



ISOLATION AND REINTEGRATION: PUNISHMENT CIRCA 2014

SEVENTEENTH ANNUAL LIMAN COLLOQUIUM
Yale Law School, 2014

**Editors: Hope Metcalf, Judith Resnik,
& Megan Quattlebaum**

Arthur Liman Public Interest Program

*W.C. Zimmerman, F House, Stateville Correctional Center, Crest Hill, IL (1925), courtesy of
Joe Day, CORRECTIONS AND COLLECTIONS: ARCHITECTURES FOR ART AND CRIME (Routledge 2013).*

Liman Colloquium Isolation and Reintegration, Punishment Circa 2014 Jan. 6 2015

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THE SEVENTEENTH ANNUAL LIMAN COLLOQUIUM
Yale Law School
April, 2014
as revised January 2015

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About the Arthur Liman Public Interest Program and Fund

The Arthur Liman Public Interest Program was endowed to honor Arthur Liman, Yale Law School Class of 1957. Throughout his career, Liman demonstrated how dedicated lawyers, in both private practice and public life, can serve the needs of people and causes that might otherwise go unrepresented. He was chief counsel to the New York State Special Commission on Attica Prison; President of the Legal Aid Society of New York and of the Neighborhood Defender Services of Harlem; Chair of the Legal Action Center in New York City; Chair of the New York State Capital Defender's Office; and Special Counsel to the United States Senate Committee Investigating Secret Military Assistance to Iran and the Nicaraguan Opposition.

The Liman Program was created in 1997 to forward the commitments of Arthur Liman as an exemplary lawyer dedicated to public service in the furtherance of justice. The Program supports the work of law students, law school graduates, and students from six universities, all of whom work to respond to problems of inequality and to improve access to justice for those without resources. The Program also engages in research and other projects to address pressing societal issues, such as those reflected in this book.

Acknowledgements

We thank the participants at the 17th Annual Liman Colloquium for contributing suggestions for materials to this volume and the Oscar M. Ruebhausen Fund at Yale Law School, which supported this volume's publication.

PREFACE

“As punishments become more cruel, so the minds of men, like fluids that always adjust their level according to the objects around them. . . . This is because one punishment obtains sufficient effect when its severity just exceeds the benefit the offender receives from the crime, and the degree of excess must be calculated precisely according to the damage to public good caused by the crime. Any additional punishment is superfluous and therefore a tyranny.”

Cesare Beccaria, ON CRIMES AND PUNISHMENTS 69-70 (XXVII, The Mildness of Punishment) (5th ed. Trans. Graeme R. Newman & Pietro Marongui, 2009, republishing 1754 edition).

“The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”

Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, paras.1-2 (VII, Cases Unmeet for Punishment) (1822).

In centuries past, reformers such as Cesare Beccaria and Jeremy Bentham offered what were then radical visions of alternative conceptions of punishment. These materials invite comparably ambitious aspirations to reframe the practices of punishment in the twenty-first century. The specter of Bentham’s proposed Panopticon stands as a reminder that one generation’s efforts at improvements may come to be understood as misguided by the next generation of reformers.

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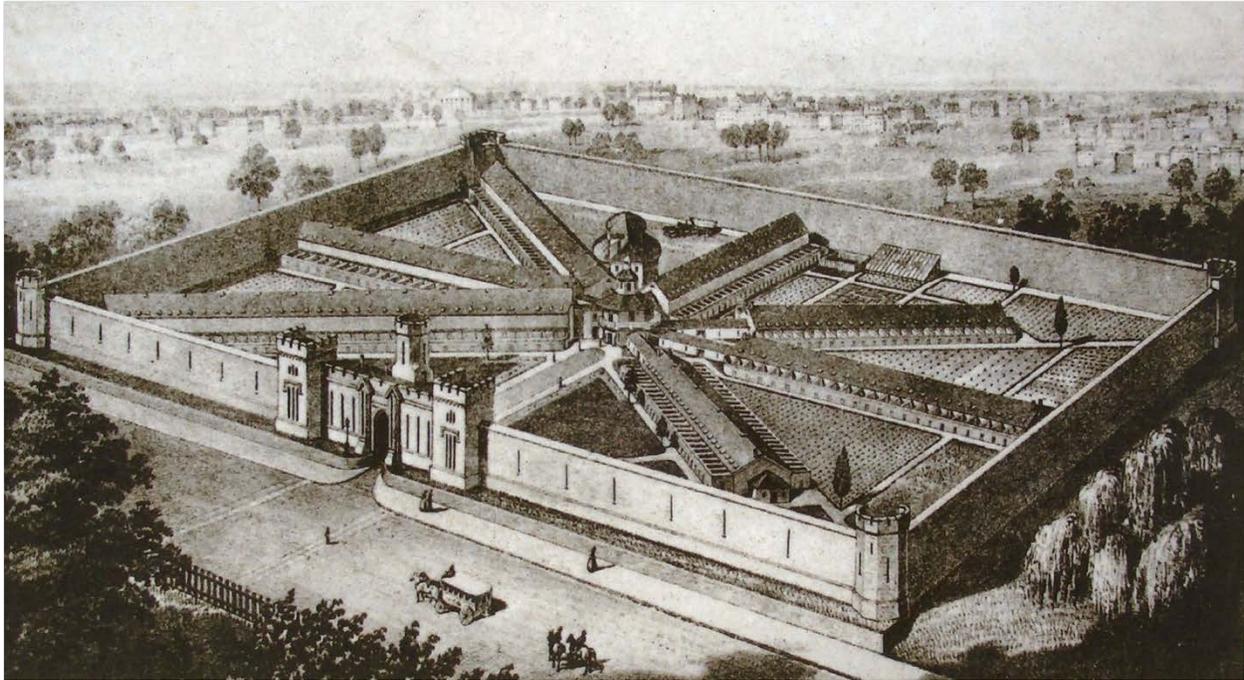
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I. ISOLATION BY PLACE AND BY RULE: MAPPING PRISON PLACEMENTS, THE IMPACT OF GENDER, AND THE CHALLENGES OF DISTANCE



Eastern State Penitentiary, Philadelphia, Pennsylvania, Lithograph by P.S. Duval & Co., 1855, courtesy of Wikipedia Commons.

Eastern State Penitentiary closed in 1971, and the prison has since become a U.S. Historic Landmark. Tourists are welcomed daily to enter the prison cells and wander its corridors. Entry to the museum's "adventure tour" costs \$14, with discounts for children.

The materials that follow explore how far we have come, and how close we remain, to the model of incarceration that Eastern Penitentiary represents. This chapter examines the roles that prison placement, classification systems, and communication rules play in shaping experiences of incarceration so as to lay the groundwork for a common conversation about what it would mean, in principle and practice, to create an accessible prison system.

We begin with examples of policies for classification of inmates and then examine their impact by mapping where, as of 2013, women and men were assigned in the 119 federal prisons. We then explore the degree to which federal law regulates placement and judicial responses to the prospect of sending inmates far from their home communities.

Efforts to relocate prisons have occasioned a good deal of public controversy. The second segment of materials examines how prison geography affects inmates and their families, management and staff, surrounding communities, and counts of the population for political districting. Readings on the Baltimore City Detention Center, San Quentin, and a proposed federal prison in downtown Washington, D.C. illustrate the challenges of placing prisons in

urban settings. Articles from Aliceville, Alabama and upstate New York highlight concerns about access to services in rural facilities. The essay *Riding the Bus* captures the impact of distance from the perspective of visitors. Together, these materials raise questions about which communities have a voice in prison placement and when prisoners count as citizens.

Another variable is the demography of the prison population. The third segment of materials in this chapter explores whether rules on classification, placement, and communication should vary based on distinctive characteristics of populations, such as gender, race, and age. Should “gender-responsive” programming be put in place? Ought staffing reflect the demographics of the inmate population or that of the communities in which prisons are sited? Readings from the state of Washington, where the Department of Corrections has implemented a gender-responsive approach, offer one context for such questions.

One response to the isolation of prisons and of prisoners is radical reconsideration of the forms of incarceration and the placement of prison facilities. In the interim, distances can be bridged or exacerbated by technologies and by policies. The last set of readings in this chapter explore rules on visiting and mail, as well as the FCC’s regulation of phone rates and emerging models of virtual visitation and online prison marketplaces. The questions that emerge are about what law, rules, and regulations can be shaped by prison administrators, courts, and administrative agencies that can reduce the cost of contact.

In short, the problems outlined are the subject of current decision making, as budgets and prison populations propel decisions about building and siting new facilities, closing old ones, and creating alternatives. We hope to enable an understanding of the challenges imposed by prison placements, the impact on the people who live and work in the prison system and those visiting from outside, and to consider whether and how it can change.

THE POWER OF PLACEMENT

Below are examples of prison placement rules and their impact. We start with a 2006 federal Bureau of Prisons (BOP) policy on placement, which sets as its aspiration to assign people to facilities within “a 500-mile radius” of their release residence and describes the criteria used for placement. The 2011 Standards from the American Bar Association provide model placement criteria, including age and gender, but do not specifically discuss distance from home.

In 2013, the Liman Program at Yale Law School used publicly available data to map where women and men are sentenced in the federal system, where they are housed, and which facilities hold numbers above their rated capacity. This cluster of materials raises questions about whether criteria ought to be revised—and if so, by whom—to make proximity to communities (measured by ready access by family and for services) a higher priority and, if so, how to do so given the current housing stock, budgets, and political conflicts about siting facilities.

Program Statement 5100.08:
Inmate Security Designation and Custody Classification (2006)
Federal Bureau of Prisons

Upon sentencing in Federal District Court, the Bureau of Prisons has the sole responsibility in determining where an offender will be designated for service of his/her sentence in accordance with Program Statement 5100.08, Inmate Security and Custody Classification manual. Prior to a designation occurring, the DSCC must receive for consideration all sentencing material regarding the offender.

The Bureau attempts to designate inmates to facilities commensurate with their security and program needs within a 500-mile radius of their release residence. If an inmate is placed at an institution that is more than 500 miles from his/her release residence, generally, it is due to specific security, programming, or population concerns. The same criteria apply when making decisions for both initial designation and re-designation for transfer to a new facility.

Inmates are designated/re-designated to institutions based on:

- the level of security and staff supervision the inmate requires,
- the level of security and staff supervision the institution provides,
- the medical classification care level of the inmate and the care level of the institution,
- the inmate's program needs (e.g., substance abuse treatment, educational/vocational training, individual and/or group counseling, medical/mental health treatment), and
- various administrative factors (e.g., institution bed space capacity; the inmate's release residence; judicial recommendations; separation needs; and security measures needed to ensure protection of victims, witnesses, and the general public).

Note: . . . Due to security requirements, certain information, such as an inmate's pending designation site and/or transfer date, will not be released to anyone even if an original authorization form is provided. . . . [A]ny request for transfer must originate with an inmate's institution unit team at his or her current facility. The DSCC evaluates referrals submitted by institution staff and makes decisions based on the information provided by the institution. Inmates are encouraged to work closely with members of their institution unit team to determine if transfer to a facility closer to their release residence may be possible.

ABA Standard on Prisoner Classification

In February 2010, the American Bar Association House of Delegates adopted a series of standards addressing the “Treatment of Prisoners” as part of its Criminal Justice Standards. Standard 23-2.2, Classification System, describes criteria for classification as “key for prisoner safety and rehabilitation.”

The ABA stated that prison officials should

- “(a) implement an objective classification system that determines for each prisoner the proper level of security and control . . . ;
- (b) initially and periodically validate an objective classification instrument . . .
- (c) ensure that classification and housing decisions, . . . take account of a prisoner’s gender, age, offense, criminal history, institutional behavior, escape history, vulnerability, mental health, and special needs, and whether the prisoner is a pretrial detainee. . . .”

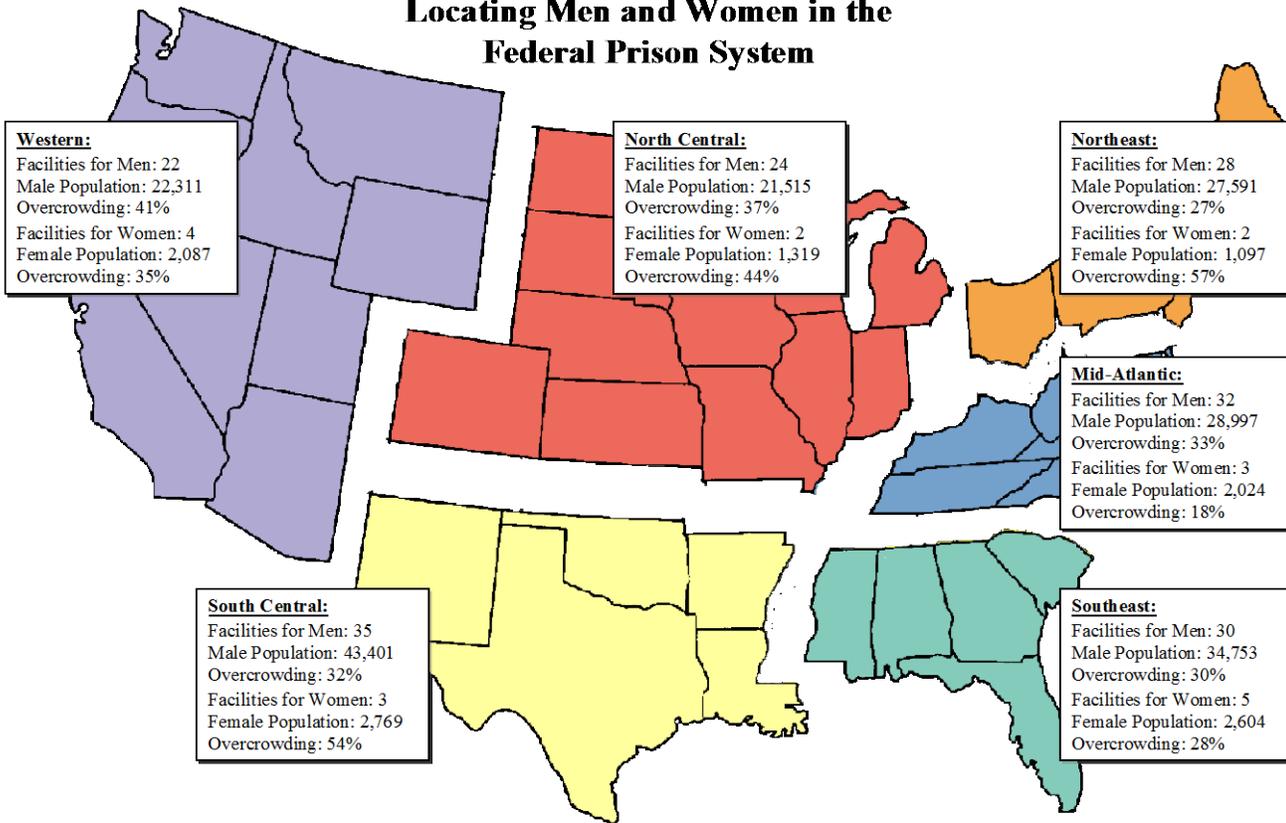
See American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, ABA 37-42, Third Edition (2011); *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html (last visited July 7, 2014).

The commentary explains that “no one factor should alone be dispositive for classification decision-making.” Further, while “[s]ome prisoner characteristics are incorporated relatively simply into a general classification system, others—in particular, age and gender (including transgender status)—require more systematically different treatment.” Accordingly, “[f]or youthful prisoners and for women prisoners, appropriate classification requires careful research and separate validation of a classification instrument. . . .”

Mapping Placements in the Federal Prison System (2013)

Anna Arons, Katherine Culver, Sinead Hunt, and Emma Kaufman*

Locating Men and Women in the Federal Prison System

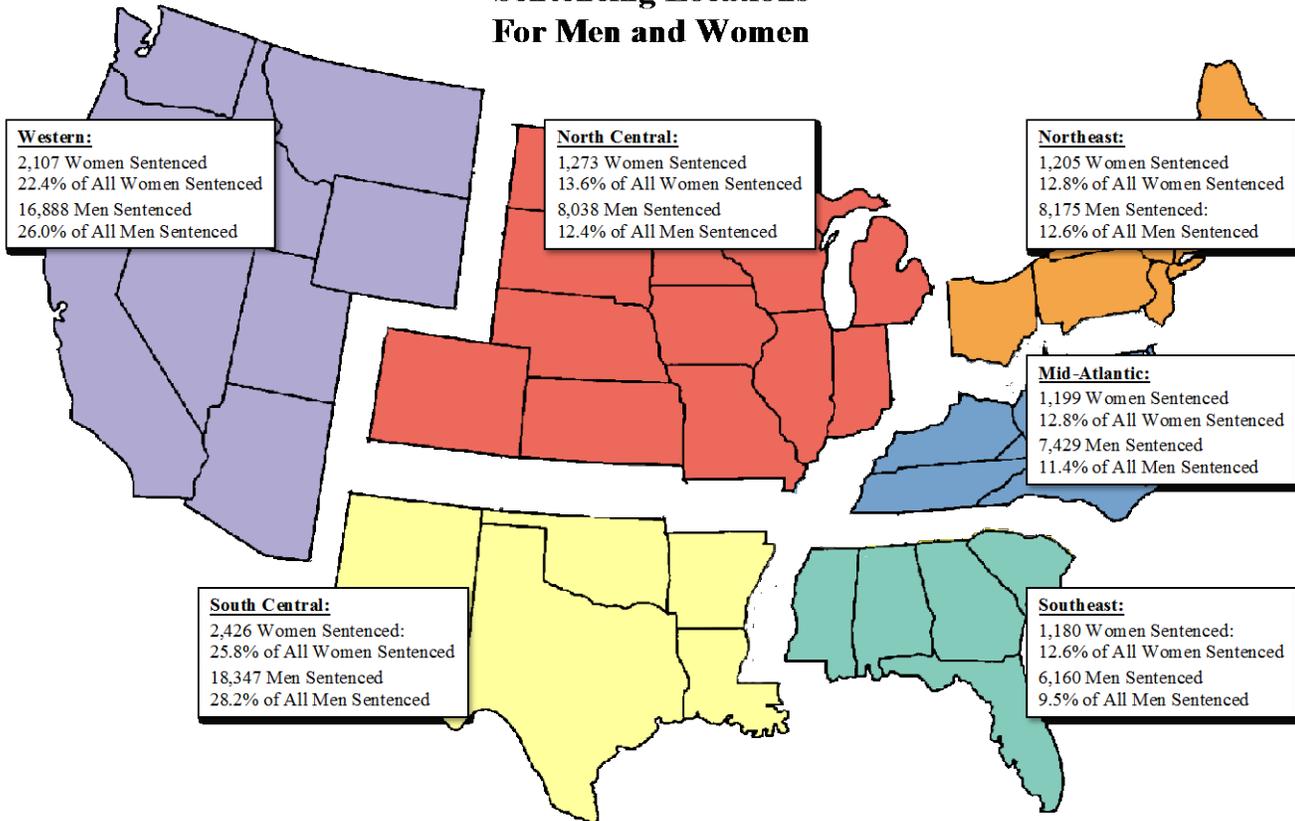


Alaska (Western), Hawaii (Western), and Puerto Rico (Southeast) are not shown. There are no B.O.P. facilities in Alaska or Hawaii, and no post-conviction facilities in Puerto Rico.

Updated October 2013

* Excerpted from Liman Program Statement Submitted for the Record, Oversight of the Bureau of Prisons and Cost Effective Strategies for Reducing Recidivism, Hearing before the Senate Judiciary Committee (Nov. 12, 2013), available at http://www.law.yale.edu/documents/pdf/Liman/Senate_Judiciary_Committee_BOP_Oversight_Hearing_Liman_Statement_for_the_Record_Nov__12_2013.pdf_website.pdf (last visited July 7, 2014).

Sentencing Locations For Men and Women



This map shows the total number of sentences – prison, jail, and non-incarcerative – aggregated up from judicial districts to BOP regions. Note that Alaska, Hawaii, and Puerto Rico are not shown, but the sentences of individuals from each district are reflected in the totals. U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics.

Updated November 2013

LAW AND PLACEMENT

This segment explores the role of law in affecting the placement and transfer of prisoners. In 1983, the Supreme Court held in *Olim v. Wakinekona* that, in terms of the Due Process Clause, prisoners had no “liberty interest” in being sent to a particular facility and, therefore, that prison systems could transfer individuals across state lines without providing them with procedural protections. A decade later, *Sandin v. Conner* concluded that if a prisoner could substantiate that a transfer imposed an “atypical and significant hardship,” some procedural process was due. (The issue of transfers to segregation are addressed in Chapter II.)

In responding to unconstitutional prison conditions, judges may have to consider tradeoffs between the hardships of overcrowding and the hardships of distance. In 2003, in *Laube v. Haley*, Judge Myron Thompson found the conditions at Julia Tutwiler Prison for Women in Alabama to be so unsafe as to be a “time bomb ready to explode facility-wide at any unexpected moment in the near future.” In response, Governor Bob Riley ordered the transfer of hundreds of women out of the state. More recently, in 2014, a three-judge court in *Plata v. Brown* determined that, rather than countenance the state’s transferring of inmates outside California, the court would extend its deadline for compliance with the requirement that, to ensure inmate health and safety, the population not exceed 137.5% capacity.

Olim v. Wakinekona

461 U.S. 238 (1983)

Justice Blackmun delivered the opinion of the Court:

. . . Respondent Delbert Kaahanui Wakinekona is serving a sentence of life imprisonment without the possibility of parole as a result of his murder conviction in a Hawaii state court. He also is serving sentences for various other crimes, including rape, robbery, and escape. At the Hawaii State Prison outside Honolulu, respondent was classified as a maximum security risk and placed in the maximum control unit.

Petitioner Antone Olim is the Administrator of the Hawaii State Prison. The other petitioners constituted a prison “Program Committee.” On August 2, 1976, the Committee held hearings to determine the reasons for a breakdown in discipline and the failure of certain programs within the prison’s maximum control unit. . . .

The August 10 hearing was conducted by the same persons who had presided over the hearings on August 2. Respondent retained counsel to represent him. The Committee recommended that respondent’s classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. He received the following explanation from the Committee:

The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However, your relationship with staff, who reported that you threaten

and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require, and you cannot remain at [the maximum control unit] because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland.”

. . . Petitioner Olim, as Administrator, accepted the Committee’s recommendation, and a few days later respondent was transferred to Folsom State Prison in California. . . .

Respondent filed suit under 42 U.S.C. § 1983 against petitioners as the state officials who caused his transfer. He alleged that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing . . . and because the Committee was biased against him. . . .

In *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976), this Court held that an *intrastate* prison transfer does not directly implicate the Due Process Clause of the Fourteenth Amendment. . . . Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State. Often, confinement in the inmate’s home State will not be possible. A person convicted of a federal crime in a State without a federal correctional facility usually will serve his sentence in another State. Overcrowding and the need to separate particular prisoners may necessitate interstate transfers. For any number of reasons, a State may lack prison facilities capable of providing appropriate correctional programs for all offenders.

Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States. On the federal level, 18 U.S.C. § 5003(a) authorizes the Attorney General to contract with a State for the transfer of a state prisoner to a federal prison, whether in that State or another. *See Howe v. Smith*, 452 U.S. 473 (1981). Title 18 U.S.C. § 4002 . . . permits the Attorney General to contract with any State for the placement of a federal prisoner in state custody for up to three years. Neither statute requires that the prisoner remain in the State in which he was convicted and sentenced. . . .

In short, it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State. Confinement in another State, unlike confinement in a mental institution, is “within the normal limits or range of custody which the conviction has authorized the State to impose.” *Meachum*, 427 U.S. at 425. Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. The difference between such a transfer and an intrastate or interstate transfer of shorter distance is a matter of degree, not of kind, and *Meachum* instructs that “the determining factor is the nature of the interest involved, rather than its weight.” 427 U.S. at 424. The reasoning of *Meachum* and *Montanye* compels the conclusion that an interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself.

Justice Marshall, with whom Justice Brennan and Justice Stevens joins, dissenting.

. . . There can be little doubt that the transfer of Wakinekona from a Hawaii prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be “among the severest.” For an indeterminate period of time, possibly the rest of his life, nearly 4,000 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.

I cannot agree with the Court that *Meachum v. Fano* . . . and *Montanye v. Haymes* . . . compel the conclusion that Wakinekona’s transfer implicates no liberty interest. . . . Both cases involved transfers of prisoners between institutions located within the same State in which they were convicted, and the Court expressly phrased its holdings in terms of *intrastate* transfers. Both decisions rested on the premise that no liberty interest is implicated by an initial decision to place a prisoner in one institution in the State rather than another. . . . On the basis of that premise, the Court concluded that the subsequent transfer of a prisoner to a different facility within the State likewise implicates no liberty interest. In this case, however, we cannot assume that a State’s initial placement of an individual in a prison far removed from his family and residence would raise no due process questions. None of our prior decisions has indicated that such a decision would be immune from scrutiny under the Due Process Clause.

Actual experience simply does not bear out the Court’s assumptions that interstate transfers are routine and that it is “not unusual” for a prisoner “to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced.” . . . In Hawaii less than three percent of the state prisoners were transferred to prisons in other jurisdictions in 1979, and, on a nationwide basis, less than one percent of the prisoners held in state institutions were transferred to other jurisdictions. Moreover, the vast majority of state prisoners are held in facilities located less than 250 miles from their homes. Measured against these norms, Wakinekona’s transfer to a California prison represents a punishment “qualitatively different from the punishment characteristically suffered by a person convicted of crime.” *Vitek v. Jones*, 445 U.S. 493. . . . I therefore cannot agree that a State may transfer its prisoners at will, to any place, for any reason, without ever implicating any interest in liberty protected by the Due Process Clause. . . .

Sandin v. Conner
515 U.S. 472 (1995)

Chief Justice Rehnquist delivered the opinion of the Court.

. . . DeMont Conner was convicted of numerous state crimes, including murder, kidnaping, robbery, and burglary, for which he is currently serving an indeterminate sentence of 30 years to life in a Hawaii prison. He was confined in the Halawa Correctional Facility, a maximum security prison in central Oahu. In August 1987, a prison officer escorted him from his cell to the module program area. The officer subjected Conner to a strip search, complete with an inspection of the rectal area. Conner retorted with angry and foul language directed at the officer. Eleven days later he received notice that he had been charged with disciplinary infractions. The notice charged Conner with “high misconduct” for using physical interference to impair a correctional function, and “low moderate misconduct” for using abusive or obscene language and for harassing employees.

Conner appeared before an adjustment committee on August 28, 1987. The committee refused Conner's request to present witnesses at the hearing, stating that “[w]itnesses were unavailable due to [a move to] the medium facility and being short staffed on the modules.” . . . At the conclusion of proceedings, the committee determined that Conner was guilty of the alleged misconduct. It sentenced him to 30 days disciplinary segregation in the Special Holding Unit for the physical obstruction charge, and four hours segregation for each of the other two charges to be served concurrent with the 30 days. . . . Conner's segregation began August 31, 1987, and ended September 29, 1987.

Conner sought administrative review within 14 days of receiving the committee's decision. . . . Nine months later, the deputy administrator found the high misconduct charge unsupported and expunged Conner's disciplinary record with respect to that charge. . . . But before the Deputy Administrator decided the appeal, Conner had brought this suit against the adjustment committee chair and other prison officials in the United States District Court for the District of Hawaii based on Rev. Stat. §1979, 42 U.S.C. § 1983. His amended complaint prayed for injunctive relief, declaratory relief and damages for, among other things, a deprivation of procedural due process in connection with the disciplinary hearing. . . .

Our due process analysis begins with . . . *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)]. There, Nebraska inmates challenged the decision of prison officials to revoke good time credits without adequate procedures. *Wolff*, 418 U. S. at 553. Inmates earned good time credits under a state statute that bestowed mandatory sentence reductions for good behavior, . . . revocable only for “ ‘flagrant or serious misconduct.’ ” We held that the Due Process Clause itself does not create a liberty interest in credit for good behavior, but that the statutory provision created a liberty interest in a “shortened prison sentence” which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct. . . . The Court characterized this liberty interest as one of “real substance” . . . and articulated minimum procedures necessary to reach a “mutual accommodation between institutional needs and objectives and the provisions of the Constitution.” . . . Much of *Wolff*'s contribution to the landscape of prisoners' due process derived not from its description of liberty interests, but rather from its intricate balancing of prison management concerns with prisoners' liberty in

determining the amount of process due. . . . *Wolff* . . . led to a more thorough treatment of the issue in *Meachum v. Fano*, 427 U.S. 215 (1976).

Inmates in *Meachum* sought injunctive relief, declaratory relief and damages by reason of transfers from a Massachusetts medium security prison to a maximum security facility with substantially less favorable conditions. The transfers were ordered in the aftermath of arson incidents for which the transferred inmates were thought to be responsible, and did not entail a loss of good time credits or any period of disciplinary confinement. . . . The Court . . . held that the Due Process Clause did not itself create a liberty interest in prisoners to be free from intrastate prison transfers. . . . The Court distinguished *Wolff* by noting that there the protected liberty interest in good time credit had been created by state law; here no comparable Massachusetts law stripped officials of the discretion to transfer prisoners to alternate facilities “for whatever reason or for no reason at all.” . . .

Examination of the possibility that the State had created a liberty interest by virtue of its prison regulations followed. [In *Hewitt v. Helms*, 459 U.S. 460 (1983) . . . the Court asked whether the State had gone beyond issuing mere procedural guidelines and had used “language of an unmistakably mandatory character” such that the incursion on liberty would not occur “absent specified substantive predicates.” . . . Finding such mandatory directives in the regulations before it, the Court decided that the State had created a protected liberty interest. It nevertheless held . . . that the full panoply of procedures conferred in *Wolff* were unnecessary to safeguard the inmates' interest and, if imposed, would undermine the prison's management objectives.

As this methodology took hold, no longer did inmates need to rely on a showing that they had suffered a “grievous loss” of liberty retained even after sentenced to terms of imprisonment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). . . . For the Court had ceased to examine the “nature” of the interest with respect to interests allegedly created by the State. *See* . . . *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). In a series of cases since *Hewitt*, the Court has wrestled with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement. . . .

Hewitt has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment Second, the *Hewitt* approach has led to the involvement of federal courts in the day to day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment. . . .

In light of the above discussion, we believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*. Following

Wolff, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. *See also Board of Pardons v. Allen*, 482 U.S. 369 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, *see, e.g., Vitek*, 445 U. S., at 493 (transfer to mental hospital), and *Washington*, 494 U. S., at 221-222 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. . . .

The punishment of incarcerated prisoners . . . serves different aims than those found invalid in [cases dealing with pretrial detainees or corporal punishment of schoolchildren] The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitative goals. . . . Admittedly, prisoners do not shed all constitutional rights at the prison gate, *Wolff*, 418 U. S. at 555, but “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Jones [v. North Carolina Prisoners Union]*, 433 U. S. 119, 125 (1977) Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law.

This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence. . . . We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest

Nor does Conner's situation present a case where the State's action will inevitably affect the duration of his sentence. Nothing in Hawaii's code requires the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, . . . even though misconduct is by regulation a relevant consideration. . . . The decision to release a prisoner rests on a myriad of considerations. And, the prisoner is afforded procedural protection at his parole hearing in order to explain the circumstances behind his misconduct record. . . . The chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause.

We hold, therefore, that neither the Hawaii prison regulation in question, nor the Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*. . . .

Justice Ginsburg, with whom Justice Stevens joins, dissenting.

Unlike the Court, I conclude that Conner had a liberty interest, protected by the Fourteenth Amendment's Due Process Clause, in avoiding the disciplinary confinement he endured. As Justice Breyer details, Conner's prison punishment effected a severe alteration in the conditions of his incarceration. Disciplinary confinement as punishment for “high misconduct” not only deprives prisoners of privileges for protracted periods; unlike administrative segregation and protective custody, disciplinary confinement also stigmatizes them and diminishes parole

prospects. Those immediate and lingering consequences should suffice to qualify such confinement as liberty depriving for purposes of Due Process Clause protection. . . .

I see the Due Process Clause itself, not Hawaii's prison code, as the wellspring of the protection due Conner. Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the "Liberty" enshrined among "unalienable Rights" with which all persons are "endowed by their Creator."

Deriving the prisoner's due process right from the code for his prison, moreover, yields this practical anomaly: a State that scarcely attempts to control the behavior of its prison guards may, for that very laxity, escape constitutional accountability; a State that tightly cabins the discretion of its prison workers may, for that attentiveness, become vulnerable to constitutional claims. An incentive for ruleless prison management disserves the State's penological goals and jeopardizes the welfare of prisoners.

To fit the liberty recognized in our fundamental instrument of government, the process due by reason of the Constitution similarly should not depend on the particularities of the local prison's code. Rather, the basic, universal requirements are notice of the acts of misconduct prison officials say the inmate committed, and an opportunity to respond to the charges before a trustworthy decisionmaker.

Justice Breyer, with whom Justice Souter joins, dissenting.

The Fourteenth Amendment says that a State shall not "deprive any person of life, liberty, or property, without due process of law." U. S. Const., Am. 14, §1. In determining whether state officials have deprived an inmate, such as Conner, of a procedurally protected "liberty," this Court traditionally has looked either (1) to the nature of the deprivation (how severe, in degree or kind) or (2) to the State's rules governing the imposition of that deprivation (whether they, in effect, give the inmate a "right" to avoid it). . . .

If we apply these general pre-existing principles to the relevant facts before us, it seems fairly clear, as the Ninth Circuit found, that the prison punishment here at issue deprived Conner of constitutionally protected-liberty. For one thing, the punishment worked a fairly major change in Conner's conditions. In the absence of the punishment, Conner, like other inmates in Halawa's general prison population would have left his cell and worked, taken classes, or mingled with others for eight hours each day. . . . Moreover, irrespective of whether this punishment amounts to a deprivation of liberty independent of state law, here the prison's own disciplinary rules severely cabin the authority of prison officials to impose this kind of punishment. . . .

The majority, while not disagreeing with this summary of pre-existing law, seeks to change, or to clarify, that law's "liberty" defining standards in one important respect. The majority believes that the Court's present "cabining of discretion" standard reads the Constitution as providing procedural protection for trivial "rights," as, for example, where prison rules set forth specific standards for the content of prison meals. It adds that this approach involves courts

too deeply in routine matters of prison administration, all without sufficient justification. It therefore imposes a minimum standard, namely that a deprivation falls within the Fourteenth Amendment's definition of "liberty" only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." . . .

[Justice Breyer outlined reasons to look to state and local rules to determine if a vested right exists]. I recognize that, as a consequence, courts must separate the unimportant from the potentially significant Yet, making that judicial judgment seems no more difficult than many other judicial tasks. . . It seems to me possible to separate less significant matters such as television privileges, "sack" versus "tray" lunches, playing the state lottery, attending an ex stepfather's funeral, or the limits of travel when on prison furlough, . . . from more significant matters, such as the solitary confinement at issue here.

Laube v. Haley

234 F. Supp. 2d 1227 (M.D. Ala. 2002)

The complaint in this lawsuit charges that conditions for female inmates in the Alabama State Prison System violate the Eighth Amendment to the United States Constitution. The plaintiffs are 15 female prisoners incarcerated in the following three facilities: the Julia Tutwiler Prison for Women (Tutwiler), located in Wetumpka, Alabama; the Edwina Mitchell Work Release Center (Mitchell), also located in Wetumpka, only a few hundred feet away from Tutwiler; and the Birmingham Work Release Center (Birmingham), located in Birmingham, Alabama. The defendants are Governor Don Siegelman, Department of Corrections Commissioner Michael Haley, Tutwiler Warden Gladys Deese, Mitchell Acting Warden Patricia Hood, and Birmingham Director Mary Carter. The plaintiffs have brought suit on behalf of themselves and all other female state prisoners in Alabama.

The plaintiffs make various claims that the defendants operate the three facilities in an unsafe manner and do not provide the facilities' inmates with their basic human needs, all in violation of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment and enforced through 42 U.S.C.A. § 1983. In support of their claims, the plaintiffs assert that the following conditions exist at Tutwiler: overcrowding, inadequate supervision in open dorms, improper or inadequate inmate classification, inmate violence, the availability of weapons, the small number of segregation cells, inadequate living space, inadequate ventilation and extreme heat during the summer. They assert that the following conditions exist at Mitchell: overcrowding, inadequate supervision in open dorms, inadequate living space, and inadequate ventilation. And they assert that the following conditions exist at Birmingham: inadequate supervision of the segregation unit and overall inadequate ventilation in the facility. The plaintiffs allege that the defendants have been deliberately indifferent to these conditions and the serious risk these conditions pose to inmates. . . .

