Written Statement of

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Briefing on

The Use of Solitary Confinement for Juveniles in New York

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Thank you for inviting me to speak with you today about solitary confinement in New York State prisons, and in particular the experience of young people held in solitary. I hope to speak to three general topics regarding the subject matter of today’s briefing. First, I will lay out some of the relevant legal doctrine that I think the Commission should keep in mind as it considers taking action on this important issue. Second, I will discuss the sparse data we have on the use of solitary confinement, with a focus on what we do and (mostly) do not know about the racial impact of solitary’s deployment as a tool for control of young prisoners. And third, I will summarize the current state of the Peoples v. Fischer litigation, the most recent attempt to regulate through litigation New York State’s use of solitary.

A few words of introduction before I address these issues. First, I have been involved in prisoners’ rights advocacy for over 14 years now. I started as a law student here at NYU, working in the Civil Rights Clinic; I continued after my clerkships when I worked with a small civil rights firm – Koob & Magoolaghan – that concentrates on prisoners’ rights litigation; and after I entered the academy I have continued to litigate, research, and write in the area. I care deeply about the conditions under which we confine people whom we have decided to punish through the criminal law – and solitary confinement for juveniles and adults is but one extremely salient example of the many ways in which our penal system has become overly harsh. Second, and relatedly, I am one of the lawyers who represents the plaintiffs in the Peoples litigation, giving me a unique perspective on the changes it has wrought, but also imposing certain limitations (aside from the obvious potential that I may be seen as less than objective in assessing the litigation itself). Most importantly, I will not be able to disclose specific information that I have learned through the confidential settlement process, nor will I be able to discuss many questions that remain about implementation of the settlement. Finally, it should be noted that I
I. Legal Framework

When one considers that legal framework governing the use of solitary confinement in general, it is useful to think about four related issues: whether extreme isolation may be used at all; whether extreme isolation may be used to punish particular categories of prisoners; how long prisoners may be subjected to extreme isolation; and for what reasons extreme isolation may be imposed as a punishment.

The use of solitary confinement in New York is subject to no real statutory restraints. In New York State, no statute specifically limits the use of isolation by prison or jail officials. State and local officials are granted broad discretion to regulate (or not) the discipline of prisoners through isolation. At the state level, the Department of Corrections and Community Supervision has granted individual hearing officers broad powers to confine prisoners in SHU for long periods of time, with some prisoners spending year after year in isolation (some of this may change as the result of the *Peoples* litigation, as I will discuss later). We know less about the practices of local jails outside of New York City, but in Rikers Island the story is similar, although there is less potential for years of solitary confinement because most of the detainees in Rikers are held for shorter periods of time.

To the extent that any legal restraints regarding the use of solitary exist, then, they are found in the Constitution. The Eighth Amendment protects prisoners from cruel and unusual punishment, and the Fourteenth Amendment’s due process clause provides certain procedural
protections as well as substantive limitations on the use of punishment for pretrial detainees. I will focus my brief doctrinal remarks on the Eighth Amendment, for a few reasons. Procedural due process principles simply require that certain procedural protections be provided prior to placing a prisoner in conditions that are “atypical and significant” in relation to the ordinary incidents of prison life. But procedural due process principles cannot limit the length of solitary, the conditions under which prisoners experience solitary, or the categories of prisoners who are exposed to solitary. And substantive due process limitations on the use of solitary for pretrial detainees may not ultimately be that different from Eighth Amendment limitations, except in circumstances that are not implicated here.

So let me turn to the Eighth Amendment. As a general matter, Eighth Amendment doctrine prohibits punishments that are either disproportionate or contrary to evolving standards of decency. Proportionality doctrine has generally been a weak constraint on the state’s exercise of its power to punish, but the Second Circuit has acknowledged that SHU sentences must not be “grossly disproportionate,” must have some penological justification, and must not involve “the unnecessary and wanton infliction of pain.” See Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984) (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1980)); Wright v. McMann, 460 F.2d 126, 134 (2d Cir. 1972); Dixon v. Goord, 224 F. Supp. 2d 739, 748 (S.D.N.Y. 2002).

