

United States: Turning the Corner on Solitary Confinement?

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The use of solitary confinement increased dramatically in the United States in the 1990s with more than forty states and the federal government operating at least one “supermax” prison by 2006. But recent years have seen a significant mobilization of opinion against solitary confinement, with legal, medical, religious, and other organizations campaigning for its restriction or elimination. Congress and state legislatures have addressed the issue with a particular focus on vulnerable populations like children and persons with mental illness. Most significantly, a number of states have substantially reduced their use of solitary confinement, with many others considering similar action. In this paper, the reasons for these developments are examined and prospects for continued reform explored.

Le recours à l'isolement cellulaire a augmenté de façon significative aux États-Unis dans les années 1990. Ainsi, le gouvernement fédéral et plus de 40 États dirigeaient au moins une prison « supermax » en 2006. Par contre, ces dernières années, l'on a vu une mobilisation d'opinion importante contre l'isolement cellulaire, soutenue entre autres par des organismes juridiques, médicaux et religieux qui font campagne pour son abolition ou la restriction de celui-ci. Le Congrès et les législatures des États ont abordé la question en se concentrant sur les populations vulnérables telles que les enfants et les personnes souffrant de maladies mentales. De façon plus importante, un certain nombre d'États ont réduit de façon significative leur recours à l'isolement cellulaire, et plusieurs autres envisagent une action semblable. Les raisons pour ces changements et des perspectives d'avenir pour la réforme sont explorées.

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The United States is well known as an egregious global outlier in criminal justice policy. It has the largest incarcerated population in the world, with more than 2.2 million people behind bars on any given day.² It also has the world's highest per capita rate of incarceration, a rate five to ten times higher than those in other Western democracies like Canada, the United Kingdom, Germany and France.³

What is less well known is that the United States is also in a class by itself in the realm of solitary confinement. While solitary confinement exists in some form in most nations, in no other democratic state — indeed, in no other state of any description — is it such an integral and normalized part of the criminal justice system. The best estimate, based on statistics from the United States Department of Justice, is that on any given day, more than 80,000 US prisoners are held in solitary confinement or some other form of highly restricted confinement.⁴ The duration of solitary confinement in the United States is often measured not in days or weeks, but in years and even decades. In one single prison in the state of Illinois, Tamms Correctional Center, a 2009 investigation found more than 50 prisoners had been in continuous solitary confinement for more than ten years.⁵

Many of these prisoners are held in segregation units in conventional prisons and jails. But many others are held in so-called “supermax” prisons. These are facilities designed and built expressly to hold prisoners in long-term solitary confinement. They have no dining hall, no gymnasium, no recreation yard, no library and no classroom space. Such facilities would be superfluous in a supermax prison, because prisoners are locked in their cells for all but five or six hours a week.⁶

² See US Bureau of Justice Statistics, *Correctional Populations in the United States, 2011* (NCJ 239972) (Washington, DC: Office of Justice Programs, 2012) at 3. The US Bureau of Justice Statistics (BJS) estimates the combined state and federal prison population at 1,504,150 and the jail population at 735,601, for a total of 2,239,751. These numbers do not include the population confined in immigration detention centers.

³ See International Centre for Prison Studies, *World Prison Brief*, online: International Centre for Prison Studies <www.prisonstudies.org> (last visited March 4, 2014). The United States incarcerates 707 per 100,000 people, significantly higher than the per capita incarceration rates in Canada (118 per 100,000), the UK (149 per 100,000), Germany (77 per 100,000), and France (100 per 100,000).

⁴ *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights*, 112th Cong (Washington, DC: Homeland Security Digital Library, 2012) at 6 (Sen Dick Durbin), online: United States Senate Committee on the Judiciary, Hearings & Meetings <www.judiciary.senate.gov/meetings/reassessing-solitary-confinement-the-human-rights-fiscal-and-public-safety-consequences> [*Reassessing Solitary Confinement Hearing*]. See also Angela Browne, Alissa Cambier & Suzanne Agha, “Prisons within Prisons: The Use of Segregation in the United States” (2011) 24 *Fed Sentencing Rep* 46 at 46.

