

Senate Judiciary Committee on the Constitution, Civil Rights, and Human Rights
Reassessing Solitary Confinement II:
The Human Rights, Fiscal, and Public Safety Consequences

I am a third year law student at the University of Michigan Law School. I recently published a student note about solitary confinement and recidivism in the University of Michigan Law School Journal of Law Reform.¹ In my research, I found that solitary confinement may increase recidivism and violence within prisons. I therefore urge Congress to implement policy reforms that would limit time spent in solitary confinement and eliminate sensory deprivation in order to remedy solitary confinement's negative effects on public safety and recidivism.

As of 2005, about 80,000 prisoners were housed in solitary confinement in jails and in state and federal prisons in the United States.² The number of prisoners held in solitary confinement increased 40 percent between 1995 and 2000; in comparison, the total prison population grew by 28 percent over the same period.³

In addition to being confined more frequently, the duration of time that prisoners spend in solitary confinement has also increased. In the Pelican Bay Security Housing Unit in California, for instance, prisoners are held for an average of seven and a half years.⁴ Of the 1,126 prisoners in solitary confinement at Pelican Bay, more than half have been there for at least five years; eighty-nine have been there for over twenty years and one has been in solitary confinement for forty-two years.⁵ Demonstrating the trend toward solitary confinement's increased role is the development of the "supermax" prison. Supermaxes are prisons in which all prisoners are held in extreme isolation in long-term solitary confinement. Prisoners in supermaxes are completely isolated from other prisoners and guards.⁶

Solitary confinement's effects on prisoners have been a source of growing concern,⁷ but the question of whether solitary confinement affects public safety and recidivism has received less attention. This question is of growing importance, because of the prevalence and severity of solitary confinement practices in U.S. prisons. Solitary confinement may cause prisoners to become more dangerous because of the mental health consequences, the lack of permitted activities, and the dehumanizing treatment by some prison guards.⁸ Two studies—which matched prisoners held in solitary confinement with those held in the general population—found that solitary confinement increased recidivism.⁹

Because of the increasing prevalence and severity of solitary confinement and its potential effects on public safety and recidivism, reform is needed.

I. THE MODERN USE OF SOLITARY CONFINEMENT

The increased use of solitary confinement has been predicated on its supposed benefits to prisons, but

1. Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J. L. REFORM 495 (2014) (Note), available at http://prospectusmjlr.files.wordpress.com/2014/02/47_2_gordon.pdf.

2. Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons*, MOTHER JONES (Nov./Dec. 2012), <http://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer>.

3. JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 14-15 (2006), available at http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf.

4. Bauer, *supra* note 2.

5. *Id.*

6. See Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 968 (2008) (quoting Jones v. Berge, 164 F. Supp. 1096, 1098-99 (W.D. Wis. 2001)).

7. See, e.g., Bauer, *supra* note 2; Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER, Mar. 30, 2009.

8. See Hans Toch, *The Future of Supermax Confinement*, 81 PRISON J. 376, 378, 382 (2001).

9. See Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 CRIMINOLOGY 1131, 1149-51 (2009); David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 634, 649-50 (2007).

there has been little discussion of the effects of solitary confinement on prisoners' interactions with society after they have been released. Most prisoners—including prisoners in solitary confinement—will eventually be released from prison: more than 93 percent of prisoners will eventually rejoin society.¹⁰

Large numbers of prisoners are released directly from solitary confinement into communities.¹¹ Prisoners may be released directly from solitary confinement if they are given “indeterminate terms” in solitary confinement when prison officials find the prisoner to be dangerous or a gang member.¹² Prisoners who are released from solitary confinement directly into communities often have difficulty adjusting to “natural light, the noise of traffic and conversation, and physical, human contact.”¹³ Similarly, prisoners released from solitary confinement into the general prison population often experience “great difficulty controlling their tempers” because of the “anger that has been mounting” during their time in solitary confinement.¹⁴

Because of these problems of transition, some prison experts have argued that prison officials should shift their focus from simple isolation in prison to preparing prisoners “to succeed at ‘going straight’ once they are released.”¹⁵