The Eighth Amendment also prohibits the use of punishments that are inconsistent with “the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958). Recent case law from the Supreme Court suggests that this aspect of Eighth Amendment doctrine has the potential to play a role in regulating the use of solitary confinement, particularly when it is used to punish young people or prisoners with mental illness. In cases involving the death penalty and life without the possibility of parole, the
Supreme Court has found in the Eighth Amendment a substantive limitation on the power to punish that is rooted in the diminished culpability of juveniles and the mentally retarded. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), for instance the Court held that juveniles could not be subject to mandatory sentences of life without parole due both to the inherent qualities of youth that make them inappropriate to be judged as adults, and the severity of the penalty which behooves a court to consider individualized circumstances.¹ One can certainly argue that similar principles should limit the use of solitary confinement to discipline juveniles or individuals with mental illness.

Indeed, if one were to ask what “evolving standards of decency” provided more than 100 years ago, it is questionable whether any use of solitary for any prisoner would be considered to be consistent with the Eighth Amendment. For although the use of solitary confinement is currently widespread throughout the United States and in many ways taken for granted by state and federal corrections officials and prisoner advocates alike, it was not always this way. Several states through the 19th Century briefly flirted with the use of extreme isolation only to abandon it after it proved too harmful to prisoners. Thus, by 1890 the Supreme Court could recount early experiments with solitary and the ultimate rejection of it as a means of controlling prisoners and conclude as follows: “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.” *In re Medley*, 143 U.S. 160, 168 (1890).

¹ See id. at 2469.
Thus, it is fair to say that over time, a consensus emerged that the harms of extreme isolation far outweighed any potential benefits of the practice. For much of the twentieth century, this was reflected in prison practices, but in the mid-twentieth century, the experimentation began anew, supported by rhetoric about the need to control the “worst of the worst” prisoners. And use of solitary escalated in the 1980s and 1990s with the construction of freestanding supermax facilities and other units designed with isolation in mind. New York State converted Southport from a general population prison to a supermax in 1991, and built 10 additional freestanding facilities between 1998 and 2000. In many of the new units, the extent of dehumanization exceeds anything comparable to 19th century standards. Consider this description of Ohio’s supermax, taken from a 2005 Supreme Court decision that addressed the procedures Ohio used to place people in isolation:

In OSP [the Ohio State Penitentiary] almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.


One wonders, given the isolation found in facilities like the OSP and clinically described in a unanimous Supreme Court opinion, whether the law has anything to say about this at all. But again, if one considers the question from the perspective of evolving standards of decency,
one could conclude that both the use of solitary confinement, and its use for the periods of time
common in New York State are in serious tension with Eighth Amendment pronciples.

Currently, only five States specifically authorize solitary confinement as a mode of punishment
for violations of the criminal law. Delaware permits a court to specify that a sentence include
solitary confinement, but not for a period of time exceeding 3 months.\(^2\) Washington permits a
sentencing court to impose up to 20 days of solitary confinement as part of a criminal sentence.\(^3\)
South Carolina generally permits courts to impose a punishment of solitary confinement for
felonies in limited circumstances.\(^4\) Michigan gives power to a sentencing court to specify that a
prisoner be kept in solitary confinement, without significant limitation.\(^5\) Pennsylvania is unusual
in including solitary confinement as a potential punishment for specific offenses, without
apparent limitation on time frame.\(^6\) In addition to these states, Idaho, Pennsylvania, and
Wyoming call for the use of solitary confinement for death row prisoners who are under death
warrant, where execution has not been stayed.\(^7\) Thus, were one asking the question from the
Eighth Amendment perspective of “evolving standards of decency,” it is fair to say that there is a
near consensus among the States that solitary confinement is inappropriate as a means of
criminal punishment.

