Testimony of Udi Ofer
Executive Director
American Civil Liberties Union of New Jersey

to the

Senate Homeland Security and Governmental Affairs Committee

Oversight of the Bureau of Prisons (BOP):
First Hand Accounts of Challenges Facing the Federal Prison System

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For further information, please contact Udi Ofer, Executive Director of the ACLU of New Jersey, at (973) 854-1716 or at uofer@aclu-nj.org, or Jesselyn McCurdy, Senior Legislative Counsel, ACLU at (202) 544-1681 or at jmccurdy@aclu.org.

Introduction

The American Civil Liberties Union (ACLU) submits the following testimony to the Senate Homeland Security and Governmental Affairs Committee for its hearing on *Oversight of the Bureau of Prisons (BOP): First Hand Accounts of Challenges Facing the Federal Prison System.* For nearly 100 years, the ACLU has been the nation's leading organization dedicated to defending and advancing civil liberties and civil rights. With more than a million members, activists, and supporters across the nation, including tens of thousands living in New Jersey, the ACLU fights on a daily basis in the courts, in the legislatures, and in communities for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Today's hearing comes at an important juncture in our nation's history, as a growing number of Republicans and Democrats have begun to take a second look at the country's criminal justice system. Following decades of punitive policies that have sent millions to prison and devastated communities, particularly low income communities of color, Americans have become more pragmatic and less ideological in their approach to criminal justice, realizing that our nation's prisons and jails have grown too big and that all too often the people who end up imprisoned suffer from drug addiction or mental illness and should not be incarcerated in the first place.

This moment provides a unique opportunity to create a criminal justice system that is smarter, fairer, smaller, and more effective. Accordingly, we urge this Committee and the Bureau of Prisons to implement reforms that will eliminate the use of solitary confinement on vulnerable populations and prohibit its use beyond 15 days on all other prisoners; increase the use of compassionate release, good time behavior credits, and residential drug abuse programs to help reduce the incarcerated population; and look to states like New Jersey, where reforms have already yielded positive results in incarceration practices.

Currently, our nation's jails and prisons hold almost 2.3 million people on any given day,[1] and another five million are on probation or parole,[2] at an annual cost to taxpayers of more than $80 billion. The federal prison population has increased from approximately 25,000 prisoners in FY1980 to slightly more than 207,000 today.[3] The BOP's budget has also doubled in the past decade, reaching its current level of $7.2 billion in the President's FY16 budget request, approximately 25 percent of the Department of Justice's overall budget. Indeed, in 2014, the BOP's budget grew at almost twice the rate of the rest of the Department of Justice.[4] Despite this growing budget, current BOP Director Charles Samuels has acknowledged that, under current conditions, the system is over-capacity and jeopardizing the safety of staff and prisoners.[5]

It costs approximately $30,000 a year to house just one federal inmate, approximately three times the average yearly cost of tuition at a public university.[6] The costs have far more consequences

than simply the fiscal expenditures necessary to incarcerate 25 percent of the world's prisoners in a country with just five percent of the world's population. The true costs are human lives and particularly generations of young black and Latino men who serve long prison sentences and are lost to their families and communities.

The criminal justice system disproportionately impacts African-Americans and Latinos, perpetuating a harmful legacy of racism that stretches back to our nation's founding. In 2013, African Americans made up about 14 percent of the nation's population but comprised almost 36 percent of people incarcerated in state and federal prisons.[7] Latinos made up 17 percent of the general population and 22 percent of the state and federal incarcerated population (in contrast, Latinos currently comprise 34 percent of people incarcerated in federal prisons[8]).[9] Close to three percent of all black men in the United States were incarcerated (a rate of 2,805 inmates per 100,000 black men), compared to one percent of Latino men (a rate of 1,134 per 100,000) and 0.5 percent of white men (a rate of 466 per 100,000).[10] Black women were imprisoned at a rate more than twice that of white women.[11]

The current system often lacks fundamental due process protections, hands down unreasonably long sentences (more than 40,000 people are currently serving life without parole sentences),[12] and makes it all but impossible for a formerly incarcerated person to rebuild his or her life after doing time – all the while wasting trillions of taxpayer dollars on efforts that have no clear connection to increasing public safety.

While in 2013 the federal prison population began to decrease in size for the first time since 1980, and today there are more than 11,000 fewer prisoners, the Bureau is still at 125 percent of its rated capacity. The rates of crowding are even higher at its high- and medium-security facilities (151 percent and 135 percent, respectively).[13] These levels of crowding pose serious challenges to the operation of safe, secure, and humane prisons. Reducing prisoners' time in institutional custody can help ease this crowding, while incentivizing good behavior and educational and rehabilitative efforts for the prisoners themselves.