II. THE EFFECTS OF SOLITARY CONFINEMENT ON PRISONERS' MENTAL HEALTH

Prisoners housed in solitary confinement often do not receive adequate mental health treatment, which is troubling because a disproportionate number of prisoners with mental illness are housed in solitary confinement, and such confinement both exacerbates and causes mental illness.¹⁶ A large number of mentally ill prisoners are placed in solitary confinement because—due to mental illness, brain damage, or other factors—such prisoners often have difficulty conforming to prison rules.¹⁷ In a Washington State study, researchers found that mentally ill prisoners were more than four times more likely than other prisoners to have been held in solitary confinement.¹⁸ The American Friends Service Committee (AFSC) found that 26 percent of prisoners held in Arizona's supermax prisons were mentally ill, compared to 16.8 percent of the state's general prison population.¹⁹

Despite the large numbers of prisoners with mental illness held there, prisoners in solitary confinement receive psychiatric treatment very infrequently; depending on the prison, prisoners may only be evaluated every ninety days.²⁰ To the extent that prisoners do receive treatment, they are not evaluated confidentially or out of earshot of other prisoners and staff.²¹

Solitary confinement can exacerbate mental illness for prisoners who are already mentally ill. In *Madrid v. Gomez*, the Northern District of California analogized that housing mentally ill prisoners in

10. Haney, *supra* note 6, at 979–80.

11. David Fathi, *The Dangerous Overuse of Solitary Confinement in the United States*, in PRISON LAW 2012, at 175, 188 (PLI Litig. & Practice, Course Handbook Ser. No. 234, 2012). In California and Colorado, 40 percent of prisoners in solitary confinement are released directly into communities. *Id.* California releases an average of 909 prisoners each year directly from solitary confinement in the Security Housing Units at Pelican Bay and Corcoran prisons. Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC'Y 530, 552–53 (2012).

12. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 127 (2003). In order for gang members to be released from solitary confinement into the general prison population, they must renounce their gang membership and “debrief” or “snitch.” Reiter, *supra* note 11, at 536.

13. Reiter, *supra* note 11, at 553.

14. Terry A. Kupers, *What to Do With the Survivors?*, 35 CRIM. JUST. & BEHAV. 1005, 1010 (2008).

15. *Id.* at 1014.

16. Haney, *supra* note 12, at 132.

17. Lovell et al., *supra* note 9, at 634.

18. *Id.* at 642.

19. MATTHEW LOWEN & CAROLINE ISAACS, AM. FRIENDS SERV. COMM., LIFETIME LOCKDOWN: HOW ISOLATION CONDITIONS IMPACT PRISONER REENTRY 8 (2012).

20. Kupers, *supra* note 14, at 1010.

21. *Id.*

solitary confinement “is the mental equivalent of putting an asthmatic in a place with little air.”²² Moreover, solitary confinement causes harmful psychological effects for prisoners who did not previously suffer from mental illness. Professor Craig Haney reviewed studies of solitary confinement and found that, in every published study of solitary confinement where participants were held in “nonvoluntary confinement” for more than ten days and were “unable to terminate their isolation at will,” the participants suffered “clinically significant symptoms,” including “hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.”²³

Solitary confinement causes mental illness and anger, which can result in a “vicious cycle—the prisoner becoming more angry and incapable of controlling his temper and the resulting disciplinary tickets leading to more time in the isolation setting that induces the angry behaviors.”²⁴ Prisoners in solitary confinement who exhibit signs of mental illness such as refusing an order, self-mutilation or cutting, or expressing anger at officers likewise receive disciplinary sanctions rather than treatment.²⁵ Even suicidal behavior is sometimes treated as a behavioral rather than a psychological problem.²⁶ When prisoners in solitary confinement “become so acutely ill” that they are brought to a psychiatric hospital, the prisoners are returned to solitary confinement when they recover, causing a “revolving door phenomenon.”²⁷

Due to the psychological effects of solitary confinement, prisoners held in such conditions may be unable to “exercise increased self-control and self-initiative” if they are released into the general population of a prison or into communities.²⁸ Additionally, prisoners may not be able to recover after their release because these harmful adaptations may “become too ingrained to relinquish.”²⁹ The severe mental health deterioration and the lack of mental health treatment associated with solitary confinement suggest that prisoners may suffer prolonged mental illness after they are released. In turn, these prisoners might pose an increased risk to public safety after their release. The “paranoia and social anxiety” that result from solitary confinement mean that prisoners may have more difficulty “getting their bearings during the first few months” after they are released from prison, when they are at the greatest risk of reoffending.³⁰