⁵ George Pawlawczyk & Beth Hundsdoerfer, “Trapped in Tamms: Supermax Prison Confines Inmates to Cells 23 Hours a Day” *Belleville News-Democrat* (5 August 2009), online: <www.bnd.com>.

⁶ This paper uses the definition of “solitary confinement” provided by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day.” See *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011) at 8-9 [*Interim report of the Special*].

In a report prepared for the US National Institute of Corrections, Chase Riveland, the former director of the Washington and Colorado state prison systems, describes supermax confinement as “locking an inmate in an isolated cell for an average of twenty-three hours per day with limited human interaction, little constructive activity, and an environment that assures maximum control over the individual.”⁷ A federal judge described Wisconsin’s supermax prison this way:

Inmates on Level One at the State of Wisconsin’s Supermax Correctional Institution in Boscobel, Wisconsin spend all but four hours a week confined to a cell. The “boxcar” style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate’s movements. Visits other than with lawyers are conducted through video screens.⁸

In the mid to late 1990s, supermax prisons were what can only be described as a raging fad in the United States. This was a time of public anxiety, even hysteria, about crime, and about a coming wave of so-called “superpredators” that never actually materialized. Suddenly every state had to have a supermax—some states, like Virginia, built more than one. Riveland concluded that supermax prisons “have become political symbols of how ‘tough’ a jurisdiction has become”, adding that “[i]n some places, the motivation to build a supermax has come not from corrections officials, but from the legislature and—in at least one instance—the governor.”⁹ By 2006, more than 40 states, as well as the federal government, had at least one supermax prison, collectively holding about 25,000 prisoners.¹⁰

Rapporteur]. US prison officials dislike the term and typically deny that solitary confinement exists in the United States. See e.g. Gary Grado, “Inmate Advocates Question Claim that Arizona Prisons have no Solitary Confinement”, *Arizona Capital Times* (12 June 2013), online: <www.azcapitoltimes.com>. Accordingly, US prisons employ euphemisms like “segregated housing”, “special management unit (SMU)”, and “security housing unit (SHU)”.

⁷ US National Institute of Corrections, *Supermax Prisons: Overview and General Considerations* (Washington, DC: US Department of Justice, 1999) at 2.

⁸ *Jones’El v Berge*, 164 F Supp (2d) 1096 at 1098 (WD Wis 2001) [*Jones’El*].

⁹ National Institute of Corrections, *supra* note 7 at 5.

¹⁰ Daniel Mears & Jamie Watson, “Toward a Fair and Balanced Assessment of Supermax Prisons” (2006) 23:2 *Justice Quarterly* 232. See also Daniel Mears & William Bales, “Supermax Incarceration and Recidivism” (2009) 47:4 *Criminol* 1131 at 1134. The United States is a federal system in which the states have primary responsibility for criminal justice matters. The federal government operates a prison system, as do each of the fifty states, and there are hundreds of local jails throughout the United States. Jails are primarily pre-trial facilities; they also hold convicted prisoners serving short sentences, in most states a year or less. Although the federal prison system is the nation’s largest, with about 215,000 prisoners, approximately 90% of the US incarcerated population is held in state and local facilities, both state prisons and local jails. See Federal Bureau of Prisons, *About Us: Population Statistics*, Federal Bureau of Prisons, online: Federal

The damaging effects of solitary confinement have long been well known. In 1890, the United States Supreme Court described the effects of solitary confinement as it had been practiced in the early days of the republic:

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.¹¹

In a 2005 *amicus curiae* brief filed in the United States Supreme Court, a group of psychologists and psychiatrists surveyed the literature and concluded that “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”¹²

The harsh conditions in supermax prisons predictably led to lawsuits alleging that they violated the Eighth Amendment to the United States Constitution, which prohibits “cruel and unusual punishments”. While these lawsuits achieved important victories, in most cases their primary effect was to alleviate some of the most oppressive conditions, rather than to significantly reduce the number of prisoners held in solitary confinement.¹³

However, the last few years have witnessed a seismic shift in correctional practice around solitary confinement in the United States. In many cases, reforms are being initiated by corrections professionals themselves, rather than being ordered by a court or a legislature.

