



NYCLU

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**Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights
Reassessing Solitary Confinement II:
The Human Rights, Fiscal, and Public Safety Consequences
Testimony of the New York Civil Liberties Union**

February 25, 2014

The New York Civil Liberties Union submits this testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights in conjunction with “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences.” We thank the Senate Judiciary Subcommittee for this important and timely follow-up hearing, and for its continued leadership in examining the practice of solitary confinement in the United States.

We write to inform the Subcommittee about recent reforms to solitary confinement practices in New York state prisons. Under an agreement between the State and the New York Civil Liberties Union (“NYCLU”) announced last week, New York is facing the issue head-on, taking immediate steps to curtail the use of extreme isolation for vulnerable populations and working with the NYCLU to develop and implement comprehensive reforms to solitary confinement practices that will benefit all prisoners. New York’s prison system is the fourth largest in the country, and has been heavily dependent on the use of punitive extreme isolation for decades. The process now underway in the New York makes clear that a similar approach is possible in every detention system in the United States. The time for reform is now, and the Subcommittee’s crucial leadership at this moment could lead to significant reforms throughout the country.

In light of the New York experience, we urge the Subcommittee to support the following concrete actions at the federal level that would have an immediate impact in addressing the harms, costs and public safety consequences of solitary confinement: (1) increase transparency by requiring the Bureau of Justice Statistics to gather, analyze and publish nationwide data on the use of solitary confinement; (2) provide federal funding for program-based alternatives to solitary confinement; (3) ensure the United States fully engages in international reform processes; and (4) support rulemaking to limit the use of all forms of isolation in state and local detention facilities.

Bringing solitary confinement to an end in the United States will alleviate the suffering of tens of thousands of individuals held in these conditions. It will also be a significant step forward in remedying decades of misguided criminal justice policies that have favored degrading and counterproductive punitive responses over evidence-based rehabilitative approaches that protect basic human dignity and improve public safety.

The New York Civil Liberties Union (“NYCLU”) was founded in 1951 as the New York affiliate of the American Civil Liberties Union, and is a nonprofit, nonpartisan organization with nearly 50,000 members across the state. Our mission is to defend and promote the fundamental principles and values embodied in the Constitution, New York laws, and international human rights law on behalf of all New Yorkers.

In July 2012, the NYCLU submitted testimony to this Subcommittee discussing the preliminary findings of the NYCLU’s in-depth investigation into solitary confinement practices in the state prison system.¹ In October 2012, the NYCLU published the complete results of that study, *Boxed In: The True Cost of Extreme Isolation in New York’s Prisons*.² The report found that New York subjected thousands of individuals to prolonged extreme isolation as discipline for violating prison rules. Through comprehensive data analysis and over one hundred interviews with prisoners and corrections staff, the report documented that extreme isolation caused severe suffering, was used unnecessarily and in a racially disproportionate manner, and was counterproductive to rehabilitation and public safety.

Following the publication of *Boxed In*, the NYCLU filed a complaint regarding New York’s practices with the United Nations Special Rapporteur on Torture,³ submitted testimony to the Inter-American Commission on Human Rights,⁴ and filed a federal class action lawsuit, *Peoples v. Fischer*, challenging the constitutionality of these practices.⁵ The plaintiffs in that lawsuit, Leroy Peoples, Tonja Fenton, and Dewayne Richardson, all African-American, were just three of tens of thousands of prisoners in New York severely harmed by long sentences to extreme isolation in Special Housing Units (“SHUs”) as punishment for non-violent misbehavior that demonstrated no threat of any kind to the safety of staff, other prisoners, or themselves.