III. THE IMPACT OF SOLITARY CONFINEMENT ON VIOLENCE IN PRISONS

Ironically, most prisoners housed in solitary confinement are not the “worst of the worst,” or the most dangerous or violent. Indeed, many prisoners are housed in solitary confinement because they are mentally ill or are “nuisance prisoners” who break minor rules.³¹ For example, 35 percent of prisoners in Arizona’s maximum-security units were convicted of non-violent offenses.³²

Solitary confinement has not come close to solving the very problem it was meant to reduce: prison violence. For example, a 2012 study showed that the “rate of violent incidents” in California prisons is almost 20 percent higher than when the Pelican Bay supermax prison—California’s first supermax—opened in 1989.³³ Studies have shown that supermax prisons have little effect on prisoner-on-prisoner violence,³⁴ and there is only mixed support for the view that supermax prisons increase safety for prison

22. 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

23. Haney, *supra* note 12, at 132.

24. Kupers, *supra* note 14, at 1012.

25. *Id.*

26. CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA’S PRISONS AND JAILS 44 (2007).

27. GIBBONS & KATZENBACH, *supra* note 3, at 60.

28. Haney, *supra* note 12, at 140.

29. *Id.* at 141.

30. Lovell et al., *supra* note 9, at 635.

31. Fathi, *supra* note 11, at 186.

32. LOWEN & ISAACS *supra* note 19, at 14.

33. Bauer, *supra* note 2.

34. Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY

guards.³⁵

In fact, solitary confinement may even result in *increased* violence in prisons. The Vera Commission³⁶ explained that “[t]here is troubling evidence that the distress of living and working in this environment actually causes violence between staff and prisoners.”³⁷ In *Toussaint v. McCarthy*, the Northern District of California found that segregation, with its idleness and lack of programmed activity, “spawn[ed] tension and violence; [and] it increase[d] rather than decrease[d] antisocial tendencies among inmates” in California’s San Quentin and Folsom prisons.³⁸ Similarly, Don Cabana, the warden of Parchman Prison in Mississippi explained: “we’re taking some bad folks, and we’re making them even worse. We’re making them meaner.”³⁹

Long-term solitary confinement is unnecessary. In the past, institutions achieved control over prisoners through less restrictive means. Recently, several states have successfully reduced the number of prisoners in solitary confinement without compromising security. “There is no evidence” that today’s violent prisoners “are any worse than those who had been adequately managed by less drastic measures in the past.”⁴⁰

In fact, Colorado, Maine, and Mississippi have reduced the numbers of prisoners in solitary confinement without an increase in prison violence.⁴¹ Mississippi State Penitentiary at Parchman, for example, experienced a 50 percent decrease in violence after it transferred 75 percent of its solitary confinement prisoners in the mid-2000s.⁴² The State transferred most of these prisoners into the general prison population and transferred prisoners with serious mental illness to a psychiatric hospital or to a step-down mental health treatment program.⁴³ After these changes, there was a “marked decrease of violence” throughout Mississippi’s Department of Corrections and a “stunning decrease in the number of disciplinary infractions . . . given to prisoners suffering from serious mental illness.”⁴⁴

One explanation for why non-violent prisoners are held in solitary confinement is that states built supermax prisons because of a “desire to appear ‘tough on crime’” and then needed to find prisoners to house in them.⁴⁵ Despite its purpose—to make the state appear as if it is keeping its citizens safe—solitary confinement actually deals a blow to societal safety concerns.

IV. SOLITARY CONFINEMENT AND RECIDIVISM

Prisoner recidivism is a serious public safety concern: almost 700,000 prisoners are released from

1341, 1365–67 (2003) (finding that opening the Tamms Supermax prison in Illinois, the SMU I and II in Arizona, and the OPH in Minnesota did not decrease inmate-on-inmate violence in these states).

35. *Id.* Prisoner assaults on staff decreased in Illinois after the Tamms supermax was built. *Id.* However, staff injuries increased following the opening of the SMU II in Arizona. *Id.* Finally, opening the OPH in Minnesota and the SMU I in Arizona did not impact violence toward staff. *Id.*

36. The Vera Institute of Justice created the Commission on Safety and Abuse in America’s Prisons, chaired by the Honorable John J. Gibbons and former Attorney General Nicholas de B. Katzenbach, which issued recommendations on prison reform, including solitary confinement.