Mississippi is an unlikely candidate for trailblazing reformer, but it was there that one of the earliest and most dramatic reforms took place. The ACLU brought and won a lawsuit challenging horrific conditions on Mississippi’s death row, which constituted a portion of a 1,000 bed supermax unit known as Unit 32.¹⁴ Following that lawsuit, the ACLU and the Mississippi Department of Corrections (MDC) began negotiations that ultimately led MDC to dramatically reduce Unit 32’s population, and in 2010 it closed the unit permanently. In the process, Mississippi substantially reduced the number of

Bureau of Prisons <www.bop.gov>.

¹¹ *In re Medley*, 134 US 160 at 168 (1890).

¹² *Wilkinson v Austin*, 2005 WL 539137, No 04-495 (3 March 2005) (Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent) at 4.

¹³ The exception involves prisoners with serious mental illness. A number of courts have ruled that the extreme social isolation and sensory deprivation of supermax confinement is so predictably damaging to this subclass of prisoners that they must be categorically excluded from such facilities. See *Jones’El*, *supra* note 8 (ordering the Department of Corrections to remove seriously mentally ill prisoners from supermax confinement); *Madrid v Gomez*, 889 F Supp 1146 (ND Cal 1995) (holding that supermax confinement of the seriously mentally ill is unconstitutional). See David Fathi, “The Common Law of Supermax Litigation” (2004) 24 Pace L Rev 675 (for a summary of lawsuits challenging supermax confinement).

¹⁴ *Gates v Cook*, 376 F (3d) 323 (5th Cir 2004).

prisoners in solitary confinement in the state.¹⁵

While the closure of Unit 32 clearly had its genesis in litigation, no court order required prison officials to close the unit. Rather, according to MDC Commissioner Christopher Epps, “utilizing large administrative segregation units in the Mississippi Department of Corrections was no longer effective. We needed a different approach.”¹⁶ Commissioner Epps continued:

I often say, “You have to decide who you are afraid of and who you are mad at” when making decisions on the use of administrative segregation in prison... Corrections professionals and the criminal justice system must be careful not to use administrative segregation in prison to manage those who we are mad at because this is an expensive option that takes away resources from important government areas such as education, human services, healthcare, etc., which are the services most needed to make a better society.¹⁷

Maine provides another example of significant reform. Prompted by political pressures and a coordinated advocacy effort, that state’s Department of Corrections sought to reduce its reliance on solitary confinement.¹⁸ Prior to these efforts, Maine’s isolation practices were among the harshest in the country. Prisoners in Maine’s Special Management Unit (SMU) were held in solitary confinement for 23 hours per day during the week and for a full 24 hours per day on weekends. Other than fleeting contact with corrections staff, they had little human interaction during periods of isolation that could stretch on for years.¹⁹ While in solitary, Maine’s prisoners had no access to television or radios and were required to wear shackles every time they left their cells. Prisoners were routinely placed in isolation as a result of disciplinary charges, during investigations of violent incidents, and even as a result of bed shortages in the general population.²⁰

Maine rejected this approach in 2010. Radically reversing course from its existing policy, the Maine Department of Corrections (MDOC) instituted a series of new measures to make isolation a last resort rather than a default

¹⁵ See John Buntin, “Mississippi’s Corrections Reforms: How America’s Reddest State – and Most Notorious Prison – Became a Model of Corrections Reform” *Governing Magazine* (August 2010), online: [Governing the States and Localities <www.governing.com>](http://www.governing.com) (describing how MDOC reduced the population of Unit 32 from 1000 to 120 in three years).

¹⁶ *Reassessing Solitary Confinement Hearing*, *supra* note 4 at 20 (Commissioner Christopher Epps).

