

***“Reassessing Solitary Confinement: The Human Rights,
Fiscal and Public Safety Consequences”***

**Hearing Before the Senate Judiciary Subcommittee on the
Constitution Civil Rights, and Human Rights**

**Chairman: The Honorable Dick Durbin
Ranking Member: The Honorable Lindsey Graham**

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Testimony of Michael B. Mushlin

Thank you for holding this important hearing and inviting testimony. My name is Michael B. Mushlin. I am a Professor of Law at Pace Law School in White Plains, New York. I am the author of *Rights of Prisoners*,¹ a four volume treatise, and a member of the American Bar Association’s Task Force on the Legal Status of Prisoners. I am also a co-chair of the American Bar Association, Subcommittee on Implementation of the ABA Resolution on Prison Oversight,² and have served as chair of the Committee on Correction of the New York City Bar Association, the Correctional Association of New York and the Osborne Association, an organization that provides training and support programs for people in jail and prison or who are being diverted from imprisonment. Currently, I am a vice chair of the Correctional Association of New York, a 168 year old organization endowed by New York law with the authority to visit New York State Prisons with the responsibility to report on their condition to the New York state legislature. With colleagues, including Prof. Michele Deitch of the University of Texas, I participated in the

¹ MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* (4th ed. 2012).

² I co-chair that committee with Prof. Michele Deitch of the University of Texas.

organization of two national conferences on prison reform, the first *Prison Reform Revisited: The Unfinished Agenda* held at Pace Law School and the second, *Opening Up a Closed World: What Constitutes Effective Prison Oversight* held at the University of Texas. Both conferences drew together professionals from all segments of the criminal justice and corrections fields to discuss improvement to the operation and oversight of the American prison system. For seven years, I was staff counsel and then the Project Director of the Prisoners' Rights Project of the Legal Aid Society. I also served as staff counsel with Harlem Assertion of Rights Inc., and was the Associate Director of the Children's Rights Project of the American Civil Liberties Union. For the 2012/13 academic year, I will be a Visiting Professor of Law at Brooklyn Law School.

I first confronted conditions in solitary confinement units over thirty years ago when I served as trial counsel in a federal civil rights case involving Unit 14, the solitary confinement unit at Clinton prison in upstate New York close to the Canadian border. What I saw there was deeply disturbing. Inmates were locked for 23 hours each day into small windowless cages for months and years on end. No programs or activities were provided to the inmates. Without access to any meaningful activity, they were separated from one another spending almost all of their time entirely by themselves. During that one precious hour per day when a Unit 14 inmate could leave his cell there was only one place to go: a small space directly behind his cell called a "tiger cage." The tiger cage was a small empty space with a barren floor surrounded on all sides by high concrete walls which were not covered by a roof. An inmate could walk only a few steps in one direction before turning. If he looked up he could glimpse a bit of the sky but nothing else of the outside world.³

Working on that case I witnessed firsthand the awful consequences of subjecting human beings to solitary confinement. I will never forget looking into the eyes of those inmates

³ See *Frazier v. Ward*, 426 F. Supp. 1354 (N.D.N.Y. 1977).

struggling to maintain a foothold on reality and sanity. Afterwards, when visiting other solitary confinement units, no matter where, I see that same pained, desperate stare. I have seen it so often, and in so many different places, that I have come to recognize it instantly as the gaze of a tortured person.

In the years since the Unit 14 case I have witnessed the growth and expansion of solitary confinement in prisons, in New York and nationally, through the emergence of “supermax” confinement and the expanded use of “administrative segregation units.” I have watched what I saw in Unit 14 three decades ago repeated throughout the nation as massive numbers of people, many of whom are mentally ill, young, and those deemed too dangerous or vulnerable to be placed in the general prison population even though they have not violated any prison rules have been placed into solitary confinement. Even teenagers have been thrown into solitary. Not so long ago I was shocked to read a Justice Department Report describing how children 16 years old were being held for up a full year in solitary in a jail for adults in Westchester County, New York, a mile or two from my office on the campus of Pace Law School.⁴ I have heard estimates that on any given day the number of people held in solitary ranges from 25,000 to 85,000 but the truth is that no one really knows how many people are held in these units. I suspect that the true number of souls in solitary confinement is higher than even the highest reported figures.