37. GIBBONS & KATZENBACH, *supra* note 3, at 14.

38. 597 F. Supp. 1388, 1403 (N.D. Cal. 1984), *aff’d*, 801 F.2d 1080 (9th Cir. 1986).

39. ISAACS & LOWEN, *supra* note 26, at 35.

40. Haney, *supra* note 12, at 129.

41. Bauer, *supra* note 2.

42. *Id.* (citing *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. On the Constitution, Civil Rights & Human Rights of the S. Judiciary Comm.*, 112th Cong. (2012) (statement of Christopher B. Epps, Comm’r of Corrections for the State of Mississippi), available at <http://www.motherjones.com/documents/452652-epps-testimony#document/p3/a76665>). Dr. James Austin, a classification expert, had concluded that almost 80 percent of the prisoners held in Unit 32 at Parchman should be transferred from solitary confinement in administrative segregation into the general prison population. Terry A. Kupers et al., *Beyond Supermax Administrative Segregation*, 36 CRIM. JUST. & BEHAV. 1037, 1040 (2009).

43. See Kupers, et al., *supra* note 42, at 1042–43 (discussing the process by which these prisoners were released from solitary confinement into the step-down mental health program and then into general population after three to six months).

44. Terry A. Kupers, *Treating Those Excluded from the SHU*, 12 CORRECTIONAL MENTAL HEALTH REP. 49, 50 (2010).

45. Fathi, *supra* note 11, at 185.

prison every year,⁴⁶ and approximately two-thirds of those released are rearrested within three years.⁴⁷ While there are multiple theories for why solitary confinement would increase or decrease recidivism, there are few quantitative studies on solitary confinement and recidivism, in part because some states do not release data on recidivism rates of prisoners held in solitary confinement.⁴⁸ Based on factors discussed below, however, spending time in solitary confinement may actually increase an individual's risk of recidivism.

A. Recidivism for General Population Prisoners and Access to Rehabilitation

Education and work programming, maintenance of family ties during incarceration, and assistance transitioning into society post-release are all factors known to decrease recidivism.

States that have reduced their recidivism rates have often done so by implementing programs that help prisoners transition from incarceration to release. For example, Oregon dropped its recidivism rate by implementing “detailed transition planning” for prisoners in the six months prior to their release.⁴⁹ Between 1999 and 2004, the recidivism rate dropped almost 32 percent. Oregon’s recidivism rate—22.8 percent—was the lowest of the forty-one states that the Pew Center studied.⁵⁰

In addition to transition planning, educational and vocational programs also reduce recidivism. Studies have shown that “adult academic and vocational correctional education programs lead to fewer disciplinary violations during incarceration, reductions in recidivism, increases in employment opportunities, and to increases in participation in education upon release.”⁵¹ Additionally, family visitation decreases the risk that prisoners will reoffend.⁵² In sum, minimizing restrictions during incarceration increases prisoners’ chances at successful reentry.⁵³

In contrast, prisoners in solitary confinement have no access to the programming that reduces recidivism. They have “little to no access” to work, substance abuse classes, vocational training, and education.⁵⁴ Solitary confinement prisoners in Arizona’s Special Management Units, for example, can only view education or rehabilitative programming if they purchase a television, which many prisoners cannot afford to do.⁵⁵ They also have few opportunities “to learn how to manage interpersonal conflict or to develop reentry plans, which can be critical to successful transition back into society.”⁵⁶

Research on recidivism has shown that rehabilitative and transition programming, as well as less punitive and restrictive conditions, can help reduce recidivism. Solitary confinement is clearly incompatible with the factors shown above that reduce recidivism.

46. E. ANN CARSON & WILLIAM J. SABOL, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 1 (2012). 688,384 state and federal prisoners were released in 2011. *Id.*

47. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), available at <http://bjs.gov/content/pub/pdf/rpr94.pdf>. Of almost 300,000 prisoners released in fifteen states in 1994, 67.5% were rearrested within three years. *Id.*

48. See, e.g., ISAACS & LOWEN, *supra* note 26, at 6 (“[N]one of the three [Arizona] institutions studied in this report could provide recidivism data for prisoners released from supermax units.”).

49. PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 20 (2006), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolvering_Door_America_Prisoners%20.pdf.

50. *Id.*

51. Gerald Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 361, 402–03 (1999) (quoting J. Gerber & E.J. Fritsch, *The Effects of Academic and Vocational Program Participation on Inmate Misconduct and Reincarceration*, in SAM HOUSTON STATE UNIVERSITY, PRISON EDUCATION RESEARCH PROJECT: FINAL REPORT 11 (1994)).

52. Mears & Bales, *supra* note 9, at 1138.

53. See ISAACS & LOWEN, *supra* note 26, at 60.

54. *Id.* at 13.

55. *Id.* at 33.

56. Mears & Bales, *supra* note 9, at 1138 (citations omitted).

B. Explanations for Why Solitary Confinement May Affect Recidivism

In addition to the negative effects of solitary confinement on mental health and the lack of rehabilitative programming described above, solitary confinement may increase recidivism by weakening prisoners' social bonds and causing prisoners to become enraged.

One explanation for why solitary confinement may increase recidivism is the "rage hypothesis," which posits that prisoners become so angry and frustrated by their incarceration in solitary confinement that they gain an "active desire, or a heightened readiness, to exact revenge on society."⁵⁷ Similarly, many prisoners believe that they were placed in solitary confinement unfairly and that they were treated in solitary confinement in an "extreme, unfair, and demeaning way."⁵⁸ "This sense of mistreatment and procedural injustice" could result in higher rates of recidivism.⁵⁹

Being confined without human contact can "reduce social bonds to others and induce strain and possibly embitterment and rage. It also may undermine inmates' beliefs in conventional moral codes and impede efforts to prepare inmates for reentry."⁶⁰ Prisoners held in solitary confinement, particularly if they are released directly into communities, "might be too disoriented, jumpy, or hostile to cope with the challenges of society."⁶¹

C. Quantitative Studies of Solitary Confinement and Recidivism

The notion that solitary confinement increases recidivism is not merely theoretical. Two studies that matched prisoners held in solitary confinement with prisoners held in the general population found that solitary confinement increased recidivism.⁶² Daniel Mears and William Bales studied prisoners released from Florida prisons between July 1996 and June 2001 who had been imprisoned for at least one year.⁶³ The authors compared recidivism rates by matching the 1,247 prisoners who were incarcerated in solitary confinement⁶⁴ with prisoners who had been in the general prison population based on "past offending record, current offense, and behavior while incarcerated."⁶⁵

The study found that 24.2 percent of the prisoners held in solitary confinement were reconvicted of a violent crime compared to 20.5 percent of prisoners held in general population⁶⁶ and concluded that solitary confinement "is associated with an increased risk of violent recidivism."⁶⁷ Mears and Bales posited that defiance theory may explain this outcome, because the increase in recidivism did not depend on how long or how recently the offender had been in solitary confinement.⁶⁸ According to defiance theory, placing prisoners in solitary confinement undermines their belief in the legitimacy of the prison system, because they feel mistreated and that their placement is unfair.⁶⁹ Mears and Bales noted that, although solitary confinement is "arguably the most severe sanction" in prisons, it does not in fact deter,

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1153.

61. Lovell et al., *supra* note 9, at 639.

62. See Mears & Bales, *supra* note 9, at 1149–51; Lovell et al., *supra* note 9, at 649–50. A third study found that solitary confinement correlated with an increased rate of recidivism; however, this study did not pair the prisoners held in solitary confinement with prisoners held in the general population based on likelihood of recidivism. MAUREEN L. O'KEEFE, ANALYSIS OF COLORADO'S ADMINISTRATIVE SEGREGATION iii, 25 (2005), available at <http://cospl.coalliance.org/fedora/repository/co:3048>.

63. Mears & Bales, *supra* note 9, at 1141.

64. Mears and Bales defined these prisoners as prisoners who had been in solitary for at least ninety-one days. *Id.* at 1144.

65. *Id.* The study defined recidivism as a new felony conviction resulting in a sentence in a local jail, state prison, or community supervision during the thirty-six months after the prisoners were released. *Id.* at 1142.