It is clearly time for a change. We are at a crossroads as Americans recognize the need to reform both our federal and state criminal justice systems. Former U.S. Attorney General Eric Holder acknowledged in a 2013 speech before the American Bar Association that "although incarceration has a significant role to play in our justice system – widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable."[14] Organizations such as the ACLU, Americans for Tax Reform, Right on Crime, and the Leadership Conference on Civil and Human Rights have come together under the umbrella of the Coalition for Public Safety to work to make our criminal justice system smarter, fairer and more cost effective at the federal, state and local levels. This is a crucial and historic moment when both Democrats and Republicans

understand the need to reform our criminal justice system, and we hope that this hearing will serve as a catalyst for moving forward with reform on the federal level.

The following testimony offers concrete ways for the Bureau of Prisons to reform its practices and reduce its incarcerated population. It provides steps that the Bureau of Prisons can take today, some on its own and some with the support of Congress, to reform its practices, treat prisoners with dignity and respect, reduce recidivism, ensure that vulnerable populations do not unnecessarily sit in prison, and credit prisoners with the reduced sentences that they deserve. The testimony ends by providing an overview of recent successes in New Jersey to reduce the state's jail and prison populations.

I. Solitary Confinement

At the top of any reforms of BOP practices must be the issue of solitary confinement. The extreme suffering and profound damage caused by solitary confinement has long been well known. In 1890, the United States Supreme Court gave this description of solitary confinement as it was 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.[15]

Half a century later, the Court referred to solitary confinement as one of the techniques of "physical and mental torture" that have been used by governments to coerce confessions.[16] And just this June, Justice Kennedy devoted a concurring opinion to solitary confinement, concluding that "research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price."[17]

The Bureau holds approximately five percent of its prisoners in solitary confinement.[18] While this is a slight decline from previous years, it nevertheless represents more than *10,000 prisoners* on any given day. The vast majority of these prisoners are held in Special Housing Units (SHUs), while the rest are held in Special Management Units (SMUs) or the Administrative Maximum facility in Florence, Colorado (ADX). In all of these facilities, prisoners are confined to their cells approximately 23 hours per day.[19]

The average prisoner sent to solitary confinement spends a long time in continuous isolation from fellow prisoners and everyday prison life; sometimes as long as an average of close to *four*

years. Prisoners in ADX spend an average of 1,376 days in continuous solitary confinement.[20] Prisoners in the Special Management Units spend an average of 277 days in continuous solitary confinement, while prisoners in the Special Housing Units spend an average of 76 days in continuous solitary confinement.[21]

The SMU and ADX solitary confinement populations are exclusively male, while women make up two percent of SHU's population.[22] The SMU population is disproportionately black, with black prisoners comprising 48 percent of SMU's population, while the racial demographics of the rest of the solitary confinement populations are in line with the general prison population, which means they are disproportionately black when compared to the general population.[23]

In May 2013, the Government Accountability Office issued a highly critical report on the Bureau's use of solitary confinement.[24] In response, the Bureau agreed to an independent review of its use of solitary, the results of which were released on February 27, 2015.[25] The review acknowledged the Bureau's stated commitment to reducing its use of solitary, but also revealed significant problems in current practices, including the housing of seriously mentally ill individuals in solitary, inadequate mental health treatment and staffing and improper mental health diagnoses, the use of solitary for vulnerable individuals who should instead be held in protective custody, overly long stays in solitary, and the direct release of individuals from solitary without adequate re-entry preparation.

It is well established that persons with mental illness are particularly vulnerable to the harms of solitary confinement. Federal courts have repeatedly found the solitary confinement of the mentally ill to be unconstitutional,[26] and in 2012, the American Psychiatric Association enacted a policy opposing the "prolonged" segregation of prisoners with serious mental illness, which it defined as longer than 3-4 weeks.[27] For these reasons, the review's findings regarding the treatment of persons with mental illness in solitary confinement are particularly disturbing. They include:

Misdiagnosis and under-diagnosis of mental illness. The reviewers disagreed with the Bureau's diagnosis in nearly *two-thirds* of the cases, and concluded that the Bureau had erroneously assessed a number of prisoners as not having significant mental health problems.[28]

Inadequate mental health treatment. Even when mental health needs are identified, services are insufficient. The reviewers found that mental health treatment was insufficient or inappropriate in more than half of the cases reviewed.[29]

Lack of psychiatric staff. The reviewers found a clear shortage of psychiatrists throughout the facilities that were visited, which "leads to numerous problems in both diagnosis and treatment, particularly for the seriously mentally ill inmates."[30]

Inappropriate placement of severely mentally ill prisoners in solitary confinement. The reviewers concluded that about *30 percent* of the prisoners they reviewed required placement in a specialized mental health program or residential treatment unit, and should have been excluded from solitary confinement as a result of their serious mental illness.[31]