Solitary units provide fertile soil for mistreatment and abuse of prisoners. As one observer put it “[b]ecause of the absence of witnesses, solitary confinement increases the risk of

⁴ CRIPA Investigation of Conditions at Westchester County Jail (Dep’t of Justice, Civil Rights Division, Nov. 19, 2009) *available at* http://www.justice.gov/crt/about/spl/documents/Westchester_findlet_11-19-09.pdf (reporting that half of inmates placed in the jail’s Special Housing Unit -- where inmates are placed in isolation as a result of disciplinary infractions -- are between 16 and 18 years of age. Many of these minors are facing an average term of 365 days in isolation. One 16 year old was given a sanction of 360 days for an infraction); *See also Troy D. v. Mickens*, 806 F. Supp. 2d 758, 764 (D.N.J. 2011).

acts of torture or other cruel, inhuman or degrading treatment or punishment.”⁵ I recently wrote an article about abuses that occur in solitary confinement units.⁶ In the article I recount the story of Tyron Alexander and Kevin Carroll inmates who were involved in a fight with two prison guards while being held in a jail awaiting their court appearance. Apparently no one was seriously injured, but as a result Alexander and Carroll were placed together in an isolation cell.⁷ Aptly named the “the hole,” this isolation cell which was a “sparse” 64 square foot space meant to contain only one person, had no running water, and no toilet.⁸ At first, Alexander and Carroll were stripped fully naked though later they were given only boxer shorts but nothing else to wear. Instead of a toilet the cell had a grate-covered hole in the floor which could only be flushed by prison officials from outside the cell.

Carroll became nauseated soon after being confined in the cell and was forced to defecate into the drain, after which he was allowed only one sheet of toilet paper for cleaning purposes. Afterwards, the drain became obstructed with feces. Alexander and Carroll tried to clear the obstruction but were unsuccessful. No one helped them. When they had to urinate, urine splattered from the clogged drain onto the cell floor. The smell nauseated Carroll, who then vomited into the drain. When the guards finally decided to do something they were unable to flush the drain. Nevertheless, rather than release Carroll and Alexander from the contaminated cell, the guards kept them confined to the cell. The guards then instructed an inmate trustee to

⁵ SPECIAL RAPPOREUR OF THE HUMAN RIGHTS COUNCIL, INTERIM REPORT ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. Doc. A/66/268, 19 (Aug. 5, 2011) (by Juan E. Méndez); *See also*, Lena Kurki & Norval Morris, *The Purposes, Practices and Problems of Supermax Prisons*, 28 CRIME AND JUSTICE, A REVIEW OF RESEARCH 385, 385 (Michael Tonry ed., 2001); *See* COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 14 (2006) (“There is troubling evidence that the distress of living and working in this environment actually causes violence between staff and prisoner.”).

⁶ MICHAEL B. MUSHLIN, *Unlocking the Courthouse Door: Removing the Barrier of the PLRA’s Physical Injury Requirement to Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FEDERAL SENTENCING REPORTER 268 (2012).

⁷ *Id.* at 268 (citing *Alexander v. Tippah County*, Miss., 351 F.3d 626, 628 (5th Cir. 2003)).

⁸ *Alexander v. Tippah County*, 351 F.3d. at 628-629. All the facts recounted about this case are drawn from this published opinion..

spray water into the cell through an opening at the bottom of the cell door which served only to further spread the waste across the floor. Desperate, Carroll and Alexander requested a mop to clean the mess, but it was denied. To make matters worse, Carroll and Alexander could not wash their hands because the cell had no running water and they were not allowed out. In this contaminated cell filled with urine, feces and vomit, prison officials served Carroll and Alexander lunch and dinner without utensils. The isolation cell did not have a bed. Instead it had a concrete protrusion from the wall with space for just one person. No mattress or sheets or blankets were provided even though the men were clothed only in boxer shorts on that winter evening. That night in the cold Carroll and Alexander tried to sleep by sharing the small concrete slab. Incredibly, despite the enormous degrading treatment and abuses they endured, the federal court to which they turned for relief dismissed their case because the conditions did not result in “physical injury” which is a requirement for relief under the Prison Litigation Reform Act.⁹

In solitary confinement units across the nation abuses, which differ in only detail from those inflicted on Carroll and Alexander, are occurring daily.¹⁰ Where but in a fictionalized horror story would one learn of places where “bodies are smeared with one's own excrement; arms are mutilated; suicides attempted and some completed; objects inserted in the penis; stitches repeatedly ripped from recent surgery; a shoulder partly eaten away.”¹¹

⁹ *Id.* at 631 (citing 42 U.S.C. § 1997e(e) (2006)).

¹⁰ These abuses, which include subjecting inmates to degrading, humiliating and unnecessary suffering, often do not cause physical injury. Even though constitutional rights are violated by these acts, federal courts have often failed to provide relief to victims of these abuses. The reason is that the Prison Litigation Reform Act (PLRA) deprives federal courts of the ability to provide relief from degrading and even torturous behavior if there is not physical injury.

