to 90 percent of their sentences beyond bars.

However, a 2013 study conducted by the Pew Charitable States Public Safety Performance Project of New Jersey of inmates released from prison found that comparable inmates placed on parole supervision committed 36 percent fewer new offenses, casting doubt on policies such as the abolishment of parole that have led to more inmates maxing out their entire term behind bars.²¹ Not only does the elimination of parole and requirements that inmates serve virtually all their time in prison put prison growth on auto-pilot, these policies create another drawback that is relevant here. That is, many inmates know that, unless they go so far as to commit another crime in prison, they will be released on the same date or virtually the same date regardless of their behavior. The same drawback applies to life without parole sentences, which while justified in many of the cases in which they are imposed due to the heinousness of the crime and a pattern of violence, are being served by inmates in Louisiana for offenses such as marijuana and stealing a belt.²² While Louisiana is the state with the most nonviolent offenders serving life without parole, the federal system dwarfs all states, accounting for two-thirds of the 3,278 prisoners serving life without parole in 2013 for nonviolent offenses. By reducing the share of inmates, particularly nonviolent inmates, who must serve all or virtually all of their entire terms behind bars, we can ensure that more inmates have an incentive to avoid the types of misconduct that often lead to solitary confinement.

D. RECOMMENDATIONS

The successful experiences of several states and the empirical research in this area lead to many recommendations that can reduce the unnecessary use of solitary confinement while promoting order in correctional facilities. These include:

- 1) End the practice of releasing inmates directly from solitary confinement.

- 2) Ensure that there is an oversight mechanism, whether that is an ombudsman or the head of the department, to review decisions to keep an inmate in solitary confinement beyond 72 hours. This is particularly important in states like Texas where inmates can be placed in solitary confinement simply for being a suspected gang member, a determination which is prone to human error.
- 3) Provide a means for inmates to earn their way out of solitary confinement, such as through a period of exemplary behavior and gang renunciation, if they were not placed there for instigating force that caused serious bodily injury to a staff member or other inmate.
- 4) Eliminate rules that make all inmates in solitary confinement ineligible for any programming and allow such inmates access to constructive reading materials, including educational course books.
- 5) Enhance training for prison personnel in de-escalation techniques, mental illness, and mental retardation, issues which often lead to solitary confinement. Some states such as Nebraska are looking at having some higher level prison guard positions filled by individuals with degrees in areas such as social work who are better equipped to not just respond to behavior, but change it.
- 6) Require agencies to include in their annual or biennial budget proposals an estimate of the additional cost attributable to solitary confinement.
- 7) Implement a parallel universe model that creates incentives for positive behavior and self-improvement.
- 8) Create a matrix of intermediate sanctions that must be used prior to placing an inmate in solitary confinement for more than 72 hours, unless that inmate has instigated force that caused serious bodily injury to a staff member or other inmate.
- 9) For nonviolent inmates, restore parole and allow for earned time, thereby reducing the number of “dead-enders” and allowing for substantial variation in time served based on the inmate’s performance. We recommend the pending bills before this Committee by Senators Whitehouse and Portman (S. 1675) and Cornyn (S. 1783) that would expand earned time for nonviolent offenders
- 10) Enact into law the Smarter Sentencing Act (S. 1410), introduced by Chairman Durbin and Senator Lee, and cosponsored by Ranking Member Cruz, which will reduce overcrowding in the federal system so that we can focus on the most serious offenders, lead to safer institutions, and save billions that can also be used for other important public safety priorities. Overcrowding can contribute to the overuse of solitary confinement by leading to an insufficient number of guards to control inmates in the general population and making it more difficult to separate inmates and groups of inmates who may have issues with one another.
- 11) Utilize “missioned housing,” which are separate, smaller correctional settings, for inmates in segregation as protective custody, such as former police officers and those who have recently exited a gang, as well as for mentally ill and developmentally delayed inmates who were segregated due to an inability to follow orders. These inmates who did not harm another inmate or staff member should not be subject to 23 hours of solitary confinement alongside those who committed acts of violence behind bars. The Wisconsin

model of Special Management Units provides an example of such “missioned housing” for these types of inmates.

- 12) Reexamine prison construction and renovation plans, including the planned BOP retrofitting of the Thomson unit purchased from Illinois, to ensure unnecessary Supermax/solitary confinement beds are not added. Even if additional maximum security capacity is needed, the vast majority or all of the beds can be general population beds.
- 13) Other states should join the BOP and states such as Illinois and Maryland in bringing in an outside organization, such as the Vera Institute, to provide a perspective from outside the system, analyze data, and help train wardens and other personnel in alternative strategies. Vera provided technical support to Washington and Ohio in successfully reducing solitary confinement and is now working with Illinois and Maryland through their Segregation Reduction Project to analyze data, and help train wardens and other personnel in alternative strategies. In Illinois, for example, Vera found that 85% of the more than 2,000 inmates in solitary confinement were placed there for less severe types of infractions and that the average length of stay was some 2.8 years.²³
- 14) Improve availability of data. For example, there is no reliable data on the number of inmates in different types of segregation (punitive versus protective) and very little data at all on local jails and immigration detention centers.