\(^2\) 11 Del. C. § 3902.
\(^3\) Wash. Rev. Code Ann. § 10.64.060.
\(^5\) Michigan Compiled Law s Ann. §769.2(2).
cheat and defraud); 18 Pa. Stat. Ann. § 4904 (Possession of burglary tools punishable by up to three years
imprisonment or “separate and solitary confinement”); 25 Pa. Stat. Ann. § 2096 (same for neglect of duty in care of
ballot boxes).
death warrant has been stayed, the warden is not required to impose solitary confinement, but the warden may
“house such person under conditions more restrictive [than maximum security confinement] if necessary to ensure
public safety or the safe, secure and orderly operation of the facility.” Id. § 19-2705(11). South Dakota has
amended its death penalty procedure to do away with the imposition of solitary confinement prior to execution. S.D.
As compared with penal statutes, there is far greater variation in legislation related to the use of solitary confinement as a means of prison discipline. The vast majority of states make no specific reference to solitary confinement as a mode of discipline for convicted prisoners. A minority of states explicitly address solitary confinement by statute. Two states – Louisiana and Wisconsin -- explicitly permit the use of solitary confinement as prison discipline, without limiting the length of confinement.8 Four states – Massachusetts, Nebraska, South Dakota, and Tennessee – permit the use of solitary but impose time limits ranging up to 30 days per offense.9 Maine recently radically revised its solitary confinement policy. Maine now requires that all sentences of segregation be approved by the chief administrative officers of the prison and that medical staff shall visit every 24 hours any prisoner sentenced to more than a day in segregation.10 Any sentence exceeding 5 days will result in the commissioner of corrections receiving notice and the reasons for the confinement.11 Relatedly, some states have explicitly limited the use of solitary confinement as discipline for prisoners and other detainees held in

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8 Louisiana, for instance, has abolished the use of solitary confinement as criminal punishment but explicitly authorizes it for “enforcing obedience to the police regulations of the penitentiary.” 15 La. Rev. Stat. § 865. Wisconsin also permits the use of solitary confinement for violation of prison rules, but specifies that the prisoner be “under the care and advice of a physician.” Wis. Stat. Ann. § 302.10

9 In Massachusetts, solitary may be imposed for no more than 15 days per offense. 127 Mass. Gen. Laws Ann. § 40. Moreover, the 15-day limit is assumed to apply to multiple violations arising out of a single course of conduct. Buchanan v. Superintendent of Massachusetts Correctional Institution at Concord, 402 N.E.2d 1082, 1083 (Mass. App. 1980) (“Were the correction institutions of the Commonwealth to tack the redundant charges of conduct which disrupts or interferes with the institution and violation of the rules of the institution to any of a variety of infractions of the Code of Offenses . . . the policy of sparing use of isolation enunciated in s 40 would be much eroded. Such a practice would have a fault analogous to the imposition of cumulative sentences for conviction of multiple offenses where the lesser offense arises out of facts identical with those which supported conviction of the greater offense.”) (footnote omitted). Nebraska specifically limits the use of solitary confinement for disciplinary reasons to no more than 15 consecutive days, or more than thirty days out of any 45 day period, except in cases of violence or attempted violence. Neb. Rev. Stat. § 83-4114. South Dakota limits to some extent the use of solitary confinement as discipline, prohibiting prisons from imposing solitary confinement for refusal to labor, to no more than 10 days for any one offense, and no more than 90 days in all. S.D. Consol. Laws § 24-11-34. It is not clear that there is any limitation on its use for other disciplinary reasons. Tennessee permits its county “workhouses” and municipal correctional institutions to use solitary confinement as discipline without any specific limitation. Tenn. Code Ann. § 41-2-120(a); § 41-3-102(a). By contrast, prisoners may be punished by solitary confinement for no more than 30 days per offense. Tenn. Code Ann. § 41-21-402(a).