The review also found that more than 1,300 federal prisoners are held in solitary confinement solely for their own protection,[32] and not because they pose a threat to security.[33] Despite their vulnerability and need for protection, prisoners in protective custody are subjected to virtually the same harsh and restrictive conditions as prisoners who are in solitary for punishment, which the reviewers noted is contrary to nationally accepted practices.[34] The reviewers also found that 48 percent of prisoner in the SHU are awaiting the results of an investigation into misconduct,[35] and that 35 percent, or 3,216 of the prisoners in the SHU are in prison for a drug offense.[36]

Finally, research has shown that prisoners who are released directly from solitary confinement to the community have higher rates of recidivism than those who are transitioned to the general prison population prior to release.[37] One study in Washington State found that prisoners released from solitary confinement to communities had a felony commission rate 35 percent greater than similar prisoners released from the general population.[38] Despite this research, the review found that the Bureau releases prisoners directly from solitary confinement to the community, while not even accounting for how many prisoners are released in this way.[39] The reviewers concluded that such releases are "not in the interests of the communities where these inmates are being released," and should occur "only under extraordinary circumstances."[40]

Recommendations:

- As an important first step, the Bureau should promptly **implement the recommendations of the independent review**, which range from better tracking of placements and the monitoring of trends and patterns, to reducing the length of stay for SMU prisoners[41] and expanding housing alternatives for prisoners in protective custody.[42]

  But much more is needed. The extreme social and environmental deprivations of solitary confinement should have no place in American corrections. Physical separation may sometimes be necessary for safety and security; isolation is not.

- The Bureau should **abolish the use of solitary confinement for persons under the age of 18 and for persons with mental illness**. Solitary confinement has been widely decried as cruel and unusual punishment, but for juveniles in particular it presents a greater danger to their health and development, making rehabilitation less likely. Studies of

juvenile solitary confinement have found that more than 50 percent of juvenile detention facility suicides occur when a youth is in confinement. Similarly, solitary confinement presents unique dangers to individuals with mental illness.

Senators Cory Booker and Rand Paul have introduced legislation, the REDEEM Act (S. 675), which would prohibit the use of solitary confinement on juveniles for any reason other than to protect a juvenile or those around him or her. In those cases it may only be used as a temporary response to behavior that threatens immediate harm to a youth or others, and then a three-hour limit is imposed. We strongly support this legislation.

- For prisoners older than 18 and who do not suffer from mental illness, the Bureau should **prohibit periods of solitary confinement lasting longer than 15 days**, which would bring it into compliance with international human rights standards.[43] The Bureau should also prohibit more than 20 days of solitary confinement during any 60-day period. Moreover, even when used for a few days, solitary confinement must be limited to very exceptional circumstances, as a last resort, for as short a time as possible. Finally, procedural safeguards must be followed to prevent the arbitrary or excessive use of solitary confinement, and strict documentation and high level, internal oversight and approval of the use of any isolation must be put in place. Regular, independent review and auditing of solitary confinement practices for all facilities are necessary to ensure that reforms are implemented and managed appropriately.

- Short of the above prohibitions, the Bureau should dramatically reduce the duration of solitary confinement; provide enriched programming, improved mental health treatment, and increased social interaction for those held in segregated housing; expand specialized housing for prisoners with mental illness and cognitive or developmental disabilities; and ensure that prisoners are not released directly from solitary confinement to communities.

Implementing the above recommendations will lead to a decrease in the federal prison population by reducing recidivism rates.

II. Compassionate Release

Under the Sentencing Reform Act of 1984, Congress authorized the BOP to request that a federal judge reduce an inmate's sentence for "extraordinary and compelling" circumstances, also known as "compassionate release."[44] The request can be based on either medical or non-medical conditions that the judge could not reasonably have foreseen at the time of sentencing. In 2013, BOP expanded the medical criteria that can be considered for inmates seeking compassionate release. In addition, the Attorney General announced revised criteria for other categories of

inmates seeking reduced sentences, including older prisoners and certain inmates who are the only possible caregiver for their dependents.

Recommendation: The Bureau should fully implement its updated policy regarding compassionate release for prisoners in order to realize its full potential to reduce the federal prison population. Moreover, although BOP has released 156 people since August of 2013 in accordance with the updated compassionate release policy,[45] it is vital that the decision on whether to apply for compassionate release is not left solely to the discretion of the Bureau. Prisoners themselves should be able to request from a judge that they be released from custody early due to health or family circumstances. The ACLU recommends that Congress amend 18 U.S.C. § 3582(c)(1) to allow individual prisoners, rather than just the Bureau, to request that a court consider compassionate release. This will ensure that courts will be given more opportunities to decide whether individuals such as elderly prisoners who are at least 65 years old and who have served at least 10 years or 75 percent of their sentences, or prisoners who need to care for their children or spouses, are given opportunities for compassionate release.