¹⁷ *Ibid* at 21. Unfortunately the problematic use of solitary confinement has not been eliminated in Mississippi. A May 2013 lawsuit brought by the ACLU and the Southern Poverty Law Center challenges (among other conditions) excessive and inappropriate solitary confinement at East Mississippi Correctional Facility, a private, for-profit prison operated by contract with MDOC. See American Civil Liberties Union, Media Release, “Civil Rights Groups File Lawsuit Alleging Massive Human Rights Violations at Mississippi Prison” (30 May 2013), online: www.aclu.org.

¹⁸ See American Civil Liberties Union of Maine, Media Release, “Change is Possible: A Case Study of Solitary Confinement Reform in Maine” (March 2013), online: www.aclumaine.org (for a fuller description of Maine’s policies both before and after the 2010 reforms) [ACLU, “Change is Possible”].

¹⁹ *Ibid* at 10.

²⁰ *Ibid*.

practice. Today, when prisoners are involved in incidents that would formerly have resulted in solitary confinement, Maine corrections officials first turn to a range of lesser punishments, such as restricting visitation and work opportunities.²¹ Corrections officers now receive training on how to de-escalate potential altercations, and prisoners who do end up in solitary confinement are permitted to participate in group recreation, counseling sessions, and step-down programs that aim to return them to general population as quickly as possible.²² MDOC also encourages its corrections officers to document and review decisions to place prisoners in solitary confinement and to keep prisoners' beds open when they are placed in temporary isolation.²³ The results of these new policies were both rapid and dramatic: in less than three years, Maine reduced its solitary confinement population by fifty percent.²⁴

Other states have followed suit. Colorado has cut its solitary confinement population by one-third, enabling it to close a 316-bed supermax unit in February 2013.²⁵ At the end of 2012, Illinois permanently closed Tamms Correctional Center, the state's only supermax prison.²⁶ Other states have made reductions that are less dramatic, but still very significant.

There has also been increased attention to solitary confinement in the Federal Bureau of Prisons, the nation's largest prison system. June 2012 saw the first Congressional hearing on solitary confinement before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, chaired by Senator Dick Durbin (D-IL).²⁷ The hearing focused largely, though not exclusively, on solitary confinement in the Bureau of Prisons, which alone holds about 15,000 people in solitary confinement.²⁸

In February 2013, Durbin announced that the Bureau had agreed to an independent and comprehensive review of its use of solitary.²⁹ In May 2013

²¹ *Ibid* at 15.

²² *Ibid* at 13-14.

²³ *Ibid* at 15 and 25.

²⁴ *Ibid* at 13 (In February 2010, there were 91 prisoners being held in the two pods that made up Maine's SMU. By August 2012, there were 46 prisoners in those two pods).

²⁵ Kirk Mitchell, "Colorado Prisons Turn Away from Heavy Use of Solitary Confinement" *The Denver Post* (4 June 2014), online: <www.denverpost.com>. See also Denise Maes, "Victory in Colorado: Closing Colorado Solitary Confinement Unit Good for Budget and Public Safety" *American Civil Liberties Union* (21 March 2012), online: <aclu-co.org>.

²⁶ *Correctional News*, "Illinois' Only Supermax Facility Set to Close" *Correctional News* (27 June 2012), online: *Correctional News* <www.correctionalnews.com>. See also Illinois Department of Corrections, *Tamms Correctional Center*, online: <www2.illinois.gov/idoc>.

²⁷ *Reassessing Solitary Confinement Hearing*, *supra* note 4.

²⁸ During the hearing, Charles E Samuels, Jr, Director of the Federal Bureau of Prisons, stated that seven percent of the total federal prison population is held in solitary confinement. With a current federal prison population of approximately 218,000, this means that approximately 15,260 prisoners are being held in isolation in federal facilities. See *Reassessing Solitary Confinement Hearing*, *supra* note 4 at 10 (verbal exchange between Charles E Samuels, Jr and Senator Al Franken at 56:45), online: <www.judiciary.senate.gov/hearings/hearing.cfm?id=6517e7d97c06eac4ce9f60b09625ebe8>.