11 See id. § 3032(3)(E).
county jails. Currently, Iowa, Michigan, Minnesota, and Wisconsin limit the use of solitary confinement in jails to 10 days for any one offense.\textsuperscript{12} By contrast, New Jersey authorizes county jails to impose solitary confinement as discipline, without any explicit limitation on duration.\textsuperscript{13}

One can imagine multiple ways in which the general practice in the States could be of relevance to the constitutionality of the continued use of solitary confinement in New York State. After all, if legislatures have abandoned use of solitary confinement as punishment for criminal violations because of the severity of the punishment, one could argue that prison officials are even less empowered to use solitary confinement as punishment. The argument could be sketched as follows: (1) solitary confinement has been rejected as a permissible punishment for violations of the penal code of nearly every state; (2) violations of prison discipline are by definition less serious than violations of criminal law; and (3) therefore as a matter of proportionality or evolving standards of decency, prison officials may not use as punishment a mode that has been rejected by elected legislatures.

One could still argue in favor of a proportionality principle, based on the State materials, without going so far as to advocate for the abolition of solitary confinement. This line of argumentation would proceed as follows: (1) to the extent that States have explicitly addressed solitary confinement as a disciplinary measure in prisons and jails, most states have imposed time limits that are much more strict than New York’s; and (2) this reflects a trend towards a bounded proportionality principle. One might consider supplementing this argument with the international trend towards requiring proportionality in the use of solitary.

Either of these arguments could be supported by the Supreme Court’s most recent line of cases regarding the Eighth Amendment and proportionality. The “evolving standards of


\textsuperscript{13} N.J.S.A. 30:8-19.
decency” standard often requires the court to determine whether there is a “consensus” among States regarding the permissibility of certain punishment. The Supreme Court’s post-2000 Eighth Amendment cases adopt a quite flexible definition of “consensus.” For instance, in Atkins v. Virginia, the Court found that a consensus against executing the mentally retarded had evolved between 1989, when two states specifically prohibited such executions, and 2002, when 18 states had enacted similar prohibitions. 536 U.S. 304, 314-15 (2002). In Roper v. Simmons, the Court found a consensus against execution of juveniles had been established between 1989, when 25 states permitted the execution of juveniles, and 2005, when 20 states did. 543 U.S. 551, 564-65 (2005). As the Court recognized in Roper, the pace of change with respect to juveniles was less dramatic than in Atkins but still “significant.” Id. at 565.

In Kennedy v. Louisiana, the Court found evidence of a consensus against executions for child rape even though the momentum of change was swinging in the opposite direction: six states had introduced the death penalty as a punishment for child rape since 1995. 554 U.S. 407, 423 (2008). And perhaps most importantly, in Graham v. Florida the Court found evidence of a consensus against life without parole for juveniles convicted of nonhomicide crimes despite the fact that six jurisdictions did not allow LWOP for any juvenile offender, seven permitted it only for homicides, and 37 states permitted it for some nonhomicide offenses. 130 S. Ct. 2011, 2023 (2010). Finally, in Miller v. Alabama, the Court found unconstitutional mandatory LWOP for juveniles on procedural grounds, despite the absence of a consensus against the punishment. 132 U.S. 2455 (2012).

One might argue from these cases that there is clearly a consensus against the use of solitary confinement as punishment for crimes, and that by definition this implies a consensus against the use of such punishment for the purposes of prison discipline. One might also argue in
the alternative that there is a consensus that punishments in solitary must be proportional to the disciplinary offense, and perhaps no greater than 15 days per offense, given the number of States that explicitly limit the length of solitary.

These arguments can attain more salience when made with respect to particular categories of prisoners or detainees such as juveniles or prisoners with mental illness, but one should be careful about the appeal of thinking about solitary as only of concern to vulnerable groups. First, there is a risk that in so doing, we create the impression that prisoners who do not fall into these classes are unaffected by solitary. There is little reason to accept this proposition – solitary in excess of 15 days is harmful to most prisoners, whether considered “vulnerable” or not. Second, focusing on the use of solitary to confine particular categories of offenders could distract us from making efforts to regulate other aspects of solitary, namely the justifications for using solitary, the amount of time prisoners spend in solitary, and the potential arbitrariness that can occur when multiple decision-makers are given the power to dispense solitary as punishment with little centralized oversight.