III. Time Credits For Good Behavior

The Bureau provides good time credit for "good behavior" that the law describes as "exemplary compliance with institutional disciplinary regulation."[46] Such credits reduce a prisoner's time in BOP custody. Yet the BOP's method of calculating earned good time credit reduces a prisoner's sentence to a maximum credit of 47 days per year – below the 54 days the statute intended. This decision results in unnecessary increases in prison sentences at significant cost.

Recommendation: Congress should clarify the statutory language allowing an inmate to earn good time credit of up to 54 days per year.[47] By clarifying the statutory language, Congress could save an estimated $41 million in the first year alone,[48] or approximately $400 million over ten years according to the BOP.[49] Congress should also implement a proposal supported by BOP that would create a new good time credit earned for successful participation in recidivism-reduction programs.[50]

IV. BOP's Residential Drug Abuse Program (RDAP)

The Residential Drug Abuse Treatment Program (RDAP) is a voluntary, 500-hour, 9-to-12 month program of individual and group therapy for federal prisoners with substance abuse problems. It is authorized by 18 U.S.C. § 3621, which directs the Bureau of Prisons to provide "residential substance abuse treatment (and make arrangements for appropriate aftercare) . . . for all eligible prisoners." As an incentive to get prisoners to participate, federal law allows the BOP to reduce the sentences of RDAP graduates convicted of "nonviolent" offenses by up to one year. Currently, however, BOP is only reducing sentences by an average of 10.2 months.

Recommendation: We urge the BOP to prioritize RDAP slots for those prisoners who are eligible for a sentence reduction and to provide the full reduction. Moreover, Congress should appropriate $116 million dollars requested by the President in his FY16 budget for the BOP Drug Treatment efforts including the RDAP.

V. New Jersey Experience

In New Jersey, the prison population reached its peak in 1999 when more than 30,000 prisoners were incarcerated in state prisons.[51] In the decade-and-a-half since then, New Jersey has reduced its prison population by almost 30 percent.[52]

New Jersey's success in reducing its prison population can be attributed to several positive policy decisions. The most notable policy changes have been a reduction in the scope and magnitude of our harsh mandatory minimum sentences for narcotics offenses,[53] and a decrease in the number of parolees returned to prison for technical violations.[54] New Jersey also recently passed sweeping reform of its system of pretrial detention and release that promises to further reduce the incarcerated population in the state.[55]

a. Blunting Harsh Mandatory Minimum Drug Sentences

New Jersey, like many other states, issued a series of legislative enactments designed to wage a "War on Drugs."[56] In New Jersey, the Legislature focused on mandatory sentencing by creating a new crime that required a three-year mandatory period of incarceration before parole eligibility for distribution or possession with intent to distribute any type or amount of drugs within 1,000 feet of property owned or used by a school.[57] When the law was first enacted, the only exceptions to the three-year mandatory minimum sentence existed if the crime involved less than one ounce of marijuana (in which case a shorter mandatory minimum applied) or if the offense took place within a private residence without juveniles present and was not for profit (in which case an affirmative defense existed).[58] At the peak of these mandatory minimum sentences, when New Jersey's prison population exceeded 30,000, more than 10,000 of those prisoners had been sentenced for drug crimes.[59]

In 2011, the Legislature amended the statute such that a mandatory minimum sentence is required *only* where the offense actually occurred on school property or the defendant used or threatened violence or was in possession of a firearm.[60] The change has been remarkable. The number of prisoners incarcerated on drug crimes is down to 3,670.[61]

b. Reducing Re-incarceration for Technical Parole Violations

Parole entails supervision of a prisoner who has been released to the community after a period of incarceration. Ex-offenders on parole must remain crime-free and follow a series of conditions established by a parole board. When a parolee commits a new crime he is likely to be re-incarcerated. But, when a parolee does not comply with supervision conditions, such as being employed, meeting with a parole officer, avoiding drugs or alcohol, attending treatment sessions, paying fines or fulfilling community service requirements, a technical violation of parole occurs.[62] Parole boards can either return the technical violator to prison or impose alternate sanctions. Generally speaking, returning technical parole violators to prison bloats prison populations without promoting public safety.[63]

In 2000, New Jersey's prison population approached 29,000.[64] That year, more than 4,000 people were sent back to prison for technical parole violations.[65] The number of technical parole violations that resulted in people being re-incarcerated has been slowly reduced almost every year since then.[66] Last year, just 1,511 people went back to prison for technical violations.[67] While some states have codified absolute limits on re-incarcerating technical parole violators,[68] New Jersey's efforts have been more tailored to the individual parolee. As the Parole Board has explained:

> In response to the burden that re-incarcerating technical, non-criminal violators of parole places on the corrections system, the [Parole Board] has adopted a new policy of graduated responses to technical violations. The new graduated sanctions regime is designed to use the least restrictive response for the violation being addressed. This policy encourages Parole Officers and their supervisors to tailor sanctions to the offense, and focus on root causes rather than relying on re-incarceration as a one-size-fits-all response.[69]

By providing for sanctions other than re-incarceration and by seeking to address root causes, New Jersey has cut the number of technical parole violators returning to prison by more than 60 percent.[70]

c. Pretrial Detention Reform

In addition to the more than 21,000 people in New Jersey prisons, approximately 15,000 people are housed in our county jails – either serving short sentences or as pretrial detainees.[71] As a 2013 study made clear, many of the 10,000 people detained pretrial were not the most violent or the most dangerous;[72] they were the poorest.[73] The study also revealed that many pretrial detainees sat in jail for long periods of time (average of 314 days) awaiting adjudication of their case.[74]

In response to this unfair and inefficient system, stakeholders in New Jersey, under the leadership of the Chief Justice of the New Jersey Supreme Court formed the Joint Committee on Criminal Justice,[75] recommended a total overhaul of the bail system and the establishment of statutory speedy trial protections.[76]

In the summer of 2014, the Legislature passed, and Governor Chris Christie signed, legislation that will transform New Jersey's bail system from a money-based system to a risk-based system.[77] The legislation aims to ensure that each person who gets arrested will be evaluated to determine the likelihood of committing another offense, intimidating witnesses, or fleeing.[78] Low-risk, non-violent offenders will be released on their own recognizance, while many of those who pose higher risks will be released subject to conditions such as curfews, travel restrictions, or electronic monitoring.[79] We believe that the Legislation has the opportunity to dramatically reduce New Jersey's jail and prison populations.[80]

d. Solitary Confinement

This is not to suggest that New Jersey is doing everything right with respect to its prisons and jails. In our state prisons, county jails and juvenile detention centers, we house far too many people in solitary confinement for far too long. Vulnerable populations like children,[81] people with mental illness[82] and people with developmental disabilities[83] have been housed in total isolation, and suffered severe consequences as a result. We are pushing – through litigation,[84] rulemaking,[85] and legislation[86] – to end the practice of housing vulnerable populations in solitary confinement. The efforts are starting to bear fruit: the Middlesex County Jail – the defendant in a lawsuit we filed to prevent the housing of mentally-ill prisoners in solitary confinement – applied for and was awarded a grant from the Vera Institute of Justice to study Safe Alternatives to Isolation.[87] A bill that would ban the use of solitary confinement for vulnerable individuals has received increased statewide attention.[88]

But we also recognize that solitary confinement, particularly long-term solitary confinement is an extremely harmful practice for anyone.[89] New Jersey has a long-history of keeping people housed in solitary confinement for long periods.[90] This is a practice that needs to end. The bill currently being considered in New Jersey would limit the amount of time a person could be subjected to solitary confinement, except in emergency situations, to 15 consecutive days.[91] The Legislation in New Jersey has gotten stakeholders to discuss seriously whether, and how, New Jersey can safely reduce its reliance of a form of punishment that has been widely condemned as torture.[92]

Conclusion

Nationwide, the bipartisan commitment to criminal justice reform is strong. This Congress has a unique opportunity to transform this commitment into real change. The ACLU urges Congress to

adopt our recommendations, which would help to increase fairness and justice at every stage in the system.

[1] This number includes almost 1.6 million individuals held in state and federal prisons, plus approximately 785,000 in county and city jails and 55,000 in U.S. Marshals custody. E. Ann Carson, Ph. D., Bureau of Justice Statistics, "Prisoners in 2013" (2014), available at http://www.bjs.gov/content/pub/pdf/p13.pdf (hereinafter "Prisoners in 2013"); Todd D. Minton & Daniela Golinelli, Ph.D, Bureau of Justice Statistics, "Jail Inmates at Midyear 2013 – Statistical Tables" (2014) (Revised Aug. 12, 2014), available at http://www.bjs.gov/content/pub/pdf/jim13st.pdf; U.S. Marshals Serv., Office of Pub. Affairs, "Fact Sheet: Facts and Figures 2015," available at http://www.usmarshals.gov/duties/factsheets/facts.pdf. Congress funds U.S. Immigration and Customs Enforcement (ICE) to hold an additional 34,000 people in detention facilities daily, though ICE does not publicly release its daily detention population. For more information, s*ee* National Immigrant Justice Center, "Eliminate the Detention Bed Quota," available at http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VO-1yfldU1J (last visited July 14, 2015).