The NYCLU’s findings in *Boxed In*, and the claims asserted in the NYCLU’s human rights complaints and the lawsuit, are consistent with overwhelming consensus of research studying the severe harms of solitary confinement. The damage these practices inflict is also vividly illustrated in nearly all the testimony currently before the Subcommittee. To the extent the Subcommittee seeks any additional information on the harms and costs of solitary confinement, the NYCLU respectfully directs the Subcommittee to *Boxed In*, the testimony of the American Civil Liberties Union’s National Prison Project, and the testimony of other New York advocates including the Correctional Association of New York and Prisoners’ Legal Services. The NYCLU submits this testimony specifically to inform the Subcommittee about recent developments regarding solitary confinement practices in New York and to urge the Subcommittee to take actions that will help initiate similar processes throughout the country.

Last week, the NYCLU and the New York State Department of Corrections and Community Supervision (“DOCCS”) announced a joint agreement to suspend the NYCLU’s lawsuit for two years to pursue a collaborative approach to reforming the use of extreme isolation within the prison system.⁶ Under the agreement, DOCCS will prohibit the use of disciplinary SHU sentences for juveniles and pregnant women, and limit SHU sentences to no more than 30 days for developmentally disabled and intellectually challenged prisoners. Juveniles and developmentally disabled prisoners who pose serious behavioral problems or safety threats will

be diverted to alternative programs and confined in a less restrictive setting that includes out-of-cell group programming. These reforms mirror similar protections for the seriously mentally ill already in place under New York's "SHU Exclusion Law."⁷

In addition to the initial actions that will be taken on behalf of these vulnerable populations, the NYCLU and DOCCS have agreed that two nationally-recognized experts on reforms to solitary confinement—Dr. James Austin and Eldon Vail, former chief of the Washington State Department of Corrections—will issue recommendations for comprehensive reforms throughout the entire disciplinary system that would apply to all prisoners. Extensive data will be gathered, shared with the experts, and analyzed to guide these system-wide reforms. Initial expert recommendations are expected in late spring of this year.

The cooperative nature of the reform process getting underway in New York reflects the leadership of New York policymakers like Governor Andrew Cuomo and DOCCS Acting Commissioner Anthony Annucci, who have concluded that reforms to solitary confinement will make the prison system more humane, more successful in achieving rehabilitative aims, and safer for prison staff and the communities that will be home to prisoners upon their release.

What is happening in New York should send a message to policymakers and corrections administrators around the country: reform is possible. New York is the fourth-largest prison system in the United States. DOCCS incarcerates approximately 55,000 individuals, 3,800 of whom are in SHU at any given time.⁸ DOCCS employs approximately 29,000 custody staff and other personnel. DOCCS operates 58 different facilities spread throughout the state, including two large SHU prisons and eight freestanding SHU facilities that were purpose-built solely to subject prisoners to extreme isolation, in addition to designated SHU cellblocks within twenty-nine other prisons. If New York can rise to meet the issue of solitary confinement head-on, every other prison or jail administrator in the country can also take a proactive approach to addressing this human rights crisis in their own facilities.

We are at a pivotal moment, and the leadership of this Subcommittee can have a tremendous impact. The Subcommittee should take concrete actions to support leaders like Commissioner Annucci who are decisively undertaking the hard work of addressing these decades-long practices. The Subcommittee should also require action from jurisdictions that have so far refused to acknowledge the profound nature of the problem or failed to initiate meaningful reforms. The NYCLU urges the Subcommittee to take the following actions.

- 1. Congress should require centralized reporting on solitary confinement practices from all jurisdictions.**

The cavalier nature of solitary confinement practices in this country is reflected by the lack of a reliable periodic accounting of its use at both the national and state level.⁹ Collecting data on who is placed into conditions of extreme isolation, for what reasons and for how long, and measuring the human, penological and fiscal impacts of those practices, is necessary to support comprehensive reform. For example, in New York the statistical data presented in *Boxed In*

shed much-needed light on the frequent use of extreme isolation sanctions and the troubling demographics of the isolated population. As part of the process announced last week, the NYCLU and DOCCS have agreed that robust data reporting and analysis will be a cornerstone for assessing current practices and guiding future evidence-based reforms.

