

NATIONAL LAWYERS GUILD

“...in the service of the people, to the end that human rights shall be regarded as more sacred than property interests.” - Preamble to the NLG Constitution

Written Statement of the National Lawyers Guild
Before the United States Senate Judiciary Subcommittee on
the Constitution, Civil Rights, and Human Rights

Hearing on

REASSESSING SOLITARY CONFINEMENT II:
THE HUMAN RIGHTS, FISCAL, AND PUBLIC SAFETY CONSEQUENCES

Tuesday, February 25, 2014

at 2:30 p.m.

Dear Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee:

The National Lawyers Guild thanks you for once again holding a hearing on the human rights, fiscal, and public safety consequences of solitary confinement.

The National Lawyers Guild (NLG) was founded in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for the protection of rights granted by the United States Constitution and to defend fundamental human rights. Since then, the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles. As one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, its members helped to draft the Universal Declaration of Human Rights.

The NLG recognizes that incarceration in the United States has reached epidemic proportions: The U.S. has the highest incarceration rate in the world, with less than 5% of the world's population and more than 25% of the world's prisoners.¹ Even more disturbing is that our criminal justice system disproportionately impacts already vulnerable and marginalized populations including African-Americans and other persons of color, LGBTI persons, immigrants, the poor, and persons with disabilities. Vulnerable groups also disproportionately suffer the torture of solitary confinement, particularly people with mentally illness.

As an organization, the NLG is committed to drawing attention to the systemic abuse of solitary confinement as a routine form of punishment, and the greater system of discriminatory over-incarceration. The NLG has been intimately involved in establishing fair guidelines for people in prison internationally² and has worked to defend the rights of incarcerated persons in the U.S.³, often alongside jailhouse lawyers and hunger strikers within U.S. prisons.⁴

Along with medical experts other leading human rights groups, the NLG views use of solitary confinement in U.S. prisons, and around the world, as cruel, inhumane, and counterproductive. This statement outlines just a few of the ways in which the widespread use of solitary confinement undermines the most fundamental principles of our democracy.

¹ Adam Liptak, *U.S. prison population dwarfs that of other nations* THE NEW YORK TIMES (April 28, 2012), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all>

² For nearly two decades, the NLG has joined with the World Organization Against Torture to express concern about such conditions that violate guidelines for treatment set in the International Covenant on Civil and Political Rights as well as the UN Standard Minimum Rules for the Treatment of Prisoners.

³ The NLG's Prison Law Project (PLP) receives hundreds of letters weekly from incarcerated people detailing inhumane conditions such as lack of health care and abuse by correctional officers. With the Center for Constitutional Rights (CCR), we publish the *Jailhouse Lawyer's Handbook*, a resource for people filing Section 1983 claims in federal court alleging violations of their constitutional rights in prison. With CCR, we send the *Handbook* to 700-800 inmates per month, in response to those who request it. This remains one of the few sources of free legal advice available to people in prison around the country. The letters we receive tell all-too-familiar narratives of the carceral state.

⁴ Recently, the NLG has called for support of hunger strikers at Pelican Bay State Prison (Crescent City, California), Menard Correctional Center (Menard, Illinois), and Guantanamo detention camp.

A. Solitary Confinement is Torture and Inconsistent with Constitutional and Democratic Principles

“Solitary confinement” is an umbrella term that refers to a range of practices in prisons where people are isolated in closed cells for 22-24 hours a day, with limited human contact, for anywhere from a few days to several decades.⁵ It is a practice that exists in some form in almost every jail, state prison, and federal prison in the country. It often includes further privations, such as limited exercise and showers, absence of natural light, and limited or eliminated privileges such as the phone, mail, commissary, education and drug treatment programming, and work duties. It may be imposed for purely punitive reasons or it may be imposed under the guise of necessary segregation or even protection.⁶ Whatever form the practice takes, it is clear that the isolation that accompanies solitary confinement has severe physiological and physical effects, sometimes even leading to death.⁷ Even our own Supreme Court recognized as early as 1890 that isolation has devastating effects on people in prison.⁸

Furthermore, Juan Méndez, UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, declared in August 2011 that even after just 15 days, solitary confinement amounts to torture; furthermore, any time served in isolation exceeding 15 days has serious and often permanent psychological and physical effects.⁹

Solitary confinement practices in our country amount to torture with alarming frequency. Most prisoners’ time in isolation far exceeds Méndez’s 15-day limit.¹⁰ The decision to place a person in isolation is often made arbitrarily, with discretion vested solely in the hands of a single corrections officer acting with impunity.¹¹

In a humane system of criminal justice, there would be a minimal to non-existent role for solitary confinement. Instead, this practice has reached epidemic proportions. As Senator Patrick Leahy stated at the first Judiciary Subcommittee on solitary confinement on June 19, 2012, “Although solitary confinement was developed as a method for handling highly dangerous

⁵ Sal Rodriguez, *Solitary Confinement FAQ*, SOLITARY WATCH, <http://solitarywatch.com/facts/faq/> (last visited (Feb. 22, 2014)).