66. *Id.* at 1150–51. However, the study found that the amount of time prisoners spent in solitary confinement and how recently the prisoners were held in solitary confinement did not impact recidivism. *Id.* at 1151–52.

67. *Id.* at 1151.

68. *Id.* at 1156.

69. *Id.*

and may instead increase, violent recidivism.⁷⁰ They inferred that solitary confinement “prevents inmates from sustaining or creating a social bond” and causes the “removal of positive stimuli, imposition of negative stimuli, and introduction of barriers to achieving goals;” its use therefore may increase violent offending.⁷¹

Similarly, a study from Washington State found that prisoners released directly from solitary confinement had a higher rate of recidivism than prisoners who had been released from the general population. Professor Lovell studied 7,248 men released from prison in Washington State and compared prisoners released from solitary confinement with those who were not held in solitary confinement.⁷² The study examined new felonies committed within three years of release and found that prisoners who were held in solitary confinement up until the point they were released from prison had an increased rate of recidivism compared to those who were not.⁷³ These prisoners “committed new felonies sooner and at higher rates” than similar prisoners who had not been held in solitary confinement and prisoners who were not released directly from solitary confinement.⁷⁴ Similarly to Mears and Bales, Lovell paired the prisoners based on their criminal histories.⁷⁵ Therefore, the different rates of recidivism were caused by conditions in solitary confinement and not by characteristics of the prisoners.⁷⁶

These studies demonstrate that solitary confinement does not help prisoners “develop[] effective, nonviolent strategies to achieve goals or to manage interpersonal conflicts.”⁷⁷ Rather, solitary confinement may cause prisoners to become more dangerous because of the mental health consequences, the lack of permitted activities, and the dehumanizing treatment by prison guards.⁷⁸ Solitary confinement may also increase *violent* recidivism, particularly for prisoners released directly from solitary confinement. Solitary confinement certainly does not decrease recidivism and may in fact increase the risk of reoffending. The harmful mental health effects of solitary confinement and its negative impact on perceived institutional legitimacy provide convincing explanations for these findings.

D. Models for Reform

States house prisoners in solitary confinement at different rates and for different reasons and amounts of time. States that have successfully reduced their use of solitary confinement serve as models for how states with large numbers of prisoners in solitary confinement can similarly reduce their reliance on the tactic. The percentage of prisoners in solitary confinement ranges by state from less than 1 percent to 12 percent.⁷⁹ California houses at least 11,730 prisoners in “some form of isolation,” and at least 3,808 California prisoners are in isolation for an indeterminate amount of time.⁸⁰ In Texas, 4,748 prisoners are held in indefinite solitary confinement because they have been validated as gang affiliates. Some of these prisoners have been held in solitary confinement for over twenty years.⁸¹ In contrast, Minnesota holds prisoners in solitary confinement for an average of only twenty-nine days.⁸²

Furthermore, multiple states have removed prisoners with mental illness from solitary confinement

70. *Id.* at 1154.

71. *Id.* at 1155.

72. Lovell et al., *supra* note 9, at 638, 649. Solitary confinement prisoners had been in solitary confinement within four years of their release and had spent either a minimum of twelve weeks in solitary confinement continuously or at least 40 percent of their sentence in solitary confinement. *Id.* at 638. Non-solitary confinement prisoners had spent no more than thirty days in solitary confinement. *Id.*

73. *Id.* at 638, 649–50.

74. *Id.*

75. *Id.* at 642.

76. Mears & Bales, *supra* note 9, at 1144.

77. *Id.* at 1155.

78. *See* Toch, *supra* note 8, at 378, 382.

79. Mears & Bales, *supra* note 9, at 1140.

80. Bauer, *supra* note 2.

81. *Id.*

82. *Id.*

following class action litigation and settlements.⁸³ As a result, some states have created intensive mental health treatment programs for these prisoners.⁸⁴ New York and Mississippi, for example, have created “step-down mental health units,” which are intensive treatment programs for those mentally ill prisoners who have been excluded from solitary confinement units.⁸⁵ These examples show that states can successfully limit the use of solitary confinement, particularly for the mentally ill.