²⁹ US Senator Dick Durbin, Press Release, "Durbin Statement on Federal Bureau of Prisons Assessment of its Solitary Confinement Practices" (4 February 2013), online: United States Senate <durbin.senate.gov>.

the Government Accountability Office, an independent investigative agency of the United States Congress, issued a report titled “Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing”.³⁰ The report found that, despite its extensive use of segregated housing, the Bureau has never assessed whether it has any effect on prison safety.³¹ Nor has the Bureau assessed the effects of long-term segregation on prisoners, although its Psychology Services Manual recognizes that extended periods in segregation “may have an adverse effect on the overall mental status of some individuals.”³² Finally, the report concluded that the Bureau does not adequately monitor segregated housing to ensure that prisoners receive food, out-of-cell exercise, and other necessities.³³

The Civil Rights Division of the United States Department of Justice is also increasing its scrutiny of solitary confinement. The Department of Justice is authorized by the Civil Rights of Institutionalized Persons Act (CRIPA) to bring suit when prison conditions violate the constitutional rights of prisoners in state correctional facilities.³⁴ A prerequisite to such a lawsuit is a letter notifying the state’s Governor of the alleged violations, known as a findings letter.³⁵ In May 2013, the Department of Justice for the first time issued a findings letter focused exclusively on a state prison’s use of solitary confinement. In its letter to the Governor of Pennsylvania regarding the State Correctional Institution at Cresson, the Justice Department concluded that “the manner in which Cresson uses isolation on prisoners with serious mental illness violates the Eighth Amendment of the U.S. Constitution”, and that “Cresson uses isolation in a way that violates the rights of prisoners with serious mental illness, as well as prisoners with intellectual disabilities, under Title II of the Americans with Disabilities Act.”³⁶ The Justice Department also notified the Governor of its “intent to expand our investigation into the use of prolonged isolation on prisoners with serious mental illness and intellectual disabilities at [the Pennsylvania Department of Corrections’] other facilities.”³⁷

Recent years have seen tremendous activity in state legislatures around solitary confinement. This legislative surge began in 2008 when New York passed the *Secure Housing Unit (SHU) Exclusion Act*, a law that diverts prisoners

³⁰ See US Government Accountability Office, *Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing* (GAO-13-429) (Washington, DC: Government Accountability Office, 2013) at 6. “Segregated housing” refers to housing units in which prisoners are locked in their cells for approximately 23 hours a day, either alone or with a cellmate.

³¹ *Ibid* at 33.

³² *Ibid* at 40.

³³ *Ibid* at 41.

³⁴ *Civil Rights of Institutionalized Persons Act*, 42 USCA § 1997a.

³⁵ *Ibid* at § 1997b.

³⁶ Letter from Thomas E Perez, Assistant Attorney General, United States Department of Justice, Civil Rights Division, to Tom Corbett, Governor of Pennsylvania (31 May 2013) (regarding the Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation) at 1.

³⁷ *Ibid* at 2.

with serious mental illnesses away from isolation and into mental health treatment units.³⁸ Nevada followed suit in 2013, passing a law that limits the use of solitary confinement in juvenile facilities.³⁹ Texas had a similar bill on juvenile solitary confinement practices introduced in its legislature in 2013,⁴⁰ and in the same year passed a law requiring correctional facilities to review and report on their use of isolation.⁴¹ Maine,⁴² Colorado⁴³ and New Mexico⁴⁴ have each passed bills that require their respective governments to study the use, impact, and effectiveness of solitary confinement. At the time of this writing, a number of other states—including California,⁴⁵ Massachusetts,⁴⁶ and New Hampshire⁴⁷—are also debating new solitary confinement laws.

This legislative activity reflects a shift in attitudes toward solitary confinement in states with some of the largest prison populations in the country.⁴⁸ While not all of the bills introduced into state legislatures have become law, there is clearly momentum building around solitary confinement reform at the state level. Advocates have been particularly effective at urging legislatures to require states to document and report on the use of isolation,

³⁸ US, *New York Corrections Law*, 21st Leg, Reg Sess, NY, 2008, § 137 (enacted).