⁶ Joseph Stromberg, *The Science of Solitary Confinement*, SMITHSONIAN.COM (Feb. 19, 2014), <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793>.

⁷ Kaba, Lewis, Glowa-Kollisch, et.al., *Solitary Confinement and Risk of Self Harm*, AM. J. OF PUB. HEALTH, Vol. 104, No. 3 (March 2014) (finding that in New York City’s jails, over 50% of acts of self-harm occurred among jail inmates in solitary confinement, even though that group constituted only 7% of the jail population).

⁸ *In re Medley*, 134 U.S. 160, 167 (1890) (“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”).

⁹ Press Release, California Jails: “Solitary confinement can amount to cruel punishment, even torture” - UN rights expert, United Nations Office of the High Commissioner for Human Rights (Aug. 23, 2013), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655>. (urging the U.S. to abolish the use of prolonged solitary confinement in the midst of the Pelican Bay hunger strike).

¹⁰ Sal Rodriguez, *Solitary Confinement FAQ*, “How Long Do People Spend in Solitary Confinement?”, SOLITARY WATCH, <http://solitarywatch.com/facts/faq/> (last visited (Feb. 22, 2014)).

¹¹ Alex Friedman, *Solitary Confinement Subject of Unprecedented Congressional Hearing*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/24706_displayArticle.aspx (last visited Feb. 22, 2014).

prisoners, it is increasingly being used with inmates who do not pose a threat to staff or other inmates.”¹²

Solitary confinement is especially damaging to individuals with mental illness. Experts estimate that one third of people in solitary have a mental illness.¹³ The American Psychiatric Association recognizes the danger to people with serious mental illness, and the American Bar Association’s *Standards for Criminal Justice, Treatment of Prisoners* places strict limits on the permissible amount of time in solitary for the mentally ill.¹⁴ Even those who do not enter isolation with a mental illness are apt to develop one because of the trauma solitary confinement inflicts upon the human psyche.

Psychiatrist and expert on solitary confinement Dr. Stuart Grassian, contends that solitary confinement produces a unique disorder. The colloquial term “special housing unit syndrome” or “SHU syndrome” refers to the symptoms experienced by many people who have been held in isolation.¹⁵ Dr. Grassian describes the syndrome as including visual and auditory hallucinations, hypersensitivity to noise and touch, insomnia and paranoia, uncontrollable feelings of rage and fear, distortions of time and perception, and increased risk of suicide.¹⁶ Dr. Grassian notes that

“[T]hese symptoms were very dramatic. Moreover, they appeared to form a discreet syndrome – that is, a constellation of symptoms occurring together and with a characteristic course over time, thus suggestive of a discreet illness. Moreover, *this syndrome was strikingly unique; some of the symptoms described above are found in virtually no other psychiatric illness*” (emphasis added).¹⁷

People in solitary confinement are frequently deprived of all social interaction, situational stimulation, education, vocational improvement, and any opportunities for rehabilitation. Once a prisoner leaves solitary confinement and reenters society, they face what psychiatrist Terry Kupers of the Wright Institute calls “the decimation of life skills” which “destroys one’s capacity to relate socially, to work, to play, to hold a job or enjoy life.”¹⁸ It therefore comes as no surprise

¹² Subcomm. on the Constitution, Civil Rights and Human Rights, *Reassessing Solitary Confinements: The Human Rights, Fiscal, and Public Safety Consequences*, S. JUD. COMM. (Jun. 19, 2012, 10:00 AM), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6517e7d97c06eac4ce9f60b09625ebe8>.

¹³ Joseph Stromberg, *The Science of Solitary Confinement*, SMITHSONIAN.COM (Feb. 19, 2014), <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793>.

¹⁴ American Psychiatric Association, *Position Statement on Segregation of Prisoners with Mental Illness*, (Approved December 2012), available at http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf (last visited Feb. 24, 2014). American Bar Association, *Criminal Justice Standards on the Treatment of Prisoners* (Approved by ABA House of Delegates, Feb. 2010), available at

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html.