In sum, the court holds that the plaintiffs are entitled to preliminary-injunctive relief on their claim that they are subject to a substantial risk of serious harm caused by Tutwiler's greatly

overcrowded and significantly understaffed open dorms. Indeed, the court is not only convinced that these unsafe conditions have resulted in harm, and the threat of harm, to individual inmates in the immediate past, it is also convinced that they are so severe and widespread today that they are essentially a time bomb ready to explode facility-wide at any unexpected moment in the near future. The plaintiffs are not entitled to preliminary-injunctive relief as to Mitchell and Birmingham, nor are they entitled to such relief as to Tutwiler in any other respect.

The court recognizes that prison officials “should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979). At this time, therefore, the court will give the defendants the latitude to fashion appropriate injunctive relief. The defendants may want to adopt the simple and direct measure of immediately and significantly increasing the number of security officers for Tutwiler's dorms or to find some way to reduce immediately the dorm populations or to pursue some other immediately effective measure unknown to the court at this time or to adopt some combination of these measures. The defendants are to submit, within four weeks, a plan that redresses immediately and fully the unconstitutionally unsafe conditions caused by overcrowding and understaffing in open dorms at Tutwiler.

Parole as a Means of Reducing Prison Overcrowding?

In a February, 2003 article in the Montgomery Advertiser entitled *More Paroles Part of Proposal*, author Mike Carson described Governor Bob Riley's proposed plan to “reduce overcrowding at Julia Tutwiler Prison for Women by sending some inmates out of state, increasing paroles of nonviolent offenders and taking other steps.”

Riley's plan was submitted to U.S. District Judge Myron Thompson in connection with *Laube v. Allen*, a class-action lawsuit filed by the Southern Center for Human Rights (SCHR), which alleged that Tutwiler was severely overcrowded and that women incarcerated there were not provided with adequate medical or mental health care. As described by Carson:

Riley's plan would initially send about 290 female inmates to private facilities out of state. . . . Riley sent \$1 million to the Alabama Board of Pardons and Paroles on Friday to begin the process of hiring 28 new parole officers The goal would be to parole about 30 a week. Tutwiler has a population of about 990 inmates. The plan is intended to reduce that to about 750 by the end of June and maintain that level. Riley will also ask the Legislature for \$3.7 million for the Department of Corrections to help carry out the plan.

According to Carson, SCHR opposed sending inmates out of state on the ground that doing so “just completely breaks off [inmates’] ties with community and family support.” But the organization was “pleased” with other aspects of the Governor’s proposal.

Susan James, an attorney who represents the Alabama State Employees Association and a group of corrections officers, also said she opposed the plan to move inmates out of state. James said the practice of moving inmates to other states could eventually cost corrections officers jobs in Alabama. James, a former federal corrections officer and a defense attorney for the last eight years, said inmates shipped out of state could not get good legal representation. “How are you going to communicate with people and protect their interests when they’re incarcerated in Louisiana?” James asked. James, who had not seen the plan, said she generally approved of some of the other steps designed to offer alternatives for nonviolent offenders. . . .

Governor Riley’s plan was not adopted at the time, and the Tutwiler litigation continued. In June 2004, after negotiation and formal mediation, the parties reached a final agreement on two four-year settlements: one addressed conditions at the facility, the other concerned medical care. The case ended in 2010 when the state was found to have performed all of the terms and conditions imposed upon it, though contempt proceedings had been initiated and then settled in 2006.

Unfortunately, 2010 did not mark the end of the difficulties for the women incarcerated in Tutwiler. In January 2014, the Special Litigation Section of the Civil Rights Division of the Department of Justice issued a letter to current Alabama Governor Robert Bentley concluding that “the State of Alabama violates the Eighth Amendment of the United States Constitution by failing to protect women prisoners at Tutwiler from harm due to sexual abuse and harassment from correctional staff.”

Plata v. Brown*Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline**

Judge Reinhardt, Judge Karlton, Judge Henderson (E.D. Cal. and N.D. Cal. 2014):

In August 2009, this Court ordered defendants to reduce the California prison population to 137.5% design capacity in order to remedy the unconstitutional condition of mental and medical health care in California prisons. Today, the prison population remains above 144% design capacity. Yet, it is at least as important now as it was then for the prison population to be reduced to the limit ordered by this Court. In fact, it is even more important now for defendants to take effective action that will provide a long-term solution to prison overcrowding, as, without further action, the prison population is projected to continue to increase and health conditions are likely to continue to worsen.

Defendants now request an extension of time within which to comply fully with the population reduction order. We are presented with two options. Plaintiffs have proposed that we deny defendants' request for an extension and order defendants to comply immediately. Pursuant, however, to a recently enacted statute, Senate Bill 105 ("SB 105"), defendants have informed this Court that, if instructed to comply immediately, they will do so by sending thousands of California prisoners to out-of-state facilities. This solution is neither durable nor desirable. It would result in thousands of prisoners being incarcerated hundreds or thousands of miles from the support of their families, and in hundreds of millions of dollars that could be spent on long-lasting prison reform being spent instead on temporarily housing prisoners in out-of-state facilities. Moreover, we have consistently demanded a "durable" solution to California prison overcrowding, and plaintiffs' proposal does not help to achieve that solution.

In contrast, belated as it may be, defendants appear to be prepared to take the necessary steps toward achieving a durable solution, without additional costly and wasteful litigation and delay. They have proposed an order whereby they will be granted a two-year extension in which they will comply fully with the population reduction order of June 30, 2011, and the population will be reduced in three stages, or "benchmarks" – first in June of this year, second in February 2015, and third and finally in February 2016. For the first time under this order, there will be an effective mechanism which will ensure that these benchmarks are met: a "Compliance Officer" who will have the authority to release prisoners should defendants fail to reach one of the benchmarks, with the number of prisoners released being the number necessary to bring defendants into compliance with the missed benchmark. Further, during these two years, defendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission to recommend reforms of state penal and sentencing laws. They have also agreed to immediately implement various population reduction measures, such as increasing good time credits prospectively for non-violent second-strike offenders and minimum custody inmates, implementing a new parole determination process by which second-striker offenders will be eligible for parole after serving only 50% of their sentence, and expanding parole for the elderly and medically infirm.

* *Plata v. Brown*, No. 2:90-cv-0520 (E.D. Cal. and N.D. Cal., Feb. 10, 2014).

In addition, as provided by SB 105, the two-year extension will allow for hundreds of millions of dollars to be allocated to a “Recidivism Reduction Fund” for activities designed to reduce the state’s prison population, including but not limited to, reducing recidivism. Finally, defendants have represented to this Court that, if a two year extension is granted, they will not appeal or support an appeal of the order granting the extension, or of any of its provisions; nor will they appeal or support the appeal of any subsequent order necessary to implement the extension order or any of its provisions, nor any order issued by the Compliance Officer pursuant to the authority vested in him by the extension order; nor will they move or support a motion to terminate any relief provided for or extended by the extension order or any of its provisions until at least two years after the date of the extension order and such time as it is firmly established that compliance with the 137.5% design capacity benchmark is durable. This should bring to an end to defendants’ continual appeals and requests for modification of this Court’s orders. . . .

Thus, while we are reluctant to extend the deadline for two more years, we also acknowledge that defendants have agreed that, with such an extension, they will implement measures that should result in a durable solution to prison overcrowding in California. We recognize that these measures should have been adopted much earlier, that plaintiffs’ lawyers have made unceasing efforts to obtain immediate relief on behalf of their clients, and that California prisoners deserve far better treatment than they have received from defendants over the past four and a half years. Similarly, California’s citizens have incurred far greater costs, both financial and otherwise, as a result of defendants’ heretofore unyielding resistance to compliance with this Court’s orders. Finally, we recognize that this Court must also accept part of the blame for not acting more forcefully with regard to defendants’ obduracy in the face of its continuing constitutional violations. Nevertheless, resolving the conditions in California prisons for the long run, and not merely for the next few months, is of paramount importance to this Court as well as to the people of this State.

LOCATING AND RELOCATING PRISONS

Decisions on where to build a prison—or whether to sell or relocate an existing prison—shape and impact the lives of inmates, families, staff, volunteers, politicians, and communities. In 1999, a plan was proposed in Washington, D.C. to build a prison within the District. Reporter Donald Braman described community members' objections. In 2010, the Director of the District's Prisoners' Project testified before Congress, detailing the logistical difficulties for prisoners seeking to return to jobs and housing yet housed in prisons at great distance from Washington. As of this writing, the plan for bringing the prison "home" to D.C. has not moved forward.

In neighboring Baltimore, reporters recounted the challenges of staffing an inner city jail, raising questions about the benefits of moving prisons back to cities. In Northern California, another reporter detailed protests, by volunteers and prisoners, about a plan to sell San Quentin (which has not gone forward). As those protestors pointed out, moving the prison out of the Bay Area presented its own staffing problems for programs that could be offered. In the summer of 2013, when the Bureau of Prisons proposed to close its only northeastern prison for women and transfer many of its prisoners to Aliceville, Alabama from FCI Danbury, concerns emerged again about the impact of placement on access.

Communities in which prisons are already located have stakes in keeping employment in their area. A *New York Times* article from January 2011 detailed the economic and political tensions that emerged when New York's Governor Andrew Cuomo announced plans to close several upstate prisons. Mr. Cuomo had previously argued that "an incarceration program is not an employment program. If people need jobs, let's get people jobs. Don't put other people in prison to give some people jobs. . . ." The *Times* described the political resistance to those plans:

The governor and his staff had considered closing or consolidating potentially 10 or more adult and youth prisons and other facilities controlled by the corrections department, but they have faced stiff resistance from Senate Republicans, who are trying to fend off the loss of hundreds of state jobs in some of their upstate districts. Now the governor appears to be scaling back his ambitions. . . .

Research shows the benefits of visits for inmates, staff, and the public, thereby suggesting the importance of proximity. A 2007 study from Ohio found statistically significant relationships between rule infractions and visitation. Inmates who received more visits, particularly from people in a parental or guardian role, had fewer violations. Another study examined the correlation between visitation and recidivism among 16,420 people released from Minnesota prisons between 2003 and 2007. Visits generally correlated with lower levels of recidivism, particularly where individuals maintained contact with siblings, in-laws, fathers, and clergy. Another significant finding was that 40% of the group received no visits. This segment concludes with excerpts from an essay, *Riding the Bus*, by Johnna Christian, helping us to glimpse the experiences from the perspective of visitors.

A Public Debate (2007)*Donald Braman**

Two elderly women have come to blows. As they shove and wrestle, scuffling across the hard floor of the District government office building, they are yelling at each other. “That’s my grandson you’re talking about! Don’t you talk about my grandson that way!” shouts one. “You love him so much, move to Ohio!” responds the other. The first woman is sent sprawling onto the floor, and the two are separated by others in a long line, all waiting to enter a public hearing about a proposed private prison slated for an abandoned industrial dump in a wooded area on the outskirts of Ward Eight, the poorest ward in our nation’s capital city. The Corrections Corporation of America (CCA), the company proposing to build the prison, already runs a private prison in Ohio that holds many District inmates.

The small meeting room quickly fills to standing room only, and people soon begin waving signs and shouting occasional comments at one another. On one side of the room is a small group of people, mostly women relatives of prisoners, there to support a local prison; on the other side is a much larger group of residents and local business owners opposed to the prison. At first the chants and shouts are direct: “Keep them home! We are family! Don’t send them away!” “No prison gates in Ward Eight! We don’t need it, we don’t want it!”

The calls opposing the prison become heated. “Move the trash out of D.C.!” shouts one man, and it is clear that he is not talking about the District’s garbage removal problem. “If your man had stayed home, he wouldn’t be locked up now!” “Thugs not wanted!”

The small room is not made to hold this many people, and those packed into it begin to wipe their brows as the heat and humidity rise. A rumor circulates that the woman leading the prison family group is on the payroll of the company that wants to build the prison; another rumor goes around that the T-shirts were paid for and the families “bought and brought” with money and busses by the private corrections company. A new chant goes up: “Prison pimps go home!” “Say no to prison ho’s!”

As the phrases are taken up as a chant, the families grow silent; people on both sides of the room begin to look very angry. A local council member announces that the meeting has been canceled for security reasons and will be rescheduled. Sweaty and worked up, a hundred or so people, most of them neighbors, begin to file into the street and go home

[This incident] was followed by five public hearings, the last two of which were open for comments from the general public. But even at the first hearing, the divergent perspectives within the community were quite clear. The proposal that the CCA was presenting seemed, at least on the surface, to be an easy sell. Ward Eight is a community with the highest unemployment rate in the District, one where many families of prisoners lived. A large new correctional facility not only would provide hundreds of well-paying, recession-proof jobs to local residents but would keep prisoners closer to home, where family, counselors, and clergy could help with their rehabilitation. The proposed prison would be state-of-the-art, including a

* *Excerpted from* DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA 13-19 (2007). Reprinted with permission from University of Michigan Press.
Liman Colloquium 2014 Isolation and Reintegration Punishment Circa 2014 Jan. 7, 2015

host of educational and job-training programs for inmates—in fact, the proposed programs were so extensive that some residents complained that they were “better than what we get out here,” and CCA promptly added community scholarships and neighborhood job-training programs to the proposed package. To top it off, CCA noted, there were plenty of other communities around the country that would be happy to have the facility if the residents of Ward Eight refused it.

Marion Barry, the former mayor, who prided himself on having a broad constituency in Ward Eight, made all these points in his testimony on the first day of the hearings:

Other states are trying to get the District to send their prisoners to their states so that jobs can be maintained in those states. In fact, in Youngstown, the Congressman there wants an addition of 2,500 beds built because of the economics of 450 jobs. And Ward Eight has the highest unemployment rate of any in the city: some thirteen percent among adults, and some sixty percent among teenagers. We need these jobs in Ward Eight.

Despite the chanting and cat calls from the first meeting, a few family members returned to testify for the proposal when public comment was finally allowed six months later. One mother spoke, generalizing from her concern about her own child to that of all the “wayward children” in prison:

I am here today to pledge my strong support for the proposed correctional rehabilitation facility in Ward Eight. I was brought up to believe that we are responsible for every child, and that we are mothers and fathers to every one of them. We cannot toss our children aside when they are sick and in need of help. If we do not help them, then who will? . . . God said, “When you help the least of my people, you help me.” Let me leave you with this final thought. What if it was your child? What type of help would you want to offer your child? . . .

Her comments touched not only on the feelings that many families of prisoners have about the lack of rehabilitation programs in most correctional settings but also on the responsibility of the community to take care of its own.

Over the course of the five hearings, however, it became clear that the opposition to the prison was overwhelming. The current mayor, Anthony Williams, the city council, and the local area neighborhood commissions all voiced strong opposition to the project, as did the major and minor newspapers and nearly all the citizens’ organizations in the District. If the proposed prison would provide Ward Eight with valuable economic opportunity and an increased chance of rehabilitation for local residents involved in the criminal justice system, why were so many in Ward Eight opposed to it?

Opponents cited a variety of complaints, but a central theme that ran through the most poignant and persuasive arguments was that the prison was, for this community in particular, an indignity. As the Reverend Dennis Wiley argued at the final hearing, “Even the thought of placing such a complex in our community is but another indication of the low regard in which the citizens of this Ward are held.”

Building this facility in Ward Eight is not only unwise, it is wrong. In fact, Ward

Eight ought to be the last place that anyone would think of building a prison. Why? Because the people of Ward Eight and especially the young people have for too long been stereotyped as residents of the most dysfunctional, pathological, and undesirable section of the city. Already this Ward has more than its share of programs, projects, institutions and facilities that no other Ward wants. Already the negative image that is constantly projected onto this Ward has taken its toll in broken dreams, lowered self-esteem, frustrated ambitions, misdirected lives, and untimely deaths. The burden, the shame, the indignity and the despair of trying to be somebody when everybody keeps telling you that you're nobody is often more than the human spirit can overcome. . . . The people of Ward Eight need hope. . . . A prison is not a symbol of hope.

This concern was echoed in the testimony of David Pair, a member of a local youth advocacy organization, who suggested that those families of inmates who were supporting the proposed prison, far from advancing the welfare of their loved ones, were inadvertently supporting their demise and that of others in the community.

There are many people who support locating a prison in Southeast because it helps keep families closer. However, this statement seems to say that people who reside in Ward Eight are the only perpetrators of crimes that occur in the District. . . . I can say that most of the young people, males anyway, will instill in their mind that yes, yes they've built a prison over here because of that. And all this, I feel as though it will be a bullet shot into minds of the young black males.

Residents were not simply concerned with the potentially demoralizing effect of a prison on those who lived in Southeast D.C. As the Reverend Wiley's and Mr. Pair's arguments made clear, Ward Eight residents were also keenly aware of the perceptions of outsiders. This sensitivity to how the prison would color the perceptions of those who lived elsewhere was apparent when Damion Cain, a youth living in Southeast, argued that the construction of a prison in Ward Eight would "perpetuate [the] negative images that those outside of Southeast, D.C. have branded in their minds." The prison, he argued, would simply reinforce the preconceptions that people outside of Southeast had about the community: . . .

How do I feel about the prison? Well, I feel that it shouldn't be there. It's a negative image because Southeast, D.C. is already labeled as a prison, by the crime and all the drugs and the trades going on in Southeast. They are just looking at the surface of our community and not looking in the heart of the community to see what's good.

The material implications of these negative perceptions were brought home by one longtime community activist, Robin Ijames. . . . Ward Eight didn't need a new prison, Ijames argued, because the distressed community was already "a prison without walls."

This is true literally as well as figuratively. A majority of the men between the ages of eighteen and thirty-five in Ward Eight are under some type of correctional supervision, most on probation or parole. Indeed, a large majority of the men in Ward Eight will spend time behind bars if current conditions persist. The different meanings of the proposed prison to different

people at the hearing give us some sense of how moral and practical concerns can be turned against one another as disadvantaged communities struggle with the terms of their own estrangement.



*Federal Correctional Institution, Herlong, CA, courtesy of Wikimedia Commons.**

* M. Spaulding, *FCI Mendota, California: Project Description and Employment and Business Opportunities*, Federal Bureau of Prisons (2005), available at http://commons.wikimedia.org/wiki/File:Eastern_State_Penitentiary_aerial_crop.jpg (last visited July 7, 2014).

Housing DC Felons Far Away From Home (2010)

*Philip Fornaci**

I serve as Director of the DC Prisoners' project, a section of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. Our organization advocates for DC prisoners held both locally in DC jail facilities, as well as those held in the Federal Bureau of Prisons (BOP), where those convicted of felonies in DC are sent. . . .

Under current law, once convicted of a felony and sentenced to a prison term, DC prisoners are legally within the custody of the BOP. . . . The District government retains no discretion over which federal facilities will house the prisoners and what programs will be available to them; the prisoners' security levels within the BOP; or how far from DC they will be held. . . .

Under a 1998 Memorandum of Understanding (MOU) between the District and the BOP, the latter agreed to attempt to keep "most" DC prisoners within 500 miles of the DC, with efforts to keep most of these within 250 miles. This MOU was consistent with pre-existing BOP policy, which attempts to keep all federal prisoners within 500 miles of their home jurisdictions. The federal government has provided no further accommodation or legal commitment for this influx of DC prisoners, about three to four percent [of] the BOP population. For more [than] 6,000 DC prisoners, the 500-mile radius [means in practice] a geographic area that reaches from Indiana and Kentucky on the west [to] Georgia on the south and upper New York State on the north.

Despite this aspirational goal, hundreds of DC prisoners are housed beyond this range, including hundreds held in facilities in Louisiana, Florida, Texas, Arizona, California, and Colorado. In total, DC prisoners are held in 98 different federal prison complexes. Additionally, some are held in various state prisons, in arrangements created by the BOP. . . .

Because prisons tend to be located in remote, rural areas, public transportation systems are rarely an option for visitation. Families must drive to the facilities, a significant hardship for families without automobiles. Because DC prisoners are dispersed so widely within the BOP, it is also difficult for DC-based social services organizations to arrange low-cost charter bus options so that families can visit loved ones in prison. When DC prisoners were held at Lorton, there were several transportation options available for visitation, and family ties were more easily maintained. Families are generally unable to visit BOP facilities except in the rarest of circumstances, leaving telephone contact the primary remaining option. . . .

Returning to DC from a prison 300 (or 1,500) miles away makes reentry planning nearly impossible. Access to potential employers, housing services, or social services agencies is limited to letters and telephone calls. There are no job fairs taking place at the far-flung sites housing DC prisoners, nor any programs to encourage recruitment of a labor force from this population, as occurs in many state prisons. Even at Rivers Correctional Institution [in North Carolina], which holds the largest number of DC prisoners in the BOP and where the Court Services and Offender Supervision Agency [CSOSA, DC's post-release supervision agency]

* *Excerpted from* Testimony of Philip Fornaci, Director, D.C. Prisoners' Project, House of Representatives Committee on Oversight and Government Reform (May 5, 2010).

engages in concerted efforts to provide information to pre-release prisoners, it [is] simply impossible for these men to successfully apply for jobs and housing while incarcerated.

Further complicating the reintegration of DC prisoners after their release from BOP facilities is the inability of BOP facility staff to effectively assist DC prisoners for their return home. With DC prisoners distributed among nearly 100 different BOP facilities, discharge planning efforts can only be piecemeal and completely inadequate. BOP staff are unfamiliar with the local DC community and the challenges facing ex-offenders in DC, which is unsurprising given the circumstances. As noted, CSOSA has attempted to work with staff at Rivers Correctional Institution to develop partnerships with potential employers and housing providers in DC after release from prison. Unfortunately, these efforts have been generally ineffective in securing housing or employment upon release, although they help to inform prisoners of the existence of potential community resources. . . . [E]ven in a more favorable economic climate, it would be very difficult to attract employers to a relatively small potential workforce hundreds of miles away.

During my visit to North Dakota in 2008 to meet with DC juveniles in the BOP, I asked a teacher at the facility what kind of local information would be helpful for him as he helped to prepare these young men to return to their lives in DC. He suggested that I send him a copy of the DC yellow pages. This startling conversation illuminated not only the complete inability of staff at this facility to assist DC youth in their efforts to prepare for reentry but also the low level of awareness about the urban environment into which these young men would be returning. . . .

Approximately 2,500 to 3,000 formerly incarcerated people return to DC every year from the BOP, with most of these subject to ongoing supervision by CSOSA. . . . Fewer than half of these returning residents are placed in halfway houses. Halfway house stays average approximately two to three months (despite the Second Chance Act's mandate for a full year of halfway house placement), during which residents must quickly find jobs, healthcare, and housing (and often drug treatment), or fall into homelessness.

Of the remaining fifty percent of returnees, our estimate is that half of these (or 25 percent overall) are homeless immediately upon their return to DC. Some live in homeless shelters (which are now at overcapacity), while others live informally with family or friends (sleeping on couches, floors, etc.) or on the streets. There are a small number of underfunded reentry programs in DC, providing job training and a few providing "transitional" housing. There are also a few limited housing slots available through DC government programs, primarily through the Department of Mental Health. Official statistics indicate that, in the District, 16 percent of people on parole had moved at least three times or lived in a shelter in the prior year, more than likely a significant undercounting, due to the reluctance of parolees to divulge their living arrangements [to] parole officers. More than 50 percent of people under CSOSA supervisions are unemployed.

People returning to DC from the BOP are competing for the same limited social services also intended for homeless people, veterans, and others experiencing destitution in Washington, DC. For many employers and some service providers, a criminal background makes them far less attractive employees and clients than other impoverished people, regardless of their skills, educations, or evidence of rehabilitation.

Unless they have family or friends ready and able to house them and find them employment, it is extremely difficult for most formerly incarcerated DC residents to avoid returning to the most dire and unstable living circumstances. There is no organized, coordinated collaboration among the various federal agencies and DC government agencies to prevent these outcomes, which present obvious and dangerous consequences for formerly incarcerated people and for the community. . . .

Litigation About Conditions at the Baltimore City Detention Center

Problems of and in detention exist in both rural and urban settings. For example, in 2009, the Public Justice Center and the ACLU National Prison Project reached an agreement to settle *Duvall v. O'Malley*, a decades-long class action that sought to improve conditions of confinement and health care delivery at the Baltimore City Detention Center (BCDC), in Baltimore, Maryland. The description of the case provided on the Public Justice Center website states:

“The BCDC is the 18th largest detention facility in the country. With approximately 120 prisoners cycling in and out . . . each day, problems inside the prison spill over to the community outside: problems such as interruption of necessary medications, unsanitary conditions, and denial of healthcare. It was built to house 2,900 inmates, but more than 4,000 inmates are frequently there. Adding to the crisis are the unsanitary conditions of the prison, overcrowding, sewage floods, and vermin-infested kitchens. And because the prison is a permeable wall, rotating detainees in and out, the healthcare emergency inside threatens the entire community with a serious public health crisis. . . .”

See PUBLIC JUSTICE CENTER, HEALTH CARE AND HUMAN CONDITIONS, available at <http://www.publicjustice.org/our-work/prisoners-rights/access-to-health-care-and-humane-conditions> (last visited July 14, 2014).

Despite the 2009 settlement, problems persisted. In May of 2013, the *Washington Post* published an article, *Baltimore Jail Case Depicts a Corrupt Culture Driven by Drugs, Money, and Sex*, by Theresa Vargas, Ann E. Marimow, & Annys Shin, that detailed the systemic problems that had not abated, including inadequate training for guards, inmate gangs targeting correction officers, overcrowding, and that the number of inmates “vastly outnumber the 625 guards.” As the *Washington Post* described it, BCDC remained

“a miserable place, with some parts more than 150 years old and conditions that state and local officials have been trying to fix for the past four decades. Its well-documented shortcomings have included rodent-infested cells, a lack of medical care for inmates and extreme temperatures. . . .”

In 2014, yet another news report detailed the unsafe conditions at the Jail.

Baltimore Jail Scandal Involving Black Guerilla Family Sparks Response From State Lawmakers (June 5, 2014)

*Eric Tucker, The Huffington Post**

BALTIMORE -- Inmates often complain of idleness, but Tavon White apparently had no trouble keeping busy behind bars. Investigators say the man nicknamed “Bulldog” impregnated four female corrections officers at the Baltimore jail while running a sophisticated criminal organization that smuggled in drugs and cell phones and employed guards as gang associates. A federal indictment charging White and two-dozen others in a contraband-smuggling conspiracy has offered an embarrassing glimpse into a jail where inmates stand accused of controlling the very officers hired to guard them.

Effects of the scandal have been widely felt, and state lawmakers plan to hold a hearing Thursday to discuss problems at the state-run jail.

The state prisons director has moved his office into the jail to offer closer oversight, the jail’s security director has been dismissed and top administrators there have undergone polygraph tests to determine what they knew about the criminal activity. Gov. Martin O’Malley, a potential Democratic presidential contender in 2016, announced a task force last week to fight corruption at the jail but has also been criticized by Republican lawmakers about the detention center’s conditions.

The indictment alleges widespread dysfunction at the Baltimore City Detention Center, a downtown jail that holds thousands of defendants awaiting trial or serving short sentences.

It accuses female corrections officers of sneaking in drugs and cellphones – sometimes in their shoes or in food – to incarcerated members of the Black Guerilla Family, a gang formed in California’s San Quentin prison in the 1960s. The inmates in turn distributed the drugs to fellow detainees and used the contraband phones to arrange sexual encounters, spread the word about impending cell searches and conduct gang-related business with members on the streets, prosecutors say. They used reloadable, pre-paid debit cards to pay for their purchases, launder funds and transfer proceeds to gang members on the outside, the indictment alleges.

“There are impacts on the outside world of this activity that’s going on in the inside,” Rod Rosenstein, the U.S. Attorney for Maryland, said in an interview. “There’s crime going on outside the jail as a result of people inside continuing to engage in gang activity. . . .”

At least some of the jail guards seem to have reveled in their sexual relationships, acquiring money and status as high-level gang associates. Inmates posted graffiti on the wall listing corrections officers they said were willing to trade sex for money. Internal gang documents recovered by investigators reveal that members were instructed to target guards with insecurities and low self-esteem, authorities say. . . .

* Reprinted with permission from YGS Group.

The defendants appear to have exploited the vulnerabilities of a jail culture that cycles detainees in and out, lacks the more defined structure of federal prisons and draws underpaid, sometimes apathetic, staff into an inherently challenging environment, said gang expert Jorja Leap, a social welfare professor at UCLA. “You've got chaos, violence, a porous environment and law enforcement who doesn't want to be there,” she said. . . .

The allegations in Maryland have stirred responses from the highest levels of state government. “The indictment that came down makes us look like a third-world nation,” said Republican Del. Michael Smigiel, who recently toured the jail and called it a “kennel for humans. . . .”

Republican lawmakers have suggested that O’Malley is too focused on national politics at the expense of local problems like the jail. The governor, who has called the allegations ugly and shocking, has called for reforms in the hiring and screening of corrections officers and has also formed a task force to focus on inmates’ access to drugs, cellphones and fraternization with corrections officers.

The department says all jail staff is in the process of being interviewed and workers will undergo polygraph tests if needed, and officers from other facilities are being rotated in to work shifts at the jail. State officials are also discussing expanding the use of technology to be able to block cellphone calls from inside the jail Still, it’s hard to know how much impact any one reform can make.

San Quentin Prison Sale? Inmates Say They Want To Stay (June 8, 2009)

*Evelyn Nieves, Huffington Post**

It's some of the most prized waterfront land in the country, a large piece of rich and beautiful property sitting right on San Francisco Bay, and the owner has proposed selling it to raise needed cash. But many of the current residents don't want to leave, and uprooting them would be costly.

The property in question is San Quentin State Prison, a maximum-security penitentiary where some of the state's toughest inmates have access to a variety of programs such as tennis and drama, thanks to the many prison volunteers who live in the Bay Area. “Some places you go for punishment,” said inmate John Taylor, a catcher for the prison baseball team, the San Quentin Giants. “Here, it's more rehabilitation. I just don't know why the governor would want to shut us down.”

Gov. Arnold Schwarzenegger has proposed selling the 432-acre prison and several other state-owned properties and using the proceeds to help ease the state's \$24.3 billion budget deficit.

* Reprinted with permission from YGS Group.

It is widely assumed that any buyer would be interested primarily in the land. Developers might tear down all or some of the prison to make way for condos or other projects.

Taylor, who is 35 and serving up to life for murder, had done nearly 10 years in three other state prisons before he asked for a transfer to San Quentin two years ago. Taylor's duties include fighting weeds in the courtyard. "This is the first place visitors see when they come in," he said. "We want it to look good."

Prison volunteers come from around the Bay Area and include professional artists, graduate students and professors at nearby universities, including the University of California at Berkeley and San Francisco State University. Others are retirees. Most are experienced teachers in their field.

San Quentin currently has 5,300 inmates and holds California's death row, a unit that has expanded beyond 600 occupants since a federal judge deemed the cramped gas chamber unacceptable and halted all executions. The state recently spent more than \$164 million on new medical facilities at the prison and has budgeted \$356 million for a new complex to house condemned inmates.

The land San Quentin occupies—only a 10-minute drive from the Golden Gate bridge—could fetch an estimated \$2 billion even in a down economy. The state could net \$1 billion after construction of a new prison elsewhere. The California Department of Corrections and Rehabilitation has started an analysis of what it would take to sell the property, said spokesman Seth Unger.

Previous legislative efforts to close the prison and sell its land have all stalled, largely because doing so would lead to more prison overcrowding while a new facility was being built. The politically powerful prison guard union has also lobbied against the idea.

Jared Huffman, a state Assembly Democrat from San Rafael, the city closest to the prison, has proposed converting the 40- to 50-acre parcel reserved for the new death row into a "transit village" with a deep water ferry terminal. "This is a simple plan for San Quentin that's very doable for that part of the property," Huffman said.

But inside the walls of San Quentin, talk of a sale is seen as a threat to the prison programming that depends on volunteers. The programs include a Shakespearean drama program, football, baseball, basketball, soccer and tennis teams, and the Prison University Project, which offers inmates classroom instruction that leads to associate's degrees. Should San Quentin close, the university project would certainly shut down. "We would probably try to reconstitute it at another prison, but it would take a long time," said Jody Lewen, the program's founder and executive director.

San Quentin is no summer camp. Inmates live two to a 4-by-9-foot cell. The intake center, with 2,700 inmates, has spilled over into a gym, where 300 inmates await their assignments to other prisons. And there are prison gangs, too. Still, during one recent visit, the

tennis team was practicing. And inmates with clear natural talent worked in a studio on art projects commissioned by the prison.

“The prison is unique,” said Vinny Nguyen, 31, who is serving 25 years to life for murder. “We’re surrounded by a lot of universities, and we get a lot of help and contact from the outside. It makes us want to be positive. That would all be destroyed along with San Quentin.

Plans to Close Prisons Meet with Opposition

In a January, 2011 *New York Times* article entitled *As Republicans Resist Closing Prisons, Cuomo Is Said to Scale Back Plan*, Danny Hakim reported that, during his first address to the Legislature in 2011, Governor Andrew M. Cuomo announced his plan to close some prisons in upstate New York. Cuomo said that “the issue has long prompted resentment, particularly for families of New York City residents who are shipped hours north of the city to be incarcerated” He added: “If people need jobs, let’s get people jobs. . . . Don’t put their people in juvenile justice facilities to give some people jobs. That’s not what this state is all about, and that has to end this session.”

Senate Republicans, worried about potential job losses in their upstate districts, were reported to be cool to Cuomo’s proposal, although they acknowledged that budget cuts would be needed. Senator Thomas W. Libous, told *The New York Times* that Republicans “hope these cuts are equally distributed around the state.”

The Correctional Association of New York, a non-profit prison monitoring group, stressed that facilities should be located near to inmates’ homes and families, noting that “[t]he evidence and the research show that when prisoners are able to maintain ties with their family, they cope better with their prison experience and they have a lower recidivism rate.” But Senators expressed concerns related to the economic needs of their districts. “The area I represent is northern New York, it’s very rural, and we built an economy around these facilities, first of all because no one else wanted them in their neighborhoods and because the land was cheap, . . . [W]e need to look at the whole picture,” said Republican Senator Betty Little.

Harder Time (July 25, 2013)

Judith Resnik, Slate^{*}

This August, the Federal Bureau of Prisons plans to start shipping women out of its only prison for women in the Northeast, located in Danbury, Conn.—70 miles from New York City,

^{*} Reprinted with permission.

and in easy reach of visitors for the many prisoners who come from there. Danbury (where Piper Kerman, who wrote *Orange is the New Black*, did her time) will soon have only 200 spots for women (in a separate low-security camp). The prison's other 1,100 beds will go to men. Most of the women are slated to be sent to a new 1,800-bed facility in Aliceville, Ala.—1,070 miles from New York City, a drive that takes nearly 16 hours.



Aerial view of FCI Aliceville in Alabama, courtesy of DigitalGlobe/USDA Farm Service Agency/Google Maps.

Becoming the site of a new federal prison is good news for Aliceville, population 2,500. As a *New York Times* editorial explained last year, Alabama Sen. Richard Shelby promoted the facility as an economic boost to the area. It cost the federal government \$250 million. But as the newspaper also commented, the government bought a “white elephant.” Aliceville is hard for anyone without a car to get to. There is no train station or airport nearby. Aliceville has no medical center or university, nor many lawyers, religious leaders, or other service providers.

The federal Bureau of Prisons houses about 220,000 people. Fewer than 7 percent (about 14,500) are women, most of them sentenced for nonviolent crimes, such as drug offenses. Of the 116 facilities the bureau runs, 27 have some beds for women, and seven—counting Danbury—have been exclusively for women. Danbury is the only prison placement in the Northeast for women. The federal jails in Brooklyn, N.Y., and Philadelphia are for pretrial detainees. Other federal facilities for women comparable to Danbury are many miles away, in West Virginia, Florida, and Minnesota.

Getting women into Danbury—and into the Northeast—was a relatively recent and hard-fought change. In 1979, I testified before a subcommittee of the House of Representatives about the lack of attention paid to female federal prisoners, and the paucity of housing options for them. It took 15 more years of lobbying, along with steep growth in the numbers of women sent to prison, before Danbury opened its doors in 1994. In addition to proximity to their families, women gained access to a program that Yale Law School had begun in the 1970s to provide legal assistance to federal prisoners. In 1997, the situation of women prisoners seemed to

brighten a bit when the Bureau of Prisoners issued a new policy, committing itself to attending to women's "different physical, social and psychological needs."