Some prisons have had great success implementing more open and social programs for housing prisoners. At Minnesota’s Oak Park Heights maximum-security prison, prisoners have human contact, natural light and sensory stimulation, and they are allowed to exercise; few people are locked in their cells during the day.⁸⁶ James Bruton, a former warden of the prison, explained: “[H]alf of the people that you work with every day have killed somebody and 95 percent have hurt somebody, you better find a way every day for them to get up in the morning and look forward to something positive or you’ve got big trouble.”⁸⁷ This prison has succeeded in treating prisoners humanely while maintaining prison safety. As a result, there has not been a homicide in the prison in its twenty-three years of operation.⁸⁸

V. REFORM

As shown above, some states have implemented reforms that have decreased the amount of time prisoners spend in solitary confinement and removed mentally ill prisoners from solitary confinement. The reforms implemented in individual states provide a blueprint for reforms that can be implemented across the United States through a federal statute to decrease the number of prisoners placed in solitary confinement, reduce the amount of time prisoners spend in solitary confinement, and end the use of sensory deprivation. These reforms will greatly limit the number of prisoners subjected to solitary confinement and counteract its harmful effects, including mental health deterioration. Prisoners will have greater access to rehabilitative programming and will have less likelihood of recidivism upon reentry into communities.

A. The Feasibility of a Federal Statute

Congress should pass a federal statute incorporating the findings of this testimony, informed by the Vera Commission’s study⁸⁹ and ABA Standards,⁹⁰ as well as by practices in Mississippi, Minnesota, and Maine.⁹¹ This reform should be enacted through legislation because it can result in the greatest number of specific changes to the way solitary confinement is currently used throughout the United States. The statute should use the Prison Rape Elimination Act (PREA) as a model for enforcement. PREA requires states to conform with its guidelines for reducing rape or lose 5 percent of any Department of Justice grant funds that they receive.⁹²

Prison litigation is difficult and, as a result, is an unlikely avenue for securing meaningful reform. While litigation contributed to closing the Tamms supermax and helped catalyze reforms in Mississippi, federal courts have generally deferred to prison officials’ judgments about the use of solitary

83. Presley v. Epps, 4:05-cv-148-JAD (N.D. Miss. 2005 & 2007); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995); Jones ‘El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

84. See Kupers, *supra* note 44, at 149–50; see, e.g., Disability Advocates, Inc. v. N.Y. State Office of Mental Health, 02 civ.4002-GEL (S.D.N.Y. 2006) (settlement).

85. Kupers, *supra* note 44, at 50.

86. GIBBONS & KATZENBACH, *supra* note 3, at 60.

87. *Id.* (internal quotation omitted).

88. *Id.* at 61.

89. *Id.* at 52–61.

90. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (2011).

91. See AM. CIVIL LIBERTIES UNION, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE (2013).

92. See 42 U.S.C. § 15607(c) (2006).

confinement, and the Prison Litigation Reform Act (PLRA) restricts the impact of judicial decisions on prison conditions more generally. Under the PLRA, a prisoner must exhaust all administrative remedies prior to suing prison officials, and the prisoner cannot recover for mental or emotional harm unless the prisoner has also been physically harmed.⁹³ The financial and public safety costs of solitary confinement provide strong policy grounds for a legislative remedy.

B. Recommendations

Reform efforts should reduce the duration of time a prisoner may be held in solitary confinement and limit the types of prisoners that can be placed in such conditions. Furthermore, solitary confinement should only be used to protect prisoners and not to punish prisoners for breaking rules. Even if prisoners need to be physically separated from others, sensory deprivation is always unnecessary. Prisoners may only need to be separated from specific people, rather than from the entire population. Indeed, prisoners in protective custody often do not need to be housed in solitary confinement. Instead, these prisoners should be placed in housing at “safe distances” from specific prisoners or groups of prisoners.⁹⁴

Prisoners should not be placed in long-term solitary confinement as punishment. The Vera Commission cites “maintaining safety” as the only permissible goal of solitary confinement.⁹⁵ A prisoner should not be put in disciplinary segregation if the violation did not pose a safety threat; instead, prisons can address those infractions by restricting certain privileges.⁹⁶ Kupers recommends that prisons should “emphasize rewards over punishments,” because the “long-term static conditions” of solitary confinement are ineffective at addressing violent behavior.⁹⁷ Instead, prisoners should be incentivized to reach “attainable goals” with increased freedom and privileges, because “[h]aving no way to attain more freedom . . . lead[s] to despair and desperate acts.”⁹⁸