¹⁵ *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., <https://afsc.org/resource/solitary-confinement-facts> (last visited Feb. 22, 2014).

¹⁶ Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM.

J. PSYCHIATRY 1450-1454 (1983). Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 9 INTER’L J.L. & PSYCHIATRY 49-65 (1986).

¹⁷ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL. 325, 337 (2006), available at <http://law.wustl.edu/journal/22/p325grassian.pdf> (last visited Feb. 22, 2014).

¹⁸ Dr. Kupers is another psychiatrist whose work documents the deterioration of previously healthy individuals after the torture of solitary. See, e.g. THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES, 213-232 (Bruce Arrigo & Heather Bersot, ed., 2013) (chapter 10 by Dr. Kupers describes the inefficacy of solitary confinement). This quote is from Brandon Keim, *The Horrible Psychology of Solitary Confinement*, WIRED (Jun. 10, 2013, 4:10 PM), <http://www.wired.com/wiredscience/2013/07/solitary-confinement-2/>.

that although only 5-8% of prisoners are housed in long-term solitary confinement in the United States, 50% of all suicides in prison occur there.¹⁹

The United States fails miserably in respecting the basic human rights of the people it incarcerates, while the rest of the industrialized world condemns solitary confinement and the UN declares that it often amounts to torture and should be banned in most cases.²⁰ A nation that proclaims to be a stalwart of democracy, freedom, and justice should not have the highest per capita incarceration rate in the world, let alone more prisoners in solitary confinement than any other democratic nation.²¹

Solitary confinement is torture, in violation of domestic and international law.²²

B. Solitary Confinement's Social and Financial Cost to Society is Unacceptably High

The National Lawyers Guild strongly urges that the issue of solitary confinement involves some moral questions where cost-benefit analyses are inappropriate. In other words, were solitary confinement practices remarkably cheap and effective at ending prisoner-on-prisoner and prisoner-on-guard violence altogether, the practice's violation of human rights and international law would still render its use unacceptable. However, even supporters of solitary confinement practices must recognize that they are extremely costly at every level and fail to reduce the incidence of violence in prison.

Administrators at prisons have acknowledged that over-use of solitary confinement in the state of Mississippi, for example, resulted in an increase in violence in the facilities. Officials found that they could save millions of dollars by reducing the use of solitary confinement while also yielding a 70 percent reduction in violence in the facility.²³

Recidivism rates are also impacted by the use of solitary confinement. Solitary confinement may increase recidivism rates of those persons subjected to it.²⁴ Research in California suggests that recidivism for prisoners subjected to solitary confinement is as much as 20% higher than those held in the general population.²⁵ In Colorado, data suggests that prisoners released directly from

¹⁹ Shawn R. Griffith, *Solitary Confinement in Jails and Prisons*, CRIME MAGAZINE (Aug. 8, 2013) <http://www.crimemagazine.com/solitary-confinement-jails-and-prisons>.

²⁰ *Solitary confinement should be banned in most cases, UN expert says*, UN NEWS CTR., <https://www.un.org/apps/news/story.asp?NewsID=40097> (last visited Feb. 22, 2014).

²¹ Press Release, Sen. Dick Durbin, Durbin Chairs First-Ever Congressional Hearing on Solitary Confinement (June 19, 2012), available at <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=7d4f1128-4d15-4112-aa48-5315cb395142>.

²² Christy Carnegie, et al., *Buried Alive: Solitary Confinement in the US Detention System*, PHYSICIANS FOR HUMAN RIGHTS (April 2013), <http://physiciansforhumanrights.org/library/reports/buried-alive-solitary-confinement-in-the-us-detention-system.html> (last visited Feb. 22, 2014).

²³ N.M. Ctr. on L. & Poverty & ACLU of N.M., *Inside the Box: The Real Costs of Solitary Confinement in New Mexico's Prisons and Jails* (Oct. 2013, at 9), available at http://nmpovertylaw.org/WP-nmclp/wordpress/WP-nmclp/wordpress/wp-content/uploads/2013/10/Solitary_Confinement_Report_FINALsmallpdf.com_.pdf (last visited Feb. 24, 2014).

²⁴ Browne, Angela, et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24:1 FED. SENT'G REP. (Oct. 2011), available at <http://www.vera.org/files/FSR-Editors-Observations-Sentencing-Within-Sentencing-October-2011.pdf> (last visited Feb. 22, 2014).