But despite efforts by the National Association of Women Judges, the bureau has repeatedly refused to make good on that commitment. Time and again, it has refused to follow the lead of many states and create special programs for women with children, make visiting easier, or expand community placements, education, and job training.

Being moved far from home limits the opportunities of women being moved out of Danbury; it hurts them in prison and once they get out. Recent research from Michigan and Ohio documents that inmates who receive regular visits are less likely to have disciplinary problems while in prison and have better chances of staying out of prison once released.

The Bureau of Prisons knows this, as it recognizes the importance of "family and community ties" in its classification system. The bureau gives inmates points for family ties when assessing the degree of security in which to place individuals. Getting visits also counts toward qualifying for a transfer to a less secure facility.

Most women come to prison from households with children. According to the National Women's Law Center, more than one-half of female federal prisoners have a child under the age of 18. Last month, the director of the federal prison system sent a memo to all inmates to announce that his staff was "committed to giving you opportunities to enhance your relationship with your children and your role as a parent." In addition to letters and calls, he hoped that inmates' families would bring their children to visit. "There is no substitute for seeing your children, looking them in the eye, and letting them know you care about them," he wrote.

But for prisoners from New England and the mid-Atlantic states, the move to Aliceville closes off those possibilities. Placement in Aliceville also makes it harder for lawyers to see their clients and provide help on problems ranging from losing custody of children to challenging convictions.

What's the justification for moving Danbury's women to Aliceville? To make the argument for the large new complex, the Bureau of Prison claimed that Aliceville would benefit women, because the existing facilities for them were about 55 percent over capacity. What the BOP did not mention was that it planned to turn over women's beds in Danbury to make room for lower security male inmates, also housed in overcrowded facilities.

The skyrocketing numbers of people in prison is a well-known tragedy. Adding to it is the isolation to which women at Aliceville are being condemned. The Bureau of Prisons itself describes women as mostly nonviolent and lower escape risks than men. Why not, therefore, keep Danbury open, as well as send women to community-based facilities near their families, and provide educational options, job training, and treatment programs? Instead of taking a route consistent with its own policies, and newly announced commitments to parenting by prisoners, the government is sending hundreds of women on a long hard trip to Aliceville.

Research indicates that there are significant positive outcomes for inmates who receive visits during incarceration. A 2007 study from Ohio found statistically significant relationships between rule infractions and visitation. Inmates who received more visits, particularly from people in a parental or guardian role, had fewer violations. Another study examined the correlation between visitation and recidivism among 16,420 people released from Minnesota prisons between 2003 and 2007. Visits generally correlated with lower levels of recidivism, particularly where individuals maintained contact with siblings, in-laws, fathers, and clergy. Another significant finding was that 40% of the group received no visits. The challenges facing visitors is the subject of Johnna Christian's essay.

Riding the Bus: Barriers to Prison Visitation and Family Management Strategies (2005)

*Johnna Christian**

. . . Little . . . is known about what it is like for families to bridge the gap between their lives outside and the life of their incarcerated loved one. This article draws from an ethnographic study of how families' lives are affected by incarceration to look at some barriers to prisoner ties to family that stem from the challenges of visiting at prisons. Data come from observation on bus rides families take from New York City to prisons throughout New York to visit incarcerated male family members and in depth, open-ended interviews with prisoners' family members. . . .

The main bus company in New York, which transports families to visits, is Operation Prison Gap, a privately operated bus service started in 1973 by a former prisoner. On a typical weekend, approximately 800 people use the service to get to a prison visit, with buses leaving throughout the night. In addition to Operation Prison Gap, there are many smaller bus and van services that transport people to prisons from New York City, some only leaving from specific neighborhoods. The companies compete for business, handing out discount coupons at visiting centers and mailing them to inmates to pass along to family members.

The majority of the individuals on the buses are women traveling alone. Some have children with them, ranging from infants to teenagers. There are also some men on the bus, but they are usually traveling with a woman. The people on the bus are prisoners' wives, girlfriends, mothers, sisters, fathers, brothers, and friends. Most of the riders I spoke with came from neighborhoods in New York already identified as having high concentrations of incarceration, and riders must take the subway or cabs into Manhattan to get the bus.

The cost of bus tickets averages \$40, more or less depending on the distance of the facility. Tickets for children are half price. There are other costs in addition to the price of the bus ticket. A low estimate of additional costs is \$20 for food and drinks during the 24-hour period of the trip and \$20 for food from the vending machines inside of the prison (visitors are

* *Excerpted from* 21 J. CONTEMP. CRIM. JUST. 31 (2005). Reprinted with permission from Sage Publications.

not allowed to bring food into the visiting room). In addition, many families bring packaged food and snacks, clothing items, and cash. These additional items can easily cost \$50 or more. On one visit, a woman had \$40 worth of candy with her. Another said her husband ate \$50 worth of food during the visit because he was so hungry. The costs associated with one visit are a minimum of \$80 and could easily be twice that amount. This is assuming that there is only one family member visiting and does not include other expenses such as childcare. In addition to these monetary costs, the journey to a visit is extremely tiring and time consuming. The process involves a tremendous amount of waiting The timeline of a visit varies, depending on which facility an individual is going to. Buses to the farthest facilities leave New York around 9:00 PM to arrive in time for visiting hours at 9:00 AM the next morning

A number of the women are regular riders who have been coming to the prison together for some time and interact with each other throughout the journey. They buy each other coffee, sit together, watch over their belongings, and just spend time chatting. Part of the bond between the bus riders centers around commiseration about the difficulties of making the visit, such as the cost, and the amount of time and energy required. In some instances, they complain about the excess demands the incarcerated man places on them and they discuss things that occurred between them and their partners during the visit. The shared experiences are one means of managing the barriers to maintaining family contact.

There is a motel a few blocks from the prison that allows the women to pay \$10 each to take a shower in a room. I once went and inquired about the cost of renting the room for a few hours (thinking it would be a private and comfortable place to conduct interviews) and was told I would have to pay the full daily rate. Each woman using the room for a shower is required to pay \$10 with the expectation that they will be out of the room within about an hour. Three or four women sometimes go together to use one room.

During the hours before the visit, the women sometimes share their concerns about news they may be getting during the visit, especially about parole hearing outcomes. They wish each other luck, offer encouragement based on successful hearings they have heard about, and share their own anticipation about pending hearings, even if they are several months to a year away.

On at least two of the visits I have been on, family members have made the trip to the prison to discover that they cannot get in to the facility, which means that their wait is prolonged until the bus returns to New York. After September 11, the prison instituted a policy that photo identification was necessary to get in to the prison. One woman brought her 14-year-old sister with her to visit their brother. Because the older sister did not have identification and was denied access to the prison, the younger sister could not get in either.

Several explanations exist for why families fail to stay connected with prisoners. These include the financial difficulties of visiting and accepting collect phone calls, the emotional demands, and the other demands of life that prevent visiting. In some instances, families are tired of the prisoner's cycling in and out of the system and essentially experience a last straw incident that leads them to cut the person off. When substance abuse or mental illness has been a factor, families may be particularly weary of such patterns. In addition, prisoners sometimes tell their families not to visit them in order to spare them the hardship and trouble. When families do visit, it is in the face of significant obstacles and barriers that they must navigate and manage.

Several themes emerged with regard to the families' rationale for visiting despite these problems. Paradoxically, many express an attitude of, I don't like it, but I do it anyway. During an interview with a woman waiting to go on a bus ride, she said that she didn't want to go on the 8-hour ride, pointing out that she could be going on a vacation to Virginia Beach in that period of time. Families realize that they must make tradeoffs to stay connected to a prisoner.

A prominent feeling among families is that visiting provides them a means of monitoring the prison system. They believe that when a prisoner does not receive visits, it is a sign that no one cares about him, which gives prison personnel free license to treat him however they wish. Further, when no one visits a prisoner, no one knows what is happening to him, and the system is not accountable to anyone. The following quote illustrates this perspective:

I mean the person could die today or tomorrow, you would never know. These prison officers ain't gonna tell you. They'll tell you like a year later. Oh we couldn't get in contact with nobody. And when that person don't have no mail, or they don't have no contact with the outside world, they say well they don't have a family. So they meaningless to them, so we gonna do whatever we want to do to them. And they do. And they do. You sit here for a whole year and have not seen one letter for him. You have not had one visit, so we gonna do whatever we want to you. You know, and that's bad, that's really, really bad. . . .

Families may see themselves as protectors of their incarcerated relatives and feel they at least have a chance of generating a response from the system if they have stayed involved in the prisoner's life. One mother whose son has mental health problems, requiring injections of an antipsychotic drug prior to his incarceration, expressed concern that he was not receiving medication in prison. She tried to visit monthly to determine whether he was getting the medication and to "keep an eye on things." She called his counselor and asked her son directly if he was getting his medication. In addition, family members knew of prisoners who did not receive visits and had stories about abuse that went unchecked and prisoners with no recourse because they had no family to defend them.

Families also see a role in providing moral support for the prisoner to counter some of the psychological damage resulting from the incarceration. One wife counseled her husband about how to deal with challenges brought on by other prisoners and corrections officers. She explained,

I mean these people put them through so much. And, if they don't have nobody there, that's the main reason they lose self-control, and they start to do things. Because nobody's behind them. And they feel well I don't have no family behind me, and I'm dealing with this all by myself. But that's why I let my husband see, you're not going through this alone, and you never forget that. You've been in here and I've, I mean I may be out in the world, but I'm still here with you. . . .

The need to monitor the prison system and provide support for the offender may foster a sense of devotion that overrides other demands in the family's life. One wife who has several children, one of them severely disabled, visited her husband every other week. There was a chance he would be transferred to a facility even farther away than the one he was already in.

When I asked if she would maintain the same visiting schedule even if he were so far away, she replied, “I have to, he’s my life.”

Despite the sense of devotion that compels some family members to make the visit, families also describe cycles in which the frequency of visiting changes for a number of reasons. This article has illustrated that going on one visit entails a major expenditure in time, money, and energy. We may be quick to assume that the relatively low levels of family contact with prisoners are because families do not want to maintain contact or visit, but evidence indicates that the maintenance of familial relationships is more complex Families may go through cycles of visiting that are partly determined by the strain that visiting puts on the family’s economic and emotional resources. One interview participant explained,

And a lot of people can not afford to come up here on these buses And I don’t blame them for charging. That’s a long ride. But you know. A lot of people can not afford it. And a lot of people just forget about ‘em. Because you know that’s money coming out they pocket. They kids gotta eat. That \$50 break people’s back. That’s bill money. . . .

Families may vary on several dimensions, including the frequency of visits, the intensity of the connection to the incarcerated individual, the stage of visiting and connection, as well as the different family members’ histories of relationships to the incarcerated individual. Whereas some families set clear boundaries with the prisoner (i.e., refusing to accept collect telephone calls or limiting the number of visits), others become completely engrossed in caring for and sustaining the prisoner as other aspects of their lives suffer. These relationships are complex, changing for reasons both directly and indirectly related to the incarceration. Families must make decisions about the extent of energies to devote to the person who is incarcerated. They realize that the family’s welfare may suffer in other ways as they give more time to the incarcerated person. This may lead to periods of time when the family doesn’t visit the prisoner at all or completely severs communication including by phone and mail. . . .

Considering the . . . research about the potential benefits of family ties to prisoners, more research exploring the fluid nature of prisoner ties to family is called for. The findings in this article suggest that families face a number of barriers in attempting to maintain contact with prisoners despite the myriad of reasons they desire to visit and have connections. The process of managing ties with prisoners may place families in a position in which they are forced to make decisions about the extent of ties they can afford to have with the prisoner.

ATTENDING TO DIFFERENCE

Some correctional systems rely on what is termed “gender-responsive programming,” reflecting the views that prisoners are not an undifferentiated set. Below are excerpts from a subcommittee of the ABA that urged revisions on classification standards that took gender into account. In addition, a report from Washington State that shaped a “women’s village” program illustrates efforts to implement gender-responsive programming.

These approaches raise questions familiar in constitutional law and in feminist and in critical race theory about whether identifying differences circumscribes opportunities or enables greater agency for the actors involved. Segregation and special programs across many dimensions—gender, race, language, and nationality, transgender, mental illness—are proffered for many reasons, from a focus on inmates’ needs to concerns about their safety. We return in Chapter II to some of these issues by excerpting *Johnson v. California*, a 2005 U.S. Supreme Court decision holding that race-based classifications used as a proxy for gangs were held presumptively unconstitutional. At issue is whether and how to attend to difference when crafting and implementing policy and which differences ought to be taken into account.

Two other framing problems—budgets and placements—are raised whenever prison systems create specialized programs, which require resources and at times, may be the rationales for placing inmates in facilities that are distant from their home. For both prison administrators and prisoners, the questions are whether tradeoffs have to exist between programming and proximity and what services ought to take priority in budget allocations.

Prison Security Classification Instruments in Need of Revision

In 2011, the Women Offenders Security Classification Subcommittee of the Criminal Justice Section of the American Bar Association’s Corrections Committee issued a report, *Revising Security Classification Instruments and Needs Assessments for Women Offenders*, that described how current correctional practices fail to take into account women prisoners’ risks and needs. The report described women’s distinctive pathways to prison and their behavior while incarcerated.

“Women offenders in the criminal justice system differ significantly from their male counterparts in a number of ways. First, female prisoners are less violent than male prisoners before, during, and after their incarceration. Women are incarcerated primarily for committing non-violent crimes, such as, according to one study, drug offenses (29%) and property offenses (31%). In contrast, 58% of incarcerated men in the same study were in prison because they committed a violent offense. In addition, men continue to be more violent than women once they are in prison: they commit twice as many violent acts of misconduct than women, and their misconduct tends to be more serious. . . .

Second, most women in prison are mothers. Over 70% of women under correctional supervision are mothers of at least one child under the age of 18. As of 2004, women in state prison were more likely (62%) to have children than men (51%). . . . Nearly 80% of women living with a minor child just prior to their incarceration were primarily responsible for caring for their child, as compared to 26% of male prisoners. Female inmates are also more likely to be located farther away from home than male prisoners.

Third, women under correctional system supervision are more likely than male

offenders to have experienced physical or sexual abuse prior to being incarcerated.
 . . .

Finally, female inmates also have different mental health needs than male inmates. Women generally suffer from higher levels of depression, anxiety, and self-injurious behavior, and female offenders are more likely to suffer from mental illness. . . .”*

See WOMEN OFFENDERS SECURITY CLASSIFICATION SUBCOMMITTEE, CORRECTIONS COMMITTEE, AMERICAN BAR ASSOCIATION, REVISING SECURITY CLASSIFICATION INSTRUMENTS AND NEEDS ASSESSMENTS FOR WOMEN OFFENDERS 4-5 (Mar. 23, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105c.authcheckdam.pdf.

The report then addressed women’s behavior while in prison:

“The researchers found that troubled women—women with histories of abuse, substance abuse issues, dysfunctional relationships prior to imprisonment, or those who were depressed, anxious, angry, or suffered from psychosis—were more likely to incur misconducts while in prison than women without these problems and that these needs were, therefore, risk factors. . . .

It is important to note that the researchers emphasized that women should *not* be placed in higher-custody situations based on these needs and risk factors alone: the result could be an unethical system that houses higher-need women in more punitive environments, which typically are poorly equipped to address these needs. Thus, while a gender-responsive needs assessment is useful for treatment purposes, it should not be used as part of the custody classification tool unless the change is accompanied by a shift in correctional culture away from high security arrangements for high-needs women, and a corresponding development of more programs to adequately address their needs. . . .”

The ABA Subcommittee called for reforms of the classification system for female offenders:

“the weaknesses of the initial risk and needs assessments of women are only one small part of a much larger problem regarding the classification of women in prison and, in general, the way in which women interact with and are impacted by criminal justice systems. Even with a risk assessment tool that is validated for women, several additional sources of overclassification will continue to affect female prisoners unless systematic change occurs. First, disciplinary codes often overclassify female offenders because they define women’s less threatening behavior in the context of male behavior. For example, inexperienced correctional staff, untrained in working with women offenders, may often write up women for minor infractions that do not present a significant security threat, thus increasing

women's reclassification scores. . . . Additionally, many correctional systems have no programming for women. . . . Finally, women are often overclassified because there are simply fewer institutions in which to house them. A 2000 survey found that 35 states housed women of different custody levels together. . . ."

The Subcommittee recommended that prison administrators redefine "risk factor and scale cut-off points to actually reflect women's security risk. Gender-responsive needs assessments will also empower prison administrators to treat women's needs, thus improving chances at rehabilitation, reducing prison misconduct, and even potentially preventing recidivism. . . ."

The Women's Village: A Source of Change for Incarcerated Women (2011)

*Rowlanda Cawthon, Washington Department of Corrections**

Principles behind the mantra, "It takes a village to raise a child," have been adopted by a group of dedicated offenders at the Washington Corrections Center for Women. Both offenders and staff at the prison wanted to foster a positive community environment and propel women to shift their thinking, so they formed the Women's Village group to develop an approach that would change the prison culture.

With the cuts to offender programming, the women realized the need to tap existing resources to foster a sense of growth, collaboration and commitment. "The Women's Village has been a great way for the women to really start thinking about their lives and how they can influence each other," said Associate Superintendent Margaret Gilbert. "We've managed to get some staff on board and we are certain this project can change the culture of the prison."

The mission of the Women's Village is, "To encourage and foster an atmosphere of change by harnessing our unique strengths together as individuals and to create a new culture based on the pursuit of personal excellence." The term Women's Village was created by Psychology Associate Robert Walker and offenders developed the purpose, values and structure of the program. "The project offers the women a unique opportunity to share their personal experiences and knowledge to inspire each other to change and make positive contributions to the community in which they all live — the prison," said Walker.

A village council serves the Women's Village in an advisory and governing capacity to provide leadership and direction. There are ten women on the council who work incredibly hard to create a healthier prison atmosphere. Their criminal backgrounds vary as do their custody levels, but this doesn't hinder their unified commitment.

* SUSTAINABILITY IN PRISONS PROJECT(Sept. 1, 2011), *available at* <http://sustainabilityinprisons.org/blog/2011/09/01/the-womens-village-a-source-of-change-for-incarcerated-women/> (last visited Sept. 9, 2014).

Jeannette Murphy who has been incarcerated for 28 years firmly believes that the Women's Village is a practical resource. "One goal of the village is to keep the women busy," said Murphy. "If we can help keep the women busy and assist them in finding their passion, we can address problems before they escalate and greatly reduce violence." . . .

As the project evolved, the women unanimously agreed that they needed to identify their passions and create work opportunities around what genuinely made them happy. This resulted in the formation of nine sub-councils that serve as a means to get women engaged in something bigger than themselves.

[The sub-councils include: Violence Reduction; Health and Wellness; Educational; Environmental; Peer Support; Morale Building; Reentry; Spirituality; and Family Support]. Each team is lead by a council member who has a sincere passion for the work required. Women interested in the Women's Village must officially become a village member by participating in three orientations, two accountability circles, and committing to engage in two self-help groups or classes offered at the prison.

The orientations are led by the council members and staff, and give an overview of the purpose and values of the Women's Village. The women are also given an opportunity during orientation to develop personal goals that will enable them to create a vision of who they are and who they are becoming. Accountability circles provide the women with an opportunity to meet regularly to discuss issues or problems they are facing, to set goals to address these issues, and to brainstorm ways to accomplish the goals.

"We are a group of women who want more for ourselves and we want the women around us to feel the same way," said Offender Renee Curtiss. "Having women believe in you and hold you accountable is the key to changing attitudes and behaviors, and that's what we are all about."

The values of the program are respect, honesty, compassion, diversity, self-empowerment, education and usefulness. These beliefs have been the driving forces behind the members' ability to assist offenders in transitioning from intensive management unit to less restrictive custody, developing recycling and gardening programs, and simply getting women to be a source of change for each other within prison walls.

BRIDGING DISTANCES: THE COST OF CONTACT

How do policies, law, and technologies work to lessen or increase the isolation of prisons and prisoners? In a 50-state survey by the Liman Program, the diversity of visiting rules becomes clear; thirty jurisdictions have a stated goal of promoting increased visits but in practice, fewer have policies that bridge the divide between "inside" and "outside" by, for example, making the hours long and opening up many days for visits. Further, some policies strictly limit the number of people who may visit and subject both visitors and inmates to

invasive search procedures. The challenges, from the perspective of those who run prison systems, are detailed in the essay by A.T. Wall. The “law” on visiting comes from *Overton v. Bazetta*, in which the U.S. Supreme Court declined, as a matter of constitutional law, to constrain prison administrators from curtailing visitation rights as long as the restriction was “for a limited period.” By way of comparison, Britain tries to ease geographic isolation by reimbursing inmates’ family members for travel, lodging, and light refreshments.

New technologies are affecting ideas about visiting. The concern is that video visits may be used to supplant, rather than supplement, personal visits. Prisons are also shifting around phones and mail. In 2013, the FCC issued a ruling that capped how much prison phone-service providers can charge the recipients of inmate’s calls. The rate can now be no higher than 25 cents a minute—a sharp decline from a system in which inmates and their families sometimes paid nearly \$20 for a 15-minute call. Yet as FCC regulations ease the financial burden on one group of stakeholders, they make budgets tighter for prison administrators, who relied on the profits from contracts with private phone companies to fund a broad array of prison programs. Other charges are imposed for mailing packages, and a new online marketplace for prison mail aims to alter the options.

Prison Visitation Policies: A Fifty State Survey (2013)

*Chesa Boudin, Trevor Stutz, and Aaron Littman**

Written policies allow prisoners and their visitors to plan and utilize available visitation opportunities. When policies are clear and readily accessible, visitors and prisoners can more easily follow the rules. Statewide policy directives often provide more detail than administrative regulations, though facilities may have additional local rules.

Forty-six jurisdictions have DOC policy directives--policies promulgated by the head of the DOC. All of the five states that lack policy directives follow an administrative regulation or have written policies on the department website. . . .

Number and Duration of Visits

Visiting a prisoner is not always an easy task. States vary widely as to the lengths of visits allowed, and the number of times in a given period during which friends and family may visit. The statewide policy then binds individual facilities to a minimum or maximum amount of visitation. Especially for visitors who live a great distance from the prison, or who have jobs, children, or other responsibilities, the greater the number of visitation options, the easier it is to visit.

Twenty-eight jurisdictions have a floor for the minimum number of days or hours visitation must be made available. For example, in Georgia, “[a] minimum of SIX (6) hours shall be allotted each day for visitation periods on Saturdays, Sundays and holidays. . . . Normally, there will be no restrictions placed on the length of visits during the facility’s established visitation periods.”

* *Excerpted from* 32 YALE L. & POL’Y REV. 149 (2013). Reprinted with permission from the authors.

Several other states provide for ceilings on visitation hours. For instance, Oregon allows only one visit per day per visitor on weekends and holidays, and Utah allows no more than two hours per visit per day. Overall, New York State's maximum security prisons provide perhaps the most welcoming visitation policy, allowing for up to six hours of visits 365 days per year and overnight visits approximately every two months. North Carolina is perhaps the most restrictive, establishing a ceiling of no more than one visit per week of up to two hours (excluding legal and clerical visits).

Inmate Eligibility for Visits

Because states uniformly consider visiting a "privilege," policies often limit prisoners' access to visitors as a sanction and may reward good behavior with greater access to visitation. In contrast, some policies provide greater access to visitation for prisoners who may have the greatest need for visits. Prisoners are categorized by their crimes and primarily based upon their behavior within the prison.

Twenty-three jurisdictions specify that offenders at certain security classifications will be subject to limits on visitation. In addition, several states have special provisions limiting the ability of minors to visit sex offenders. Many jurisdictions note that though the policy directives do not limit visitation based on inmate classifications, individual facilities will determine their own specific rules. In most states that differentiate based on security classification, higher-security inmates are allowed fewer visiting opportunities.

In Oklahoma, for example, maximum-security inmates are given up to four hours per week of visitation, while minimum-security inmates get up to eight hours per week. Likewise, Mississippi's regulations state that Long-Term Administrative Segregation Status offenders are allowed only "one (1) hour non-contact visit each quarter of any year with any approved visitors on their visitation list." In contrast, New York is the only state that provides more visitation opportunities and more flexible timing of visits to inmates in higher-security settings. While New York's policy does not articulate a particular reason for this uncommon approach, one can infer that it is to provide the inmates with the greatest needs and most long-term, profound isolation from their communities with ongoing, meaningful contacts outside of prison.

In general, higher-security inmates and those in segregation within the prison may face additional barriers to visitation, such as restriction to "no-contact" visits. Georgia, however, has a specific provision to allow visitation to inmates in the most restrictive custody. Additionally, prisoners may be temporarily or permanently banned from visits for disciplinary violations. Michigan enforces a potentially irrevocable permanent ban on visiting in some circumstances. And new regulations in New York have introduced harsher penalties for inmate misconduct, including a six-month to year-long suspension of all visiting privileges for any drug-related charges, whether stemming from a visit or not.

Approval of Visitors

Primarily because of security concerns, every state requires that visitors seek advance approval from the prison before visiting. That process can include a background check, fees, and a waiting period. Many states limit how many visitors may be approved for each prisoner and

limit how frequently the approved visitor list may change. These added barriers require that prospective visitors plan their visits, sometimes months in advance.

Thirty-one jurisdictions limit the number of visitors an inmate may have on an approved visiting list. Pennsylvania allows the longest visitor list (forty) and South Dakota the shortest (two plus family). Of these thirty-one jurisdictions, the mean number of visitors allowed is fourteen and the mode numbers are ten and twenty with six states each. In contrast, California affirmatively places no limit on the number of approved visitors.

Many states allow a visitor to be on only one inmate's approved visitors list, unless a visitor has multiple immediate family members incarcerated. Although not usually made explicit, this policy is generally aimed at promoting security by limiting communication between separately housed inmates via outside visitors. . . .

States vary in their policies for adding and removing visitors to or from the "approved visitors" list. In some cases, such as North Carolina and Wisconsin, states provide opportunities to add visitors to or remove them from the list only once every six months. Tennessee requires a visitor taken off one inmate's list to wait a full year prior to appearing on another inmate's list. Utah requires that all adult visitors reapply every year to stay on an inmate's visitors list.

Exclusion of Visitors

Not just anyone can visit a prisoner. Policies often exclude individuals with criminal records from visiting, with the likely goal of diminishing security risks and negative influences. In communities and social groups where having a criminal record may be common, this limitation circumscribes the number of potential visitors. In contrast, some policies take the opposite approach, with the goal of encouraging visitation.

Almost every jurisdiction excludes some categories of visitors, often former felons. Sometimes these restrictions bar former felons from ever visiting. For instance, Idaho excludes anyone who has a felony conviction, an arrest within the last five years, or a misdemeanor drug arrest within the last two years. Michigan prohibits visitation by "a prisoner or a former prisoner in any jurisdiction." However, a prisoner or former prisoner who is "an immediate family member may be placed on the prisoner's approved visitors list with prior approval of the Warden of the facility where the visit will occur and written approval of the supervising field agent." Hawaii, by contrast, specifically allows former felons to visit inmates, absent other aggravating circumstances, as do Massachusetts, Vermont, and the BOP. New Jersey and Nebraska are the only states that explicitly provide for inmate-to-inmate visitation in their written policies. States require various levels of background checks for visitors, ranging from nothing to a detailed criminal history check.

Many states do not allow victims to visit inmates. In Indiana, "[v]ictims generally shall not be allowed to visit offenders, unless the visit is for therapeutic reasons and a therapist has requested the visit and will be a part of the visit." Several jurisdictions have highly specific, and sometimes unique, rules excluding other categories of visitors. The BOP only allows visits from people inmates knew prior to their incarceration. Oklahoma is the only state to prohibit married inmates from receiving visits from friends of the opposite gender. Washington was the only state

to explicitly require, in its written policy directive, non-citizens who wish to visit to provide proof of their legal status in the United States; however, thanks in part to our research, Washington abolished that policy in January 2013. Arkansas and Kentucky require visitors to include a social security number on the visiting information form, and this may serve to deter or exclude undocumented immigrants from visiting their incarcerated family members even when the inmates themselves have legal status.

Searches of Visitors

In order to prevent contraband, prisons search visitors as a matter of course. Searches range in their degree of invasiveness. Invasive searches may prevent more contraband from entering the prisons, though they may also deter well-intentioned visitors from coming at all, especially the young, the old, and the disabled.

Forty-three jurisdictions specify, with varying levels of detail, the search procedures for visitors. In some cases, searches may extend to vehicles and to body cavities of visitors. Some jurisdictions specify additional search methods. For example, in Arizona, “[a]ll visitors and their possessions are subject to physical search by staff, electronic metal detection devices, barrier sniff screening (Narcotics Detection) by a Department Service Dog, and/or Ion Scanning. . . . All vehicles on Department property are subject to search.”

In some cases, the refusal to submit to a more intrusive search bars entrance to the facility and can be cause for sanctions. In Georgia, “[i]f a person refuses to be searched, an incident report will be completed and this could be cause for removal from the inmate’s approved visitor list.” Pennsylvania, however, prohibits its correctional officers from conducting pat or strip searches of incoming visitors.

Dress and Behavior of Visitors

. . . Many policy directives limit displays of physical affection. In New Hampshire, “[p]hysical contact and displays of affection will be kept within bounds of decorum with hugging and kissing allowed only at start and end of visits for 15 seconds or less,” and in Kentucky, “[a]n inmate in the regular visiting area shall be allowed brief physical contact (example: holding hands, kissing, and embracing). This contact shall be permitted within the bounds of good taste and only at the beginning and end of the visit.” Utah prohibited visitors from speaking any language other than English, but thanks in part to our research, Utah abolished that discriminatory policy in July 2013. . . .

Extended Visits

Prisons often offer expanded visitation opportunities for certain classes of visitors. Extended visiting opportunities for visitors who must travel long distances incentivize making the trip. Extended visits also allow prisoners to forge stronger bonds with friends or family, sometimes allowing them to interact in more natural and less surveilled settings. For families, these opportunities may permit moments of normalcy and intimacy not generally available in the average visitation setting.

Nearly all states offer some form of extended daytime visit, and some offer overnight family visits. These visits look different in each jurisdiction, however, as there is no consistent

length of time allotted for an “extended” visit, and there is no consistent definition of “family” for the purposes of overnight visit eligibility. . . .

Nine jurisdictions allow for overnight family visits or conjugal visits. California, for example, provides for “Family Visiting” in great detail. Connecticut’s policy provides for “[a] prolonged visit between an inmate and specified immediate family member(s), and/or a legal guardian, in a designated secure area separate from the inmate population.” However, family visitation is not currently operational in any Connecticut facilities. . . .

Virtual Visits

[V]irtual visitation is a double-edged sword. Virtual visitation refers to video visits conducted over the internet or an intranet. Like other technological means of communication, virtual visits may make visitation far easier and cheaper for some and may also make visits less intimate or more costly for others. Some states use virtual visitation to affirmatively expand visitation opportunities, while others use it as a restrictive sanction in place of normal visits. At least nineteen jurisdictions have some form of virtual visitation.⁹⁶ Indiana and Wisconsin allow video visitation when the inmate is not allowed other forms of visitation, on a temporary or permanent basis. Minnesota, New Mexico, Oregon, Pennsylvania, and Virginia, by contrast, allow for video visitation as a supplement to, rather than a replacement for, other forms of visitation. Alaska, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, New Jersey, New York, and Ohio reported that they also have programs, many of which are limited in scope and/or privately operated, but these programs do not appear in their policy directives or regulations. . . .

Similarities and Differences Across the Fifty States

Substantial consistency and significant commonalities exist across all the jurisdictions surveyed. All states have some provisions for prison visitation; all states screen visitors and place limitations on who can visit and when; and all states provide a substantial amount of discretion to each prison’s warden or superintendent in implementing the policy directives. Reading through the various policy directives, administrative regulations, and visitation codes makes clear that all DOCs treat visitation as a privilege, not a right. In most of the policies reviewed, DOCs note that inmates are not entitled to visits.

The significant differences between states’ visitation policies are also revealing. First, limits on visitation are often justified in terms of security, which may lead one to expect more consistent policies across jurisdictions than we observed. In some instances there is a direct tradeoff between security and prisoner access to the outside world through visitation such that limiting visitation increases security. However, most of the time, providing prisoners with access to the outside world through visitation decreases prison violence and facilitates rehabilitation. Thus, while contact visits may serve as a vehicle for contraband to enter the prison, they may also be essential to reduce fights in the prison and recidivism after release. We do not know why similar security concerns yield widely variant statewide policies. Jurisdictions evaluate security in different ways in different contexts, so we need to learn more about policy in practice in order to understand this variation.

No clear regional, geographic, or political trends appear to explain the variation in policies. One might expect that certain policies--for example, overnight family visits--would

exist in a state or group of states with certain common characteristics. Instead, the states in each category we examined do not appear to have much in common. The nine states that allow for overnight family visits, for example, are not from any one or even two geographic regions, and it is unclear what else of significance California, Colorado, Connecticut, Mississippi, Nebraska, New Mexico, New York, South Dakota, and Washington have in common.

Further, while the states often serve as laboratories of policy experimentation, one might expect some harmonization of best practices. If there has been such a harmonization or cross-pollination process, it is not apparent in several key areas. For example, North Carolina allows just one visit per week for a maximum of two hours, while New York allows its maximum-security offenders 365 days of visiting. While South Dakota allows only two people (plus family members) to be placed on an inmate's list of approved visitors, California allows inmates to list an unlimited number of visitors. It would be useful to know more about how these policies are developed and revised, both procedurally and substantively. What resources and which stakeholders are consulted when policy directives are drafted or updated? What prompts the issuance of new policies?

Recent Policy Reforms

We presented our research and an early draft of this Feature at an ASCA conference in October 2012. Since then, we have continued to dialogue with many departments of corrections about policies we consider to be counterproductive outliers. In response, two states have already made significant reforms.

In February 2013, Washington State published a revised visitation policy that made numerous changes. Most significantly, Washington removed the requirement that noncitizen visitors provide proof of legal status in the United States, and added a section outlining procedures for video visits and for "videograms." These reforms will help ensure that inmates in Washington can maintain ties to their families and communities while incarcerated. The reforms to the identification requirements eliminated the only state policy in the country to require that visitors present proof of legal status and are a major step towards ending discrimination based on country of origin. The development of the video visitation policy helps modernize Washington's visiting options and ensure that those visitors who live across the state or out of state may still be able to maintain contact.

In July 2013, Utah announced significant reforms to its visitation policy. Most significantly, Utah abolished what had been the only state policy in the country to require that English be the only language spoken during visits. Another change allows visitors to be on more than one inmate's approved visitation list. This change will allow, for example, parents with two children in prison to visit both (though not at the same time). Yet another reform "allow[s] unmarried inmates to have more than one unmarried person of the opposite gender" listed as a friend on the approved visitor list. The antiquated, gender-based policy this reform eliminated was originally justified in the interests of preventing fights between two girlfriends who showed up to visit on the same day, but in practice served to restrict inmates' ability to maintain contact with friends and support networks. Overall, Utah's reforms were a significant step towards increasing equitable access to visitation.

This chart maps practices that promote or that inhibit visiting. It is derived from Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation: A Fifty State Survey*, 32 YALE L. & POL’Y REV. 149 (2013).