[2] Lauren E. Glaze & Thomas P. Bonczar, Bureau of Justice Statistics, "Probation and Parole in the United States 2010," at 1, 30 app. tbl. 2, 40 app. tbl. 12, *available at* http://bjs.gov/content/pub/pdf/ppus10.pdf

[3] *Compare* Federal Bureau of Prisons, "Statistics: Total Federal Inmates," (2015), *available at* http://www.bop.gov/about/statistics/population_statistics.jsp *with* Federal Bureau of Prisons, Statistics: Past Inmate Population Totals, *available at* http://www.bop.gov/about/statistics/population_statistics.jsp#old_pops

[4] Michael E. Horowitz (Inspector General, Bureau of Prisons), "Top Management and Performance Challenges Facing the Department of Justice 2014" (2014).

[5] Charles E. Samuels, Jr. (Director, Federal Bureau of Prisons), "Testimony on Oversight of the Federal Prison System before the Judiciary Committee of the U.S. House of Representatives Subcommittee on Crime" (2013).

[6] Charles E. Samuels, Jr., "Annual Determination of Average Cost of Incarceration," Federal Register (Mar. 18, 2013), https://www.federalregister.gov/articles/2013/03/18/2013-06139/annual-determination-of-average-cost-of-incarceration. See also "Average Published Undergraduate Charges by Sector, 2014-15," College Board, http://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2014-15

[7] *See* Prisoners in 2013, *supra.*

[8] Federal Bureau of Prisons, "Statistics: Inmate Ethnicity," (2015), *available at* http://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp.

[9] *See* Prisoners in 2013, *supra.*

[10] *Id.*

[11] *Id.*

[12] *See* Ashley Nellis & Ryan S. King, Sentencing Project, "No Exit: The Expanding Use of Life Sentences in America" 9-10 (Figure 2) (July 2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf.

[13] Kenneth McGinnis, et al., "Federal Bureau of Prisons: Special Housing Unit Review and Assessment," CNA Analysis and Solutions (December 2014), at 13 (hereinafter "CNA Audit").

[14] Eric Holder, Att'y Gen., "Remarks at the Annual Meeting of the American Bar Association's House of Delegates" (Aug. 12, 2013) (transcript available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations)

[15] *In re Medley*, 134 U.S. 160, 168 (1890).

[16] *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940).

[17] *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

[18] CNA Audit at iii-iv.

[19] Government Accountability Office, "Bureau of Prisons: Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing," GAO-13-429 (May 2013) (hereinafter, GAO Report). The Bureau has sometimes disputed the term "solitary confinement," pointing out that some prisoners in the SHUs and SMUs are double-celled. According to the Civil Rights Division of the Department of Justice, "the terms 'isolation'

or 'solitary confinement' mean the state of being confined to one's cell for approximately 22 hours per day or more, *alone or with other prisoners*[.]" Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, to Honorable Tom Corbett, Governor of Pennsylvania, May 31, 2013, at 5 (available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf) (emphasis added). Both courts and mental health experts have concluded that the presence of a cellmate does not significantly mitigate, and indeed may aggravate, the stresses of solitary confinement. *See Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) (finding that prisoners in California's SHU "are severely deprived of normal human contact regardless of whether they are single or double celled"); Grassian, "Psychiatric Effects of Solitary Confinement," 22 Wash. U.J.L & Pol'y 325, 357-58 (2006) ("Confined groups comprising just two individuals may be the most pathogenic of all").

[20] CNA Audit at 58.

[21] *Id.*

[22] CNA Audit at 52.

[23] *Id.*

[24] GAO Report, supra.

[25] Kenneth McGinnis, et al., "Federal Bureau of Prisons: Special Housing Unit Review and Assessment" (December 2014).

[26] *See, e.g., Madrid*, 889 F. Supp. at 1265-66; *Ruiz v. Johnson*, 37 F.Supp.2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand,* 154 F.Supp.2d 975 (S.D. Tex. 2001).

[27] American Psychiatric Association, "Position Statement on Segregation of Prisoners with Mental Illness" (December 2012), available at http://www.psychiatry.org/File%20Library/Learn/Archives/Position-2012-Prisoners-Segregation.pdf.

[28] CNA Audit at 115, 117.

[29] CNA Audit at 117.

[30] CNA Audit at 123.

[31] CNA Audit at 118, 128.

[32] CNA Audit at 14.

[33] CNA Audit at 29 ("It is not uncommon to find these inmates comingled with disciplinary and/or administrative segregation inmates")

[34] CNA Audit at 82-83.

[35] CNA Audit at 14.

[36] CNA Audit at 53.

[37] Commission on Safety and Abuse in America's Prisons, "Confronting Confinement" 55 (2006); Maureen L. O'Keefe, Colo. Dept. of Corrections, "Analysis of Colorado's Administrative Segregation" 25 (2005).