³⁹ US, SB 107, *An Act Relating to the Administration of Justice (restricting the use of corrective room restriction on children who are in confinement in a state, local or regional facility for the detention of children; requiring the Advisory Commission on the Administration of Justice to conduct a study concerning detention and incarceration; and providing other matters properly relating thereto)*, 77th Leg, Reg Sess, Nev, 2013 (enacted). Nevada's law does not entirely ban the solitary confinement of juveniles, but places restrictions on the practice. SB 107 also created an advisory commission to study solitary confinement in the state.

⁴⁰ US, SB 1517, *An Act Relating to the collection of data regarding the placement of a child in disciplinary seclusion in a juvenile facility*, 83rd Leg, Reg Sess, Tex, 2013.

⁴¹ US, SB 1003, *An Act Relating to the Creation of the Adult and Juvenile Administrative Segregation Task Force*, 83rd Leg, Reg Sess, Tex, 2013.

⁴² US, LD 1611, *An Act to Ensure Humane Treatment of Special Management Prisoners*, 124th Leg, Reg Sess, Me, 2009 (enacted). The original version of Maine's solitary confinement bill included much more sweeping reforms, including a ban on isolation periods of longer than 45 days. See ACLU, "Change is Possible", *supra* note 18 for more on the history of this bill and its ultimate effects in Maine.

⁴³ US, SB 176, *A Bill for an Act Concerning Appropriate use of Restrictive Confinement*, 68th Gen Assem, Reg Sess, Colo, 2011.

⁴⁴ US, SM 40, *A Memorial Requesting the Appropriate Legislative Interim Committee to Convene a Working Group to Gather Information Regarding the Use of Solitary Confinement in New Mexico Public and Private Correctional Facilities, to Determine the Impact of Solitary Confinement on Inmates and to Assess the Effectiveness of Solitary Confinement in Reducing Problems and Costs*, 50th Leg, Reg Sess, NM, 2011.

⁴⁵ US, SB 61, *An Act to Amend Section 230 of, to Amend, Repeal, and add Sections 225, 226, and 229 of, and to add Section 208.3 to, the Welfare and Institutions Code, Relating to Juveniles*, 2013-2014, Reg Sess, Cal, 2013.

⁴⁶ US, SB 1133, *An Act Relative to the Appropriate Use of Solitary Confinement*, 188th Gen Court, Reg Sess, Mass, 2013.

⁴⁷ US, HB 480, *An Act relative to solitary confinement*, 2013 Gen Court, Reg Sess, NH, 2013. See American Civil Liberties Union, *State Reforms to Limits the Use of Solitary Confinement*, online: ACLU <www.aclu.org> (for more detailed information on state reforms to solitary confinement practices).

⁴⁸ California, which incarcerates roughly 165,000 people, and Texas, which imprisons approximately 174,000, have the two highest state prison populations in the country. Florida, which incarcerates approximately 104,000 people, is third. There, too, there has been legislative activity around solitary confinement. A bill to limit the solitary confinement of juveniles was introduced into the Florida legislature, but failed to pass in March of 2013. See US, SB 812, *Youth in Solitary Confinement Reduction Act*, 150th Leg, Reg Sess, Fla, 2013. See US Bureau of Justice Statistics, *Prisoners in 2010* (NCJ 236096) (Washington, DC: Office of Justice Programs, 2012) at 14 (for state-by-state prison population statistics).

an important step toward making solitary confinement practices less opaque. Reformers have also mounted successful challenges to the use of solitary confinement for juveniles and prisoners with serious mental illness, two populations for whom the experience of isolation is particularly damaging.