<p>ALLOWS VISITING</p> <ul style="list-style-type: none"> - No limit on number of visitors on an inmate’s list (e.g., California) - No limit on visiting days (e.g., New York maximum security) - Overnight family visits (e.g., Mississippi) - Virtual visits supplementing, but not replacing, in-person visits (e.g., Oregon) - Locate prisons near urban populations (e.g., Rhode Island) - Provide subsidized public transit to remote prisons (e.g., New York) - Provide “special” visits for out of state / long distance visitors (e.g., Alaska) - Allow young children to visit without ID (e.g., Arkansas) - Allow inmate-inmate visits (e.g., New Jersey) - Allow visits from former felons (e.g., Hawaii) - Define “immediate family” broadly (e.g., Kentucky) 	<p>PROMOTES VISITING</p> <ul style="list-style-type: none"> - Policies accessible online (e.g., South Dakota) - Plain language visitor handbook (e.g., Connecticut) - Local rules accessible online and clearly posted at each facility - Promote/encourage visitation in policy (e.g., Colorado) - Provide toys in visit room (e.g., Florida) - Provides grievance procedures when visits are terminated/prohibited (e.g., Maine) - Less restrictive dress codes (e.g., New Mexico) - Less invasive search procedures (e.g., New York) - Allow diaper bags for infants (e.g., North Dakota) - Provide children’s play areas in visiting rooms (e.g., Missouri) - Allow breastfeeding during visits (e.g., Wisconsin)
<p>DISCOURAGES VISITING</p> <ul style="list-style-type: none"> - Prohibit toys in visiting room (e.g., New Hampshire) - Restrictive dress codes (e.g., Utah) - Invasive search procedures (e.g., Texas) - Terminate visits if children misbehave or make noise (e.g., Rhode Island) - Require multiple forms of ID (e.g., West Virginia) - Prohibit visitors from being on more than one inmates’ list (e.g., Alabama) - Limit frequency of changes to inmates’ visitor lists (e.g., Mississippi) - Waiting period for inmates removed from one inmate list and added to another (e.g., Arkansas) - Require visitors to reapply every year (e.g., Utah) 	<p>PROHIBITS VISITING</p> <ul style="list-style-type: none"> - Limit number of visitors on an inmate’s list (e.g., South Dakota) - Limit visiting days/hours (e.g., Virginia) - Send inmates to prisons far from families/out of state (e.g., federal BOP) - Prohibit visits from friends of the opposite gender for married inmates (e.g., Oklahoma) - Require proof of legal status for noncitizens (e.g., Washington) (recently repealed) - Deny contact visits as punishment (e.g., Michigan) - Visits by appointment only (e.g., Delaware) - Prohibit visits from persons with a recent drug arrest (e.g., Idaho) - Prohibit visits from former felons (e.g., Michigan) - Prohibit visits from people not known to inmate prior to incarceration (e.g., federal BOP) - Limited visiting with minors (e.g., Indiana)

**Why Do They Do It That Way?:
A Response to *Prison Visitation Policies: A Fifty-State Survey* (2013)**

Ashbel T. (“A.T.”) Wall, II^{*}

Through an unprecedented collaboration between Yale Law School’s Liman Program and the Association of State Correctional Administrators (ASCA)—the membership organization encompassing the Chief Executive Officers of the fifty-state corrections departments and the Federal Bureau of Prisons—we practitioners now have available a full and fascinating set of data describing every jurisdiction’s policies governing visiting. The effect is that of a large mirror. It reflects back to us how each of our systems handles this universal feature of prison operations—one of the most significant aspects of institutional life. The results fairly cry out for us to compare and contrast. [ASCA] members are now pondering a host of questions. Why do we do it this way? Why don’t our colleagues? Why do they do it that way? Why don’t we? What is the logic of particular practices? Do they make sense?

Many of these questions concern the details of visiting arrangements. Some of them are: their frequency and duration; the numbers of visitors allowed and what attire is permissible or unacceptable; search procedures; conduct in the visiting room itself; and restrictions and exclusions placed on those who wish to visit. In each of these categories, our various agencies come to different conclusions according to such variables as history, culture, location, technology, the philosophy of organizational leaders, the custody level of a given institution, architecture, staffing patterns, and the nature of security breaches attempted or completed. Interestingly, as the authors observe, one factor that almost never comes into play is judicial intervention. This domain is ours alone, largely unconstrained by court decrees. Yet while these decisions may strike the public at large as so much minutiae, they matter enormously to those who live and work in prisons, and to those who visit the facilities.

The lack of uniformity across the nation reflects not only these myriad individualized considerations but also the role of corrections as a traditional domain of state and local governments. While membership in professional associations, development of professional standards, and technical assistance from the federal government have facilitated the exchange of information in recent decades, the corrections profession has traditionally been highly state- and local-centric. The rapid expansion of electronic communication and what appears to be increasing interest in our field at the national level may lead to greater similarity in a variety of correctional practices, including visiting rules and protocols.

This study, which was itself greatly facilitated by the ease of information exchange, has already begun to stimulate self-examination and alterations in our regulations. One jurisdiction, for instance, quickly discovered that it was a unique outlier in its prohibition of visits conducted in any language other than English. It rapidly revised its policy in conformity with the norm. I expect that the publication of this feature will also generate movement toward general guiding principles. This has been the case with administrative segregation, where the Liman Program produced a similar survey using data provided by ASCA. There will undoubtedly be some adoption of one another’s practices as well. Ultimately, however, for reasons related to the

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³² YALE L. & POL’Y REV. 199 (2013). Reprinted with permission from author.
Liman Colloquium 2014 Isolation and Reintegration Punishment Circa 2014 Jan. 7, 2015

particular characteristics of the different systems (and even among institutions in the same system), there will still be plenty of variation in both official policy and actual practice. For example, a jurisdiction that may have no objection to overnight family visits in principle may reject the idea based on a consideration of the advantages versus the downsides. Factors might include needed modifications to the physical plant, changes in staffing patterns, alterations in facility scheduling, and attitudes of those inmates who don't receive this privilege as opposed to the numbers who can and do participate in the program. Is the payoff worth the fuss? In another vein, liberal visitation policies that appear generous on their face can be an empty promise in practice if inmates are situated in such remote areas that their loved ones lack the money or the means to travel there.

Embodied in the ways we structure visitation is also a larger set of issues than those raised by the idiosyncrasies in our specific visiting procedures. They arise from certain tensions among some of our profession's core values and principles. There is a broad consensus among all corrections directors about our purpose. In essence, we understand our mission to include both the administration of safe, secure, orderly, and constitutional facilities *and* the provision of programs and opportunities that will promote lawful and pro-social behavior following release. Visitation policies and practices stand at the intersection of these two fundamental and sometimes conflicting goals. The way in which visiting is actually experienced on the ground reflects the challenges we face in our efforts to honor each.

Since the beginning of the current century, the concept of effective prisoner reentry into the community post-release has emerged as a key organizing principle of our profession. Among its many strands is the belief that the maintenance of ties to family and other loved ones has a powerful role in easing the sensitive transition from an institutional setting to the far less structured environment of life in the free world. For example, ASCA's members immediately grasped the troubling implications of research done in some of our agencies that revealed the large numbers of inmates (forty percent or more in some instances) who had received no visits whatsoever in the past twelve months. As the feature's authors note, a careful study in Minnesota has shown that prisoners who had visitors were significantly less likely to reoffend. Research done in Ohio provides evidence of the benefits of visitation for inmate compliance with institutional rules.

Uniformed personnel are familiar with the relationship between successful prisoner reentry and public safety. They understand that visiting is an important inducement to good behavior and that it keeps inmates connected to loved ones. But custody staff also know that the sine qua non of their job is the maintenance of security inside the prisons. Their performance is judged by their success in providing safety and maintaining order. Their failure to do so can lead to serious consequences for them, their peers, and the inmates. Visiting introduces an element of unpredictability. It can lead to disruption in the routines, difficult encounters with visitors and inmates, and security threats such as the conveyance of contraband (including drugs and weapons in particular). The introduction of these items to prison settings sets the stage for all manner of security breaches and a destabilization of the inmate climate. Correctional officers and supervisors are expected to exercise a very high level of scrutiny throughout the visiting process, checking to see if visitors are authorized to enter the facility, making sure that clothing conforms to the regulations, conducting thorough searches without being impermissibly intrusive, keeping careful watch over the interaction between inmates and visitors, assuring that children are under

control, and terminating visits if the parties don't follow the rules. For the front-line guardians of institutional security, the idea that visiting can help lead to better outcomes for public safety down the road can seem highly attenuated when compared to the risks and threats it raises in the here and now.

The results can be difficult for all concerned. Staff must be hyper-vigilant throughout the visitation process, sometimes interjecting themselves into intimate encounters between people whose privacy is already severely constrained. Visitors frequently complain that they are treated like criminals, denied entrance or subjected to peremptory termination of their visits without being given satisfactory explanations. Inmates become angry if they perceive that their visitors have been treated poorly or that a much-anticipated visit has been cut short. Staff, for their part, uncover ruses to hide the visitor's true identity and criminal history or ever-changing schemes to smuggle in forbidden and even dangerous items. These experiences reinforce their concerns about the risks associated with the visiting process in general.

There are other contingencies that exacerbate the potential for a fraught and tense visiting experience. Issues that arise in prison management—sudden lockdowns, changes in institutional schedules, disciplinary infractions, the movement of inmates to different housing units when visiting days and times are organized by housing location—occur regularly in environments as complex as these. Harried personnel may lack the time or skill to explain what is happening while they are trying to manage long lines of sometimes impatient members of the public or ordering inmates back to their cells. Differing interpretations of the rules by various staff and visitors lead to additional frustration and stress.

Given the competing considerations, what are some options that could make the experience of visiting less charged for all concerned? Recognizing the evidence that visitation fosters a positive institutional climate and better reintegration post-release, how can visitation be promoted without unduly compromising essential managerial objectives?

One way to increase visiting opportunities without the attendant security concerns lies in the use of technology to expand virtual visitation. In discussing this option, the Feature's authors set forth its potential benefits and drawbacks. In addition to these pros and cons there are also some less tangible considerations. For example, is there a qualitative but measurable difference between face-to-face contact and technologically facilitated visiting? How important is the element of touch, however constrained? In a presentation to ASCA members, one of the authors raised the troubling case of a young child whose experience of seeing his incarcerated father via video had such a powerful impact on him that when he saw his dad in person he had difficulty distinguishing which of the two persons was "real." Although public reaction to the enhanced screening technology of the federal Transportation Safety Administration may not give cause for optimism, the use of similar equipment in prison to replace the increasingly outmoded metal detectors may boost the ability of correctional officials to detect a wider array of contraband without raising the ire of visitors or inmates. In those jurisdictions where institutional managers have the flexibility to deploy staff on posts where their abilities are best suited to the tasks at hand, careful consideration could—and should—be given to assigning those with the best combination of customer service skills and watchfulness.

In view of its centrality to both the prison experience and to successful reentry, visitation in policy and in practice deserves the careful attention it receives in the feature, *Prison Visitation Policies: A Fifty-State Survey*. In many ways, the topic encapsulates the contradictions of correctional administration as a whole. Weighing the interests of both security and rehabilitation when they come into conflict is perhaps the most profound challenge faced by our profession. The efforts we make to sort out the relationship between these two priorities in both the microcosm of visitation and institutional management as a whole is at the essence of the query, “why do they do it that way?” There is no simple answer to the question. The fact is that we will always be calibrating and recalibrating, trying to get the balance right.

Overton v. Bazetta

539 U.S. 126 (2003)

Justice Kennedy delivered the opinion of the Court.

The population of Michigan’s prisons increased in the early 1990’s. More inmates brought more visitors, straining the resources available for prison supervision and control. In particular, prison officials found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs. Special problems were encountered with the increase in visits by children, who are at risk of seeing or hearing harmful conduct during visits and must be supervised with special care in prison visitation facilities.

The incidence of substance abuse in the State’s prisons also increased in this period. Drug and alcohol abuse by prisoners is unlawful and a direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order, and the prevention of violence in the prisons. . . . In response to these concerns, the Michigan Department of Corrections (MDOC or Department) revised its prison visitation policies in 1995, promulgating the regulations here at issue. One aspect of the Department’s approach was to limit the visitors a prisoner is eligible to receive, in order to decrease the total number of visitors.

Under MDOC’s regulations, an inmate may receive visits only from individuals placed on an approved visitor list, except that qualified members of the clergy and attorneys on official business may visit without being listed. The list may include an unlimited number of members of the prisoner’s immediate family and 10 other individuals the prisoner designates, subject to some restrictions. Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. If an inmate’s parental rights have been terminated, the child may not be a visitor. A child authorized to visit must be accompanied by an adult who is an immediate family member of the child or of the inmate or who is the legal guardian of the child An inmate may not place a former prisoner on the visitor list unless the former prisoner is a member of the inmate’s immediate family and the warden has given prior approval.

The Department’s revised policy also sought to control the widespread use of drugs and

alcohol among prisoners. Prisoners who commit multiple substance-abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. Reinstatement is within the warden's discretion.

Respondents are prisoners, their friends, and their family members. They brought this action under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that the restrictions upon visitation violate the First, Eighth, and Fourteenth Amendments. . . .

We have said that the Constitution protects "certain kinds of highly personal relationships," *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 619–620 (1984). And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents. . . .

The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. . . . And, as our cases have established, freedom of association is among the rights least compatible with incarceration. . . . Some curtailment of that freedom must be expected in the prison context.

We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them

In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a " 'valid, rational connection' " to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation. *Turner*, 482 U.S. 78, 89 (1987).

Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. . . . As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Respondents argue that excluding minor nieces and nephews and children as to whom parental rights have been terminated bears no rational relationship to these penological interests.

We reject this contention, and in all events it would not suffice to invalidate the regulations as to all noncontact visits. To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her—children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.

MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. . . . Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons.

Respondents argue that the regulation bears no rational connection to preventing substance abuse because it has been invoked in certain instances where the infractions were, in respondents' view, minor. Even if we were inclined, though, to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations, the individual cases respondents cite are not sufficient to strike down the regulations as to all noncontact visits. Respondents also contest the 2-year bar and note that reinstatement of visitation is not automatic even at the end of two years. We agree the restriction is severe. And if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction on noncontact visits in all instances.

Having determined that each of the challenged regulations bears a rational relationship to a legitimate penological interest, we consider whether inmates have alternative means of exercising the constitutional right they seek to assert. . . . Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable. That showing, however, cannot be made. Respondents here do have alternative means of associating with those prohibited from visiting. . . . [I]nmates can communicate with those who may not visit by sending messages through those who are allowed to visit. Although this option is not available to inmates barred all visitation after two violations, they and other inmates may communicate with persons outside the prison by letter and telephone. Respondents protest that letter writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available. . . .

If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid. . . .

Justice Stevens, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, concurring.

Our decision today is faithful to the principle that “federal courts must take cognizance of the valid constitutional claims of prison inmates.” *Turner v. Safley*, 482 U.S. 78, 84 (1987). . . . It was in the groundbreaking decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), in which we held that parole revocation is a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment, that the Court rejected the view once held by some state courts that a prison inmate is a mere slave. Under that rejected view, the Eighth Amendment’s proscription of cruel and unusual punishment would have marked the outer limit of the prisoner’s constitutional rights. It is important to emphasize that nothing in the Court’s opinion today signals a resurrection of any such approach in cases of this kind. To the contrary, it remains true that the “restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.” 479 F.2d, at 712. . . .

Justice Thomas, with whom Justice Scalia joins, concurring in the judgment.

The Court is asked to consider “[w]hether prisoners have a right to non-contact prison visitation protected by the First and Fourteenth Amendments.” . . . In my view, the question presented, as formulated in the order granting certiorari, draws attention to the wrong inquiry. Rather than asking in the abstract whether a certain right “survives” incarceration, . . . the Court should ask whether a particular prisoner’s lawful sentence took away a right enjoyed by free persons The Court’s precedents on the rights of prisoners rest on the implicit (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment*. . . .

The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishments Clause of the Eighth Amendment, and *Turner* cited neither that Clause nor the Court’s precedents interpreting it. Prisoners challenging their sentences must, absent an unconstitutional procedural defect, rely solely on the Eighth Amendment. The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations.

It is highly doubtful that, while sentencing each respondent to imprisonment, the State of Michigan intended to permit him to have any right of access to visitors. Such access seems entirely inconsistent with Michigan’s goal of segregating a criminal from society,. . . . Prison as it is known today and its part in the penitentiary system were “basically a nineteenth-century invention.” L. Friedman, *Crime and Punishment in American History* 48 (1993) The rise of the penitentiary and confinement as punishment was accompanied by the debate about the Auburn and Pennsylvania systems, both of which imposed isolation from fellow prisoners and the outside. D. Rothman, *The Discovery of the Asylum* 82 (1971) . . . Although there were several justifications for such isolation, they all centered around the belief in the necessity of

constructing a special setting for the “deviant” (*i.e.*, criminal), where he would be placed in an environment targeted at rehabilitation, far removed from the corrupting influence of his family and community. . . . Indeed, every feature of the design of a penitentiary—external appearance, internal arrangement, and daily routine—were aimed at achieving that goal.

To the extent that some prisons allowed visitors, it was not for the benefit of those confined, but rather to their detriment. Many prisons offered tours in order to increase revenues. During such tours, visitors could freely stare at prisoners, while prisoners had to obey regulations categorically forbidding them to so much as look at a visitor Although by the 1840’s some institutions relaxed their rules against correspondence and visitations, the restrictions continued to be severe With such stringent regimentation of prisoners’ lives, the prison “had assumed an unmistakable appearance” . . . one which did not envision any entitlement to visitation.

Although any State is free to alter its definition of incarceration to include the retention of constitutional rights previously enjoyed, it appears that Michigan sentenced respondents against the backdrop of this conception of imprisonment Consequently, respondents’ Eighth Amendment challenge must fail.

Assisted Prison Visits Scheme: Customer Guide (2013)

United Kingdom Ministry of Justice^{*}

The Assisted Prison Visits Scheme (APVS) provides financial assistance to prisoners’ close relatives, partners or sole visitors who are in receipt of qualifying benefits or a low income when making qualifying visits to prisons. The scheme is funded by the National Offender Management Service (NOMS) and is managed by the Assisted Prison Visits Unit on behalf of NOMS and the Ministry of Justice. . . . APVU also administers the scheme on behalf of the Scottish Prison Service. . . .

Who Can Apply?

To qualify for assistance you must be in one of the categories listed in this section and satisfy the income rules in Section 3.

Close relatives

Close relative means: wife, husband, civil partner, mother, father, sister, brother, son, daughter, grandparent or adoptive step/half brother/sister, step child or step parent or someone who was in loco parentis for a significant period during the prisoner’s childhood.

The minimum age for applying for an assisted prison visit is 18 years (16 years when visiting a prison in Scotland) but this restriction may be waived where the governor or director gives

^{*} *Excerpted from* Introducing “PAYMENT BY RESULTS” in OFFENDER REHABILITATION AND OTHER REFORMS 13-15 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251964/Assisted-Prison-Visits-Guide.pdf (last visited July 7, 2014).

permission for a qualifying close relative or partner or sole visitor aged 16 or 17 years to visit unaccompanied.

Partner

A partner means a person with whom the prisoner was living, as a couple, in an established relationship, immediately before the period of remand or imprisonment was imposed. An age restriction applies. Any children living within the family unit are also eligible to receive assistance.

Sole visitor

A sole visitor is someone who is not a close relative or partner but is the prisoner's only visitor during a four week period immediately before the date of the first assisted visit. An age restriction applies.

Escort to a qualifying child or young person

There are three types of escort to a prisoner's child/children: 1) Prisoner's spouse or partner 2) Carer 3) A person authorised by either of the above to escort the child / children to the prison on their behalf. . . .

Escort to a qualifying adult

Adult visitors may qualify for an escort. The escort must complete an application form and wherever possible it should be sent to us at the same time as the visitors form. A return journey between the home of the escort and qualifying visitor is payable subject to a maximum rate. Where a car journey is being claimed, the total mileage allowance will normally be paid to the qualifying visitor unless advised otherwise. The volunteer driver rate only applies if the escort isn't going into the visit.

Assisted Visit Program

Entitlement

Assistance is normally given towards a visit every two weeks and up to 26 assisted visits per 12 month period. This commences on the date of the first assisted visit. Assisted visits can be saved up to allow two or more consecutive visits to take place during one return journey. A contribution towards an overnight stay will be considered. Each visiting day will count towards the annual allowance. Assistance may be granted towards accumulated visits, contact us for advice. . . . A maximum of 13 unused assisted prison visits can be carried forward at the end of the 12 month period.

Additional visits

The prison governor may authorise additional visits if it is considered necessary for resettlement purposes or the welfare of the prisoner or you. Payment will not count towards the annual allowance.

What Financial Help Can I Get?

Travel

You can go by car, motor cycle or public transport. You must use the cheapest method of public transport available for the journey you are making. Check to see if you can go by bus or coach for, if you go by rail use standard class trains, travelling off peak where possible. If you travel by public transport, APVU reserve the right to limit your payment to the cheapest method available.

Light refreshment allowance

If you need to buy food or drink on the day of the visit, and are away from home for more than 5 or over 10 hours, you may be eligible for a light meal refreshment. Tick the box on the application form and enter your times of travel. APVU reserve the right to ask for receipts. . . .

Overnight accommodation

If you apply for payment of overnight accommodation costs we will take the following factors into account before approving payment: length of time absent from home; difficulty of journey; number and ages of any eligible children; your age; availability of public transport; medical needs. The cost of travel between the accommodation address and establishment is payable but subject to a maximum published rate. You must get approval from APVU before incurring expenses. A light refreshment allowance may be payable. Regular checks are carried out to validate claimed overnight accommodation costs

Child care

The cost of a registered childminder or breakfast/after school club or similar will be considered if you decide not to take a qualifying visitor who is under 16 to the prison. The following details should be sent with your application form: name and address of school/childminder; registration number of childminder and name and address of local authority (if applicable); name of children and date of care; cost per hour. A receipt must be obtained and attached to the application form. We do not normally contact the childminder or school direct.

Prisoners and Families Connect with Video Visitation, for a Price (Sep. 15, 2012)

Prison Legal News^{*}

Since 2006, family members and friends of Virginia prisoners have been able to use modern videoconferencing equipment to enjoy visits with loved ones held in state prisons hundreds of miles away. The Video Visitation Program, operated by two Richmond-based nonprofit groups, Assisting Families of Inmates and the New Jubilee Educational and Family Life Center, in cooperation with the Virginia Department of Corrections, is designed to make it

^{*} Excerpted from Prison Legal News, available at <https://www.prisonlegalnews.org/news/2012/sep/15/prisoners-and-families-connect-with-video-visitation-for-a-price/> (last visited July 1, 2014).

easier for prisoners to keep in touch with their families. Staying connected, prison officials and prisoner advocates agree, improves the likelihood that prisoners will achieve long-term success once they are released.

For prison officials, there is the added bonus that participation in the video visitation program gives prisoners an incentive to maintain good behavior. A prisoner who has not remained disciplinary-free for six months is generally not allowed to take part. For families, the video visiting program is user friendly. A half-hour video chat costs \$15 while an hour-long visit costs \$30; by comparison, an in-person visit – taking into account the cost of gas, food and overnight lodging – can run \$500 or more, according to Fran Bolin, executive director of Assisting Families of Inmates. The Video Visitation Program is offered at ten Virginia state facilities, and four churches serve as outside video visit sites in Richmond, Norfolk, Alexandria and Roanoke. A number of prisons and jails in other states provide video visitation, too.

In fall 2011, a video visitation program at three Ohio prisons, organized by the Cleveland Eastside Ex-Offender Coalition, shut down after state grant funding ended. The organization was unable to find replacement funding for the video visits, which were made available at the Ohio Reformatory for Women in Marysville, Trumbull Correctional Institution in Leavittsburg and Allen Correctional Institution in Lima. The video visitation was provided at no cost to prisoners and their family members.

“We still kept the program going for our clients as we looked for other sources of revenue, but we became over-whelmed,” said Caroljean Gates, the organization’s director. “Our phones have constantly been ringing every week because people want to talk with their loved ones [in prison].”

The Ohio Department of Rehabilitation and Correction offers pay video visits at four other facilities though Global Tel*Link, a company that primarily provides prison phone services. Other for-profit companies, such as JPay, also provide video visitation for a fee at various prisons and jails nationwide.

On July 25, 2012, the District of Columbia’s jail system switched to video visits instead of in-person visits. Video stations were installed in jail housing units and at an outside Video Visitation Center for freeworld visitors. According to jail officials, video visitation will double the number of visits available each day and visitors will no longer have to wait in long lines or undergo searches. . . .

Report and Order and Further Notice of Proposed Rulemaking in the Matter of Rates for Interstate Inmate Calling Services (Aug. 9, 2013)

Federal Communications Commission

In this document, the Federal Communications Commission adopts rule changes to bring high interstate inmate calling service (ICS) rates into compliance with the statutory mandate of being just, reasonable, and fair. This action is intended to bring rate relief to inmates and their friends and families who have historically been required to pay above-cost rates for interstate ICS. This final rule is effective February 11, 2014 except for . . . information collection requirements that are not effective until approved by the Office of Management and Budget.

Nearly 10 years ago Martha Wright, a grandmother from Washington, DC, petitioned the Commission for relief from exorbitant long-distance calling rates from correctional facilities. Tens of thousands of others have since urged the Commission to act, explaining that the rates inmates and their friends and families pay for phone calls render it all but impossible for inmates to maintain contact with their loved ones and their broader support networks, to society's detriment. Today, we answer those pleas by taking critical, and long overdue, steps to provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.

This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities. Studies have shown that family contact during incarceration is associated with lower recidivism rates. Lower recidivism means fewer crimes, decreases the need for additional correctional facilities, and reduces the overall costs to society. By reducing interstate inmate phone rates, we will help to eliminate an unreasonable burden on some of the most economically disadvantaged people in our nation. We also recognize that inmate calling services (ICS) systems include important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees. Our Order ensures that security features that are part of modern ICS continue to be provided and improved.

Our actions address the most egregious interstate long distances rates and practices. Evidence in our record demonstrates that inmate phone rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service. While an inmate in New Mexico may be able to place a 15 minute interstate collect call at an effective rate as low as \$0.043 per minute with no call set up charges, the same call in Georgia can be as high as \$0.89 per minute, with an additional per-call charge as high as \$3.95 as much as a 23-fold difference. Also, deaf prisoners and family members in some instances pay much higher rates than hearing prisoners for equivalent communications with their families.¹⁰ For example, the family of a deaf inmate in Maryland paid \$20.40 for a nine minute call placed via Telecommunications Relay Service (TRS)—an average rate of \$2.26 per minute. A significant factor driving these excessive rates is the widespread use of site commission payments—fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service. . . .

We applaud states such as New Mexico and New York that have already accomplished reforms, and thereby shown that rates can be reduced to reasonable, affordable levels without jeopardizing the security needs of correctional facilities and law enforcement or the quality of service. Similarly, we acknowledge that some federal agencies, such as the Department of Homeland Security's Immigration Customs and Enforcement (ICE), have taken similar measures to provide lower rates, resulting in nationwide calling rates of \$0.12 a minute without additional fees or commissions at ICE facilities. Following such reforms, there is significant evidence that call volumes increased, which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with friends and family. There is also support in the record that ICS rate reform has not compromised the security requirements of correctional facilities. Thus, these examples disprove critics who fear that reduced rates will undermine security or cannot be implemented given provider costs. Our actions build upon these examples by reducing rates, while balancing the unique security needs of facilities and ensuring that inmate phone providers receive fair compensation and a reasonable return on investment.

While some states have taken action to reduce ICS rates, the majority have not. We therefore take several actions to address interstate rates. We require inmate phone providers to charge cost-based rates to inmates and their families, and establish "safe-harbor" rates at or below which rates will be treated as lawful (i.e., just, reasonable, and fair) unless and until the Commission issues a finding to the contrary. Specifically, we adopt interim safe harbor rates of \$0.12 per minute for debit and prepaid interstate calls and \$0.14 per minute for collect interstate calls. Based on the evidence in this record, we also set an interim hard cap on ICS providers' rates of \$0.21 per minute for interstate debit and prepaid calls, and \$0.25 per minute for collect interstate calls. This upper ceiling ensures that the highest rates are reduced immediately to the upper limit of what can reasonably be expected to be cost-based rates. Interstate ICS rates at or below the safe harbor are presumed just, reasonable, fair and cost-based. Rates between the interim safe harbor and the interim rate cap will not benefit from this presumption. . . .

In addition to immediate rate reform, we find that site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families. We require that charges for services ancillary to the provision of ICS must be cost-based. We prohibit special charges levied on calls made using teletypewriter (TTY) equipment or other technologies used to access TRS. . . .

The Communications Act (Act) requires that interstate rates be just and reasonable for *all* Americans—there is no exception in the statute for those who are incarcerated or their families. The Act further requires that our payphone regulations "benefit . . . the *general* public," not just some segment of it. Our actions in this Order, while long overdue, fulfill these statutory mandates while taking into account the legitimate and unique requirements for security and public safety in the provision of inmate phone services and the benefits to society of increased communications between inmates and their families. Our work, however, is not done, and we continue in the Further Notice (or FNPRM) our efforts to ensure that these rates are just, reasonable, and fair to the benefit of both providers and the general public. . . .

FCC Order Heralds Hope for Reform of Prison Phone Industry (2013)

*John E. Dannenberg and Alex Friedmann**

On August 9, 2013, the Federal Communications Commission (FCC) in a landmark decision, voted to cap the cost of long distance rates for phone calls made by prisoners and enact other reforms related to the prison phone industry The order, entered in response to a petition for rulemaking submitted to the FCC, is the result of a decade-long effort to lower prison phone rates and implement much-needed changes in the prison phone industry.

Prison Phone Services: A Primer

The billion-dollar prison phone industry is comprised of companies that provide phone services for prisoners and detainees held in state, federal and privately-operated prisons, county and municipal jails, juvenile facilities, immigration detention centers and other correctional facilities. Such services are commonly referred to as Inmate Calling Services (ICS).

Five companies, known as ICS providers, dominate the prison phone market; Global Tel*Link (GTL), Securus Technologies, CenturyLink, Telmate and ICSolutions provide phone services for 49 of the 50 state Departments of Corrections. A number of other companies, such as Pay-Tel, NCIC, Legacy and EagleTel, provide ICS services primarily to jails.

When prisoners make phone calls they typically have three payment options – collect, prepaid or debit. Collect calls are paid by the call recipient, prepaid calls are paid from a pre-funded account established by the call recipient and debit calls are funded from a prisoner’s institutional debit account. Prisoners can usually call only a small number of people on a specified list, and calls are frequently limited to 15 or 20 minutes per call. . . .

There are three types of phone calls within the telecommunications industry – local, intrastate and interstate Prisoners’ family members and friends pay for the vast majority of ICS calls, either by accepting collect calls, establishing prepaid accounts or sending money to their incarcerated loved ones to place on their debit phone accounts. . . .

ICS rates are much higher than non-prison rates, in large part because prison phone companies pay “commission” kickbacks to the corrections agencies with which they contract. Such commissions are usually based on a percentage of the revenue generated from prisoners’ calls and have nothing to do with the actual cost of providing the phone service. Because ICS providers factor commission payments – which currently average 47.79% for state Departments of Corrections (DOCs) – into the phone rates they charge, the rates are artificially inflated. Absent commission kickbacks, which are received by 42 state DOCs, the rates could be considerably lower. ICS providers paid at least \$123.3 million to state prison systems in 2012.

History Behind the FCC’s Order

The high costs of prison phone calls and the practice of commission kickbacks were presented to the FCC in 2003, in the form of a petition for rulemaking filed by attorneys representing Martha Wright, a District of Columbia resident, who filed a lawsuit challenging the phone rates she had to pay to stay in touch with her incarcerated grandson. The federal court

* *Excerpted from* PRISON LEGAL NEWS, Dec. 1, 2013. Reprinted with permission.

referred the matter to the FCC since that agency has primary jurisdiction over interstate phone rates. An alternative petition for rulemaking, commonly known as the “Wright petition,” which requested a cap on prison phone rates, was filed with the FCC in 2007. . . . Little action was taken on the Wright petition for the next four years.

In April 2011, following extensive research initially funded by a small grant from the Funding Exchange, PLN published a damning exposé on the prison phone industry that included detailed information on prison phone rates and commission percentages and amounts, based on 2007-2008 data As a result of the interest generated by PLN’s report on the prison phone industry, which was filed with the FCC on the Wright petition’s docket, HRDC co-founded the national Campaign for Prison Phone Justice in conjunction with the Center for Media Justice/Media Action Grassroots Network (MAG-Net) and Working Narratives.

The Campaign, which grew to include 55 supporting organizations and thousands of individual members, coordinated actions to pressure the FCC to act on the Wright petition and reduce the cost of prison phone calls – such as letter-writing and email campaigns, plus a rally outside the Commission’s Washington, D.C. headquarters. Tens of thousands of people submitted comments to the FCC or signed petitions, including over 1,700 prisoners and dozens of civil rights, faith-based, immigration reform and prisoners’ rights organizations. . . .

In December 2012, under the direction of then-Acting Chairwoman Mignon Clyburn, the FCC issued a Notice of Proposed Rulemaking (NPRM) on the Wright petition. . . . Finally, in August 2013, nearly a decade after Martha Wright filed her initial petition for rulemaking with the FCC, the Commission voted to cap the cost of interstate prison phone calls and institute other reforms. The rate caps were very close to those requested in the Wright petition, which had sought benchmark rates (caps) of \$.25 per minute for collect calls and \$.20 per minute for debit and prepaid calls. . . .

Two prison phone companies, GTL and Securus, filed petitions for a stay of the FCC’s order until they could bring a legal challenge, then filed lawsuits in federal court seeking review of the order in November 2013. In other words, they want to continue price-gouging prisoners and their families by postponing the FCC-mandated reforms for as long as possible while using revenue from prisoners’ phone calls to subsidize the cost of their litigation in the interim.

On a brighter note, one California county responded to the FCC’s order by proposing to manage its own jail and juvenile detention facility phone systems – simply dispensing with ICS providers as an unnecessary anachronism. . . .

An Updated Look at the Prison Phone Industry

PLN’s April 2011 exposé on the prison phone industry included a chart with state-by-state ICS rates, commission percentages and annual commission payments for state DOCs. PLN focused on state prison systems due to the impracticality of obtaining similar data from the thousands of jails in cities and counties across the U.S.

Alabama, Alaska, Georgia and Minnesota charge the highest collect interstate rates for prison phone calls, at \$17.30 for a 15-minute call. Other states with exceptionally high interstate rates include Ohio, which charges \$16.97 for a collect 15-minute call, and Idaho, which charges

\$16.55. Based on a 15-minute interstate ICS call, 13 states charge over \$10.00 for collect calls, 8 charge more than \$10.00 for prepaid calls and 7 charge over \$10.00 for a debit call.

In terms of the lowest interstate rates, three states charge less than \$1.00 for collect, prepaid and debit calls. New Mexico charges a flat \$.65 for collect and debit calls, plus a flat \$.59 for prepaid calls. New York charges \$.048 per minute for all types of calls, or \$.72 for a 15-minute call. The rates in South Carolina include a flat \$.99 for a collect call and flat \$.75 for prepaid and debit calls. Currently, the average rates for 15-minute interstate ICS calls are \$7.18 for collect, \$6.05 for prepaid and \$5.56 for debit calls.

For intrastate rates, based on a 15-minute prison phone call, 11 states currently charge over \$5.00 for collect calls, 7 charge more than \$5.00 for a prepaid call and 5 charge over \$5.00 for debit calls. The highest intrastate ICS rates are in Delaware, which charges \$10.70 for 15-minute calls of all types under a contract with GTL. Other high rates include \$8.40 for a 15-minute collect call in South Dakota, \$6.75 for collect, debit and prepaid calls in Alabama, and \$6.45 for a collect call in Minnesota.

Four states charge less than \$1.00 for a 15-minute intrastate call for all types of calls: New Mexico (flat \$.65 for collect and debit calls, and flat \$.59 for prepaid); Rhode Island (flat \$.70 for collect and prepaid, and flat \$.63 for debit calls); New York (\$.72 for all types of calls based on a rate of \$.048 per minute); and South Carolina (flat \$.99 for collect and flat \$.75 for debit and prepaid calls). The current average rates for 15-minute intrastate prison phone calls are \$3.90 for collect, \$3.41 for prepaid and \$3.42 for debit calls. . . .

The vast majority of state DOCs receive commission kickbacks from their ICS providers, usually in the form of a percentage of revenue generated from prisoners' phone calls. Based on full or partial commission data from 49 states, prison phone companies paid at least \$123.3 million in ICS kickbacks to DOCs in 2012. Notably, this doesn't include commissions generated from phone services at federal prisons, jails, privately-operated prisons, juvenile facilities, immigration detention centers and other correctional facilities.

Current state DOC commission rates range from a low of 7% in Alaska to a high of 76% in Illinois (though Maryland receives an 87% commission on collect ICS calls while Maine gets a 100% kickback on debit calls). The average commission rate for states that have a percentage-of-revenue commission is 47.79%, based on 2012-2013 data Beyond commission payments, some states receive other perks from prison phone companies. For example, under its contract with the California Department of Corrections and Rehabilitation, GTL provides cell phone blocking technology at all California state prisons

Eight states have banned ICS commission kickbacks, mostly through legislation: California, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island and South Carolina. Unsurprisingly, since prison phone companies don't have to recoup commission payments from the phone rates charged in non-commission states, those states have some of the lowest ICS rates in the nation. . . .

Unlike in most state DOCs, the majority of calls from BOP facilities are interstate (long distance); this is mainly due to the fact that federal prisoners can be housed at any BOP prison

nationwide, far from their families. The percentage of long distance calls has recently dropped, though, which the GAO attributed to “technology that allows inmates’ friends and family who do not live within the inmates’ local calling area to acquire telephone numbers local to the inmates’ prison locations.”