Congress should set the stage for nationwide reform by ensuring there is a complete periodic accounting of solitary confinement practices. To achieve this goal, the Subcommittee should take steps to ensure that federal, state, and local facilities regularly report to the Bureau of Justice Statistics (“BJS”) who is held in solitary confinement, for what reason, and how long. Facilities should also be required to report on the impacts of the practice based on uniform metrics such as fiscal cost, institutional safety, self-harm, and recidivism. This is particularly important as research continues to emerge about the serious health and public policy consequences of solitary confinement: both increased rates of self-harm and higher recidivism are linked to solitary confinement.¹⁰ BJS should annually publish the data and analysis. In conjunction with the annual release of these statistics, a review panel of appointed experts should conduct public hearings to review the findings, hear from stakeholders, and issue recommendations.

2. Congress should provide funding to incentivize alternatives to solitary confinement.

Congress should make funding available to states that commit to reforming solitary confinement. This funding would aid states in reversing course on the 1990s-era federal policies that paid for state construction of costly new facilities purpose-built for extreme isolation.¹¹ Because of these federal financial incentives, many states, including New York, spent hundreds of millions of taxpayer dollars to build harshly punitive prisons.¹² Congress should now ensure that adequate funding is available for states committed to reform. To this end, the Subcommittee should provide federal funding through the Bureau of Justice Assistance (“BJA”) or elsewhere to support state and local efforts to reduce the use of solitary confinement, with a focus on program-based alternatives to extreme isolation.

3. Congress must ensure that the United States fully engages in international processes regarding solitary confinement.

The prominent role of the United States in the international community underscores the importance of continued engagement at the international level regarding the rights of prisoners. There are two concrete actions the Subcommittee should take. First, the Subcommittee should formally request that the U.S. Department of State play an active role in the overdue process of updating the United Nations Standard Minimum Rules for the Treatment of Prisoners, including standards that restrict isolation. Second, the Subcommittee should formally request the U.S. Department of State grant the longstanding request by the United Nations Special Rapporteur on Torture to conduct site visits to U.S. prisons as part of an international investigation of the use of solitary confinement. These steps will increase transparency, strengthen fundamental protections for incarcerated populations across the globe, and demonstrate U.S. commitment to international law.

4. Congress should support rulemaking to reduce the use of solitary confinement in all detention facilities in the United States.

The use of solitary confinement in the United States has proven to be a human rights disaster, but no one suggests the correct response is uncomplicated. Prison and jail administrators interested in reform face difficult questions about how to ensure the well-being of prisoners and staff while effectively responding to serious safety threats in the general population. The federal government is uniquely positioned to develop best practices for state and local corrections officials seeking guidance. The Subcommittee should call for rulemaking by the U.S. Department of Justice that would ensure the promulgation of smart, humane and evidence-based regulations to limit the use of all forms of isolation.

Solitary confinement is viciously and myopically punitive, and degrading to basic human dignity. Given the harm to individuals who are subjected to these practices and the overwhelming number of prisoners who will eventually return home, solitary confinement is also extremely short-sighted and costly from a corrections and public safety perspective.¹³

The United States cannot effectively address solitary confinement without also bringing about a significant shift in a decades-long focus on punitive incarceration. This is both a significant challenge and an important opportunity. Sweeping reforms to solitary confinement throughout U.S. will necessitate reorienting corrections policies away from punishment and isolation and toward treatment and intervention. For this reason, achieving success in reforming solitary confinement will also have broader benefits for our criminal justice and corrections systems as a whole.

Recent developments in New York show that reform is possible and that corrections leaders and advocates share a belief that the harms caused by extreme isolation must be comprehensively addressed. The leadership and support of the federal government on this issue is essential at this critical time. We respectfully urge the Subcommittee to take the steps outlined in this letter to support these reform efforts.

Sincerely,



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¹ *Reassessing Solitary Confinement: the Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Taylor Pendergrass and Scarlet Kim, New York Civil Liberties Union), *available at* <http://www.boxedinny.org/wp-content/uploads/2013/03/Testimony-before-Senate-Judicial-Subcommittee-July-2012.pdf>.