Civil society has been active as well. Religious organizations have campaigned tirelessly against solitary confinement; in particular, the National Religious Campaign Against Torture has made solitary reform a top priority.⁴⁹ The American Bar Association's Standards on Treatment of Prisoners, revised in 2010, recommend strict limits on what it calls "segregated housing", defined as "substantial isolation from other prisoners."⁵⁰ The New York State Bar Association has called on the New York State and City Departments of Corrections to "profoundly restrict" long-term solitary confinement.⁵¹ In 2012, the American Academy of Child and Adolescent Psychiatry enacted policy opposing the solitary confinement of juveniles⁵², and the American Psychiatric Association approved policy opposing the prolonged segregation of persons with serious mental illness.⁵³ There is even an effort underway to amend the American Institute of Architects Code of Ethics to prohibit the design of facilities intended for prolonged solitary confinement.⁵⁴

Finally, there has been activity on the international level as well. The UN Special Rapporteur on Torture made solitary confinement the subject of his first thematic report after assuming the mandate, calling for a ban on solitary confinement lasting longer than 15 days as well as an absolute prohibition on solitary confinement of children and the mentally ill.⁵⁵ The Council of Europe's Committee for the Prevention of Torture has made similar recommendations.⁵⁶

In March 2013, the Inter-American Commission on Human Rights held its first hearing on solitary confinement in the Americas. Citing the potentially "irreversible" psychological effects of isolation, the Commission concluded

⁴⁹ See National Religious Campaign Against Torture, *Ending Torture in U.S. Prisons*, online: <www.nrcat.org>.

⁵⁰ American Bar Association, *ABA Standards for Criminal Justice: Treatment of Prisoners*, 3d ed (Washington DC: ABA, 2011) at standards 23-1.0 and 23-2.6 to 2.9 (defining and outlining limits on the use of segregated housing).

⁵¹ New York State Bar Association Committee on Civil Rights, *Solitary Confinement in New York State* (25 January 2013) at 1-2, online: <www.nysba.org/WorkArea/DownloadAsset.aspx?id=32124>.

⁵² American Academy of Child and Adolescent Psychiatry, Policy Statement, "Solitary Confinement of Juvenile Offenders" (April 2012), online: <www.aacap.org>.

⁵³ American Psychiatric Association, Position Statement, "Position Statement on Segregation of Prisoners with Mental Illness" (December 2012), online: APA <www.psych.org/>. See also *Reassessing Solitary Confinement Hearing*, *supra* note 4 (James H Scully, Jr), online: <www.psych.org/File%20Library/Advocacy%20and%20Newsroom/APA%20on%20the%20Issues/Regulatory/06-19-12-APA-Statement-on-Solitary-Confinement.pdf>.

⁵⁴ See Architects/Designers/Planners for Social Responsibility, Ethics Petition, "Ending Design for Torture or Killing" (20 June 2013), online: <www.adpsr.org>.

⁵⁵ *Interim report of the Special Rapporteur*, *supra* note 6 at 9.

⁵⁶ Council of Europe, Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *21st General Report of the CPT*, (2011) 28 at 43.

that countries should “adopt strong, concrete measures to eliminate the use of prolonged or indefinite isolation under all circumstances.”⁵⁷ The Commission stressed that prolonged or indefinite solitary confinement “may never constitute a legitimate instrument in the hands of the State.”⁵⁸

In sum, less than twenty years after the supermax building boom brought a surge in solitary confinement in the United States, there are unmistakable signs of a turn away from this practice. To what can we attribute this reversal? There is no doubt that cost plays a major, perhaps decisive, role. Incarceration is expensive, and solitary confinement is particularly expensive, primarily because prisoners who are locked in their cells for 23 or 24 hours per day are dependent on prison staff for many of the activities that general population prisoners perform for themselves. The Government Accountability Office explained the factors contributing to higher costs in the Bureau of Prisons’ segregation facilities:

For example, at least two correctional officers are needed to escort SHU and SMU inmates to showers and to recreation cells. Some high security inmates at SMUs require a three-officer escort each time they leave the cell. Staff are required to bring meals to inmates in their cells in SHUs, SMUs and ADX three times each day. In addition, staff are also required to provide laundry services, daily medical visits, and weekly psychological, educational, and religious visits to inmates in their cells in SHUs, SMUs and ADX. In contrast, inmates in general population units can generally access services in other areas of the facility freely, and therefore can perform these activities without assistance from correctional officers.⁵⁹