Indeed, a cottage industry has developed in which numerous services, some of which advertise in PLN, provide prisoners’ families with local forwarding phone numbers for the purpose of skirting more expensive long distance ICS rates. . . .

According to the GAO report, “In fiscal year 2010, BOP’s inmate telephone system generated approximately \$74 million in revenue, cost approximately \$39 million to operate, and showed a profit of approximately \$34 million”. . . In terms of gross revenue, the BOP’s phone system generated \$69.6 million in fiscal year (FY) 2011, \$65.3 million in FY 2012 and \$60.25 million in FY 2013; net profits were not available.

Revenue from the Bureau of Prisons’ phone services are deposited in the BOP’s Trust Fund, which manages income and pays expenses related to the ITS system. The Trust Fund is primarily used to pay wages for BOP prisoners, and to provide educational and recreational services and programs. . . .

The GAO observed that lowering the BOP’s phone rates could have both positive and negative implications. “The primary advantage would be that inmates would incur lower costs for making calls. This could possibly encourage greater communication between inmates and their families, which BOP has stated facilitates the reintegration of inmates into society upon release from prison,” the report said. “In contrast, reducing inmate telephone rates could also have some disadvantages....With fewer profits, BOP would have less Trust Fund money to spend on inmate amenities. As a result, unless BOP recouped these revenues from other sources, BOP would have to reduce the wages it pays inmates for their labor and/or scale back the number and type of other educational and recreational activities it currently offers using revenue from the Trust Fund. According to BOP officials, such reductions could make prisons more dangerous to manage and more expensive to operate.” . . .

Comments by the Commissioners

When the FCC decided to cap the cost of interstate ICS calls in August 2013, it did so on a 2-to-1 vote. Then-Acting Chairwoman Mignon Clyburn – who had championed reform of the prison phone industry – and Commissioner Jessica Rosenworcel voted for the rate caps and related measures to curb the worst abuses of ICS providers. Commissioner Ajit Pai, appointed to the FCC in 2012 by President Obama, cast the dissenting vote.

In an unusual epilogue, the Commissioners appended statements reflecting their personal thoughts and comments to the FCC’s final order released on September 26, 2013. Commissioner Rosenworcel wrote:

When I step back from the record in this proceeding, there is one number that simply haunts me – perhaps because I am a parent. Across the country, 2.7 million children have at least one parent in prison. That is 2.7 million children who do not know what it means to talk regularly with their mother or father. After

all, families with an incarcerated parent are often separated by hundreds of miles. They may lack the time and means to make regular visits. So phone calls may be the only way to stay in touch. Yet when the price of a single phone call can be as much as you and I spend for unlimited monthly plans, it is hard to keep connected. Reaching out can be an impossible strain on the household budget. This harms the families and children of the incarcerated. But it goes far beyond that. It harms all of us because we know that regular contact between prisoners and family members reduces recidivism.

Today, this changes. After a long time – too long – the Commission takes action to finally address the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice. We establish a framework that will immediately reduce interstate inmate calling service rates This effort has my unequivocal support. . . .

Conclusion: The Bell Tolls

On November 21, 2013, the FCC denied Securus' and GTL's petitions to stay the Commission's order and to hold the FNPRM in abeyance. "Justice delayed is justice denied," Commissioner Clyburn stated. "Families and loved ones have already been waiting ten long years for relief from unlawfully high and unaffordable rates I look forward to working with Chairman [Tom] Wheeler and my fellow Commissioners to adopt permanent rate caps to ensure that inmate calling service phone calls are just and reasonable as required by the statute."

Upon denying the petitions to stay, the FCC wrote that "delay of implementation of the reforms adopted in the Order will perpetuate the significant harms that third parties are currently subject to in the form of unjust, unreasonable and unfair ICS rates and the various secondary harms that those excessive rates cause, such as a higher rate of recidivism and emotional harm to prisoners' children."

Thus, ICS providers should not ask for whom the bell tolls, as it has tolled for them. Prison phone companies have for too long price-gouged prisoners and their loved ones in collusion with corrections agencies that profit from such exploitation through commission kickbacks. If ICS providers want to continue providing prison phone services, they must do so within the new paradigm of regulation, rate caps and public scrutiny.

Lady Justice may be blind, but judging from the FCC's order she is not deaf – and the pleas of prisoners and their families for reform of the abusive prison phone industry are finally being heard, loud and clear.

Developing a Market in Delivering Packages to Prisoners

As reported by the *New York Times* in March 2013, a company called Sendapackage, “which could be thought of as prison’s version of Amazon.com,” offers “New York’s 50,000 inmates hundreds of items for purchase and delivery: soft drinks, cigarettes, canned ravioli, cotton hoodies and—perhaps most popular of all—music on cassette tape, the only format that corrections regulations will allow.” The business evolved in response to the fact that

sending packages to loved ones doing time can be, as thousands of local families know, a Kafkaesque process. Beyond the hassle of going to several stores to assemble a package, and then having to take it to the post office or UPS, is navigating a welter of rules governing what is allowable. The New York State Department of Corrections and Community Supervision publishes a list, currently more than 20 pages long, of who can send what, and how, and what is permitted and what is not. Food cannot contain poppy seeds; emery boards must be “nonmetallic;” boxer shorts and briefs must be of a solid color only. . . .

See Alan Feuer, *The Cellblocks’ Amazon.com: Sendapackage.com Bills Itself as ‘New York’s Inmate Superstore,’* *New York Times* (Nov. 1, 2013).

Sendapackage has attracted \$1.5 million in startup funding from a Brooklyn businessman.

On an ordinary day, Sendapackage handles up to 40 orders. About a third are placed online by relatives on the outside; most of the rest arrive from inside prisons by telephone or mail. Mr. Barrett said the average order was usually in the neighborhood of \$110. With seven employees, he currently serves all of New York’s 58 state prisons

Some states, such as California, have developed cooperative arrangements with private vendors who sell goods and provide packaging and shipping services according to the state guidelines. The California Department of Correction and Rehabilitation website lists vendors that comply with the department rules. See California Department of Correction and Rehabilitation, *Inmate Pack Vendors*, available at: http://www.cdcr.ca.gov/Visitors/Approved_Vendors.html (last visited July 7, 2014).

II. LIVING TOGETHER OR APART: ISOLATION IN PLACE, OVERSIGHT, AND ALTERNATIVES



View of Fifth Block Corridor, with Gallery, two Stories high.

View of the Fifth Block Corridor, with Gallery, from Richard Vaux, *BRIEF SKETCH OF THE ORIGIN AND HISTORY OF THE STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA* (McLaughlin Bros. Printers, Phila, 1872).

Every prison system in the United States uses some form of segregation that entails isolating prisoners for periods of time. Such isolation is described by different terms—disciplinary segregation, administrative segregation, protective custody, special management units—to reflect different, albeit often overlapping, rationales for such confinement. Although the terms and policies vary by jurisdiction, the basic features of segregation are shared throughout the United States: criteria for placement in segregation give broad discretion to decision-makers; detention generally is open-ended, rather than for a fixed duration; confinement is close and restrictive; and access to contact with visitors and to activities is very limited.

This chapter considers some of the law and policies governing segregation and the current efforts to revise their parameters. Directives on segregation come from department-level policies, regulations, statutes, and judicial interpretations of constitutional mandates that, together, have generated the content of what is understood today as segregation.

These provisions may also be the sources of change, as proposals from many sectors seek to “stop solitary” in terms of what it now entails. Corrections systems have revised rules governing hygiene, exercise, and medical visits, restrictions of movement out of one’s cell, limitations on contact with visitors, and opportunities to work or participate in programs. A

number of systems pursuing reform of their segregation policies have ended the segregation of certain sub-populations, emphasized treatment over punishment, and increased programming to assist the transition back to general population.

What are the rationales for segregation and what are understood to be ordinary facets of what segregation entails? How might the content of segregation change, in terms of the degrees of isolation—measured in time, space, or contact? What would be the sources of change and how far-reaching can the reforms be? What role does law play in sustaining the current parameters of segregation, and what role could law play in changing those parameters? How much ought discretion about segregation be left to those who administer prisons? What role ought discretion play in a reformed segregation regime? How should responsibility for guiding reform be allocated between legislators, judges, prison administrators, and other professionals?

POLICIES AND PRACTICES FOR PLACEMENT AND PROGRAMS

The leading U.S. Supreme Court case addressing the constitutionality of *how* inmates are placed in segregation is *Wilkinson v. Austin*, in which a unanimous Court held that “extreme isolation” is permissible so long as some procedural protections are accorded to prisoners placed in such confinement. Process was due when a transfer would result in “significant and atypical hardships” as compared to the “ordinary incidents of prison life.” In addition to excerpts of *Wilkinson*, we provide Ohio’s revised policy for placement in isolation, termed “Level Five Classification.”

Since 2005, federal judges have applied *Wilkinson* to a variety of segregation facilities and policies. Courts have reached differing conclusions as to what constitutes a “significant and atypical hardship,” as well as what are the “ordinary incidents of prison life.” Courts that have conceptualized segregation as primarily punitive have distinguished such isolation from “discretionary” placements, driven by prison management concerns, and have required greater procedure when segregation is a form of discipline. In contrast, those courts that view segregation as primarily a prison management tool have found segregation to be the “ordinary incidents of prison life.” *Rezaq v. Nalley* illustrates that approach; the Tenth Circuit found that conditions at the federal supermax prison resembled those “routinely imposed in the administrative segregation setting” and were insufficiently extreme to trigger procedural protections.

Wilkinson v. Austin
545 U.S. 209 (2005)

Justice Kennedy delivered the opinion for a unanimous Court:

This case involves the process by which Ohio classifies prisoners for placement at its highest security prison, known as a “Supermax” facility. Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. We must consider what process the Fourteenth Amendment to the United States Constitution requires Ohio to afford to inmates before assigning them to Supermax. We hold that the procedures Ohio has adopted provide sufficient procedural protection to comply with due process requirements. . . .

In 1998, Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum-security prisons. OSP has the capacity to house up to 504 inmates in single-inmate cells and is designed to “separate the most predatory and dangerous prisoners from the rest of the . . . general [prison] population.” . . .

Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement. . . . In OSP 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.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate’s sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. . . . Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP. . . .

Placement at OSP is determined in the following manner: Upon entering the prison system, all Ohio inmates are assigned a numerical security classification from level 1 through level 5, with 1 the lowest security risk and 5 the highest. . . . The initial security classification is based on numerous factors (*e.g.*, the nature of the underlying offense, criminal history, or gang affiliation) but is subject to modification at any time during the inmate’s prison term if, for instance, he engages in misconduct or is deemed a security risk. Level 5 inmates are placed in OSP, and levels 1 through 4 inmates are placed at lower security facilities. . . .

A classification review for OSP placement can occur either (1) upon entry into the prison system if the inmate was convicted of certain offenses, *e.g.*, organized crime, or (2) during the term of incarceration if an inmate engages in specified conduct, *e.g.*, leads a prison gang. App. 42-43. The review process begins when a prison official prepares a “Security Designation Long Form” (Long Form). . . . This three-page form details matters such as the inmate’s recent violence, escape attempts, gang affiliation, underlying offense, and other pertinent details. . . .

A three-member Classification Committee (Committee) convenes to review the proposed classification and to hold a hearing. At least 48 hours before the hearing, the inmate is provided with written notice summarizing the conduct or offense triggering the review. . . . At the time of notice, the inmate also has access to the Long Form, which details why the review was initiated. See Tr. of Oral Arg. 13-17. The inmate may attend the hearing, may “offer any pertinent information, explanation and/or objections to [OSP] placement,” and may submit a written statement. . . . He may not call witnesses.

If the Committee does not recommend OSP placement, the process terminates. . . . If the Committee does recommend OSP placement, it documents the decision on a “Classification Committee Report” (CCR), setting forth “the nature of the threat the inmate presents and the committee’s reasons for the recommendation,” App. 64, as well as a summary of any information presented at the hearing, *id.*, at 59-65. The Committee sends the completed CCR to the warden of the prison where the inmate is housed or, in the case of an inmate just entering the prison system, to another designated official. . . .

If, after reviewing the CCR, the warden (or the designated official) disagrees and concludes that OSP is inappropriate, the process terminates and the inmate is not placed in OSP. If the warden agrees, he indicates his approval on the CCR, provides his reasons, and forwards the annotated CCR to the Bureau of Classification (Bureau) for a final decision. *Id.* at 64. (The Bureau is a body of Ohio prison officials vested with final decisionmaking authority over all Ohio inmate assignments.) The annotated CCR is served upon the inmate, notifying him of the Committee’s and warden’s recommendations and reasons. *Id.* at 65. The inmate has 15 days to file any objections with the Bureau.

After the 15-day period, the Bureau reviews the CCR and makes a final determination. If it concludes OSP placement is inappropriate, the process terminates. If the Bureau approves the warden’s recommendation, the inmate is transferred to OSP. The Bureau’s chief notes the reasons for the decision on the CCR, and the CCR is again provided to the inmate. . . .

Inmates assigned to OSP receive another review within 30 days of their arrival. That review is conducted by a designated OSP staff member, who examines the inmate’s file. . . . If the OSP staff member deems the inmate inappropriately placed, he prepares a written recommendation to the OSP warden that the inmate be transferred to a lower security institution. Brief for Petitioners 9: App. 25. If the OSP warden concurs, he forwards that transfer recommendation to the Bureau for appropriate action. If the inmate is deemed properly placed, he remains in OSP and his placement is reviewed on at least an annual basis according to the initial three-tier classification review process outlined above. . . .

We granted certiorari to consider what process an inmate must be afforded under the Due Process Clause when he is considered for placement at OSP. . . . For reasons discussed below, we conclude that the inmates have a protected liberty interest in avoiding assignment at OSP. We further hold that the procedures set forth in the New Policy are sufficient to satisfy the Constitution's requirements. . . .

The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. . . . We have held that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. . . . We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Conner* (1995). . . . After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves "in relation to the ordinary incidents of prison life." . . .

The *Sandin* standard requires us to determine if assignment to OSP "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." . . . [T]he Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. . . . This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . . While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP. . . .

OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. . . . That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.

A liberty interest having been established, we turn to the question of what process is due an inmate whom Ohio seeks to place in OSP. Because the requirements of due process are

“flexible and cal[.] for such procedural protections as the particular situation demands,” . . . we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . .

Applying the three factors set forth in *Mathews*, we find Ohio’s New Policy provides a sufficient level of process. We first consider the significance of the inmate’s interest in avoiding erroneous placement at OSP. Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. . . . The private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties.

The second factor addresses the risk of an erroneous placement under the procedures in place, and the probable value, if any, of additional or alternative procedural safeguards. The New Policy provides that an inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. . . . Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate’s being mistaken for another or singled out for insufficient reason. In addition to having the opportunity to be heard at the Committee stage, Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation.

Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. This avoids one of the problems apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation.

If the recommendation is OSP placement, Ohio requires that the decisionmaker provide a short statement of reasons. This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior. . . .

The third *Mathews* factor addresses the State’s interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration. Ohio has responsibility for imprisoning nearly 44,000 inmates. . . . The State’s

first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves. . . .

Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls. *See* Brief for State of California et al. as *Amici Curiae* 6. Murder of an inmate, a guard, or one of their family members on the outside is a common form of gang discipline and control, as well as a condition for membership in some gangs. . . . Testifying against, or otherwise informing on, gang activities can invite one's own death sentence. It is worth noting in this regard that for prison gang members serving life sentences, some without the possibility of parole, the deterrent effects of ordinary criminal punishment may be substantially diminished. . . .

The problem of scarce resources is another component of the State's interest. The cost of keeping a single prisoner in one of Ohio's ordinary maximum-security prisons is \$34,167 per year, and the cost to maintain each inmate at OSP is \$49,007 per year. . . . We can assume that Ohio, or any other penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners. It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.

The State's interest must be understood against this background. Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. This problem, moreover, is not alleviated by providing an exemption for witnesses who pose a hazard, for nothing in the record indicates simple mechanisms exist to determine when witnesses may be called without fear of reprisal. The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.

A balance of the *Mathews* factors yields the conclusion that Ohio's New Policy is adequate to safeguard an inmate's liberty interest in not being assigned to OSP. Ohio is not, for example, attempting to remove an inmate from free society for a specific parole violation, . . . or to revoke good-time credits for specific, serious misbehavior, . . . where more formal, adversary-type procedures might be useful. Where the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, . . . informal, nonadversary procedures . . . provide the appropriate model. . . .

The Court of Appeals was correct to find the inmates possess a liberty interest in avoiding assignment at OSP. The Court of Appeals was incorrect, however, to sustain the procedural modifications ordered by the District Court. The portion of the Court of Appeals' opinion reversing the District Court's substantive modifications was not the subject of review upon certiorari and is unaltered by our decision.

Ohio Policy on Level Five Classification (2012)
Ohio Department of Rehabilitation and Correction

It is the policy of the Ohio Department of Rehabilitation and Correction and objective of the classification level system to create a process for the classification of inmates according to their security risk. This process shall consider behavior and such other objective factors as are available and relevant when assessing an inmate's institutional security needs. The goal of the classification process is to place inmates in the lowest security level deemed necessary to ensure the safety and security of persons, the institution, and the community.

To maintain a safe and orderly environment within its institutions, the Ohio Department of Rehabilitation and Correction has established a classification level 5 at the Ohio State Penitentiary to place inmates whose violent, disruptive, predatory, riotous, or other serious misconduct demonstrates that they are unable to function in a less restrictive environment without posing a serious threat to other inmates, staff, the orderly operation of the institution, or the general public.

No level 5 inmate shall be housed at the Ohio State Penitentiary who is determined to be seriously mentally ill pursuant to the criteria set forth in Department Policy 67-MNH-17, Transfer of Offenders to the Ohio State Penitentiary, or whose medical needs are inconsistent with that assignment pursuant to Department Policy 68-MED-13, Medical Classification.

VI. PROCEDURES. . . .

An inmate may be referred to the Classification Committee for proposed placement into level 5 if the inmate satisfies both an administrative and a behavioral criterion listed below.

B. Administrative Criteria For Placement in Level 5. An inmate may not be referred to the Classification Committee for proposed placement at level 5 unless one of the following administrative criteria is met:

1. The Rules Infraction Board (RIB) found the inmate guilty of violating an institutional rule and as a consequence of the finding recommended that the inmate receive a security review or transfer to another institution; or
2. The inmate is guilty of a criminal offense that is described under behavioral criterion C.2., below, and has been sentenced and committed to the custody of the Ohio Department of Rehabilitation and Correction. A Reception Coordinator or a Managing Officer of an institution may refer the inmate to the Classification Committee using the procedures set forth in subsection D below.

C. Behavioral Criteria Governing Placement at Level 5. Inmates may not be placed at Level Five unless they demonstrate behavior meeting one or more of the following behavioral criteria. These criteria guide the exercise of discretion, but do not mandate the outcome.

1. Assault and related acts:
 - a. The inmate caused or attempted to cause serious physical harm or death to another person;
 - b. The inmate caused or attempted to cause physical harm to another with a deadly weapon;

- c. The inmate compelled or attempted to compel another person without consent to engage in sexual conduct or sexual contact; or
 - d. The inmate compelled or coerced another person, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.
2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.
 3. The inmate has led, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.
 4. The inmate has conspired or attempted to convey, introduce, or possess major contraband which poses a serious threat or danger to the security of the institution. This includes without limitation:
 - Deadly weapons. “Deadly weapon” means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.
 - Ammunition. “Ammunition” means anything hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets, etc.
 - Escape Instruments. “Escape instruments” include any substance, device, instrument, or article designed or specially adapted for criminal use in an escape attempt; or possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use in an escape attempt.
 - Drugs for distribution.
 5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.
 6. Escape and related acts:
 - a. The inmate was classified as level 3 or 4 and escaped, attempted to escape, or committed acts to facilitate an escape; or
 - b. The inmate was classified as level 1 or 2 and escaped, attempted to escape, or committed acts to facilitate an escape that resulted in physical harm or threatened serious physical harm to another, or caused serious destruction to property.
 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution or the general public.
 8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, including without limitation HIV or hepatitis.
 9. The inmate through repetitive and/or seriously disruptive behavior has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated findings of guilt by the RIB.
- D. Procedures for Placing an Inmate in the Classification Level 5
1. Notice of hearing

- a. Placement at level 5 may be initiated by the Managing Officer, Deputy Warden, Major, Unit Manager Administrator (UMA), Unit Manager, the RIB, or the Reception Coordinator.
- b. The inmate must be provided with notice . . . at least forty-eight (48) hours prior to the Classification Committee's hearing unless waived in writing. The notice must provide, at a minimum, notice of the conduct or other factual basis giving rise to the inmate's proposed placement at level 5. The notice need not provide all the evidence against the inmate, but must provide sufficient information to notify the inmate of the reason(s) for the proposed placement and conduct that could result in retention at level 5. . . .

2. Classification Committee

- a. The Classification Committee must review the notice, the conduct it refers to, and any other relevant information. The committee shall also consider the offender's institutional and criminal history to the extent they are relevant to the inmate's potential threat to security.
- b. The inmate must be afforded the opportunity to appear before the entire Classification Committee, unless waived in writing, and to present any relevant information, explanation, or objections to level 5 placement.
- c. If the Classification Committee intends to rely on a statement that previously was not made known to the inmate, the Classification Committee shall disclose the substance of such information to the inmate. Before utilizing such information, the Classification Committee shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.
- d. The inmate must be afforded the opportunity to submit a written statement and documents.
- e. The Classification Committee must document information presented by the staff and inmate on the record of hearing. The Classification Committee shall make an audio recording of the hearing.
- f. The Classification Committee must determine whether the inmate has met one of the behavioral criteria set forth in subsection C., above, the inmate's potential threat to safety and security, and whether the inmate needs to be placed at level 5.
- g. The Classification Committee must make a recommendation accordingly and must articulate the reason(s) for its recommendation in a written statement and list the sources of information relied on. The statement need not be lengthy, but must include every basis for the recommendation, and may not be merely conclusory.
- h. The inmate must be provided promptly with a copy of the Classification Committee's recommendation and reason(s) ensuring the inmate sufficient time to review it, prepare a defense, and file any objections before the Managing Officer's review. The inmate must be notified upon receipt of the Classification Committee's recommendation that he or she may file formal objections with the Managing Officer or designee no later than fifteen calendar days (15) from the date the inmate is served with the Classification Committee's recommendation and reason(s).

3. Managing Officer or Designee's Recommendation

- a. If the Classification Committee recommends against placement, the process for level 5 placement shall terminate and the recommendation against placement must control; unless the Managing Officer or designee overturns the recommendation against placement. In that event the inmate must receive notice, the reason for the contemplated reversal, an opportunity to respond, and a reasoned decision for any subsequent reversal of the Classification Committee's recommendation against placement at level 5. . . .
- e. The inmate must be provided with a copy of the Managing Officer or designee's recommendation and reason(s) promptly, ensuring the inmate sufficient time to review it, prepare a defense, and file any objections before the review of the Chief of the Bureau of Classification and Reception (BCR) or designee. The inmate must be notified upon receipt of the Managing Officer's recommendation that he or she may file formal objections with the Chief of the BCR or designee no later than fifteen (15) calendar days from the date the inmate is served with the Managing Officer's recommendation and reason(s).

4. Chief of the BCR or Designee's Decision

- a. If the Managing Officer or designee recommends against placement, the process for level 5 placement shall terminate and the recommendation against placement must control; unless the Chief of the BCR or designee overturns the recommendation against placement. In that event the inmate must receive notice, the reason for the contemplated reversal, an opportunity to respond, and a reasoned decision for any subsequent reversal of the Managing Officer or designee's recommendation against placement at level 5.
- b. The Chief of the BCR or designee must review the notice, the recommendations and reasons of the Classification Committee and the Managing Officer or designee, any objections filed by the inmate, and any other relevant information presented by staff or the inmate. . . .
- e. The inmate must be provided promptly with a copy of the decision and the reason(s). The inmate must be served with a copy of the Bureau's decision prior to transfer to level 5 at the Ohio State Penitentiary.

E. Thirty (30) Day Review/Orientation Process

1. Placement at level 5 varies in length depending on the nature of the initiating incident, criteria for placement, and/or demonstrated behavior in assigned level. All inmates placed into this level must have a review of their classification level completed by an assigned unit staff member within thirty (30) calendar days of placement to determine if they have been properly classified. This review must include a review of the inmate's file to ensure that proper documentation has been included detailing how/why the inmate has been classified into level 5.
2. If the review finds that the inmate meets the appropriate criteria, unit and/or programming staff shall meet with the inmate to explain the classification and review processes and what the expectations are concerning his behavior and appropriate program participation. This meeting shall also afford the inmate the

opportunity to request any needed assistance while assigned in the classification level. Staff shall advise the inmate whether release to a general population institution in three (3) years or less appears reasonably possible. . . .

F. Annual Security Reviews for Level 5 Inmates

An inmate shall be reduced from level 5 security level classification when there are no longer sufficient security concerns justifying retention at that level. All inmates at level 5 shall receive a security review at least annually. . . . The Classification Committee must . . . take into consideration at a minimum the following information [in determining whether an inmate ought to be reduced from level 5 security]:

- Reason for placement in Level 5 and relevant circumstances;
- Guilty findings by the RIB;
- Current privilege level;
- Time served in current privilege level;
- Total time spent in level 5;
- Time left to spend on current sentence;
- Time since last incident that resulted in inmate being designated level 5;
- Program involvement;
- Behavior including prior to level 5 classification;
- Security level prior to placement;
- Adjustment/behavior after placement;
- Factors which indicate a risk of future violence;
- Interaction with others (staff or inmates);
- Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
- The findings and recommendations of the previous assessment committees;
- Previous review committees;
- The findings and recommendations of all assessment committees subsequent to the placement in level 5; and
- The findings and recommendations of all security and privilege review committees subsequent to placement in level 5.

The Classification Committee shall use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. . . . The Classification Committee must consider the factors listed above, the circumstances underlying the placement at level 5, the reasons for initial placement, the inmate's subsequent adjustment and his or her demonstrated attitude. The Classification Committee must determine whether there has been a diminishing of the inmate's risk to the safety of persons within their correctional judgment.

Rezaq v. Nalley*677 F.3d 1001 (10th Cir. 2012)*

Before Chief Judge Briscoe, Circuit Judge Tymkovich, and District Judge Eagan. Chief Judge Briscoe delivered the opinion of the court:

In these consolidated cases, plaintiffs-appellants Omar Rezaq, Mohammed Saleh, Ibrahim Elgabrownny, and El-Sayyid Nosair—all of whom are currently incarcerated in the federal prison system—appeal the district court’s grants of summary judgment in favor of appellee Federal Bureau of Prisons (BOP) and certain named officials in these actions. . . . The plaintiffs contend that they have a liberty interest in avoiding transfer without due process to the Administrative Maximum Prison (ADX) in Florence, Colorado, where they were formerly housed. In separate orders, the district court rejected this argument and found that the plaintiffs lack a cognizable liberty interest in avoiding confinement at ADX

ADX is the most restrictive and secure prison operated by the BOP. . . . As the only facility of its kind in the federal system, it is reserved for inmates who require “the highest custody level that can be assigned to an inmate.” . . . Prisoners housed in the general population unit at ADX spend twenty-three hours a day confined to their cells. . . . The typical cell at ADX measures eighty-seven square feet and contains a bed, desk, sink, toilet, and shower. . . . Inmates take their meals alone in their cells. . . . Although BOP policy provides for ten hours of recreation per week, recreation is frequently cancelled due to staff shortages, mass shakedowns, or adverse weather. . . .

According to the BOP, these carefully controlled conditions serve two primary penological interests. The stated missions of ADX include: (1) “maintaining the safety of both staff and inmates, while eliminating the need to increase the security of other penitentiaries”; and (2) “confin[ing] inmates under close controls while providing them opportunities to demonstrate progressively responsible behavior . . . and establish readiness for transfer to a less secure institution.”

Most inmates at ADX, like those in this case, were transferred there from other prisons. An inmate may be transferred because he poses a physical threat to other inmates or staff, presents an escape risk, or requires “increased monitoring.” . . . Other inmates are transferred to ADX for reasons unrelated to their behavior. For example, some inmates “require high security but can’t function in open population facilities due to cooperation with the government or other protection needs.” In some cases, the BOP may designate an inmate to ADX directly following conviction. . . .

Inmates housed at ADX may improve their conditions of confinement by seeking admission to the Step-Down Program, a “stratified system of less-restrictive housing” that incentivizes inmates to adhere to the prison’s expectations for their conduct. . . . Once admitted to the program, ADX inmates may progress from the general population unit through the Intermediate, Transitional, and Pre-Transfer Units “with increasing degrees of personal freedom at each stage.” . . . ADX policy states that “[e]very inmate has the opportunity to demonstrate he may be housed in a less-restrictive unit.”

Plaintiffs argue that they have a protected liberty interest in avoiding the conditions of confinement at ADX—a facility that, they maintain, creates an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” . . . Plaintiffs contend that the district court erred when addressing whether a liberty interest existed: (1) by giving weight to the BOP’s asserted penological interest; (2) by improperly comparing the conditions of confinement in this case to those at the state supermax prison at issue in *Wilkinson* instead of “the ordinary incidents of prison life” in the federal system; (3) by improperly relying on inapposite precedent, thus “erroneously elevating the standard for determining whether the challenged conditions were extreme”; and (4) by “not considering the extraordinary length of their segregation” as a factor in determining whether a liberty interest existed. . . .

A protected liberty interest only arises from a transfer to harsher conditions of confinement when an inmate faces an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” . . . Courts have struggled to identify the appropriate baseline for assessing what constitutes an “atypical and significant hardship” on inmates. Our own cases have taken two different approaches to the baseline question in assessing conditions in segregated confinement. For example, this court has explained that it is proper to consider whether the segregation at issue mirrors that imposed on other inmates in the same segregation. . . . [W]e compared conditions in segregated confinement to conditions in the general prison population. *Penrod v. Zavaras*, 94 F.3d 1399, 1407 (10th Cir.1996) (“Even though the conditions in Living Unit II were more restrictive than those imposed upon the general population, it offered inmates all of the same privileges as the general population inmates.”).

Our sister circuits are certainly not in agreement regarding the correct approach. While some circuits compare the conditions of confinement at issue to those in the general prison population, . . . others compare them to the conditions typically found in administrative segregation, . . . or “the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences,” *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C.Cir.1999). *Wilkinson* recognized the divergent views on this issue among the circuit courts, but the Court declined to resolve the baseline question because the conditions at issue in that case “impose[d] an atypical and significant hardship under any plausible baseline.” . . .

[W]e recognize that *Wilkinson* called the conditions of confinement in the Ohio supermax prison “sever[e]” and “synonymous with extreme isolation” but ultimately placed the weight of its analysis on the indeterminate duration of confinement and the effect the placement had on an inmate’s parole eligibility. . . . Thus, we read *Wilkinson* to say that extreme conditions in administrative segregation do not, on their own, constitute an “atypical and significant hardship” when compared to “the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 484. . . .

Plaintiffs argue that it is improper for the court to consider penological interests in determining whether a liberty interest exists. They contend that any inquiry into the necessity of restrictive confinement should be made at a due process hearing, not in determining at the outset whether a liberty interest exists. . . . We disagree. Legitimate penological interests are a relevant consideration under settled Tenth Circuit precedent. . . . And unlike plaintiffs, we do not read *Wilkinson* to suggest the inquiry is inappropriate. In *Wilkinson*, the Supreme Court observed that

the Ohio supermax prison’s “harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners,” but “necessity . . . does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.” . . . That statement, read in concert with the Court’s earlier admonition that “federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment,” *Sandin*, 515 U.S. at 482, does not foreclose our consideration of the relationship between the means chosen—segregated confinement—and the ends asserted. . . . [W]e remain “mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts.” The BOP should not have to prove segregated confinement is essential in every case. Instead, it is sufficient to show a reasonable relationship between isolation and the asserted penological interests. . . .

As we have noted, it is appropriate to compare the nature of the challenged conditions to the type of nonpunitive confinement routinely imposed on inmates serving comparable sentences. A comparison to the conditions at issue in *Wilkinson* can also be instructive when considering conditions in segregated confinement.

The conditions at ADX are undeniably harsh. When they were housed at ADX, plaintiffs had control over the lights in their cells, the opportunity for outdoor recreation, regular contact with staff, and the ability to occasionally communicate with other inmates. . . . Their cells, while unquestionably small and stark, contained a television that aired black-and-white educational and religious programming. . . . The inmates spent twenty-three hours per day in their cells. When they were permitted outdoor recreation, the inmates remained alone in fenced-in areas slightly larger than their cells. . . . The inmates were permitted five “no contact” social visits and two fifteen-minute phone calls per month. . . .

There are some similarities between the conditions at ADX and those at the Ohio supermax prison in *Wilkinson*. Because the conditions at issue in *Wilkinson* imposed an atypical and significant hardship on inmates “under any plausible baseline,” it is clear that the Supreme Court did not intend for courts to make side-by-side comparisons of challenged conditions and the conditions in that case. But we must take note of the facts that led the Court to its conclusion. For example, in *Wilkinson*, the Court found that “almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell.” . . . There is some evidence that plaintiffs in the present cases had to shout through doors to communicate with other inmates, and that they were not permitted to do so. But there is also evidence that plaintiffs could communicate with other inmates. . . . Second, the inmates in *Wilkinson* were restricted to “indoor recreation cells” when they were permitted to leave their cells. . . . The inmates at ADX are permitted outdoor recreation.

But we need not draw fine distinctions based on these comparisons. The conditions at ADX, like those at the Ohio supermax prison in *Wilkinson*, do not, in and of themselves, give rise to a liberty interest because they are substantially similar to conditions experienced in any solitary confinement setting. . . . The conditions at ADX are comparable to those routinely imposed in the administrative segregation setting. We conclude that the conditions in the general population unit at ADX are not extreme as a matter of law. . . .

Transfer to a higher security facility may lengthen an inmate’s period of incarceration if the transfer “disqualifies an otherwise eligible inmate for parole consideration.” *Wilkinson*, 545 U.S. at 224. This factor counseled in favor of finding a liberty interest in *Wilkinson*, where the Court found that transfer to the Ohio supermax prison caused inmates who were “otherwise eligible for parole [to] lose their eligibility while incarcerated” there. . . . There is no evidence that confinement at ADX lengthened plaintiffs’ sentences. . . .

Plaintiffs argue . . . that the duration of segregated confinement *itself* is atypical and significant. This argument has some support in Tenth Circuit precedent . . . Several other courts have determined that prolonged placements in administrative segregation can constitute “atypical and significant hardship.” *See, e.g., Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) (concluding that “eight years in administrative custody, with no prospect of immediate release in the near future, is ‘atypical’ in relation to the ordinary incidents of prison life”). While duration is certainly an important consideration, *Wilkinson* emphasized that duration is properly considered in tandem with indeterminacy. In considering duration, the Court observed that “placement at OSP is indefinite and, after an initial 30–day review, is reviewed just annually.” . . .

Here, the periodic review process at ADX included opportunities for plaintiffs to participate. While plaintiffs were housed at ADX for many years, they were given regular reevaluations of their placement in the form of twice-yearly program reviews. . . . These periodic reviews included procedural protections, including the chance to appeal decisions through an administrative process. Importantly, however, it is not necessary for us to closely review the process at this stage. . . . The availability of periodic reviews merely suggests that the confinement was not indefinite. This factor weighs against finding a liberty interest. . . .

[T]he inmates lack a cognizable liberty interest in avoiding the conditions of confinement at ADX, so no due process protections were required before they were transferred to that facility. We therefore AFFIRM the judgments of the district court.

Surveying Policies on Segregation

The Liman Program, in a 2013 study conducted with the cooperation of the Association of State Correctional Administrators (ASCA), reviewed policies on administrative segregation then in effect in 46 states and the Federal Bureau of Prisons. A statement based on that study was submitted to the Senate Judiciary Subcommittee at its 2014 Hearing, *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences*. Many others submitted testimony, including ASCA, which outlined its recent efforts at reform and described what it believes to be the best practices associated with the use of segregation.

The Policies Governing Placement in Isolation in U.S. Prisons

*Hope Metcalf and Judith Resnik**

Below, we detail how corrections departments define the criteria for placement in administrative segregation, the processes for determining who falls within those criteria, some of the rules governing contact while in isolation, and the provisions for exit. . . .

What we can report is that, despite the 47 different policies, administrative segregation throughout the United States shares the same basic features: criteria for placement give broad discretion to decision-makers; detention generally is open-ended, rather than for a fixed duration; confinement is close and restrictive; and access to contact with visitors and to activities is very limited.