²⁵ ACLU Nat'l Prison Project, *ACLU Briefing Paper: The Dangerous Use of Solitary Confinement in the United States*, at 8, available at https://www.aclu.org/files/assets/stop_solitary_briefing_paper.pdf (last visited Feb. 22, 2014).

solitary confinement returned to prison within three years, while those who transitioned from solitary to general population had a 6% reduction in their comparative recidivism rate.²⁶

Research conducted on the effects of supermax prisons—super-maximum security prisons designed for primarily solitary confinement—further emphasize this fact. According to criminologist Hans Toch, “Supermax prisons may turn out to be the crucibles and breeding grounds of violent recidivism. ... [Prisoners] may become ‘the worst of the worst’ because they have been dealt with as such.”²⁷ A 2007 study by researchers at the University of Washington found that prisoners released from supermax prisons into their communities committed new crimes sooner than prisoners who had been transferred first into the general prison population before reentering society.²⁸

Evan Ebel, the man accused of shooting to death Tom Clements, former director of the Colorado Department of Corrections, was released directly to the community from solitary confinement. Mr. Ebel served an eight year prison term with much of his time in solitary confinement. In March 2011, Mr. Ebel’s father, a lawyer, testified before a committee of the Colorado Legislature about solitary confinement, saying that during visits, his son “has a high level of paranoia and [is] extremely anxious. . . . He is so agitated that it will take an hour to an hour-and-a-half before we can actually talk,” further noting that this behavior was uncharacteristic of his son prior to his confinement in isolation.²⁹ Solitary confinement could not be said to be the cause of Mr. Clements’ death; however, from all that is known about Mr. Ebel, it played a role.

In the overuse of solitary confinement, people are suffering lifelong damage that they take home with them to their families, friends, and communities. Ninety-five percent of all people in prison are eventually released back into the public, rarely with any form of treatment or therapy that would ease the shock and facilitate the transition of returning to one’s “normal” life.³⁰ This practice not only robs the community of the potential productive contributions of the formerly incarcerated, it introduces a risk to communities that, in most cases, is completely manufactured by the very practice designed as a protective mechanism.

The fiscal irresponsibility of solitary confinement should not go unremarked. The cost of housing people in supermax prisons can average three times the cost of housing them in general population. In general, people in solitary confinement must be escorted by at least two officers whenever they leave their cells. Work usually performed by prisoners must be taken over by paid personnel. As the length of time in solitary increases, in some cases to months and even years, so does the cost per person. Obviously, with an increase in the number of people housed in solitary confinement, so too does the overall cost rise.

²⁶ *Ibid.*

²⁷ Pat Nolan, *Years in Solitary: Is It Justified? Does It Make Us Safer?*, JUSTICE FELLOWSHIP (Sep. 16, 2013), <http://www.justicefellowship.org/content/years-solitary-it-justified-does-it-make-us-safer>.

²⁸ Kirsten Weir, *Alone, in ‘the hole,’* 43:5 AM. PSYCHOL. ASS’N 54 (MAY 2012), *available at* <http://www.apa.org/monitor/2012/05/solitary.aspx> (last visited Feb. 22, 2014).

²⁹ Brad Knickerbocker, *Colorado Shooting Suspect Evan Ebel had a Streak of Cruelty and Anger*, CHRISTIAN SCIENCE MONITOR (Mar. 24, 2013), <http://www.csmonitor.com/USA/2013/0324/Colorado-shooting-suspect-Evan-Ebel-had-a-streak-of-cruelty-and-anger>.

³⁰ Lisa Guenther, *The Living Death of Solitary Confinement*, THE NEW YORK TIMES (Aug. 26, 2012, 5:00 PM), <http://opinionator.blogs.nytimes.com/2012/08/26/the-living-death-of-solitary-confinement/>

Not only is solitary confinement a human rights crisis in this country, it does not work to maintain order in jails and prisons, it exacerbates recidivism, and it increases the costs of incarceration.

C. Alternatives to Solitary Confinement and Other Reforms Must be Implemented

This body and all authorities of the U.S. criminal justice system must reconsider solitary confinement within the framework of mass incarceration. The National Lawyers Guild is gratified that the Senate is taking up the important issue of solitary confinement; however, policymakers should recognize that this issue represents one small segment within the grossly problematic U.S. criminal “justice” system. Solitary confinement magnifies and exacerbates many of the problems of over-incarceration, but these problems will not be eliminated merely by reducing the use of isolation in prisons.