II. General Unavailability of Relevant Data

Now, even though I worry over focusing solely on the experience of vulnerable groups in solitary, there is a reason that courts and advocates have focused energies on identifying and protecting these groups from the harms of solitary. Other members of this panel have provided more detailed information about what we know (and mostly do not know) about the use of solitary confinement in prisons and jails. I want to make some basic observations about why young people and people with mental illness might be at particular risk of being subjected to solitary, and also be particularly vulnerable to the effects of solitary. And I also want to suggest
why we might be concerned that solitary will be used disproportionately to punish young people of color.

Prisons and jails are “total control” institutions. It is not difficult to engage in behavior that constitutes an infraction of one kind or another – refusal to obey a direct order, out of place, etc. For people with less self-control – juveniles and the mentally ill among them – complying with the rules of the institution can be extremely challenging. And given the discretion afforded prison officials in meting out punishment, usually subject to little oversight, mentally ill and young prisoners have the potential to be placed in solitary for long periods of time for fundamentally non-violent offenses. Moreover, because the disciplinary system relies on the prisoner to be his or her own advocate when facing charges that could result in time in isolation, one might expect that juveniles and people with mental illness will have more difficulty effectively navigating the procedural regime.

When they are placed in solitary, one also can expect that they will suffer extreme hardship from the conditions. Prisoners with mental illness may have difficulty accessing medicine, and the isolation alone could cause decompensation and self-harming behavior. Young prisoners may experience severe depression and also act out because of the frustration and pain of isolation. This creates a vicious cycle in which prisoners are kept in SHU because they continue to commit infractions while in isolation.

Finally, there are reason to fear that prisoners, young and old, mentally ill or not, will be subject to different discipline based on their race, and that African-American and Latino prisoners will experience solitary more often, and for longer periods of time, than white prisoners. This is an area where frankly we have little to no data. We know that the criminal justice system in general disparately impacts black and brown communities. For confirmation,
one need only look to the Vera Institute’s recently-released methodical study of prosecutions in Manhattan showing that at most critical points in a prosecution, black and Latino defendants are treated worse than white or Asian defendants accused of similar crime. See Vera Institute of Justice, Prosecution and Racial Justice in New York County Technical Report ii-iii (January 31, 2014), available at http://www.vera.org/pubs/special/race-and-prosecution-manhattan.

Yet we have little information about whether prison discipline is meted out in a way that disproportionately impacts prisoners of color, young or old. The NYCLU’s Boxed-In report found that African-American prisoners were over-represented in solitary as compared to white prisoners (50% of prison population but 60% of SHU population), but those raw data would require further analysis before one would draw any firm conclusions. We have very little publicly available information about the use of solitary for young people at all, let alone how its use differs according to race.

But here are the reasons we should at least be asking the question and seeking additional data. First, although African-Americans and Latinos are overrepresented in New York’s prisons, the racial demographics of the staff skews white because most prisons are located upstate. For example, about 80% of Southport and Upstate staff (the prisons with the largest number of SHU cells) are white, with almost no African-American or Latino officers, even though the prisoners there are almost all African-American or Latino. Although one cannot conclude that this will automatically result in disparate treatment of one race or another of prisoners, it at least should be enough to raise concerns and seek more information. This is especially the case where SHU is used as a discretionary tool to manage misbehavior, with very little guidance or oversight as to how and when it should be used.
Second, what we know about discipline in other contexts suggests that there is the potential that young prisoners in particular are at risk of experiencing solitary in different ways based on race. The most analogous comparison outside of the criminal justice system is school discipline. In that context, we know, based among other things on data generated by many State Advisory Committees to the Commission, that African-American and Latino students are subjected to school discipline at a far greater rate than white or Asian students. In Georgia, data showed that black and brown children were much more likely to be suspended as compared to white students. See Georgia Advisory Committee to the United States Commission on Civil Rights, *School Discipline: African American Students Disproportionately Disciplined in Georgia Schools as well as Other School Districts in the South* 13 (2013). Similar results have been found in states across the country. There is some evidence that these disparities exist as early as preschool, and persist into high school.