Looking at the rules sheds light on why the practice of administrative segregation has become so prevalent. The policies provide relatively little guidance about which concerns and what risks necessitate segregation, and under which circumstances or by which criteria an inmate should be returned to general population. Thus, the rules do not reflect how segregation is actually used, either in the jurisdictions where isolation remains commonplace or in those that, in recent years, have reduced their segregation populations. As a consequence, we remain concerned that isolation is used too often, for too long, and with too little oversight. Thus, we share the goals, expressed repeatedly at the February 25th Hearing, of diminishing both the use of isolation and the degrees of isolation for those confined, whether under the rubric of administrative, punitive, or disciplinary segregation.

I. Expansive Criteria for Entering Isolation

Correctional systems explain that administrative segregation is used to ensure the safety of inmates, staff, and the public. As testimony presented at the Hearing on February 25, 2014 emphasized, the issue is not whether safety is central but whether reliance on isolation promotes safety.

Reading the many policies makes plain the degree of discretion accorded to correctional officials when deciding whether to put individuals into isolation. . . . Below, we excerpt a few policies to provide a first-hand understanding of the breadth of the criteria and the degree of discretion accorded. Segregation is permitted when or if: . . .

- “Presence of the inmate in general population would pose a serious threat to the community, property, self, staff, other inmates, or the security or the good government of the facility.” - Hawaii, COR.11.01.2.2.a.2; *see also* North Dakota, DOC 5A-20.2.a; Vermont, DOC 410.03;

* *Excerpted from Hope Metcalf and Judith Resnik, Statement for “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences”*: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights (Feb. 25, 2014). Reprinted with permission from authors.

- “Based on: 1) threat an offender’s continued presence in the general population poses to life, self, staff, other offenders, or property; 2) threat posed by the offender to the orderly operation and security of the facility; and 3) regulation of an offender’s behavior which was not within acceptable limits while in the general offender population.” - Indiana, DOC 02-01-111-II;
- “Administrative segregation admission results from a determination by the facility that the inmate’s presence in general population would pose a threat to the safety and security of the facility.” - New York, 7 NYCRR 301.4(b).

In addition to such general provisions, many states include other bases for isolation. . . . Administrative segregation may be based on the following reasons:

- Continued presence in general population would jeopardize “the integrity of an investigation of an alleged serious misconduct or criminal activity.”
- California, Cal. Code Regs. Tit. 15 § 3335(a);
- “Disruptive geographical group and/or gang-related activity.”
- Bureau of Prisons, P5217.01(2);
- “A conviction of a crime repugnant to the inmate population.”
- Florida, Fla. Admin. Code r. 33-602.220(3)(e);
- “Those who received unusual publicity because of the nature of their crime, arrest, or trial, or who are involved in criminal activity of a sophisticated nature, such as organized crime.”
- Montana, DOC 4.2.1(IV)(C)(d);
- “Those with special needs, including those defined by age, infirmity, mental illness, developmental disabilities, addictive disorders, and medical problems.” - Montana, 04.05 120C(f); *see also* Kentucky, CCP 10.2(II)(G)(3)(i); Maryland DOC.100.002, Sec. 18(B)(2)(e);
- “As a cooling off measure.” - North Carolina, DOC C.1201(a)(4)(E); . . .

A few jurisdictions have narrowed or are planning to narrow the criteria. For example, in Colorado as of 2013, administrative segregation policies were under revision to require showings of serious bodily harm or other discrete acts. Virginia revised its policy in 2012 to require specific predicate acts for admission to long-term segregation.

II. Decision-Making and Isolation

All of the policies authorize immediate temporary placement in segregation. Thereafter, some but not all jurisdictions provide for notice of the grounds for the placement and an opportunity for a hearing evaluating the need for continued segregated detention. The kind of notice and hearing required varies substantially, as do the decision-makers. Some systems leave decision-making at the unit-level, others place authority in committees, and others require oversight by the warden or the central office.

To understand the formal criteria for placement decisions, we examined policies governing two junctures – the first (non-emergency) placement and then what is generally termed “periodic review.” . . .

Initial (Non-Emergency) Placement and Oversight of that Decision: Thirty-eight jurisdictions specify that a hearing be held upon initial placement, while nine jurisdictions authorize administrative segregation and do not mention hearings. All but seven of the jurisdictions mandating hearings also require that some form of written notice be provided to the inmate in advance of the hearing. Among states that require hearings, nearly all specify that the hearings must take place within 14 days of placement. . . .

Most of the policies authorize a diverse set of institutional authorities – staff, shift commanders, deputy wardens, wardens – to make initial decisions on placing prisoners immediately in segregation. Policies call for additional procedures thereafter. Thirty-one jurisdictions authorize decision-making by a committee. . . . In three jurisdictions, Hawaii, Kentucky, and Tennessee, the warden or his/her designee is responsible for making initial determinations.

Of the 38 jurisdictions that specify hearing procedures, 30 authorize inmates to present evidence (by oral statements, written submissions, or documents) and/or to call witnesses, subject to security considerations. Eight states (Arizona, Connecticut, Idaho, Maine, Mississippi, Nevada, New Mexico, and New York) do not specify that inmates can present evidence. Of these 38 jurisdictions, eight authorize inmates to have a representative, advocate, assistant, or counselor to assist with hearing proceedings. Nine additional jurisdictions provide for assistance or appoint representatives in specified circumstances – such as language barriers, illiteracy, or mental illness – so as to help in preparation for the hearing or to explain the inmate’s rights and/or the proceedings. . . .

Most policies do not mention lawyers as participants. One state, Vermont, expressly bans lawyers; two others, Alaska and Massachusetts, expressly permit attendance by lawyers.

States employ several means to review the initial decision to place inmates in administrative segregation. In addition to “periodic review,” discussed below, many states provide for prompt review (required as an institutional policy matter) or for an optional appeal by the inmate.

Fifteen jurisdictions authorize automatic review by the warden (or designee). For example, in Ohio, a hearing officer issues a report to the warden, who decides whether placement is appropriate. Six of these states (Alaska, Colorado, Nebraska, Ohio, Vermont, and

Washington) provide for another level of review, typically at the central office. Nine jurisdictions provide for automatic review by the central office: Arizona, the Federal Bureau of Prisons, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, Rhode Island, and Virginia. North Dakota and Oklahoma state that reviews will be done by “the appropriate authority.”

A fewer number of states specify that inmates can appeal a placement. Five states permit inmates to appeal placement decisions to the warden: Kansas, Maine, Mississippi, Pennsylvania, and South Dakota. Two of those states, Pennsylvania and South Dakota, provide for another level of review. In some states, such as Arizona, Michigan, New York, and Oregon, inmates can appeal to the central office. . . .

IV. Learning from the Written Rules

Reading dozens of policies on isolation underscores the reliance placed on this practice in American prisons. Policies cast a wide net of authority and provide dozens of predicates to permit placement of inmates in isolation. Only a few jurisdictions make placements more difficult by imposing specific controls on such decisions. As of 2013 and despite efforts in several jurisdictions to address the overuse of isolation, the written criteria for placing individuals into segregation facilitate its ready use.

Missing from policies are concrete directives to diminish the reliance on isolation and to restructure isolation to limit the degrees of isolation when prisoners are so confined. The policies governing isolation did not describe isolation as a last resort, to be used sparingly for the shortest duration possible, and under the least isolating conditions.

Written Statement of the Association of State Correctional Administrators for Senate Judiciary Subcommittee Hearing on Solitary Confinement (2014)

*Gary C. Mohr**

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee, I appreciate the opportunity to submit this written statement on behalf of the Association of State Correctional Administrators [ASCA]. We understand that there have been multiple references to ASCA during the proceedings of this Subcommittee and as a result felt it important to provide our position on this very significant matter under your consideration. ASCA is the membership association for state correctional commissioners, the Federal Bureau of Prisons and select large city correctional systems. Our members participate in established committees and attend association meetings and trainings multiple times each year. ASCA is committed to providing a safe and programmatically rich environment with a mission to reduce recidivism for those placed in our custody and care.

* *Excerpted from Gary Mohr (on behalf of Association of State Correctional Administrators), Statement for “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences”: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights (Feb. 25, 2014). Liman Colloquium 2014 Isolation and Reintegration Punishment Circa 2014 Jan. 7, 2015*

I have the privilege of serving as the Chair of the ASCA Legal, Legislation and Policy Committee. In this capacity, I have had the opportunity to work with some very dedicated Commissioners of Corrections as well as Professor Judith Resnik, Director Hope Metcalf and the team representing the Arthur Liman Public Interest Program at Yale Law School on the matter of “Restrictive Housing”. The Liman Public Interest Program has had the opportunity to analyze state agency policies on restrictive housing including the type of offenses that generate assignment to a restrictive unit, processes to approve placement and release, programs and services provided to inmates in this status, including access to visiting and mental health services and other issues related to this restrictive setting. The analysis conducted by this team from Yale Law School provided a foundation for correctional administrators to consider individual state practices within a national framework. The work on restrictive housing in the past year by ASCA is best described as collaborative, spirited, intense and committed to provide a framework for change.

The members of ASCA uniformly recognize the need to maintain a placement where offenders who act out in a manner that seriously jeopardizes the safety and security of those staff and offenders under our care can be safely and effectively managed. Given our responsibility for reducing recidivism, it is imperative that our prisons maintain a climate that supports the delivery of evidenced-based programs and the participation of community partners to assist with transition from prison to the community. In order for that to occur, inmates, often associated with security threat groups, who are committed to disrupting facility operations and programs must not be allowed to cause intimidation and interface with the rehabilitative process. Correctional administrators also recognize and understand that our work does not end with the transfer of inmates to restrictive housing. Our responsibility extends to providing a pathway to a positive transition out of this status.

ASCA recognized that effectively managing inmates who are placed in restrictive housing must be a priority of our organization. Our members consistently state that the number of dangerous incidents is higher in restrictive housing. These incidents include assaults on staff and inmates. Also of serious concern is the elevated rate of suicides beyond that in general population settings. Suicides are a tragic indicator of failure and are devastating both to families who have planned on the safe return home of their loved ones and to the staff who supervise and work with these offenders.

Restrictive housing by its purpose is a controlling environment. It includes real limitations on the freedom of movement of inmate occupants and access to other inmates and staff. It has also historically reduced inmate access to programs and services as well as to visiting. The analysis of these restrictions was depicted in the study conducted by Yale Law School. As ASCA continued to drill down into the implications of restrictive housing, we determined that more often than many of us realized inmates released from a restrictive housing status were actually discharged directly into our communities. In fact, Ohio found this number to be 20%. Some states actually discovered a higher rate. This practice does not support a successful transition for the inmates to their families and neighborhoods and increases the risk to the public whom we are committed to protect.

It became clear to the membership of ASCA that the issues surrounding restrictive housing must be a priority of our organization and that we have a clear calling to assist our members in creating an environment of hope and positive transition into the future for those who reside in these settings. In its most recent gathering, the American Correctional Association [ACA] also recognized the need to address this issue. In fact, a plenary session on this topic was held at the Mid-Winter ACA Congress. In addition, the ACA Standards Committee replaced terms such as segregation and isolation with the term restrictive housing.

Phase I – Commitment to Reform:

To move forward on almost any significant challenge, it is imperative first to recognize that the subject at hand needs to be addressed. In the past two years, ASCA has inserted this topic into all of its meeting agendas, with presenters who were not only commissioners but also with partners at Yale Law School and its Liman Public Interest Program. These sessions have provided a framework for initiating meaningful approaches to improve the quality of operations and conditions in restrictive housing. As ASCA considered the matter of balancing the necessity of restricting those inmates who pose a threat to others or to facility operations with the fundamental belief that people can change and the environment in restrictive housing should support positive change, several themes arose. These themes included the following:

- We should reduce the number of inmates in restrictive housing. As Tom Clements, former Director of Colorado Department of Corrections said during an early meeting of our ASCA Restrictive Housing Committee, “We should ensure those inmates in restrictive placement are those we have reason to fear and not those we are mad at.”
 - The intent of restrictive housing is to protect others and preserve order and not to punish.
 - Inmates in restrictive housing require the attention of medical and mental health staff to monitor their wellness and to support their transition to a general population setting.
 - Inmates should not be released from restrictive housing directly to the community unless extraordinary circumstances exist.
 - Inmates should have access to family and pro-social community sources while in restrictive housing.
 - Inmates should have access to programming that is consistent with their transition out of restrictive housing into a general population setting.
- Inmates in restrictive housing should have access, consistent with security needs, to congregate programs and activities in order to prepare them for transitioning to general population when their conduct allows.

Phase II – Approval of Guiding Principles for Restrictive Housing:

The ASCA Committee on Restrictive Housing drew on the energy generated by the many association sessions held with the collaboration of Yale Law School and the thoughtful discussions that accompanied those gatherings to begin to forge some general parameters for our members to consider and further debate. This committee was committed to developing a set of principles that could be used by any correctional system to evaluate current practices and to design new approaches aimed at creating a rehabilitative environment in restrictive housing. The process utilized by the committee was first to draft guiding principles that achieved consensus of the team and then to send out these statements to the ASCA membership for refinement and further debate. This approach led to evolving versions of the Guiding Principles which served as the centerpiece for multiple sessions held in person with our ASCA members.

Finally, during our ASCA Summer Meetings in August 2013, the Guiding Principles for Restrictive Housing were presented for membership consideration in advance of a formal resolution to accept them. Shortly following the presentations to the Executive Committee and then to the ASCA membership a ballot was distributed to 100% of our members for a vote to accept. The following Guiding Principles were overwhelmingly endorsed by ASCA members as a framework for systems to use in reforming their practices.

1. Provide a process, a separate review for decisions to place an offender in restrictive housing
2. Provide periodic classification reviews of offenders in restrictive housing every 180 days or less
3. Provide in-person mental health assessments, by trained personnel within 72 hours of an offender being placed in restrictive housing and periodic mental health assessments thereafter including an appropriate mental health treatment plan
4. Provide structured and progressive levels that include increased privileges as an incentive for positive behavior and/or program participation
5. Determine an offender's length of stay in restrictive housing on the nature and level of threat to the safe and orderly operation of the general population as well as program participation, rule compliance and recommendation of the person[s] assigned to conduct classification review as opposed to strictly held time periods
6. Provide appropriate access to medical and mental health staff and services
7. Provide access to visiting opportunities
8. Provide appropriate exercise opportunities
9. Provide the ability to provide proper hygiene
10. Provide program opportunities appropriate to support transition back to a general population setting or to the community
11. Collect sufficient data to assess the effectiveness of implementation of these Guiding Principles
12. Conduct an objective review of all offenders in restrictive housing by persons independent of the placement authority to determine the offenders' need for continued placement in restrictive housing
13. Require all staff assigned to work in restrictive housing units to receive appropriate training in managing offenders on restrictive status housing

Phase III – Creating Best Practices Suitable for Replication:

The ASCA Committee on Restrictive Housing understands that the Guiding Principles are only the beginning of an effort to reform operations in restrictive housing. It is simply a template for systems to evaluate their operations and begin to put basic services and practices in place. ASCA is committed to continue discussing challenges and opportunities related to restrictive housing and has launched Phase III: the development of best practices that will push a continuous improvement process in our principles. We are calling for systems to provide practices that can be certified by the ASCA Committee on Restrictive Housing and placed on the ASCA web-site to assist members with replication and refinement of those approaches in their respective organizations. Best practices include specific strategies for mental health inmates, effective programs that can be delivered to assist with transitioning, congregate programs for those assigned to restrictive housing and training initiatives to assist staff with their role in this

developmental process. The designers of these practices will have the opportunity to present their programs in person to other commissioners at upcoming meetings of ASCA.

Phase IV – Collaboration and Continuous Refinement:

The foundation for positive change has been established through on-going meetings, development of the Guiding Principles and now the process of collecting best practices that can be used and adapted by systems around the country. As we move forward, ASCA is dedicated to working with interested parties such as Yale Law School. In fact, as of the preparation of this written testimony, some correctional systems have embarked on a relationship with The Liman Public Interest Program that includes inviting participants into our restrictive housing units in order to review our practices. Given the interest from both Yale and these commissioners, we anticipate that reform of restrictive housing will be on-going and accelerated. . . .

The membership of ASCA is committed to the continuous process of improving our operations by creating safer environments for all offenders. We are far from finished in our on-going work with this most difficult population. We also recognize that providing effective programming and a sense of hope for those inmates who have committed serious offenses and infractions while incarcerated can assist with a more positive environment for our staff and inmates and will ultimately create a safer community for the residents of our jurisdictions. The metrics of our work are expected to reveal fewer inmates in restrictive housing, smoother transition from this status to general population and ultimately a safer environment for staff, inmates and the public we serve.

Segregation in Practice

Below are excerpts from segregation policies from Washington and Connecticut. The Administrative Directive Appendix from Connecticut illustrates the diversity of purposes for which, and processes by which, individuals may be placed in various forms of restrictive housing. The Washington policy describes a “Step Down” program designed to ease the transition from segregation to general population.

Intensive Management Unit (IMU) Progression Program (2013)

Washington Department of Correction, Monroe Correctional Complex

The IMU Progressive Program (IPP) is oriented towards providing offenders the pro-social skills to successfully live in the general prison population and be safe productive citizens in the community. Offenders learn to meet their needs non-violently in the following areas: physically, emotionally, mentally, socially, spiritually.

Purpose of IPP

- Promote a successful transition from the IMU to the Transition Tier and/or general population and to the community with decreased in violent and/or acting out behavior and recidivism.
- Reduce recidivism to the Intensive Management Unit through effective behavior, participation in the programs to develop pro-social skills and opportunities to practice those skills in a safe, but less restrictive setting.
- And to promote the offender to the least restrictive custody

Goal of IPP

- To improve coping skills that include: appropriate communication and interactions with staff, compliance with rules, programs for self-improvement while in prison, avoidance of harm to self and others, effective/positive decision making and focusing on short and long term goals

Benefits of IPP

- Positive change for self-improvement/ less restrictive environment
- More out of cell time
- Independent study
- In cell reading and writing
- Classroom study and discussion
- Breaking the IMU cycle
- Reduce Recidivism
- Transfers will be considered to facilities that offer the offender a positive transition into their perspective communities.
- Offenders graduating from IPP may be promoted to a less restrictive environment/custody level

Desired Behavior for Participation

- Acceptance will be considered on a case by case basis for this program.
- Willingness to participate in programs
- Willingness to make a positive change
- Positive behavior towards staff and offenders.
- Fifteen (15) day infraction free behavior

Groups within IPP

- RAPP – Healthy Choices, Healthy Life: Six stages that include: Pre-treatment, Motivational Engagement, Cognitive Restructuring, The Stress-Vulnerability and Treatment Strategies, Coping with Stress and Reducing Relapse. They are designed to increase motivation and coping skills to help offenders work off IMS status. A token economy will enable offenders to earn tokens for attending class and use prosocial and effective behavior. Tokens can be used to receive incentive items and work through the stages.
- Partners in Parenting: Was designed to address the needs and concerns of parents in substance abuse treatments programs. The manual provides materials and instructions for

leading a workshop that focuses on concepts important for parenting effectiveness such as communications skills, guidance techniques and positive discipline strategies.

- 99 Days and a Get Up: A Guide to Success Following Release for Inmates and Their Loved Ones
- ACT (RAPP): Aggression Control Training: Is a cognitive behavioral intervention program to help individuals improve social skill competence and moral reasoning, better manage anger, and reduce aggressive behavior.
- Acceptance Commitment Therapy: Is an intervention that uses acceptance and mindfulness strategies mixed in different ways with commitment and behavior-change strategies, to increase psychological flexibility.
- DBT Skills Group: Learning positive coping skills to help react to your life more effectively: Mindfulness, Distress Tolerance, Emotion Regulation, and Interpersonal Effectiveness Skills.
- Stress and Anger Management – EDCC
- Religious Programming – Cascade Prison Ministry does a weekly Bible study. Being able to use the big screen for movies and documentaries is a great asset
-

Administrative Directive 9.4: Restrictive Housing Status Matrix (2010)
Connecticut Department of Correction

		Restrictive Housing Status Matrix Connecticut Department of Correction			Attachment B REV 1/1/10 AD 9.4
Type of Restrictive Status	Purpose(s)	Approval Authority for Placement	Approval Authority for Release	Authorized Length of Confinement	Review Requirements
Administrative Segregation Transition Phases <i>Northern and York only</i>	To prepare inmate for return to general population	Unit Administrator or higher authority	Commissioner or designee	Indefinite	Classification staff every seven (7) days for first two (2) months and every 30 days thereafter and by a mental health professional after 30 days and every three (3) months following.
Administrative Segregation <i>Northern and York only</i>	Classified as a threat to staff, other inmates or facility security. (Requires a hearing prior to placement)	Director of Offender Classification and Population Management or higher authority	Commissioner or designee	Indefinite	Classification staff every seven (7) days for first two (2) months and every 30 days thereafter and by a mental health professional after 30 days and every three (3) months following.
Punitive Segregation	Discipline (Requires a hearing prior to placement)	Disciplinary Hearing Officer	Unit Administrator or higher authority or inmate serves time	In accordance with A.D. 9.5, Code of Penal Discipline	Local as appropriate
Administrative Detention	During an investigation or pending a hearing if an inmate may need protection or poses a threat to facility security and safety.	Shift Commander, higher authority or Director of Offender Classification and Population Management	Unit Administrator, higher authority or Director of Offender Classification and Population Management	Up to 14 calendar days. When an Administrative Segregation hearing is pending, up to 30 calendar days.	Every 72 hours by the Unit Administrator or designee and recorded on Restrictive Housing Order.
Transfer Detention	Pending transfer as appropriate	Shift Commander, higher authority or Director of Offender Classification and Population Management	Shift Commander, higher authority or Director of Offender Classification and Population Management	Up to 72 hours excluding weekends and holidays	Local as appropriate
Chronic Discipline Interval I	Adjustment of problematic inmate behavior due to multiple disciplinary reports	Director of Offender Classification and Population Management	Approval for release to Interval II shall be by the Unit Administrator	Minimum of 30 days	Classification staff every seven (7) days for one (1) month and every 30 days thereafter.
Chronic Discipline Interval II	To prepare inmate for return to general population	Unit Administrator	Director of Offender Classification and Population Management	Minimum of 60 days	Classification staff every 30 days. By a mental health professional every 90 days. Inmates remaining in the Close Custody for Chronic Discipline Unit for more than six (6) months shall be reviewed for Administrative Segregation.
Special Needs Management	For inmates who have demonstrated behavioral qualities either through the serious nature of their crime, behavior or reasonable belief that they continue to pose a threat to the safety and security of staff, other inmates, themselves, or the public.	Director of Offender Classification and Population Management in consultation with the Deputy Commissioner of Operations or designee and the DOC Director of Psychiatric Services.	Director of Offender Classification and Population Management in consultation with the Deputy Commissioner of Operations or designee and the DOC Director of Psychiatric Services.	Indefinite	A classification hearing shall be held at a minimum of every six (6) months. By a mental health professional after 30 days of initial placement and every 90 days thereafter.

INCLUSION, EXCLUSION, AND SUB-POPULATIONS

The materials that follow raise questions about how the use of isolation-based segregation intersects with segregation on the basis of race, HIV-status, sexual orientation, and gender identity, and whether certain subpopulations should be excluded from isolation.

In *Johnson v. California*, the Supreme Court considered a constitutional challenge to the California Department of Corrections' practice of "racially segregating prisoners in double cells . . . each time they enter a new correctional facility." California defended the policy as necessary to the safety of inmates in a system dominated by race-based gang violence. The Supreme Court has, in many instances, insisted that courts defer to the discretion of prison administrators. Yet the majority in *Johnson* rejected the usual deference and remanded the policy for reconsideration. Following *Johnson* is a brief excerpt by Margo Schlanger, comparing the racial make-up of certain forms of segregated confinement to that of the general prison population and concluding that isolation has a disparate impact on incarcerated people of color.

Johnson v. California

543 U.S. 499 (2005)

Justice O'Connor delivered the opinion of the Court.

The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy. . . .

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are " '[p]retty close' " to zero percent. App. to Pet. for Cert. 3a. The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and northern California Hispanics are separated from southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. . . . It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. . . . The CDC also notes that prison-gang culture is violent and murderous. . . . An associate warden testified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. . . . Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. . . . The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others. . . .

With the exception of the double cells in reception areas, the rest of the state prison facilities—dining areas, yards, and cells—are fully integrated. After the initial 60-day period, prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them. . . .

We have held that “*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications “are narrowly tailored measures that further compelling governmental interests.” *Ibid.* We have insisted on strict scrutiny in every context, even for so-called “benign” racial classifications, such as race-conscious university admissions policies, see *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), race-based preferences in government contracts, see *Adarand, supra*, at 226, and race-based districting intended to improve minority representation, see *Shaw v. Reno*, 509 U.S. 630 (1993).

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to “‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” . . .

The CDC claims that its policy should be exempt from our categorical rule because it is “neutral”—that is, it “neither benefits nor burdens one group or individual more than any other group or individual.” Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are “equally” segregated. The CDC’s argument ignores our repeated command that “racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.” . . . Indeed, we rejected the notion that separate can ever be equal—or “neutral”—50 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), and we refuse to resurrect it today. . . .

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), we upheld a three-judge court’s decision striking down Alabama’s policy of segregation in its prisons. . . . Alabama had argued that desegregation would undermine prison security and discipline, . . . but we rejected that contention. Three Justices concurred “to make explicit something that is left to be gathered only by implication from the Court’s opinion”—“that prison authorities have the right, acting in good faith and in *particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.” . . .

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to *incite*

racial hostility.” . . . Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates “may exacerbate the very patterns of [violence that it is] said to counteract.” . . . See also Brief for Former State Corrections Officials as *Amici Curiae* 19 (opinion of former corrections officials from six States that “racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence” and that “a blanket policy of racial segregation of inmates is contrary to sound prison management”). . . .

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in *Turner v. Safley*, 482 U.S. 78 (1987), because its segregation policy applies only in the prison context. We decline the invitation. In *Turner*, we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. . . . We rejected prisoners’ argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners’ fundamental rights was “reasonably related” to “legitimate penological interests.” . . .

We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee*. We think this unsurprising, as we have applied *Turner’s* reasonable-relationship test *only* to rights that are “inconsistent with proper incarceration.” . . . Thus, for example, we have relied on *Turner* in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, . . . limits on inmate correspondence, . . . restrictions on inmates’ access to courts, . . . ; restrictions on receipt of subscription publications . . . ; and work rules limiting prisoners’ attendance at religious services, . . . We have also applied *Turner* to some due process claims, such as involuntary medication of mentally ill prisoners, . . . ; and restrictions on the right to marry, . . .

The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment’s ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is “especially pernicious in the administration of justice.” *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And public respect for our system of justice is undermined when the system discriminates based on race. Cf. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (“[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race”). When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. . . .

In the prison context, when the government’s power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our “unceasing efforts to eradicate racial prejudice from our criminal justice system.” *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) The “necessities of

prison security and discipline,” . . . are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. . . . Chief Justice Rehnquist took no part in the decision of this case.

Justice Ginsburg, with whom Justice Souter and Justice Breyer join, concurring:

[That concurrence reiterated the Justices’ view that the same standard of review “ought not to control judicial inspection of every official race classification,” and made reference to their view of the constitutionality of affirmative action under appropriate circumstances.]

Justice Stevens, dissenting:

In my judgment a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violates the Equal Protection Clause of the Fourteenth Amendment. The California Department of Corrections (CDC) has had an ample opportunity to justify its policy during the course of this litigation, but has utterly failed to do so whether judged under strict scrutiny or the more deferential standard set out in *Turner*. . . . The CDC had no incentive in the proceedings below to withhold evidence supporting its policy; nor has the CDC made any offer of proof to suggest that a remand for further factual development would serve any purpose other than to postpone the inevitable. I therefore agree with the submission of the United States as *amicus curiae* that the Court should hold the policy unconstitutional on the current record. . . .

Justice Thomas, with whom Justice Scalia joins, dissenting:

. . . The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less “fundamental” than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation’s prisons. There is good reason for such deference in this case. California oversees roughly 160,000 inmates in prisons that have been a breeding ground for some of the most violent prison gangs in America—all of them organized along racial lines. In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity and stigma of racial discrimination. . . . California is concerned with their safety and saving their lives. . . .

Turner made clear that a deferential standard of review would apply across the board to inmates’ constitutional challenges to prison policies. . . . At issue . . . was the constitutionality of a pair of Missouri prison regulations limiting inmate-to-inmate correspondence and inmate marriages. The Court’s analysis proceeded in two steps. First, the Court recognized that prisoners are not entirely without constitutional rights. As proof, it listed certain constitutional rights retained by prisoners, including the right to be “protected against invidious racial discrimination Second, the Court concluded that for prison administrators rather than courts to “make the difficult judgments concerning institutional operations,” . . . courts should uphold prison regulations that impinge on those constitutional rights if they reasonably relate to legitimate penological interests. . . . Nowhere did the Court suggest that *Lee*’s right to be free from racial

discrimination was immune from *Turner's* deferential standard of review. To the contrary, “[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights.” . . .

The majority claims that strict scrutiny is the applicable standard of review based on this Court’s precedents and its general skepticism of racial classifications. It is wrong on both scores. . . . The majority heavily relies on this Court’s statement that “all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.”. . . *Adarand* has nothing to do with this case. *Adarand's* statement that “all racial classifications” are subject to strict scrutiny addressed the contention that classifications favoring rather than disfavoring blacks are exempt. . . . None of these statements overruled, *sub silentio*, *Turner* and its progeny, especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons. . . .

The majority offers various other reasons for applying strict scrutiny. None is persuasive. The majority’s main reason is that “*Turner's* reasonable-relationship test [applies] *only* to rights that are ‘inconsistent with proper incarceration.’” . . . According to the majority, the question is thus whether a right “need necessarily be compromised for the sake of proper prison administration.” . . . This inconsistency-with-proper-prison-administration test begs the question at the heart of this case. For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it ought to be administered. . . . But the very issue in this case is whether such second-guessing is permissible. . . .

In place of the Court’s usual deference, the majority gives conclusive force to its own guesswork about “proper” prison administration. It hypothesizes that California’s policy might incite, rather than diminish, racial hostility. . . . The majority’s speculations are implausible. New arrivals have a strong interest in promptly convincing other inmates of their willingness to use violent force. *See* Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 13-14 (citing commentary and congressional findings); *cf. United States v. Santiago*, 46 F.3d 885, 888 (C.A.9 1995) (describing one Hispanic inmate’s murder of another in order to join the Mexican Mafia); *United States v. Silverstein*, 732 F.2d 1338, 1341 (C.A.7 1984) (prospective members of the Aryan Brotherhood must “make bones,” or commit a murder, to be eligible for membership). In any event, the majority’s guesswork falls far short of the compelling showing needed to overcome the deference we owe to prison administrators. . . .

The majority does not say why *Turner's* standard ably polices all other constitutional infirmities, just not racial discrimination. In any event, it is not the refusal to apply-for the first time ever-a strict standard of review in the prison context that is “fundamentally at odds with our constitutional jurisprudence. . . . Instead, it is the majority’s refusal—for the first time ever—to defer to the expert judgment of prison officials. . . .

Prison Segregation: Preliminary Data on Racial Disparities (2013)

*Margo Schlanger**

[T]his [article] offers some preliminary data that suggest that in many states the harsh conditions of solitary confinement are probably disproportionately affecting prisoners of color.

...

The best sources of demographic information about prisoners are the various surveys and censuses conducted by the U.S. Department of Justice Bureau of Justice Statistics (BJS). While no BJS publication directly addresses the issue, and no BJS dataset allows its full analysis, it is possible to glean something from the most recent BJS prison census, the 2005 Census of State and Federal Adult Correctional Facilities. I present in Table 1, below, data derived from that census for seven state facilities. I also include, for comprehensiveness, the information from the NYCLU report. (Even so, the table covers only a very small portion of the nation's tens of thousands of supermax prisoners.)

TABLE 1: DEMOGRAPHICS IN SELECTED SUPERMAX FACILITIES

	U.S. 2005	Ark. 2005	Colo. 2005	Conn. 2005	Md. 2005	Mass. 2005	N.J. 2005	N.Y. • 2011-12	R.I. 2005
Population (N)									
Prison	1,038,363	11,416	14,272	17,928	16,626	9,297	23,176	55,197	2,632
Supermax		447	755	412	253	541	1,825	4,293	86
White									
Population	66.8%	77.0%	71.9%	75.3%	59.1%	79.7%	63.0%	58.3%	79.1%
Prison	37.6%	52.6%	45.7%	29.4%	22.6%	45.5%	20.3%	23.2%	48.3%
Supermax		28.6%	35.5%	11.9%	24.9%	41.0%	19.8%	14.6%	41.9%
Black									
Population	11.9%	15.3%	3.5%	8.8%	28.4%	5.5%	12.8%	14.4%	6.3%
Prison	43.1%	45.7%	19.7%	42.9%	72.6%	27.1%	61.5%	49.5%	29.6%
Supermax		70.7%	15.0%	43.7%	75.1%	34.2%	65.2%	59.0%	32.6%
Hispanic									
Population	14.5%	4.7%	19.5%	10.9%	5.8%	7.9%	15.3%	17.6%	10.9%

* Excerpted from 18 MICHIGAN JOURNAL OF RACE & LAW 241 (2013). Reprinted with permission from author. Liman Colloquium 2014 Isolation and Reintegration Punishment Circa 2014 Jan. 7, 2015

Prison	16.0%	1.4%	31.5%	27.0%	0.1%	25.3%	17.7%	24.6%	20.4%
Supermax		0.4%	46.6%	43.9%	0.0%	22.7%	14.1%	24.7%	25.6%
Other									
Population	6.8%	3.0%	5.0%	4.9%	6.7%	6.8%	8.8%	9.7%	3.6%
Prison	3.2%	0.3%	3.1%	0.7%	4.6%	2.2%	0.5%	2.7%	1.7%
Supermax		0.2%	2.9%	0.5%	0.0%	2.0%	0.9%	1.7%	0.0%

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en the limited available information, the table is merely suggestive—but it does support a working hypothesis of current racialized impact for isolated confinement. In four of the eight columns (Arkansas, Colorado, Connecticut, and New York), non-White prisoners are substantially overrepresented in the highlighted facilities; statistical testing confirms that the difference is statistically significant. (In three of the other four—Massachusetts, New Jersey, Rhode Island—the small overrepresentation is not statistically significant; likewise, the tiny proportion of underrepresentation in Maryland lacks statistical significance. . . .).

Of course evidence of disproportion does not demonstrate racial discrimination; it is possible that whatever disproportion exists has other explanations. But whether or not the source is detectable bias, the demographic impact of supermax and similarly isolated custody seems to me worthy of analysis. In short, it seems high time for corrections researchers to . . . more systematically ask the race question in this area. American jails and prisons are themselves vastly racially skewed in their populations, and what we are likely to find is an even more extreme skew for those who are on the receiving end of isolated confinement’s harsh effects.

The tension between the management and punitive purposes of segregation raises questions for reformers who seek to limit the use of segregation for mentally ill prisoners. The segregation of the mentally ill is an area in which judges have imposed constitutional limits on the nature and extent of isolation. *Madrid v. Gomez* set limits on placing in solitary confinement “those . . . [who] are at a particularly high risk for suffering very serious or severe injury to their mental health.” The court held that placing inmates who are “already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression” in isolation-based segregation violated the Eighth Amendment.

Efforts at reforming the interaction between mental illness and segregation can be seen in New York, Colorado, and Washington. The New York “SHU Exclusion Law” and recent Colorado Senate Bill 64 preclude the mentally ill from being placed in segregation in those states. Both the proposed and enacted law share similar definitions of mental illness that rely heavily on the Diagnostic and Statistical Manual of Mental Disorders, itself a document undergoing reassessment and reform. Some have criticized such legislation as counterproductive interference with necessary discretion on the part of prison officials; a recent editorial in the *Denver Post* is representative of such criticism.

In Washington, concerns regarding mental illness have led the Department of Corrections to undertake an effort – aided by the Vera Institute and Disability Rights Washington (DRW) – to incorporate mental health treatment into its segregation programming, attempting to transform segregation into a site for treatment rather than excluding the mentally ill from it.