¹¹ Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the S. Jud. Subcomm., 112th Cong. 3 (June 13, 2012) (Statement of Fred Cohen, LL.B., LL.M.).

Seven years ago, commenting on solitary confinement, I said in a *New York Times* Op-Ed that, “there is never justification for prison conditions that cause mental torture.”¹² I went on in that Op-Ed to observe that since most inmates will someday return to our communities, “it is a mistake to think that these kinds of conditions do not directly affect us.”¹³ A conversation with a correction officer I had several years ago during a visit to Southport prison in upstate New York near Elmira drove this point home to me. Southport prison at the time of my visit housed hundreds of men, all in solitary confinement. The officer told me of his concern for law bidding people whenever a Southport prisoner is released from solitary directly back on to the streets. He recalled the times he saw inmates, most of whom are from the New York City metropolitan areas and have been in solitary confinement for months or even years, released from the prison front gate with a suit of clothes, \$40 and a bus ticket to the Port Authority Bus Station in midtown Manhattan. I, too, feel apprehension when I consider that I or my wife and children might encounter on the street a person just released back into the community directly from a solitary confinement unit.

Prisons must be safe and humane and they can be without solitary confinement. There are alternatives. As others will no doubt describe in detail, in Colorado, Maine and my home state of Mississippi, recent efforts led by talented corrections officials and prison reformers have dramatically decreased the use of solitary confinement with savings to the taxpayers, without compromising security, and with untold benefits in terms of the decrease in mental abuse and suffering. These alternatives and others, when implemented, will reduce the numbers of people in isolation to a tiny fraction of those currently held, will improve the conditions in which those

¹² Michael B. Mushlin, *Breeding Psychotics*, N.Y. TIMES, March 27, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9802E6DE173FF934A15750C0A9639C8B63>.

¹³ *Id.*

who are isolated are held, and will make prisons safer for prison staff, the public and for prisoners.

These changes are consistent with the standards on the treatment of prisoners for the American Bar Association which have been recently adopted by the ABA.¹⁴ I served on the Task Force comprised of a wide variety of experts from across the spectrum which drafted these standards. Drawing on examples of good corrections practice, the standards prohibit isolation of the mentally ill or juveniles,¹⁵ and even for those who must be isolated the standards absolutely prohibit “[c]onditions of extreme isolation . . . regardless of the reasons for a prisoner’s separation from the general population.”¹⁶ The animating idea behind these standards is the one that my colleague Fred Cohen put so well in his testimony to this subcommittee:

Inmates may need to be insulated from each other, and for a variety of valid reasons, but insulation (separation) and contemporary penal isolation are quite different concepts and operations. The process of insulation need not lead ineluctably to conditions of extreme social and sensory deprivation.¹⁷

For all these reasons I add my voice to those who will testify before you about the damaging physiological effects of solitary confinement and the awful pain and suffering it causes, and the urgent need for reform. I call upon you to take action that would responsibly address this American problem.

¹⁴ ABA, CRIMINAL JUSTICE SECTION STANDARDS, STANDARDS ON TREATMENT OF PRISONERS (2010); ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3rd ed. 2011),

¹⁵ *Id.* at Standard 23-2.8.

¹⁶ *Id.* at Standard 23-3.8.

¹⁷ Statement of Fred Cohen, *supra* note 11 (emphasis in original).

Recommendation

Just as it has addressed the scourge of prison rape,¹⁸ Congress should mandate reform of solitary confinement. With the Prison Rape Elimination Act, Congress called for the establishment of a national commission, a study and survey of existing levels of sexual abuse of prisoners, and the promulgation of national standards for the prevention of sexual abuse with federal funding tied to compliance with the adoption, oversight, and enforcement of these standards.¹⁹ That law, passed on a bipartisan basis, has been the catalyst for important fundamental change. Similarly, a law addressed to solitary confinement would lay the foundation for essential reform. Lastly, for the reasons I have set out in my article cited earlier Congress should also amend the Prison Litigation Reform Act to allow federal courts to remedy the most serious unaddressed abuses occurring in solitary confinement units.²⁰ Stories like Alexander's and Carroll's must become a remnant of the past.

¹⁸ 42 U.S.C.A. § 15607 (West 2003).

¹⁹ See, e.g., *Id.*; Statement of Fred Cohen, *supra* note 11 (I agree with the Statement of Fred Cohen advancing a similar position).

²⁰ MUSHLIN, *supra* note 6.