[38] CNA Audit at 37.

[39] CNA Audit at 141.

[40] CNA Audit at 142.

[41] To earn release from solitary confinement, prisoners in the SMUs, which institutes enhanced and more restrictive approaches and are meant for prisoners who have participated in gang-related activity and/or present unique security concerns, currently must progress through a four-level program, which takes a minimum of 18-24 months. The review found that backlogs of prisoners awaiting transfer to the next program level "negate the intent of the program design and decrease the [prisoners'] motivation to change behavior." CNA Audit at 100. Accordingly, the reviewers recommended compressing the program into three levels, which would take 12 months to complete. CNA Audit at v, 101.

[42] CNA Audit at 228-36.

[43] *See* Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268 (5 August 2011), ¶ 88.

[44] 18 U.S.C. § 3582(c)(1)(A).

[45] Office of Inspector General, "The Impact of an Aging Inmate Population on the Federal Bureau of Prisons" U.S. Department of Justice (May 2015) available at https://oig.justice.gov/reports/2015/e1505.pdf)

[46] 18 U.S.C. § 3624(b).

[47] *Id.*

[48] U.S. Department of Justice, FY 2012 Budget Request, (2012), http://www.justice.gov/sites/default/files/jmd/legacy/2014/01/12/fy12-bud-summary-request-performance.pdf at p. 8.

[49] U.S. Gov't Accountability Office, "Bureau of Prisons: Information on Efforts and Potential Options to Save Costs" 46 (Sept. 2014) *available at* http://www.gao.gov/assets/670/666254.pdf.
[50] Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, Before the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015), *available at* http://www.colsontaskforce.org/wp-content/uploads/2015/01/SamuelsStatement-1-27-15.pdf.
[51] New Jersey Department of Corrections, "Offenders in new Jersey Correctional Institutions on January 11, 1999 by Base Offense" (Total Population, 30,263).
[52] *Compare id. with* New Jersey Department of Corrections, "Offenders in new Jersey Correctional Institutions on January 2, 2015, by Base Offense" (30,263 in 1999, 21,486 in 2015, for a change of 29 percent).
[53] *See* N.J. Stat. Ann. § 2C:35-7 (West 2005), amended by N.J. Stat. Ann. § 2C:35-7b(1)(a)-(d) (West Supp. 2011) (granting judges broader sentencing discretion).
[54] Presentation by Lenny Ward, Director, Parole Supervision Division, Community Programs Division, New Jersey State Parole Board at Collateral Consequences of Criminal Convictions Conference, March 5, 2015, slide 13 (on file with Udi Ofer).
[55] *See* American Civil Liberties Union of New Jersey *"*ACLU-NJ hails passage of NJ bail reform as historic day for civil rights*"* August 4, 2014 (available at: https://www.aclu-nj.org/news/2014/08/04/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-righ).
[56] New Jersey Developments: New Jersey's Drug Courts: A Fundamental Shift From The War On Drugs To A Public Health Approach For Drug Addiction And Drug-Related Crime, 64 Rutgers L. Rev. 795, 796 ("In response to the societal perception in the 1970s and 1980s that there was a growing and overwhelming drug problem in this country, many states waged a 'war on drugs'").
[57] *Id.*
[58] *See* N.J. Stat. Ann. § 2C:35-7 (West 2005).
[59] New Jersey Department of Corrections, "Offenders in new Jersey Correctional Institutions on January 11, 1999 by Base Offense (10,385 drug offenders).
[60] N.J. Stat. Ann. § 2C:35-7b(2)(a)-(b) (West Supp. 2011).
[61]New Jersey Department of Corrections, "Offenders in new Jersey Correctional Institutions on January 2, 2015, by Base Offense" (available at: http://www.state.nj.us/corrections/pdf/offender_statistics/2015/By%20Base%20Offense%202015.pdf).
[62] *See generally*, National Conference of State Legislatures, "Probation and Parole Violations State Responses" (Nov. 2008) at 3-4, available at: http://www.ncsl.org/print/cj/violationsreport.pdf.
[63] *See* Justice Policy Institute, "How to safely reduce prison populations and support people returning to their communities" (June 2010) (available at: http://www.justicepolicy.org/images/upload/10-06_fac_forimmediaterelease_ps-ac.pdf).
[64] Presentation by Lenny Ward, *supra*.
[65] *Id.*
[66] *Id.* (The number of technical parole violations has reduced every year since 2000, with the exception of 2007 and 2011, in which years there were slight upticks).
[67] *Id.*
[68] See, e.g., National Conference of State Legislatures, *supra* (Louisiana law limits incarceration to 90 days for a first technical violation of parole. The Washington statute sets a maximum of 60 days' confinement for minor violations. Lawmakers in California created guidelines that define the length of time an offender can be revoked to prison. Incarceration is limited to 12 months, although it can be extended if the offender commits subsequent acts of misconduct while incarcerated. The Nevada State Board of Pardons Commissioners can order an offender to six months' incarceration or residential confinement for a parole violation, in lieu of revoking parole.)
[69] New Jersey State Parole Board Annual Report 2004, at 4-5 (available at: http://www.state.nj.us/parole/docs/reports/AnnualReport04.pdf)
[70] A reduction from 4,049 to 1,511 is a 61.7% change.
[71] Marie VanNostrand, *Drug Policy Alliance, "*New Jersey Jail Population Analysis" (March, 2013), at 1 (available at: http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf).
[72] *Id.* at 10 (noting that less than half of pretrial detainees are held on violent, weapon, or sex crimes).
[73] *Id.* at 13 (noting that more than 1,500 people are held on bails of $25,000 or less).
[74] *Id.* at 12 (noting that the average stay for a person awaiting trial was 314 days). Indeed, in several cases the delay was far longer. Take, for example, the case of Jahnell Weaver, who was incarcerated for more than four years