Schools, of course, are not identical to prisons and jails. But these data, in addition to what we know about the criminal justice system overall, should be enough to seek data from the state and, most importantly, local jails, regarding the use of solitary overall and any potential disparate impact based on race or other protected class category.

III. The Impact of the Peoples Litigation

Finally, I will discuss how the Peoples litigation relates to the issues that this Advisory Committee is considering. Leroy Peoples filed his original complaint pro se, seeking remedies for his placement in solitary confinement for three years for possession and filing of legal papers. The New York Civil Liberties Union, joined by Morrison & Foerster and me, appeared on his behalf, amending his complaint to add class allegations and two additional named plaintiffs, DeWayne Richardson and Tonja Fenton. All three prisoners had been subjected to lengthy
sentences of solitary confinement for entirely nonviolent infractions. All three seek to represent prisoners held under the custody of the New York State Department of Corrections and Community Supervision.

After our appearance as counsel and filing of a Third Amended Complaint, we entered into settlement discussions with the State. From those discussions emerged an interim settlement agreement, executed in February 2014. The interim agreement does several things. First, it provides that for two years the parties will engage in an expert-driven collaborative process to seek reforms to SHU that will maintain the safety and security of prisoners and staff, while limiting the use of disciplinary isolation to those circumstances in which it is appropriate and necessary, and also improving SHU conditions. Second, for the first time it provides that specific guidance will be given to hearing officers regarding the length of isolation for particular categories of offenses. And third, perhaps most salient to today’s briefing, it specifies that certain “vulnerable populations” (among them prisoners under the age of 18) will not be placed into SHU.

As to the latter, DOCCS has agreed to ensure that juveniles sentenced for disciplinary violations will be confined to their cells no more than 19 hours per day (5 days per week) and will be offered out-of-cell recreation and programming. DOCCS has 18 months from the execution of the Interim Stipulation to work out the details of programming and other specifics, as it also transitions to a regime, mandated by the Prison Rape Elimination Act, in which all prisoners under the age of 18 are confined in units separated from adults by sight and sound.

In addition, for prisoners with developmental disabilities who are sentenced to SHU confinement longer than 30 days, the interim stipulation provides for the creation of a Correctional Alternative Rehabilitation Program that seeks to provide more individualized-based
treatment and programming for such prisoners, with additional out of cell time than would be provided in a traditional SHU cell.

There are lots of things that this interim stipulation does not accomplish. First, it still permits juveniles to be housed in SHU-type isolation for up to two days a week, and also in exceptional circumstances approved by DOCCS’ Central Office. Second, juveniles may still be subjected to isolation, even if that isolation would not be described as “solitary” or “extreme isolation” – 19 hours a day in one’s cell is still a form of isolation, and one can expect that it poses risks of harm to some juveniles.

Moreover, many details about the use of discipline in general remain to be worked out in the collaborative dialogue between the parties and their experts. For instance, the Department’s guidelines for use of isolation will be introduced soon, and it will take some time to determine what impact those guidelines have on the use of SHU for all prisoners, and whether further changes to the guidelines are appropriate. Second, the conditions associated with SHU, and the circumstances under which prisoners are released from SHU are among the many items that are under discussion pursuant to the interim stipulation. For all of these reasons, the Peoples litigation should be viewed as the start of a process to reform the use of isolation to punish juveniles and other prisoners held in State custody.

I appreciate having the opportunity to address the Advisory Committee on these important issues and look forward to additional informed dialogue regarding the use of isolation in our state prisons and local jails.