Even when prisoners must be physically separated from other prisoners in order to ensure prison safety, this separation does not require the “social and sensory isolation” that is far too common in solitary confinement.⁹⁹ Sensory deprivation is solely punitive; it does not have any health or safety justification.¹⁰⁰ Prisoners should be provided stimulation including books, television, radio, and communication and visits with family and friends.¹⁰¹ The Vera Commission recommended that prisoners in solitary confinement be provided “opportunities to fully engage in treatment, work, study, and other productive activities, and to feel part of a community.”¹⁰² These recommendations counteract the sensory deprivation that researchers such as Haney have found to be harmful.

Solitary confinement should only be used as a last resort to prevent prisoners from acting violently.¹⁰³ In these situations, solitary confinement should be used for less than twenty-four hours and only in “extreme circumstances as a therapeutic intervention to stabilize someone who is completely out of control and to prevent harm to self or others.”¹⁰⁴ Additionally, trained mental health professionals should be involved throughout the process,¹⁰⁵ and prisoners should never be released directly from solitary confinement into communities. Instead, they should undergo a “transitional process” where the prisoners can “gradually increas[e]” their interactions with prisoners and guards in order to “become accustomed to

93. 42 U.S.C. § 1997e(e) (2006).

94. GIBBONS & KATZENBACH, *supra* note 3, at 14.

95. *Id.* at 53.

96. *See id.*

97. Kupers, *supra* note 44, at 59.

98. *Id.* at 59–60.

99. Margo Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, 25 CRIM. JUST. 14, 24 (2010).

100. *Id.*

101. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 132 (2008).

102. GIBBONS & KATZENBACH, *supra* note 3, at 53.

103. *See id.*

104. *Id.* at 58.

105. *Id.* at 59.

living with others in a less controlled environment.”¹⁰⁶

C. Provisions of a Federal Statute

I propose that the following text be included in a federal statute to limit the use of solitary confinement.

- Solitary confinement is defined as housing a prisoner in a single cell for twenty-three hours per day, without the ability to eat, exercise, or otherwise interact with other prisoners.
- Solitary confinement may only be used in prisons under the following conditions:
 - Violent prisoners may be placed in solitary confinement for up to twenty-four hours under medical supervision as a therapeutic intervention.
 - Prisoners who have seriously injured other prisoners or prison guards may be placed in solitary confinement but must receive periodic reviews every thirty days, as well as weekly mental health assessments.
- Prisoners may not be housed in solitary confinement as a punishment for non-violent infractions.
- Prisoners may not be housed in solitary confinement for protective custody.
- Prisoners in solitary confinement must receive access to mental health care, mental stimulation, rehabilitative programming, and family visitation and phone calls.
- Prisoners who are mentally ill or under the age of eighteen may not be housed in solitary confinement.
- Prisoners must receive transition programming when they are released from solitary confinement into the general prison population and when they are released from prison.
- Prison staff must be trained to recognize symptoms of mental illness and to use alternative methods of addressing prisoner behavior other than solitary confinement.

CONCLUSION

Solitary confinement, like all prison policies, should be designed to maximize public safety and not solely to punish prisoners. Studies have shown that solitary confinement results in mental illness and appears to increase recidivism. Therefore, prisons need to drastically reduce their populations in solitary confinement and the amount of time they hold prisoners in solitary confinement. Indeed, the most oppressive feature of solitary confinement—sensory deprivation—is unnecessary. Studies of prisons that have used solitary confinement less frequently show that this action actually increased public safety.

The statutory reforms that I propose will decrease the harmful effects that solitary confinement has on recidivism and public safety by greatly decreasing the number of prisoners housed in these conditions. Furthermore, the reforms will mitigate the harms such confinement causes to prisoners by providing those in solitary confinement with mental health treatment and sensory stimulation. Solitary confinement is inhumane and unnecessary, and for the common sense reason that doing so would increase public safety, Congress should pass legislation that limits the use of solitary confinement.

106. *Id.* at 57; AM. BAR ASS’N, *supra* note 90, at 43 (“[Prisoners] should be placed in a less restrictive setting for the final months of confinement.”).