Thus, the daily per-prisoner cost at ADX, the Bureau’s highest-security supermax facility, is \$216.12, or nearly \$80,000 per year, compared to \$69.41 per day in a non-supermax high security facility.⁶⁰ Such cost disparities are typical of state prison systems as well. The per-prisoner cost in Illinois’ recently closed Tamms supermax was more than \$60,000 per year, approximately three times the state’s average per-prisoner cost.⁶¹

Since the global financial crisis of 2008, most U.S. states are facing crushing budget deficits. Against that backdrop, the question is starkly posed whether the extraordinary costs of solitary confinement can be justified when essential public services – education, transportation, health care, and others – are being slashed to the bone.

On the other side of the ledger, solitary confinement – certainly its

⁵⁷ Inter-American Commission on Human Rights, Press Release, 23A/13, “Annex to the Press Release Issued at the Close of the 147th Session” (5 April 2013), online: <www.oas.org/en/iachr/>.

⁵⁸ *Ibid.*

⁵⁹ Government Accountability Office, *supra* note 30 at 31.

⁶⁰ *Ibid.*

⁶¹ See George Pawlaczuk & Beth Hundsdorfer, “Tamms Supermax: Expensive, but is it necessary?” *The State Journal-Register* (3 January 2010), online: <www.sj-r.com> (citing state-provided figures that estimate the annual per-prisoner cost of Tamms at \$64,000).

supermax variant—has failed to deliver on its alleged benefits. The evidence for the efficacy of solitary confinement as a means of promoting prison safety or public safety is scarce to nonexistent. As already noted, the federal Bureau of Prisons has failed to assess whether solitary confinement and other forms of segregated housing have any effect on prison safety. A 2006 study found that opening a supermax prison had no effect on prisoner-on-prisoner violence in Arizona, Illinois and Minnesota.⁶² The same study found that establishing a supermax had only limited impact on prisoner-on-staff violence in Illinois, none in Minnesota, and was associated with increased violence in Arizona.⁶³ A reduction in the number of prisoners in segregation in Michigan has resulted in a decline in violence and other misconduct.⁶⁴ The evidence also suggests that prisoners held in solitary confinement have higher recidivism rates than comparable prisoners who were not held in solitary.⁶⁵

As the fiscal crisis eases, the cost argument will presumably lose some of its force. The last two decades provide ample evidence that when people are frightened, they will bear any cost to feel safer—even if that feeling is illusory. But even when state coffers are full again, it is unlikely that the United States will ever return to the unthinking and reflexive use of solitary confinement that characterized the 1990s. Now that a critical mass of states have safely and successfully reduced their use of solitary, saving millions of dollars in the process, others are taking notice. While we may or may not have reached an irreversible tipping point, it is clear that the United States is, at long last, turning the corner on solitary confinement.⁶⁶

⁶² Chad S Briggs et al, “The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence” (2003) 41 *Criminol* 1341 at 1341-42.

⁶³ *Ibid* at 1365-67.

⁶⁴ Jeff Gerritt, “Pilot Program in UP Tests Alternatives to Traditional Prison Segregation” *Detroit Free Press* (1 January 2012), online: <www.freep.com>.

⁶⁵ See e.g. David Lovell, L Clark Johnson & Kevin C Cain, “Recidivism of Supermax Prisoners in Washington” (2007) 53 *Crime & Delinquency* 633 at 643-45 (finding that prisoners released directly from supermax confinement have significantly higher recidivism rates and commit new offenses sooner than their nonsupermax counterparts).

⁶⁶ It is undeniable that increased public consciousness has also contributed to solitary confinement reforms. For example, Atul Gawande’s 2009 article appropriately titled “Hellhole” was the first extended treatment of solitary confinement in the popular media. Atul Gawande, “Hellhole” *The New Yorker* (30 March 2009), online: <www.newyorker.com>.