E. CONCLUSION

It is doubtful that any prison warden ever lost their job for putting an inmate in solitary confinement. Prison officials are rightly worried about being held to account for prison violence and escapes. Consequently, absent independent scrutiny and a focus on this issue at the highest level in a corrections agency, the natural incentive within the system can be to use solitary confinement excessively. As conservatives who believe in holding institutions accountable, we must be especially vigilant in shining a light into these darkest recesses of government. Now, that light is illuminating policies and practices that can lead to greater public safety through improved offender outcomes, lower costs to taxpayers, and more orderly correctional facilities.

¹ Marc Levin and Jeanette Moll, “Texas Is Still Tough on Crime, But Now More Effective,” Texas Public Policy Foundation, March 2013, <http://www.texaspolicy.com/sites/default/files/docufflments/2013-03-PB06-TexasToughonCrime-CEJ-MarcLevinJeanetteMoll.pdf>.

² “Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing, General Accounting Office, May 2013, <http://www.gao.gov/assets/660/654349.pdf>.

³ *Ibid.*

⁴ David Lowell, et. al., “Recidivism of Supermax Prisoners in Washington State,” *Crime & Delinquency*, Oct.2007, vol. 53 no. 4 633-656, <http://cad.sagepub.com/content/53/4/633.abstract>.

⁵ *Ibid.*

⁶ Testimony of Travis Leete, Texas Criminal Justice Coalition, April 17, 2013, [http://www.texascjc.org/sites/default/files/uploads/HB%201266%20Testimony%20\(Ad%20Seg%20Review\).pdf](http://www.texascjc.org/sites/default/files/uploads/HB%201266%20Testimony%20(Ad%20Seg%20Review).pdf).

⁷ Jennifer Brown and Karen Krummy, “Half of parolees who murdered spent time in solitary confinement,”

Denver Post, Sept. 23, 2013, http://www.denverpost.com/parole/ci_24140370/half-parolees-who-murdered-spent-time-solitary-confinement. Rick Raemish, "My Night in Solitary," *New York Times*, Feb. 20, 2014, http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0.

⁸ Jeffrey L. Metzner, MD and Jamie Fellner Esq., "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics," *J Am Acad Psychiatry Law* 38:1:104-108 (March 2010), <http://www.jaapl.org/content/38/1/104.full>.

⁹ D. Lovell, Patterns of disturbed behavior in a supermax population, *Criminal Justice and Behavior*, 35, 985-1004 (2008).

¹⁰ Randall Pinkston, "Mississippi Rethinks Solitary Confinement," CBS News, May 18, 2013, <http://www.cbsnews.com/news/mississippi-rethinks-solitary-confinement/>.

¹¹ *Ibid.*

¹² Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," *Criminal Justice and Behavior* 36 (2009): 1037-50, https://www.aclu.org/files/images/asset_upload_file359_41136.pdf.

¹³ Alex Barber, "Less restriction equals less violence at Maine State Prison," *Bangor Daily News*, June 15, 2012, <http://bangordailynews.com/2012/06/15/news/state/less-restriction-equals-less-violence-at-maine-state-prison/>.

¹⁴ *Ibid.*

¹⁵ Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," *Criminal Justice and Behavior* 36 (2009): 1037-50, https://www.aclu.org/files/images/asset_upload_file359_41136.pdf.

¹⁶ Nicholas Flatow, "Texas Prison Guards Vie For Less Solitary Confinement." *Think Progress*, Jan. 30, 2014, <http://thinkprogress.org/justice/2014/01/30/3223731/texas-prison-guards-vie-solitary-confinement/#>.

¹⁷ TDCJ Statistical Reports for 2007 and 2012,

http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2007.pdf

http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2012.pdf.

¹⁸ "Leaving Gang Life Behind in Texas," *Correcitons.com*, <http://www.corrections.com/articles/3071>.

¹⁹ Ann Coppola, "A Parallel Universe," *Correcitons.com*, <http://www.corrections.com/news/article/20339>.

²⁰ *Ibid.*

²¹ The Pew Charitable Trusts, "The Impact of Parole in New Jersey," November 2013. Available at:

http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf

²² "A Living Death: Life Without Parole for Nonviolent Offenses," American Civil Liberties Union, November 2013, <https://www.aclu.org/files/assets/111213a-lwop-complete-report.pdf>.

²³ Testimony of Michael Jacobson, Director of the Vera Institute, June 19, 2012,

<http://www.vera.org/files/michael-jacobson-testimony-on-solitary-confinement-2012.pdf>.