Since the 1970s, the goal of rehabilitation has taken a backseat in our penal system—prison populations have exploded³¹ while programs aimed at rehabilitation and restorative justice were replaced by a relentless emphasis on incarceration and punishment.³² The crisis of solitary confinement arises from many years of misbegotten policy, including the bipartisan “War on Drugs” and other “tough on crime” policies that disproportionately affect poor black communities and other marginalized groups.³³

This crisis is rooted in our nation’s legacy of racial discrimination and oppression. Michelle Alexander is the most recent writer to compare our penal system to the Jim Crow South.³⁴ The nearly limitless discretion afforded to police officers, prosecutors, corrections officers, and parole boards permits bias and other illegitimate considerations to infect their decision-making.³⁵ Additionally, conditions in prisons are worse than ever³⁶, and the strictures of the Prison Litigation Reform Act prevent people in prison from bringing suit in the courts.

Congress should take note that our penal system is creating a burgeoning underclass of incarcerated and formerly-incarcerated people unable to obtain employment or vote, often damaged by mental illness or addiction but lacking meaningful treatment.³⁷ That this predicament is disproportionately suffered by racial minorities, particularly African-Americans but also the poor, LGBTI persons, immigrants, and disabled people, is unacceptable.

³¹ E. Ann Carson & William J. Sabol, Bureau of Statistics, U.S. Dep’t of Justice, NCJ 239808, Prisoners in 2011, at 6 tbl.6 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

³² Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, The New Press (2010).

³³ *Id.* at 63-71; see also, Jamie Fellner, “Race, Drugs, and Law Enforcement in the United States,” 20 *Stan. L. & Pol’y Rev.* 257, 269-70 (2009) (discussing greater black arrest/incarceration rates for drug crimes even though whites commit drug crimes in greater numbers).

³⁴ Alexander, *supra*.

³⁵ See William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, Belknap Press (2011) (discussing how too much discretion for prosecutors has had a negative impact on the criminal justice system); see also, Anthony G. Greenwald & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations,” 94 *Calif. L. Rev.* 945, 966 (2006) (discussing the way unconscious or implicit bias may motivate individuals).

³⁶ See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011) (Supreme Court’s affirmation of order to reduce prison population in California because of inadequate health care).

³⁷ See, e.g., Edward E. Rhine & Anthony C. Thompson, “The Reentry Movement in Corrections: Resiliency, Fragility and Prospects,” 47 *No. 2 Crim. Law. Bulletin Art. 1* (Spring 2011) (Section III(A) catalogues challenges faced by people upon their release from prison.)

Solitary confinement will be an obsolete and wholly unnecessary practice when our government dedicates itself to eliminating racism from the criminal justice system and places more emphasis on rehabilitation, treatment for addiction, safe and effective reentry, and helping with housing and employment.

Congress has at its disposal many tools to control and ultimately eliminate the destructive practice of solitary confinement. As concrete first steps supported by a broad and interdisciplinary group, the NLG calls for the following:

Congressional support for increased federal oversight, monitoring, and transparency in to solitary confinement practices conducted by local and state facilities. The impacts of solitary confinement are in some ways masked due to the lack of data regarding who and for what reasons an individual is placed in solitary confinement. Data collection would help clarify the magnitude of the problem and minimize the extreme overuse of isolation. Further, funding dedicated to the exploration and implementation of alternatives to solitary confinement will allow prison administrators necessary tools for prison management without the unacceptable cost of human integrity and dignity.

Solitary confinement is used rampantly throughout the federal prison system. The Federal Bureau of Prisons (BOP) uses solitary confinement for punishment and in excess of international norms. Congress must require the BOP to reform their use of solitary confinement and put an end to this barbaric practice. Specifically,

- The BOP must change its policies on solitary confinement to conform to standards created by expert organizations, such as those developed by the American Bar Association.
- The BOP must also implement and execute policies that end the use of solitary confinement against vulnerable populations such as juveniles and people with mental illness. “No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing” and no prisoner should be held in solitary for more than one day without a thorough mental health evaluation.³⁸
- The BOP must close supermax facilities and refrain from establishing new ones.

Congress has the duty to ensure that the United States engages with the international community to reform its use of solitary confinement such that is in line with the obligations and expectations of a democratic nation.

Finally, Congress must support administrative rulemaking to minimize the use of solitary confinement in facilities across the country. Directing the Department of Justice to establish

³⁸ American Bar Association, *Criminal Justice Standards on the Treatment of Prisoners* (Approved by ABA House of Delegates, Feb. 2010), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html. See specifically “Standard 23-2.8 Segregated housing and mental health.”

administrative rules that drastically reduce the use of solitary confinement will limit the abuses suffered by those currently in prisons and jails.

The National Lawyers Guild commends the Subcommittee for taking up the important issue of solitary confinement in the United States, and we hope that this will mark the beginning of desperately needed criminal justice reform.