Madrid v. Gomez

889 F.Supp. 1146 (N.D. Cal. 1995)

Thelton E. Henderson, Chief Judge:

. . . Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control. This response has been observed not only in the extreme case where a subject in a clinical setting is completely isolated in a dark soundproofed room or immersed in water, but in a variety of other contexts. For example, similar effects have been observed in hostages, prisoners of war, patients undergoing long-term immobilization in a hospital, and pilots flying long solo flights. While acute symptoms tend to subside after normal stimulation or conditions are returned, some people may sustain long-term effects. This series of symptoms has been discussed using varying terminology; however, one common label is “Reduced Environmental Stimulation,” or “RES.” According to Dr. Grassian, the complex of symptoms associated with RES is rarely, if ever, observed in other psychotic syndromes or in humans not subject to RES, a point which defendants did not refute with any specificity.

There is also an ample and growing body of evidence that this phenomenon may occur among persons in solitary or segregated confinement—persons who are, by definition, subject to a significant degree of social isolation and reduced environmental stimulation. Early experiments with complete solitary confinement in American and European penitentiaries in the late 1700’s and 1800’s led to numerous reports of psychiatric disturbances. . . . More recent studies have also documented the potential adverse mental health effects of solitary or segregated confinement. . . .

Turning to the case at bar, it is clear that confinement in the Pelican Bay SHU severely deprives inmates of normal human contact and substantially reduces their level of environmental stimulation, as detailed above. It is also clear that there are a significant number of inmates in the Pelican Bay SHU that are suffering from serious mental illness. . . .

Based on studies undertaken in this case, and the entirety of the record bearing on this claim, the Court finds that many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU. . . .

It is also equally clear that although the SHU conditions are relatively extreme, they do not have a uniform effect on all inmates. For an occasional inmate, the SHU environment may

actually prove beneficial. For others, the adverse psychological impact of the SHU will be relatively moderate. They may experience some symptoms but not others, and/or experience those symptoms to a minor or moderate degree. . . .

The experts are essentially in agreement with respect to the types of persons that are most likely to suffer a serious mental injury from continued exposure to the conditions in the Pelican Bay SHU. Probably most vulnerable are inmates already suffering from mental illness. . . .

Certain inmates who are not already mentally ill are also at high risk for incurring serious psychiatric problems, including becoming psychotic, if exposed to the SHU for any significant duration. As defendants' expert conceded, there are certain people who simply "can [no]t handle" a place like the Pelican Bay SHU. Persons at a higher risk of mentally deteriorating in the SHU are those who suffer from prior psychiatric problems, borderline personality disorder, chronic depression, chronic schizophrenia, brain damage or mental retardation, or an impulse-ridden personality. . . .

Having given the matter careful deliberation, we conclude that the record and the law do not fully sustain the position advocated by either plaintiffs or defendants. As explained below, we are not persuaded that the SHU, as currently operated, violates Eighth Amendment standards vis-a-vis all inmates. We do find, however, that conditions in the SHU violate such standards when imposed on certain subgroups of the inmate population, and that defendants have been deliberately indifferent to the serious risks posed by subjecting such inmates to the SHU over extended periods of time. . . .

In this case, the conditions at issue primarily affect three inmate populations: (1) those who are being disciplined for committing serious rules violations, (2) those who the CDC has determined are affiliated with a prison gang, and (3) those who are otherwise considered security risks because of disruptive or assaultive behavior. The severe restrictions on social interaction further defendants' legitimate interest in precluding opportunities for disruptive or gang related activity and assaults on other inmates or staff. For those serving short-term disciplinary terms, they also serve a punitive function. Other aspects of the conditions in the SHU, however, appear tenuously related to legitimate penological interests, at least with respect to those inmates that are segregated in the SHU not as a disciplinary measure, but for other reasons. For example, it is not clear how the lack of an outside view, the extreme sterility of the environment, and the refusal to provide any recreational equipment in the exercise pen (even a handball) furthers any interest other than punishment, and defendants have not advanced one. Thus, in the Court's view, the totality of the SHU conditions may be harsher than necessary to accommodate the needs of the institution with respect to these populations. However, giving defendants the wide-ranging deference they are owed in these matters, we cannot say that the conditions overall lack any penological justification.

Accordingly, . . . plaintiffs cannot prevail on the instant claim simply by pointing to the generalized "psychological pain"—i.e. the loneliness, frustration, depression or extreme boredom—that inmates may experience by virtue of their confinement in the SHU. . . . The Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation. . . . However, if the particular conditions of segregation

being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.

In short, while courts will reject Eighth Amendment claims where there is no persuasive evidence that the challenged conditions lead to serious mental injury, where such injury can in fact be shown, Eighth Amendment protections clearly come into play. Thus, we must ask the following question: does the evidence before the Court demonstrate that the conditions in the Pelican Bay SHU inflict mental harm so serious or severe that they cross the constitutional line? . . .

Here, the record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods. Clearly, this impact is not to be trivialized; however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards. While a risk of a more serious injury is not non-existent, we are not persuaded, on the present record and given all the circumstances, that the risk of developing an injury to mental health of *sufficiently serious magnitude* due to current conditions in the SHU is high enough for the SHU population as a whole, to find that current conditions in the SHU are *per se* violative of the Eighth Amendment with respect to all potential inmates.

We cannot, however, say the same for certain categories of inmates: those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly “unreasonable.” . . . Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief. . . .

We are acutely aware that defendants are entitled to substantial deference with respect to their management of the SHU. However, subjecting individuals to conditions that are “very likely” to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness cannot be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. . . . Thus, with respect to this limited population of the inmate class, plaintiffs have established that continued confinement in the SHU, as it is currently constituted, deprives inmates of a minimal civilized level of one of life’s necessities.

New York Segregated Housing Unit (SHU) Exclusion Law (2008)*

An act to amend the correction law and the mental hygiene law, in relation to confinement conditions and treatment of convicted persons with serious mental illness

Section 1. Legislative findings.

1. The legislature finds that the needs of inmates with serious mental illness should be served by improved access to mental health treatment during incarceration. In particular, inmates with serious mental illness should be offered therapeutic care and treatment in residential mental health settings when doing so will not compromise the safety of inmates or other persons or the security of the facility. While in exceptional circumstances segregated confinement may sometimes be necessary to maintain such safety and security, even for inmates with serious mental illness, the state should strive to maintain such inmates with serious mental illness in less restrictive settings whenever it can safely do so.

2. When inmates with serious mental illness are placed in segregated confinement, they should receive a heightened level of care, including out-of-cell therapeutic programming and/or mental health treatment, when consistent with the safety of the inmate and other persons or the security of the facility. Such inmates with serious mental illness should also undergo periodic reassessments of their mental condition to determine whether diversion from segregated confinement to a less restrictive setting is appropriate.

3. This act creates a balanced approach to care and treatment of inmates with serious mental illness and the state's ability to ensure the safety of all inmates and employees and the security of prison facilities.

Section 2. Definitions

21. "Residential mental health treatment unit" means housing for inmates with serious mental illness that is operated jointly by the department and the office of mental health and is therapeutic in nature. Such units shall not be operated as disciplinary housing units, and decisions about treatment and conditions of confinement shall be made based upon a clinical assessment of the therapeutic needs of the inmate and maintenance of adequate safety and security on the unit. . . The models shall be defined in regulations promulgated by the department in consultation with the commissioner of mental health consistent with this subdivision and section four hundred one of this chapter. Inmates placed in a residential mental health treatment unit shall be offered at least four hours a day of structured out-of-cell therapeutic programming and/or mental health treatment, except on weekends or holidays, in addition to exercise, and may be provided with additional out-of-cell activities as are consistent with their mental health needs; provided, however, that the department may maintain no more than thirty-eight behavioral health unit beds in which the number of hours of out-of-cell structured therapeutic programming and/or mental health treatment offered to inmates on a daily basis, except on weekends or holidays, may be limited to only two hours. . . .

* *Excerpted from A09342/S06422 (N.Y. 2008).*

22. "Mental health clinician" means a psychiatrist, psychologist, social worker or nurse practitioner who is licensed by the department of education and employed by the office of mental health.

23. "Segregated confinement" means the disciplinary confinement of an inmate in a special housing unit or in a separate keeplock housing unit. Special housing units and separate keeplock units are housing units that consist of cells grouped so as to provide separation from the general population, and may be used to house inmates confined pursuant to the disciplinary procedures described in regulations.

24. "Joint case management committee" means a committee composed of staff from the department and the office of mental health. Such a committee shall be established at each level one and level two facility. Each committee shall consist of at least two clinical staff of the office of mental health and two officials of the department. The purpose of such committee shall be to review, monitor and coordinate the behavior and treatment plan of any inmate who is placed in segregated confinement or a residential mental health treatment unit and who is receiving services from the office of mental health.

25. "Joint central office review committee" means a committee comprised of central office personnel from the department and the office of mental health as designated by the respective commissioners. . . .

Section 3. . . . *Except as provided in paragraphs (D) and (E) of this subdivision, the superintendent of a correctional facility may keep any inmate confined in a cell or room, apart from the accommodations provided for inmates who are participating in programs of the facility, for such period as may be necessary for maintenance of order or discipline, but in any such case the following conditions shall be observed: . . .*

(D)

(i) ...[T]he department, in consultation with mental health clinicians, shall divert or remove inmates with serious mental illness, as defined in paragraph (e) of this subdivision, from segregated confinement, where such confinement could potentially be for a period in excess of thirty days, to a residential mental health treatment unit. . . .

(ii) (a) Upon placement of an inmate into segregated confinement. . . a suicide prevention screening instrument shall be administered by staff from the department or the office of mental health who has been trained for that purpose. If such a screening instrument reveals that the inmate is at risk of suicide, a mental health clinician shall be consulted and appropriate safety precautions shall be taken. . . .

(b) . . . All inmates placed in segregated confinement at a level three or level four facility shall be assessed by a mental health clinician, within fourteen days of such placement into segregated confinement.

(c) At the initial assessment, if the mental health clinician finds that an inmate

suffers from a serious mental illness, a recommendation shall be made whether exceptional circumstances, as described in clause (e) of this subparagraph, exist. . . . Any such recommendation shall be reviewed by the joint central office review committee. The administrative process described in this clause shall be completed within fourteen days of the initial assessment, and if the result of such process is that the inmate should be removed from segregated confinement, such removal shall occur as soon as practicable, but in no event more than seventy-two hours from the completion of the administrative process.

(d) If an inmate with a serious mental illness is not diverted or removed to a residential mental health treatment unit, such inmate shall be reassessed by a mental health clinician within fourteen days of the initial assessment and at least once every fourteen days thereafter. After each such additional assessment, a recommendation as to whether such inmate should be removed from segregated confinement shall be made and reviewed according to the process set forth in clause (c) of this subparagraph.

(e) A recommendation or determination whether to remove an inmate from segregated confinement shall take into account the assessing mental health clinicians' opinions as to the inmate's mental condition and treatment needs, and shall also take into account any safety and security concerns that would be posed by the inmate's removal, even if additional restrictions were placed on the inmate's access to treatment, property, services or privileges in a residential mental health treatment unit. A recommendation or determination shall direct the inmate's removal from segregated confinement except in the following exceptional circumstances: (1) when the reviewer finds that removal would pose a substantial risk to the safety of the inmate or other persons, or a substantial threat to the security of the facility, even if additional restrictions were placed on the inmate's access to treatment, property, services or privileges in a residential mental health treatment unit; or (2) when the assessing mental health clinician determines that such placement is in the inmate's best interests based on his or her mental condition and that removing such inmate to a residential mental health treatment unit would be detrimental to his or her mental condition. . . .

(iii) Inmates with serious mental illness who are not diverted or removed from segregated confinement shall be offered a heightened level of care, involving a minimum of two hours each day, five days a week, of out-of-cell therapeutic treatment and programming. This heightened level of care shall not be offered only in the following circumstances: . . .

(b) The heightened level of care shall not apply in exceptional circumstances when providing such care would create an unacceptable risk to the safety and security of inmates or staff. Such determination shall be documented by security personnel together with the basis of such determination and shall be reviewed by the facility superintendent, in consultation with a mental health clinician, not less than every seven days for as long as the inmate remains in segregated confinement. The facility shall attempt to resolve such exceptional circumstances so that the heightened level of care may be provided. If such exceptional circumstances remain unresolved for thirty days, the matter shall be referred to

the joint central office review committee for review. . . .

(v) All inmates in segregated confinement in a level one or level two facility who are not assessed with a serious mental illness at the initial assessment shall be offered at least one interview with a mental health clinician within fourteen days of their initial mental health assessment, and additional interviews at least every thirty days thereafter, unless the mental health clinician at the most recent interview recommends an earlier interview or assessment. All inmates in segregated confinement in a level three or level four facility who are not assessed with a serious mental illness at the initial assessment shall be offered at least one interview with a mental health clinician within thirty days of their initial mental health assessment, and additional interviews at least every ninety days thereafter, unless the mental health clinician at the most recent interview recommends an earlier interview or assessment.

(E) An inmate has a serious mental illness when he or she has been determined by a mental health clinician to meet at least one of the following criteria:

(i) He or she has a current diagnosis of, or is diagnosed at the initial or any subsequent assessment conducted during the inmate's segregated confinement with, one or more of the following types of Axis I diagnoses, as described in the most recent edition of the diagnostic and statistical manual of mental disorders, and such diagnoses shall be made based upon all relevant clinical factors, including but not limited to symptoms related to such diagnoses:

- (a) schizophrenia (all sub-types),
- (b) delusional disorder,
- (c) schizophreniform disorder,
- (d) schizoaffective disorder,
- (e) brief psychotic disorder,
- (f) substance-induced psychotic disorder (excluding intoxication and withdrawal),
- (g) psychotic disorder not otherwise specified,
- (h) major depressive disorders, or
- (i) bipolar disorder I and II;

(ii) He or she is actively suicidal or has engaged in a recent, serious suicide attempt;

(iii) He or she has been diagnosed with a mental condition that is frequently characterized by breaks with reality, or perceptions of reality, that lead the individual to experience significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;

(iv) He or she has been diagnosed with an organic brain syndrome that results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;

(v) He or she has been diagnosed with a severe personality disorder that is manifested by

frequent episodes of psychosis or depression, and results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health; or

(vi) He or she has been determined by a mental health clinician to have otherwise substantially deteriorated mentally or emotionally while confined in segregated confinement and is experiencing significant functional impairment indicating a diagnosis of serious mental illness and involving acts of self-harm or other behavior that have a serious adverse effect on life or on mental or physical health.

Section 5. Section 401 of the correction law, as added by chapter 766 of the 48 laws of 1976, is amended [to include]: . . .

3. Misbehavior reports will not be issued to inmates with serious mental illness for refusing treatment or medication, however, an inmate may be subject to the disciplinary process for refusing to go to the location where treatment is provided or medication is dispensed. In addition, there will be a presumption against imposition and pursuit of disciplinary charges for self-harming behavior and threats of self-harming behavior, including related charges for the same behaviors, such as destruction of state property, except in exceptional circumstances. . . .

6. The department shall ensure that the curriculum for new correction officers, and other new department staff who will regularly work in programs providing mental health treatment for inmates, shall include at least eight hours of training about the types and symptoms of mental illnesses, the goals of mental health treatment, the prevention of suicide and training in how to effectively and safely manage inmates with mental illness. Such training may be provided by the office of mental health or the New York state commission on quality of care and advocacy for persons with disabilities. All department staff who are transferring into a residential mental health treatment unit shall receive a minimum of eight additional hours of such training, and eight hours of annual training as long as they work in such a unit. The department shall provide additional training on these topics on an ongoing basis as it deems appropriate. . . .

[Sections 6-8, dealing with oversight at the state level, corresponding changes to the mental hygiene law, and date of effectiveness, have been omitted.]

A Bill for an Act Concerning Restricting the Use of Long-Term Isolated Confinement for Inmates with Serious Mental Illness

Colorado Senate Bill 14-064 (2014)

SECTION 1. Legislative declaration.

(1) The general assembly hereby finds and declares that: (a) Isolated confinement is the practice of housing prisoners in small, barren cells where they are restricted for up to twenty-three hours per day; (b) Since its creation, the practice of prolonged isolated

confinement has been subject to intense scrutiny due to its damaging effects on mental health; (c) Prisoners with mental illness are disproportionately likely to be subjected to isolated confinement because mental illness often makes it difficult or impossible to comply with the strict behavioral expectations of prison; (d) Once housed in isolated confinement, the mental health of prisoners with serious mental illness often decompensates further, making them a great threat to their own safety as well as to the safety of other prisoners, prison staff, and ultimately the public, since almost all Colorado prisoners will one day be released; (e) Colorado does not currently require prisoners who have lived in isolated confinement to gain exposure to human interaction before release to the general public; (f) The United States department of justice and courts have agreed that the constitution forbids subjecting prisoners with serious mental illness to prolonged isolated confinement; and (g) Since 2010, the Colorado department of corrections has worked to significantly reduce the number of prisoners with mental illness in isolated confinement.

- (2) Therefore, the general assembly finds that the state must codify the practice of limiting the housing of prisoners with serious mental illness in isolated confinement.

SECTION 2. In Colorado Revised Statutes, add 17-1-113.8 as follows:

17-1-113.8. Directives for dealing with the seriously mentally ill offender - definitions.

- (1) To ensure that offenders held in long-term isolated confinement have been evaluated to determine their mental health status, within ninety days after the effective date of this section, the department shall review the status of all offenders held in long-term isolated confinement in the state to determine whether the offenders currently housed in long-term isolated confinement should remain in those units under the terms of this section. If the mental health clinician determines that the offender is seriously mentally ill, the department shall move the offender from long-term isolated confinement to a mental health or special needs step-down unit, a prison mental hospital, or other appropriate housing that does not include long-term isolated confinement.
- (2) As of the effective 1 date of this section, prior to placing an offender in long-term isolated confinement for either a disciplinary infraction or a nonpunitive reason, the department shall have the offender evaluated by a mental health clinician to determine if the offender is a person with serious mental illness. If the mental health clinician finds the offender is a person with a serious mental illness and other significant mental impairment, the department shall place the offender in a mental health or special needs step-down unit, a prison mental hospital, or other appropriate housing that does not include isolated confinement.
- (3) A person with serious mental illness and other significant mental impairment may be subject to discipline, but the discipline shall be handled by collaboration between mental health clinicians, other required medical staff, and custody staff in a mental health or special needs step-down unit or other appropriate housing that does not include long-term isolated confinement. Any punishment must work within the individual's mental health or rehabilitation treatment plan.

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- (4) The mental health or special needs step-down units shall be physically separate from any long-term isolated confinement unit and shall not be operated as a disciplinary housing unit. The department shall offer offenders in the mental health or special needs step-down units a minimum of twenty hours out-of-cell time every week, including ten hours of therapeutic activity.
- (5) The department shall provide offenders in the mental health or special needs step-down units clinical visits by mental health clinicians and rehabilitative medical personnel as part of their treatment program. These visits must be conducted in a clinical environment that ensures privacy.
- (6) As used in this section, unless the context otherwise requires:
- (a) "Isolated confinement" means the state of being confined in one's cell for approximately twenty-two hours per day or more with very limited out-of-cell time and severely restricted activity, movement, and social interaction, whether pursuant to disciplinary, administrative, or classification action.
 - (b) "Long-term isolated confinement" means isolated confinement that is expected to extend or does extend for a period of time exceeding thirty days.
 - (c) "Mental health or special needs step-down units" means residential therapeutic housing units within a correctional facility that provide clinically appropriate and therapeutic programming to offenders with serious mental illness in lieu of housing in administrative or disciplinary segregation units or isolated confinement.
 - (d) "Person with serious mental illness or other significant mental impairment" means a person with a substantial disorder of thought or mood that significantly impairs judgment, behavior, or capacity to recognize reality, which may include individuals found to have current symptoms or who are currently receiving treatment for the following:
 - (i) Type of diagnosis found in the Diagnostic and Statistical Manual 5 (DSM-5), or the most current version, including:
 - (a) schizophrenia, including all sub-types;
 - (b) delusional disorder;
 - (c) schizophreniform disorder;
 - (d) schizoaffective disorder;
 - (e) brief psychotic disorder;
 - (f) substance-induced psychotic disorder, excluding intoxication and withdrawal;
 - (g) psychotic disorder not otherwise specified;
 - (h) major depressive disorders; or
 - (i) bipolar affective disorder;
 - (ii) A mental disorder that includes being actively suicidal;

- (iii) A serious mental illness that is frequently characterized by breaks with reality or perceptions of reality that leads the individual to significant functional impairment;
- (iv) An organic brain syndrome, which results in a significant functional impairment if not treated;
- (v) A severe personality disorder that is manifested by frequent episodes of psychosis or depression and results in significant functional impairment;
- (vi) Any other serious mental illness or disorder that is worsened by confinement; or
- (vii) Mental retardation with significant functional impairment.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Leave Solitary to Prison Officials (March 11, 2014)

*The Denver Post Editorial Board**

When we first heard of a bill pending in the legislature that would heavily prescribe how Colorado prison officials ought to deal with mentally ill prisoners in solitary confinement, we were concerned. No doubt, it's an important issue and one Colorado Department of Corrections officials have struggled with. Yet, however imperfect their efforts have been, we're reasonably sure the situation would be worse if legislators were to micromanage prison affairs.

That's why we were pleased to see the measure significantly amended. Senate Bill 64, which says prisoners with serious mental illnesses should not be kept in solitary confinement long-term, gives the DOC broad discretion. The department defines what a serious mental illness is, and it has flexibility when "exigent circumstances" arise. Remaining in the bill is the creation of an advisory committee, which could be useful, that formalizes and continues cooperation between the DOC and mental health experts on the issue.

Eliminating the practice of warehousing mentally ill prisoners in solitary confinement should be a policy priority, but this is a job for professionals.

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Minimum Standards for Mental Health Services in IMU/Seg Units

*Washington Department of Corrections***

Following a Pilot implementation of VERA (Vera Institute of Justice) and DRW [Disability Rights Washington] recommendations for mental health services, Mental Health (MH) staff at MCC made recommendations for services that yielded the greatest benefit for the offenders in this setting. These findings informed the development of our Minimum Standards for Mental Health Services in IMU/Seg Units. These standards include screening, rounds, MH treatment, Offender Change Programming, Transition services and communication across disciplines. The full implementation of these standards, based upon adequate staffing, is operational at this time at MCC, WSP and WCCW. A budget request has been submitted to increase the staffing at SCCC, CBCC and WCC in order to fully implement these standards. These locations are providing services according to these standards as staff resources allow.

1. Screening: MH screenings would be completed within 1 working day of admission to IMU/Seg, to determine suitability of placement (i.e. ability to tolerate IMU/Seg setting)
 - a. MH staff will use the Mental Status Examination (13-349) to document the assessed needs of the offender.
 - b. If an offender is assessed as being too ill to be placed in IMU/Seg, the MH staff will make arrangements for the offender to be placed on watch or placed in an acute care setting, depending on location.

2. Rounds: MH will round in IMU/Seg on a weekly basis
 - a. During rounds, the MH staff will knock on the door and attempt to engage in discussion with the offenders, who are able to refuse contact without penalty.
 - b. MH staff are assessing for any de-compensation in mental status which could be determined by the verbal interaction with the offenders, observation of the offenders' self-care or observation of the hygiene/sanitation of the cell.
 - c. Any interaction that results in clinical concern for the offender will be followed by an attempts to have them leave the cell (does not have to occur during the rounding time, but within 48 hours) for a more thorough assessment.
 - d. These interactions (the interaction during rounds that raised concern and the follow-up) should be documented in PER notes.
 - e. If an offender is assessed as being too ill to remain in IMU/Seg, the MH staff will make arrangements for the offender to be placed on watch or placed in an acute care setting, depending on location.

3. Mental Health Treatment Services: Offenders in IMU/Seg are subject to the outpatient care provided through the Offender Health Plan.
 - a. MH staff will maintain a roster of all IMS offenders designated as SMI at their facility.
 - b. Mental Health Appraisals/Updates: For those offenders on IMS and transferred into a new facility, a Mental Status Update will be completed for those offenders

** *Excerpted from Washington Department of Correction, Project Report: Vera/Disability Rights Washington Project (Jan. 2014).*

with an S code of 2 or higher and who have been in active treatment in the 14 days prior to transfer

- c. Treatment Plans: For those individuals who want to participate in MH treatment and qualify for services based on the OHP, a Treatment Plan would be developed based on needs identified in the MHU.
4. Offender Change Programming
 - a. WSP & MCC: MH staff will provide some group offender change programming as part of the MOC and RAPP programs respectively.
 - b. For those offenders not participating in MOC or RAPP, the MH staff will manage the Offender Change Programming for those offenders assigned this task through their CFP.
 - c. The MH staff will return all lessons to the offender upon completion of the program.
 - d. In the event an offender transfers, send completed assignments to receiving facility and communicate progress.
 5. Transition Services
 - a. All transition services required by DOC 630.500 (Behavioral Health Discharge Summary, Expedited Medicaid Eligibility Application, etc.) will be provided or coordinated by IMU MH Staff, for IMS offenders who are releasing from DOC custody.
 - b. For IMS offenders promoting from MAX Custody and transitioning to other housing within DOC, the assigned IMU MH staff will ensure continuity of care by coordinating with the MH staff at the receiving facility.
 6. Communication
 - a. Routine communication across disciplines, through a Multi-disciplinary team (MDT) to discuss IBMP's, level promotions/demotions, acuity concerns and other unit issues.



Classroom at Intensive Management Unit (2014), courtesy of Washington Department of Corrections.

Segregation is often explained as a means of ensuring the safety of certain subpopulations. In *Henderson v. Thomas*, the court held that Alabama's practice of segregating prisoners who are HIV-positive violated the Americans with Disabilities Act. Identifying the challenges facing LGBT prisoners, Sharon Dolovich endorses segregation (with reservations) as one possible way to respond to the hardships faced by LGBT prisoners.

Henderson v. Thomas
913 F.Supp.2d 1267 (M.D. Ala. 2012)

Myron H. Thompson, District Judge.

The seven plaintiffs . . . bring this lawsuit on behalf of themselves and a class of all current and future HIV-positive prisoners incarcerated in Alabama Department of Corrections (ADOC) facilities. They challenge the ADOC's policy of categorically segregating HIV-positive prisoners from the general prison population, arguing, among other things, that, despite the dramatic advances in the treatment of HIV and despite the plaintiffs' differing individual circumstances, the plaintiffs are being denied the opportunity to be even considered for various rehabilitative services and programs offered to other prisoners. . . .

The plaintiffs claim that the HIV-segregation policy discriminates against them on the basis of a disability (HIV status) in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C. § 794. . . .

Based on the evidence presented during a month-long non-jury trial and for the reasons that follow, this court holds that the ADOC has violated the ADA's Title II and the Rehabilitation Act's § 504. . . .

The first report of HIV in prisons was made in 1983. Soon after, a critical minority (but never a majority) of state-correctional systems began segregating HIV-positive prisoners from the general prison population. In the mid-1990s, as the fear surrounding HIV began to subside, most States that had enacted such policies reversed them. By 2006, only three States still segregated HIV-positive prisoners: South Carolina, Mississippi, and Alabama. In 2010, Mississippi ended its segregation policy as well. Today, preeminent public-health organizations, including the U.S. Centers for Disease Control and the National Commission on Correctional Healthcare, uniformly recommend against segregating prisoners with HIV. . . .

At trial, the parties offered competing characterizations of the department's policy as it operates today. The court finds that the policy itself is best described as, in general, a series of categorical, non-individualized determinations that the department makes with regard to HIV-positive prisoners. Simply put, in a number of aspects of institutional life, HIV results in automatic placement and automatic exclusion. Outcomes that depend on a complex web of factors for HIV-negative prisoners are determined based on a prisoner's HIV-positive diagnosis alone. Because the policy differs with respect to male and female prisoners, the respective practices are discussed separately below. . . .

For the approximately 250 men within the ADOC who are HIV-positive . . . all of the factors normally considered in the classification process [e.g., physical and mental health; behavioral and criminal history; and the prisoner's need for educational programs, trade school, and substance-abuse treatment] are overridden by an HIV-positive diagnosis. . . . If the [prisoner is confirmed HIV-positive], the prisoner is transferred to Limestone Correctional Facility. This occurs regardless of whether the prisoner has complex medical needs or very simple ones. HIV is the only disease or medical condition listed on the ADOC's medical-classification chart for which diagnosis alone, without any consideration of actual treatment needs, limits the prisoner's placement possibilities to a single facility. This placement is also made without regard to security-classification procedures. Limestone is equipped to house only general-population prisoners who are medium and minimum custody; the only close-custody prisoners there are those who have HIV.

The decision to house [HIV-positive] men exclusively in Limestone results in a number of inevitable consequences. . . . Program opportunities are . . . necessarily limited. . . . Further, . . . while general-population prisoners are by no means guaranteed a placement near their homes and families, most HIV-positive prisoners are completely barred from this possibility. For many of them, this makes family visits difficult or impossible.

The segregation policy continues within Limestone. There, HIV-positive men are separated into two HIV-only dormitories: Dorms B and C. Together, these dorms are known as the "Special Unit." HIV-positive prisoners who are mentally ill, because they are barred from going to Bullock or another facility equipped to treat serious mental health needs, are housed in the Residential Treatment Unit, a set of nine cells in Dorm C cordoned off by a large metal cage, which juts out into the dorm's common area. If an HIV-positive prisoner is placed in administrative or disciplinary isolation (for example, as punishment for his conduct), he is placed in the same isolation dormitory as the HIV-negative prisoners, Dorm E. Although that dormitory includes only individual isolation cells that are locked closed throughout the day, which completely prevents any physical contact among prisoners, the HIV-positive prisoners are placed together in a row, separated from cells occupied by HIV-negative prisoners by a floating metal gate. . . .

HIV-positive prisoners are also barred from certain aspects of the Substance Abuse Program (SAP). . . . [W]hile HIV-positive prisoners can participate in SAP classes, they are not permitted to live in the SAP dorm, and must return to the Special Unit for meals and when classes end each day. As a result, they are deprived of one of the fundamental qualities that makes SAP effective.

In addition to the housing-segregation policy, prisoners with HIV at Limestone are required to wear white armbands. The ADOC attests that all prisoners are required to wear armbands of various colors and that each color simply designates the dorm to which each prisoner belongs. . . .

Tutwiler is the only prison for women in the ADOC. Upon arrival there, each woman is given an ELISA test to determine whether she has HIV. If a woman's test comes back positive,

an officer removes the woman from the receiving area and escorts her to an isolation cell. The woman then must wait there for several weeks (at times for up to a month) for the results of the Western blot to confirm the diagnosis.

When diagnosis is confirmed, HIV-positive women are assigned to Dorm E, which is segregated from the general population. Like the men at Limestone, they are permitted to participate in the prison's various programs. However, also like the men at Limestone, they cannot reside in any specialized dorms, including Tutwiler's SAP dorm and Honor Dorm. HIV-positive women who are mentally ill, instead of being placed in the open-bay area of the mental-health unit, are automatically sent to the isolation cells reserved for the seriously mentally ill (the Intensive Psychiatric Stabilization Unit), regardless of their actual mental-health needs. . . .

To state a claim under either [Title II of the ADA or § 504 of the Rehabilitation Act], the plaintiffs must show: "(1) that [they are] qualified individual[s] with a disability; (2) that [they were] either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or [were] otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff[s'] disability." . . .

The court first addresses the ADOC's housing segregation policy at Limestone, which requires all HIV-positive prisoners to reside in the Special Unit. . . . It was clear to the court that both the plaintiffs and the ADOC had adopted the general principle that virally suppressed individuals are highly unlikely to transmit HIV sexually, whether the sexual act is between people of different sexes or of the same sex. . . . Based on this evidence, it is clear that at least some, if not a majority, of HIV-positive prisoners at Limestone present a very low risk of transmitting the virus. Prisoners who have achieved viral suppression pose an infinitesimal risk if they abstain from sharing needles, regardless of whether they have sexual intercourse with other prisoners. . . .

The ADOC's argument that integrating HIV-positive prisoners would increase the number of transmissions stems from the indisputable fact that integration would increase opportunities for high-risk behavior. However, the picture is more complex than the department suggests. HIV-positive and HIV-negative prisoners at Limestone already have ample opportunity to interact with one another and engage in high-risk activity in areas of the prison other than their housing units. . . . Meanwhile, the transmission rate for HIV within the ADOC is exceedingly low: at or approaching zero. In light of the substantial opportunities for interaction between HIV-positive and HIV-negative prisoners, the virtual nonexistence of transmissions within the ADOC casts serious doubt on the department's assumption that further integration would increase the transmission rate. It instead appears that so long as integration is handled responsibly, it is unlikely to meaningfully increase transmissions, if at all.

. . . [G]iven the life-changing advances in HIV treatment, ceasing the housing, categorically, of all HIV-positive prisoners exclusively in Limestone's Special Unit would not create "a direct threat to the health or safety of other individuals" within the meaning of the ADA. . . . A very low risk would be created if the ADOC integrated HIV-positive prisoners on an individual-by-individual basis, based, for example, on whether their viral levels are

suppressed and whether they have a demonstrated history of medication adherence and abstinence from high-risk behavior. That description could fit many prisoners currently incarcerated in the Special Unit; segregating them thus violates the ADA. . . .

What is critical here is that, despite this range of risk, the ADOC maintains a blanket policy of precluding all HIV-positive prisoners at Limestone from integrated housing, regardless of their individual circumstances. That policy denies plaintiffs the individualized determinations to which they are entitled under the ADA, *see Arline*, 480 U.S. at 287, and unjustifiably treats all HIV-positive prisoners identically, despite the fact that their circumstances are materially different, not identical. . . . For this reason, the ADOC is currently violating the rights of the HIV-positive prisoners within its custody by categorically segregating them because of their HIV status and excluding them from the integrated housing for which they may be qualified.

The court witnessed the impact of the segregation policy when it toured Limestone and the Special Unit with both legal teams during the trial. . . . [T]he Special Unit evoked the feeling of a place abandoned. The prisoners there displayed a striking uniformity of disposition. They peered, sullen, from their cells. The quiet, which the ADOC touted at trial as an asset of the unit, seemed instead to accent the dormitories' isolation from the lively general-population dorms, communicating these prisoners' exclusion. The imposing cage around the residential treatment unit, where mentally ill prisoners with HIV are kept, allows any observer to see the activity within. The effect of a severely mentally ill man isolated within the cage, which juts into the common area where the prisoners eat and watch television, would surely be disturbing to those both within it and without. It is evident that, while the ADOC's categorical segregation policy has been an unnecessary tool for preventing the transmission of HIV, it has been an effective one for humiliating and isolating prisoners living with the disease. . . .

The court emphasizes that, in affording HIV-positive prisoners the individualized determinations to which they are entitled, the ADA grants the ADOC discretion in choosing how best to do so. . . . This court is "sensitive to . . . the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of" prisoners. *Brown v. Plata*, — U.S. —, (2011). . . .

A final aspect of the ADOC's housing policy at Limestone warrants brief discussion: the practices in Dorm E. That dormitory houses both HIV-positive and HIV-negative prisoners who have been placed in administrative or disciplinary isolation. . . .

Unlike prisoners housed in other parts of Limestone, prisoners in Dorm E are restricted to their closed (and locked) cells (each of which holds only a single prisoner) for almost the entire day. They leave their cells only when handcuffed and escorted by ADOC staff. Because of this intensive monitoring, they have no physical contact with one another at any time, and consequently, transmission of HIV between an HIV-positive and HIV-negative prisoner in isolation is not remotely possible. Nevertheless, the HIV-positive and HIV-negative prisoners in Dorm E are segregated: HIV-positive prisoners are clustered together separately from the HIV-negative prisoners. Because the size of each group will differ depending on isolation needs at the time, the dorm features a "floating gate" that the ADOC uses to demarcate the border where the HIV-positive cluster ends and the cells housing HIV-negative prisoners begin.

Because ending segregation in Dorm E would present absolutely no risk of harm, it is clear that the ADOC's policy of separating HIV-positive prisoners and HIV-negative prisoners in the dormitory and using the physical infrastructure of the building to indicate which prisoners have HIV, is, and has always been, wholly unnecessary and promotes no legitimate purpose. As such, it serves only to discriminate for the sake of discrimination. That is precisely the sort of "irrational disability discrimination" that the ADA "seeks to [prohibit]." . . .

The ADOC's practices in Dorm E are most relevant in that they illuminate the intent underlying the department's treatment of HIV-positive prisoners. In order to accommodate assumed and actual anti-HIV prejudice among its staff and prisoners in its custody, and to some extent due to prejudice that stems from department decision-makers, the ADOC has sought to segregate HIV-positive prisoners from the general population in all possible contexts regardless of whether any legitimate purpose is served by doing so. . . .