awaiting trial. *State v. Jahnell Weaver*, No. A-3274-08T3, 2011 WL 3516934, (App. Div. Aug. 12, 2011) (unpublished opinion), pages 14-15.
[75] New Jersey Judiciary [Press Release], "Chief Justice Forms Joint Committee to Examine Criminal Justice Process" June 19, 2013 (available at: http://www.judiciary.state.nj.us/pressrel/2013/pr130619a.htm).
[76] Kate Zernike, "Panel Proposes Changes to New Jersey Bail System," *The New York Times*, March 20, 2014, available at: http://www.nytimes.com/2014/03/21/nyregion/panel-recommends-significant-changes-to-new-jersey-bail-system.html.
[77] Matt Arco, "Christie signs bail reform measure, lauds lawmakers for bipartisanship." *The Star Ledger*, August 11, 2014 (available at: http://www.nj.com/politics/index.ssf/2014/08/christie_signs_bail_reform_measure_lauds_lawmakers_for_bipartisanship.html).
[78] American Civil Liberties Union of New Jersey, *supra*, "ACLU-NJ hails passage of NJ bail reform as historic day for civil rights"
[79] *Id.*
[80] Alexander Shalom, "Bail Reform as a Mass Incarceration Reduction Technique," 66 RUTGERS L. REV. 921, 928.
[81] *See, e.g.* Second Amended Complaint*, Troy D. and O'Neill S. v. Mickens*, Civil Action No.: 1:10-cv-02902-JEI-AMD (D. N.J., Dec. 14, 2011) (available at: http://www.jlc.org/legal-docket/td-and-os-v-mickens-et-al).
[82] American Civil Liberties Union of New Jersey, "ACLU-NJ Sues Middlesex County Jail to End Solitary Confinement of Pretrial Detainee with Mental Illness" (July 3, 2014) (available at: https://www.aclu-nj.org/news/2014/07/03/aclu-nj-sues-middlesex-county-jail-end-solitary-confinement)
[83] *Id.*
[84] *Id.*
[85] American Civil Liberties Union of New Jersey "Petition for Rulemaking for Juvenile Solitary Confinement" (July 2013) (available at: https://www.aclu-nj.org/download_file/view_inline/1421/999/)
[86] *See, Senate Bill* No. 2588, introduced December 8, 2014 (available at: http://www.njleg.state.nj.us/2014/Bills/S3000/2588_I1.PDF)
[87] Vera Institute of Justice, "Vera Selects Five Corrections Departments for Initiative Aimed at Reducing Solitary Confinement" (March 24, 2015) (available at: http://www.vera.org/news/vera-selects-five-corrections-departments-initiative-aimed-reducing-use-solitary-confinement).
[88] "Kean University Forum on solitary confinement brings together prison reform proponents from throughout New Jersey" *Suburban News*, July 24, 2015 (available at: http://www.nj.com/suburbannews/index.ssf/2015/07/kean_university_forum_on_solit.html).
[89] *See, e.g.* Stuart Grassian, *Psychiatric Effects of Solitary Confinement* 22 WASH. U. J. OF L. & POL'Y, 325-383 (2006)
[90] *See, e.g.* American Friends Service Committee "The art of surviving in solitary confinement" (May 27, 2014) (available at: https://www.afsc.org/story/art-surviving-solitary-confinement).
[91] *Senate Bill* No. 2588*, supra*.
[92] United Nations Special Rapporteur on Torture Warns About Abuse of Solitary Confinement in the Americas, 3/13/2013) (available at: http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/5B5F637424BFED7AC1257B2D0060155F?OpenDocument).