² SCARLET KIM, TAYLOR PENDERGRASS, & HELEN ZELON, NEW YORK CIVIL LIBERTIES UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS* (2012), *available at* <http://www.boxedinny.org/report/>.

³ Allegation Letter from New York Civil Liberties Union to United Nations Special Rapporteur on Torture Juan Mendez Concerning New York State Prisoners Held in Solitary Confinement and Other Forms of Extreme Isolation (Feb. 5, 2013), *available at* http://www.nyclu.org/files/releases/ExtremeIsolation_UNletter_2.5.13.pdf.

⁴ *Solitary Confinement in the Americas: Hearing of the Inter-American Commission on Human Rights*, 147th Sess. (2013) (testimony of Taylor Pendergrass and Elena Landriscina, New York Civil Liberties Union), *available at* <http://www.nyclu.org/content/testimony-iachr-thematic-hearing-solitary-confinement>.

⁵ Third Amended Class Action Complaint, *Peoples v. Fischer*, No. 11 Civ. 2694 (S.D.N.Y. Mar. 6, 2013), ECF No. 93, *available at* <http://www.nyclu.org/files/releases/Third%20Amended%20Class%20Action%20Complaint..pdf>.

⁶ Stipulation for a Stay With Conditions, *Peoples v. Fischer*, No. 11 Civ. 2694 (S.D.N.Y. Feb. 19, 2014), ECF No. 124, *available at* http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf.

⁷ SHU Exclusion Law of 2008, codified as amendments to N.Y. Mental Hyg. Law § 45 (McKinney 2011) and N.Y. Correct. Law §§ 2, 137.6, 401, 401-a (McKinney 2011).

⁸ New York State Dep't of Corrections & Community Supervision, DOCCS Fact Sheet (Feb. 1, 2014), *available at* <http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf>.

⁹ This problem also exists in the federal system. U.S. GOV'T ACCOUNTABILITY OFFICE, *BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING* (2013).

¹⁰ See Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUBLIC HEALTH 442, 445 (2014) (finding that individuals placed in solitary confinement were 6.9 times more likely to engage in self-harm); see David Lovell & Clark Johnson, *Felony and Violent Recidivism Among Supermax Prison Inmates in Washington State: A Pilot Study* (2004) (indicating that rates of recidivism increase when prisoners are returned directly from isolated confinement to the community with no re-entry planning); see Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 CRIME & DELINQ. 124, 131 (2003) (noting the association of suicide and self-mutilation with isolated housing).

¹¹ See PAULA M. DITTON & DORIS JAMES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3 (1999) (noting that "the U.S. Congress authorized incentive grants to build or expand correctional facilities through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in the 1994 Crime Act" and that New York enacted a truth-in-sentencing law one year after the Crime Act, making the state eligible for federal incentive grants); U.S. GENERAL ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 2 (1998) (describing the Department of Justice's authority under the 1994 Crime Act to provide incentive grants for expanding prisons to "increase the secure confinement space for persons convicted of Part 1 violent crimes"); see *id.* at 4 (indicating that in 1996 and 1997, New York received more than \$50 million in incentive grants).

¹² See CORRECTIONAL ASS'N OF NEW YORK, *LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS* 13 (2003) (explaining that between 1996 and 2000, New York received nearly \$200 million of federal grants, "all of which was spent on the construction of high-tech lockdown facilities"); see also KIM, PENDERGRASS, & ZELON, *supra* note 2, at 14 (noting that the federal grants were used to construct Upstate Correctional Facility and purpose-built "SHU 200" facilities).

¹³ In New York, approximately 25,000 prisoners are released each year from DOCCS custody. See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2011* 30 (2012) (indicating that 24,460 individuals were released from New York state prison in 2011); see PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2010* 24 (2011) (reporting 25,481 prisoners released from New York state prisons in 2009 and 25,365 prisoners released in 2010).