In addition to Dorm E, certain other unnecessary features remain in place at Limestone. One standard operating procedure, which remains on the books (though purportedly unenforced), warns that, "Routine physical contact with Special Unit inmates should be kept at a minimum at all times." Joint Ex. 7, at 3. "Any staff member who enters the cell of a Special Unit inmate may wear . . . 1) plastic or latex gloves; 2) Face mask; 3) Goggles; 4) Protective Rainwear." *Id.* A barbed-wire fence surrounds the two Special Unit dorms. Originally, that fence separated HIV-positive prisoners from general-population prisoners in the common yard. The gate to the fence is kept open now, but the fence is no less visible; it remains a stark reminder of the HIV-positive prisoners' separation. . . .

. . . [T]hese . . . unnecessary features . . . impress upon both the prisoners and ADOC staff that HIV-positive prisoners are different and dangerous. Despite the ADOC's modifications to its policy in recent years, the symbolic power of the segregation policy has not been diluted. Like the fence with its unlocked gate, the barrier between the prisoners with HIV and the rest of the prison is more visible and more imposing than the narrow doorways that allow them access. . . .

The court now turns to the female plaintiffs' claims. The female plaintiffs challenge the ADOC's policy of requiring all HIV-positive women to be housed in Dorm E at Tutwiler. . . . While it is clear that some men at Limestone could be provided integrated housing without posing a meaningful risk, it is even more obvious that this is true for the women at Tutwiler. The vast majority of women (four out of five) within the ADOC who are taking antiretroviral medication have achieved viral suppression, which dramatically reduces the probability of transmission. In addition, the transmission risk among women is significantly lower than it is among men because women cannot transmit the virus through sexual activity. . . .

The court's impression of the atmosphere at Tutwiler is powerfully informed by the court's tour of [Dorm E] during the trial. . . . The court struggles to convey the depression in that room, so thick it felt possible to reach out and touch it. While the other dorms in Tutwiler were vibrant, Dorm E was nearly empty. Vacant bunk beds lined the room, stripped of sheets and mattresses. It resembled an isolation cell more than it did a dorm. . . .

. . . The ADOC's policy of requiring male HIV-positive prisoners to wear white armbands implicates [the ADA's] broad prohibition against discrimination. At trial, the ADOC insisted that the sole purpose of the armbands policy at Limestone is to allow correctional officers to identify easily whether a prisoner is in a dormitory other than the one to which he is assigned (which would implicate legitimate safety concerns). That justification is not credible. . . . The justification (dorm identification) is pretextual, for the white armbands do not identify which dorm (B or C) a prisoner is from but rather identifies the prisoner as HIV-positive. The policy, therefore, tellingly portrays the ADOC's willingness to discriminate against HIV-positive prisoners and then dress naked discrimination in the guise of neutral policy. Here, the emperor has no clothes. The purpose of the white armbands has been to identify the HIV-positive prisoners. . . .

The white armbands are also profoundly stigmatizing. Plaintiff Henderson said: "I feel like it's a tag. . . . Just like you put a tag on cattles. . . . It's branding me. Everywhere I go . . . it sticks out." . . . Requiring all HIV-positive prisoners to wear white armbands that disclose their HIV status does not serve a legitimate purpose. This policy constitutes unlawful, and, indeed, intentional, discrimination under the ADA. . . .

. . . [T]he court cannot overemphasize that it is not holding that all HIV-positive prisoners are entitled to be co-mingled with HIV-negative prisoners; indeed, the court is not even holding that any particular HIV-positive prisoner is entitled to such. Rather, the court is simply holding that how prisoners should be treated based on their HIV-positive status must depend upon an individual-by-individual assessment of these prisoners that honors each prisoner's rights under the ADA . . . The essential thrust of this court's opinion today is simply that the ADOC must look at each HIV-positive prisoner separately and individually based upon that prisoner's particular circumstances.

Strategic Segregation in the Modern Prison

Sharon Dolovich^{*}

In corrections circles, it is well recognized that people who are gay or transgender face heightened vulnerability to sexual victimization behind bars.

Although accurate statistics on prison rape are notoriously difficult to generate, recent research confirms this dynamic. A 2007 study conducted in the California prison system found that "67 percent of inmates who identified as LGBTQ reported having been sexually assaulted by another inmate during their incarceration, a rate that was 15 times higher than the inmate population overall." Recent Bureau of Justice Statistics findings suggest similarly disproportionate rates of assault for LGBTQ detainees in juvenile facilities, with "[y]outh with a sexual orientation other than heterosexual" reporting sexual victimization at a rate almost ten times higher (12.5%) than that reported by heterosexual youth (1.3%). . . .

^{*} *Excerpted from* 48 AM. CRIM. L. REV. 1 (2011). Reprinted with permission from author.
Liman Colloquium 2014 Isolation and Reintegration Punishment Circa 2014 Jan. 7, 2015

Gay men and trans women are not the only people vulnerable to sexual victimization in men's prisons and jails. But their assigned place in the prison sexual hierarchy makes them almost automatic targets for such abuse. For this reason, many carceral facilities around the country routinely house gay men and trans women separately from the general population (GP). Often, this segregation takes the form of protective custody, a classification that typically involves isolation in "a tiny cell for twenty-one to twenty-four hours a day[,]" the loss of access to any kind of programming (school, drug treatment, etc.), and even deprivation of basics like "phone calls, showers, group religious worship, and visitation" Such conditions, even if increasing a person's protection from sexual assault—a proposition some commentators challenge—force vulnerable prisoners into the cruel position of having to choose between personal safety and the satisfaction of other basic and urgent human needs, above all, those of community and fellow human contact.

There is, however, a notable exception to this national trend. In the Los Angeles County Jail—the biggest jail system in the country—officials have found a way to increase the personal security of gay men and trans women detainees without forcing them to choose between safety and community. For more than two decades, the L.A. County Sheriff's Department (the Department), which runs the County's jail system, has been systematically separating out the gay men and trans women admitted to the L.A. County Jail (the Jail) and housing them wholly apart from GP. As a consequence of this segregated unit—long known as "K11" but recently officially rechristened "K6G"—gay men and trans women detained in the Jail are relatively free from the sexual harassment and forced or coerced sexual conduct that can be the daily lot of sexual minorities in other men's carceral facilities.

. . . L.A. County has managed to create a surprisingly safe space for the high-risk populations K6G serves. That it has done so in a carceral system that is severely overcrowded and notoriously volatile makes the success of the program even more remarkable.

There is, however, no getting around it: with K6G, L.A. County is engaged in a process of state-sponsored, identity-based segregation. Although this program would most likely survive a constitutional challenge, it nonetheless puts government officials in the business of intruding into the most private and intimate details of detainees' lives in order to determine whether they meet the Department's definition of "homosexual." Worse still, it engages state officers in a process of openly labeling certain individuals as sexual minorities—with color-coded uniforms, no less.

These concerns are serious ones, and point to admittedly troubling aspects of the K6G program. They are, however, insufficient grounds to reject the enterprise. Given the current state of the American carceral system—overcrowded, understaffed, volatile and often violent, frequently controlled from the inside by prison gangs and other powerful prisoners—there is at present no prospect for risk-free reform. If K6G provides gay men and trans women in the L.A. County Jail with safer and more humane conditions of confinement, the question we should be asking is not whether the program ought to be allowed, but what it would take to maintain the protection it provides while minimizing the dangers posed whenever the state authorizes differential treatment on the basis of identity.

The more vexing question is whether the K6G program is one that other jurisdictions ought to seek to emulate. As I argue in what follows, given its success, this model should be available as a tool in the toolkits of officials seeking to reduce the incidence of victimization in their facilities. . . .

Yet one thing is clear: even where the K6G model seems, as in L.A. County, to meet the needs of a given institution, this approach can never be sufficient. Although K6G succeeds in keeping its residents relatively safe, its admission criteria are sorely underinclusive, excluding even people who, although neither gay nor trans, are nonetheless liable to victimization in GP. Plainly, all detainees known to face a risk of abuse in custody must be protected. The key policy question is whether there may be grounds for dividing K6G's target populations even from other vulnerable groups. The National Prison Rape Elimination Commission (the Commission), created by Congress through the Prison Rape Elimination Act of 2003 (PREA), made recommendations in its final report suggesting a negative answer to this question. Concerned about the "demoralizing and dangerous" effects of the L.A. County model, the Commission advanced an approach that did not distinguish among at-risk groups. This unified strategy has much to commend it, not least that it mitigates many of the troubling aspects of state-sponsored identity-based segregation. For this and other reasons, the Commission's approach will in most cases be preferable. Still, there may be reason to regret the widespread adoption of a unified model, which could come at the cost of some of the more humane and appealing aspects of life in K6G and result in a direct loss of some of its benefits.

Certainly, no single strategy will be without its dangers and drawbacks. Prisons are an ugly business, and the problems they pose—including prison rape—admit of no easy fix. Indeed, to await such a fix would be to consign some of the most vulnerable people behind bars to the worst forms of suffering and abuse. K6G merits attention not because it is a perfect program, but because with it, L.A. County has created a relatively safe space for people who would otherwise be at great risk of victimization. . . .

For myself, the alleviation of immediate suffering is the greater imperative—hence the instant undertaking, and my endorsement . . . of [K6G's] imperfect half-measures.

REASSESSING SEGREGATION

By 2013, a growing consensus had emerged that the experiences of people housed in long-term segregation needed to be changed. The question is thus not whether but how. Below are perspectives on the shape that reform can and should take. What resources do various institutional actors (courts, legislatures, prison administrators) have to revise radically what is understood as appropriate for different forms of segregation? What constraints do reform efforts face? Above, we provided excerpts from the statements by ASCA and the Liman Program for the 2014 Senate Judiciary Subcommittee Hearing, *Reassessing Solitary Confinement II: The Human*

Rights, Fiscal, and Public Safety Consequences. Below, we offer additional commentary from that hearing.

Press Release: Time to End the Use of Solitary Confinement for Juveniles, Pregnant Women and Those with Serious Mental Illness (Feb. 25, 2014)

Senator Richard Durbin

Assistant Majority Leader Dick Durbin (D-IL) called for an end to the use of solitary confinement for juveniles, pregnant women and those with serious and persistent mental illness during a hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Durbin, who chaired the hearing, urged further reform of the controversial detention practice so the United States can protect human rights, improve public safety, and be more fiscally responsible.

“Thirty-five percent of juveniles in custody report being held in solitary for some amount time. The mental health effects of even short periods of isolation – including depression and risk of suicide – are heightened in youth,” Durbin said at today’s hearing. “Today, I’m calling for all federal and state facilities to end the use of solitary confinement for juveniles, pregnant women, and individuals with serious and persistent mental illness, except in those exceptional circumstances where public safety requires it.”

Durbin’s call for the end of the use of solitary confinement for juveniles, pregnant women and those with serious and persistent mental illness comes the week after New York State declared it would end related practices for vulnerable prisoners.

Witnesses at today’s hearing included Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons; Craig DeRoche, President of the Justice Fellowship; Piper Kerman, author of “Orange is the New Black”; Marc Levin, Director of the Center for Effective Justice at the Texas Public Policy Foundation; Rick Raemisch, Executive Director of the Colorado Department of Corrections; and Damon Thibodeaux, who was held in solitary confinement for 15 years before his exoneration and release from prison. . . .

The United States has the highest per capita rate of incarceration in the world – with five percent of the world’s population, we have close to 25 percent of its prisoners. African Americans and Hispanic Americans are incarcerated at much higher rates than whites. And the United States holds more prisoners in solitary confinement than any other democratic nation.

In 2012, Durbin chaired the first hearing examining the human rights issues surrounding the use of solitary confinement. That hearing discussed the dramatic increase of the use of solitary that began in the 1980’s; the serious fiscal impact of solitary confinement; and the human impact of holding tens of thousands of men, women and children in small windowless cells for 23 hours a day.

Durbin’s first hearing also looked at how the overuse of solitary can present a serious threat to public safety, including an increase of violence inside and outside of prison. The reality is that the vast majority of prisoners held in isolation will be released someday. The damaging

impact of their time in solitary – or their release directly from solitary – can make them a danger to themselves and their neighbors.

Administrative Segregation: A Story without an End (Feb. 25, 2014)

*Rick Raemisch**

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee:

I am Rick Raemisch, Executive Director of the Colorado Department of Corrections. I was appointed to this position following the murder of the Department's former Executive Director on March 19th of last year. Tom Clements, as many of you know, was murdered answering the door of his home by a recent parolee who had been released directly into the community from Administrative Segregation. I am honored to appear before the Subcommittee, and I look forward to talking to you about Administrative Segregation and what we are doing in Colorado to prevent such tragedies from ever happening again.

My career in law enforcement began in 1976 when I became Deputy Sheriff in Dane County, Wisconsin. During the three decades that followed, I served the citizens of my home state as Deputy; Undercover Narcotics Detective; elected Sheriff; Assistant District Attorney; Assistant U.S. Attorney; Administrator of Probation and Parole, Wisconsin Department of Corrections; Deputy Secretary, Wisconsin Department of Corrections; and Secretary, Wisconsin Department of Corrections.

My experiences in law enforcement have led me to the conclusion that Administrative Segregation has been overused, misused, and abused for over 100 years. "The Steel Door Solution" of segregation, as I call it, either suspends the problem or multiplies it, but definitely does not solve it. If our goal is to decrease the number of victims inside prison, and outside prison, like Tom Clements, then we must rethink how we use Administrative Segregation, especially when it comes to the mentally ill. This is a goal I pursued in Wisconsin and now am pursuing in Colorado.

While head of the Wisconsin Department of Corrections (DOC), I was accountable for more than 22,000 inmates, 73,000 individuals on probation or parole, and approximately 1,000 juveniles. During my three and a half years leading the Department, we made tremendous strides in reducing the number of offenders in Administrative Segregation and removing those with mental illness so they could receive treatment.

I was in Wisconsin when I heard of Tom Clements' murder. After the initial shock, I became angry someone had the audacity to take the life of someone who was working hard to improve the quality of life for inmates while also protecting the public. I applied for the position,

* Rick Raemisch, *Statement for "Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences": Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights* (Feb. 25, 2014).

and was appointed Executive Director by Governor John Hickenlooper, who wanted me to continue Mr. Clements' vision. For me, it was an opportunity to bring to Colorado what I had started in Wisconsin. Moreover, it was an opportunity for me to channel my anger about Mr. Clements' death into developing and implementing a plan that focuses on using segregation only for those who really need it, making sure those offenders who are released from solitary do not cause more harm, and making sure segregation does not make people more violent.

My belief was, and still is, that it's impossible to hold an offender with an unstable serious mental illness accountable for violating the prison's rules, if the offender doesn't understand the rules he is supposed to be playing by. So expecting a mentally ill inmate who is housed in Administrative Segregation long-term and without treatment to follow the rules is pointless. It's my conviction that long-term segregation creates or exacerbates mental illness. I try to visit institutions at least once a week to talk with staff and inmates including some who are in Administrative Segregation. Often times, the mental illness was apparent. Sometimes inmates were so low-functioning they could not meaningfully function or communicate.

During my time in Wisconsin, I developed many of the philosophies and practices that we are successfully incorporating at the Colorado DOC. Some of this work had already begun under the direction of former Executive Director Tom Clements.

Since leading the CDOC, I've worked with my Executive Team to develop a workable action plan to reduce the use of Administrative Segregation. We are reducing the number of offenders in Administrative Segregation by assessing each case individually. We have made reductions among those with a serious mental illness, those who are released directly from Administrative Segregation into the community, and all other persons in Administrative Segregation.

Along with my Executive Team, I am focusing on allowing the use of Administrative Segregation only for those who truly are a danger to others or themselves. But just because an offender needs to be in Administrative Segregation for safety reasons, that doesn't mean they should sit in a windowless, tiny cell for 23 hours a day. There are other solutions. There are other options.

In Colorado, our goal is to get the number of offenders in Administrative Segregation as close to zero as possible, with the exception of that small number for whom there are no other alternatives. We have put in place an action plan that I believe will get us to that goal by the end of this year. This action plan consists of:

- focusing the use of Administrative Segregation on truly violent offenders who pose an immediate danger to others or themselves;
- not releasing an offender into the community directly from Administrative Segregation;
- removing levels of Restrictive Housing (housing will be driven by incentives);
- developing a Sanction Matrix for violent acts, which will result in placement in Administrative Segregation;
- ending indeterminate lengths of Administrative Segregation placement;

- reviewing the cases of offenders currently housed in Administrative Segregation for longer than 12 months;
- establishing a “Management Control Unit” where offenders have 4 hours a day out of their cells in small groups;
- establishing a “Transition Unit” with a cognitive course to prepare offenders for transition to General Population; and
- redefining the housing assignments with incentives for Death Row offenders.
- These offenders will no longer be classified as Administrative Segregation cases and will have opportunities to leave their cells 4 hours a day together.

While the goal is to decrease the number of offenders housed in Administrative Segregation, there will always be a need for a prison within a prison. Some offenders will need to be isolated to provide a secure environment for both staff and offenders, but they should not be locked away and forgotten.

Administrative Segregation cannot be a story without an end for offenders. While I continue to believe that offenders who are violent should remain in Administrative Segregation until they can demonstrate good behavior, there must be a defined plan. Offenders, if they are to meet expectations, must know what those expectations are; to succeed, they must know what success looks like. When individuals enter the prison system they know the length of their sentence. The same philosophy should apply to those entering an Administrative Segregation cell.

Since putting the first stage of the Department’s action plan into effect in December, we are seeing successes. In these few months, the number of serious mentally ill housed in Administrative Segregation has been reduced to one offender. These offenders removed from Administrative Segregation are receiving treatment in Residential Treatment Programs outside of the containment of Administrative Segregation.

As a result of recent changes, the Colorado Department of Corrections has seen a reduction in the Administrative Segregation population from 1,451 in January 2011 to 597 in January 2014. That is a reduction of nearly 60 percent. Because Colorado’s total adult offender incarcerated population is currently 17,574, this means the Colorado DOC Administrative Segregation population is currently just 3.4%, down from a peak of 1,505 or 6.8% in August of 2011. As a result of these reductions, we did not see an immediate increase in assaults. We believe as we track this further, our institutions will actually be safer.

Of course, there is no question that Administrative Segregation is more expensive. The cost of housing an offender in Administrative Segregation is \$45,311 a year, compared to the \$29,979 a year it costs to house an offender in general population. Therefore, each offender that is housed in the general population and not Administrative Segregation saves the state \$15,332 annually per offender.

I am data driven. And if what you care about is victims and the community, you must do what works. What I want is fewer victims. Each person we turn around who was in Administrative Segregation means fewer victims of crime and violence. Ninety-seven percent of

all offenders will eventually go back to their communities. Releasing offenders directly from Administrative Segregation into the community is a recipe for disaster. Our job is to effectively prepare each of them for successful re-entry, not to return them to the community worse than before their time in prison. In Colorado, in 2012, 140 people were released into the public from Administrative Segregation; last year, 70; so far in 2014, two.

This is a message I deliver directly to my wardens. I say to them: “Who wants to live directly next to someone who was just released from solitary confinement? Think about how dangerous that is.” I also encourage my staff to spend some time in segregation so that they understand the experience. I have done that myself, and the experience was eye-opening.

The current reliance on Administrative Segregation is not a Colorado problem. It’s not even only a national problem. The use of Administrative Segregation is an international problem and it will take many of us to solve it. I believe reform requires the cooperation of corrections leadership, corrections staff, legislators, stakeholders and the community. But I do see change. I see an evolution that will better serve our citizens and make our communities safer. . . .

Written Statement for Senate Judiciary Subcommittee Hearing on Solitary Confinement (Feb. 25, 2014)

*American Civil Liberties Union**

. . . [T]he ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation. The ACLU’s national **Stop Solitary** campaign works to end the pervasive use of solitary confinement and to divert children and persons with mental disabilities and mental illness out of solitary altogether. The monetary cost of solitary confinement, coupled with the human cost of increased psychological suffering and sometimes irreparable harm, far outweighs any purported benefits. More effective and humane and less costly alternatives exist. . . .

Over the last two decades, corrections systems have increasingly relied on solitary confinement, even building entire “supermax” prisons, where prisoners are held in extreme isolation, often for years or even decades. Although supermax prisons were rare in the United States before the 1990s, today forty-four states and the federal government have supermax units or facilities, housing at least 25,000 people nationwide. But this figure does not reflect the total number of prisoners held in solitary confinement in the United States on any given day. Using data from the Bureau of Justice Statistics, researchers estimated in 2011 that over 80,000 prisoners are held in “restricted housing,” including administrative segregation, disciplinary segregation and protective custody—all forms of housing involving substantial social isolation.

* *Excerpted from American Civil Liberties Union, Statement for “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences”: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights (Feb. 25, 2014). Reprinted with permission from ACLU.*

This massive increase in the use of solitary confinement has led many to question whether it is an effective or humane use of public resources. Legal and medical professionals criticize solitary confinement and supermax prisons as unconstitutional and inhumane, pointing to the well-known harms associated with placing people in isolation and the rejection of its use in American prisons decades earlier.

Other critics point to the expense of solitary confinement. Supermax prisons typically cost two or three times more to build and operate than even traditional maximum-security prisons. Yet there is little evidence to suggest that solitary confinement makes prisons safer. Indeed, research suggests that supermax prisons actually have a negative effect on public safety. Despite these concerns, states and the federal government continue to invest taxpayer dollars in constructing supermax prisons and enforcing solitary confinement conditions. As new fiscal realities force state and federal cuts to essential public services like health and education, it is time to ask whether we should continue to use solitary confinement despite its high fiscal and human costs. . . .

. . . Numerous states have taken steps to investigate, monitor, reduce, and reform their use of solitary. These reforms have resulted from agency initiative as well as legislative action. A growing number of state corrections officials have taken direct steps to regulate the use of solitary confinement, especially as it relates to mental health issues and potential litigation. Responding to litigation that was settled in 2012, the Massachusetts Department of Correction rewrote its mental health care policies to exclude prisoners with severe mental illness from long-term segregation and designed two maximum security mental health treatment units to divert the mentally ill out of segregated housing. . . .

U.S. Immigration and Customs Enforcement (ICE) has since September 2013 imposed monitoring requirements and substantive limits on the use of solitary confinement, providing an example for reform which BOP should strive to emulate. The directive, which applies to over 250 immigration detention facilities, requires that any placement in solitary confinement for longer than 14 days receive field office director approval; it also places substantive safeguards on “protective” segregation of vulnerable individuals.¹²⁰ Because ICE is comparable to BOP in many ways, including its extensive national network of facilities and private contract facilities, the ICE directive sets a strong example of rigorous monitoring and substantive requirements which BOP can and should follow. . . .

Recognizing the inherent problems of solitary confinement, the American Bar Association recently approved *Standards for Criminal Justice, Treatment of Prisoners* to address all aspects of solitary confinement (the Standards use the term “segregated housing”).¹²¹ The solutions presented in the Standards represent a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards.¹²² These solutions include the provision of adequate and meaningful process prior to placing or retaining a prisoner in segregation (ABA Treatment of Prisoners Standard 23-2.9 [hereinafter cited by number only]); limitations on the duration of disciplinary segregation and the least restrictive protective segregation possible (23-2.6, 23-5.5); allowing social activities such as in-cell programming, access to television, phone calls, and reading material, even for

those in isolation (23-3.7, 23-3.8); decreasing sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, and punitive diets (23-3.7, 23-3.8); allowing prisoners to gradually gain more privileges and be subject to fewer restrictions, even if they continue to require physical separation (23-2.9); refraining from placing prisoners with serious mental illness in segregation (23-2.8, 23-6.11); careful monitoring of prisoners in segregation for mental health deterioration and provision of appropriate services for those who experience such deterioration (23-6.11).

V. Recommendations

1. The ACLU urges Congress to enact legislation that would establish a commission to create national standards to address to overuse of solitary confinement in federal, state and local prisons, jails and other detention facilities. This commission would conduct a comprehensive study of the use of solitary confinement in corrections and detention facilities across the country, the impact of the practice on cost, facility safety, incidents of self-harm, and recidivism. In addition, the commission would develop national standards to address the overuse of solitary confinement. The Department of Justice would take the commission's recommendations and create regulations that ensure the development of smart, humane and evidence-based best practices that will limit the use of all forms of isolation and solitary confinement, and ban the practice for children under the age of 18, persons with mental illness, and other vulnerable individuals.

2. The ACLU urges Congress to pass legislation to require reforms to the use of solitary confinement in federal facilities operated by or contracted with BOP. This legislation should include a BOP ban on the solitary confinement of juveniles held in federal custody and prisoners with mental illness. BOP should be required to reduce its use of solitary confinement and other forms of isolation in federal prisons by implementing reforms based on the standards for long-term segregated housing established by the American Bar Association's *Standards for Criminal Justice, Treatment of Prisoners*, as well as the findings of the Government Accountability Office (GAO), and the ongoing study of BOP's use of segregation being conducted by outside contractors. Consistent with this type of legislation that would require reforms to the use of solitary confinement, BOP's newly acquired facility at Thomson, Illinois, should not be designated for use as an ADX (supermax) facility. Instead, it should be converted for use as a lower custody, general population prison.

3. The ACLU urges Congress to engage in increased federal oversight and monitoring of BOP's use of solitary confinement and provide more funding to the agency for alternatives to solitary confinement in order to further the goals of transparency and substantive reform. A necessary first step toward reform is the promotion of transparency in segregation practices. Greater accountability would empower citizens, taxpayers, lawmakers, and corrections officials to make informed choices about the use of segregation, a practice which has been shrouded in secrecy and therefore subject to abuse.

4. The ACLU urges Congress to enact legislation that would require federal, state, and local prisons, jails, detention centers, and juvenile facilities to report to the Bureau of Justice Statistics (BJS) who is held in solitary confinement and for what reason and the length of their

segregation. BJS should annually publish the statistical analysis and present a comprehensive review of the use of solitary confinement in the United States.

5. The ACLU urges Congress to provide federal funding through the Bureau of Justice Assistance (BJA) or other entity to support federal, state, and local efforts to reduce the use of solitary confinement, with a focus on programming and other alternatives.

6. The ACLU urges Congress to conduct oversight into why the Department of State has not yet granted the United Nations Special Rapporteur on Torture an official invitation to visit the United States to examine the use of solitary confinement in U.S. prisons and detention facilities. Also, the Congress should inquire about the State Department's role in the overdue process of updating the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs). New provisions of the SMRs should include a ban on solitary confinement of juveniles and individuals with serious mental illness.

The excerpts that follow detail efforts by the American Bar Association (ABA) and two state legislatures to modify practices of segregated confinement. In 2010, the ABA issued a revised set of standards for the treatment of prisoners; included were provisions regarding the use of segregation. In addition to the Colorado legislation on mentally ill inmates and segregation, another bill—now law—calls for study and reporting on the use of administrative segregation. The New York legislation proposes to limit the use of segregation, to replace long-term isolation with a new rehabilitative program, and to exclude a number of populations from long-term segregation altogether. How do the bills compare with legislative oversight of prisons more generally? What forms of oversight and/or legislative intervention are possible and what are the likely effects?

Proposed Changes to Segregation Practices and Conditions of Confinement

As noted in Chapter I, the ABA revised its Standards on the Treatment of Prisoners in 2010. Part Three of the Standards is devoted to “Conditions of Confinement.” Standard 23-3.6 addresses “Recreation and Out-of-Cell Time,” while Standard 23-3.7 discusses “Restrictions Relating to Programming and Privileges.” Standard 23-3.8 deals with “Segregated Housing.” Each of these standards speaks to how isolated inmates should be within the prison setting.

“Recreation and out-of-cell time (*Standard 23-3.6*):

- (a) [C]orrectional authorities should minimize the periods during the day in which prisoners are required to remain in their cells.
- (b) Correctional authorities should provide all prisoners daily opportunities for significant out-of-cell time and . . . recreation. . . .

- (c) Correctional authorities . . . should allow each prisoner not in segregated housing to eat in a congregate setting.’ . . .

Restrictions relating to programming and privileges (*Standard 23-3.7*):

- (a) In no case should restrictions relating to a prisoner’s programming . . . alter access to:
- (i) exposure to sufficient light; . . .
 - (ii) adequate ventilation;
 - (iii) living area temperature;
 - (iv) exposure to either unusual amounts of noise or auditory isolation;
 - (v) opportunity to sleep;
 - (vi) access to medication or medical devices or other health care . . .
- (b) Restrictions relating to a prisoner’s programming . . . should be permitted to reduce, but not to eliminate, a prisoner’s:
- (i) access to items of personal care and hygiene;
 - (ii) opportunities to take regular showers; . . .

Segregated housing (*Standard 23-3.8*):

- (a) Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.
- (b) Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner’s separation from the general population. . . .
- (c) All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. . . .”*

*See American Bar Association, STANDARDS ON TREATMENT OF PRISONERS, CONDITIONS OF CONFINEMENT, STANDARD 23 -3.6, 23-3.7& 23 – 3.8, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html (last visited on July 7, 2014).

A Bill Concerning Appropriate Use of Restrictive Confinement (2011)

Colorado Senate Bill 11-176

Concerning appropriate use of restrictive confinement, and making an appropriation in connection therewith. [Italics] indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 1 of article 1 of title 17, Colorado Revised Statutes, is amended *by the addition of a new section* to read:

17-1-113.9. Use of administrative segregation for state inmates – reporting. (1) On or before January 1, 2012, and each January 1 thereafter, the executive director shall provide a written report to the judiciary committees of the senate and house of representatives, or any successor committees, concerning the status of administrative segregation; reclassification efforts for offenders with mental illnesses or developmental disabilities, including duration of stay, reason for placement, and number and percentage discharged; and any internal reform efforts since July 1, 2011. (2) Any cost savings achieved as a result of the implementation of sections 17-22.5-302 (1.3) and 17-22.5-405 (8) shall be appropriated and redirected to the department to support behavior-modification programs, incentive programs, mental health services or programs, or similar efforts designed as viable alternatives to administrative segregation.

SECTION 2. 17-1-109 (2), Colorado Revised Statutes, is amended to read:

17-1-109. Duties and functions of the warden. (2) (a) The warden of each correctional facility should, wherever possible, take such measures as are reasonably necessary to restrict the confinement of any person ~~with known past or current affiliations or associations with any security-threat group~~ *who actively participates in disruptive security-threat group behavior*, as defined in paragraph (b) of this subsection (2), so as to prevent contact with other inmates at such facility. The warden should, wherever possible, also take such measures as are reasonably necessary to prevent recruitment of new security-threat group-members from among the general inmate population. *Association with an inmate gang or security-threat group alone shall not be sufficient to meet the requirements of this paragraph* (a). (b) For the purposes of this subsection (2), unless the context otherwise requires, "security-threat group" means a group of three or more individuals with a common interest, bond, or activity characterized by criminal or delinquent conduct engaged in either collectively or individually *acting in concert or individually in an activity that is-characterized by criminal conduct or conduct that violates the department's code of penal discipline for the purpose of disrupting prison operations, recruiting new members, damaging property, or inflicting or threatening to inflict harm to employees, contract workers, volunteers, or other state inmates.*

SECTION 3. 17-22.5-302, Colorado Revised Statutes, is amended *by the addition of a new subsection* to read:

17-22.5-302. Earned time. (1.3) *Notwithstanding the provisions of subsection (1) of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.*

SECTION 4. 17-22.5-405, Colorado Revised Statutes, is amended *by the addition of a new subsection* to read:

17-22.5-405. Earned time - earned release time. (8) *Notwithstanding any provision of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.*

SECTION 5. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated . . . for contract services related to the completion of an annual report concerning the status of administrative segregation, for the fiscal year beginning July 1, 2011, the sum of twenty-six thousand two hundred fifty dollars (\$26,250), or so much thereof as may be necessary, for the implementation of this act. (2) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the general fund not otherwise appropriated, to the department of corrections, for allocation to the institutions, mental health subprogram, mental health services, for behavior-modification programs, incentive programs, mental health services or programs, or similar efforts designed as viable alternatives to administrative segregation, for the fiscal year beginning July 1, 2011, the sum of forty-nine thousand nine hundred thirty-three dollars (\$49,933), or so much thereof as may be necessary, for the implementation of this act. (3) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the general fund not otherwise appropriated, to the department of corrections, for allocation to the support services, information systems subprogram, purchase of services from computer center, for computer system programming modifications and ongoing maintenance related to changes to earned time accrual eligibility for inmates in administrative segregation, for the fiscal year beginning July 1, 2011, the sum of one hundred twenty-two thousand six hundred thirteen dollars (\$122,613), or so much thereof as may be necessary, for the implementation of this act. (4) In addition to any other appropriation, there is hereby appropriated to the governor - lieutenant governor - state planning and budgeting, for allocation to the office of information technology, for the fiscal year beginning July 1, 2011, the sum of one hundred twenty-two thousand six hundred thirteen dollars (\$122,613) and 2.0 FTE, or so much thereof as may be necessary, for the provision of programming services to the department of corrections related to the implementation of this act. Said sum shall be from reappropriated funds received from the department of corrections out of the appropriation made in subsection (3) of this section.

SECTION 6. Appropriation - adjustments in 2011 long bill. For the implementation of this act, the general fund appropriation made in the annual general appropriation act for the fiscal year beginning July 1, 2011, to the department of corrections, management, external capacity subprogram, for payments to house state prisoners, is decreased by one hundred ninety-eight thousand seven hundred ninety-six dollars (\$198,796). . . .

Humane Alternatives to Solitary Confinement Act
New York Senate Bill 6466-2013

AN ACT to amend the correction law, in relation to restricting the use of segregated confinement

and creating alternative therapeutic and rehabilitative confinement options

Section 137 of the correction law is amended by adding a new subdivision to read as follows:

5-A. The use of segregated confinement, exclusion of certain special populations, and length of time any person can spend in segregated confinement shall be restricted in accordance with paragraphs (g), (h), (i), (j), (k), (l), (m), and (n) of subdivision six of this section or any other applicable law.

Subdivision 23 of section 2 of the correction law, as added by chapter 1 of the laws of 2008, is amended to read as follows [added sections in emphasis]:

“Segregated confinement” means the [disciplinary] confinement, *other than for emergency confinement...or for documented medical reasons or mental health emergencies*, of an inmate in a special housing unit or in a separate keeplock housing unit *or any form of keeplock, or cell confinement for more than seventeen hours a day other than in a facilitywide lockdown*. Special housing units and separate keeplock units are housing units that consist of cells grouped so as to provide separation from the general population, and may be used to house inmates confined pursuant to the disciplinary procedures described in regulations.

Section 2 of the correction law is amended by adding five new subdivisions 32, 33, 34, 35, and 36 to read as follows:

32. "Special populations" means any person: (a) twenty-one years of age or younger; (b) fifty-five years of age or older; (c) with a disability as defined in subdivision twenty-one Of section two hundred ninety-two of the executive law, including but not limited to, for purposes of mental impairment, persons with a serious mental illness as defined In paragraph (e) of subdivision six of section one hundred thirty-seven of this chapter; (d) who is pregnant; or (e) who is or is perceived to be lesbian, gay, bisexual, transgender, or intersex.

33. "Emergency confinement" means confinement in any cell for no more than twenty-four consecutive hours and no more than forty-eight total hours in any fifteen day period, with at least one hour of out-of-cell recreation for every twenty-four hours.

34. "Short-term segregated confinement" means segregated confinement of no more than three consecutive days and six days total within any thirty-day period.

35. "Extended segregated confinement" means segregated confinement of no more than fifteen consecutive days and twenty days total within any sixty-day period.

36. "Residential rehabilitation unit" means secure and separate units used for therapy, treatment, and rehabilitative programming of people who would be placed in segregated confinement for more than fifteen days. Such units are therapeutic and trauma-informed, and aim to address individual treatment and rehabilitation needs and underlying causes of problematic behaviors.

Subdivision 6 of section 137 of the correction law is amended by adding eight new paragraphs

(g), (h), (i), (j), (k), (l), (m), and (n) to read as follows:

(G) Persons in a special population as defined in subdivision thirty-two of section two of this chapter shall not be placed in segregated confinement for any length of time. Any such persons the department would otherwise place in segregated confinement shall remain in general population or be diverted to a residential rehabilitation unit. If a person in a special population is placed in emergency confinement for more than sixteen hours, he or she shall be allowed out-of-cell at least four hours.

(H) No person may be in segregated confinement for longer than necessary and never more than fifteen consecutive days nor twenty total days within any sixty-day period. At these limits, persons must be released from segregated confinement or diverted to a separate secure residential rehabilitation unit.

(I)

(i) All segregated confinement and residential rehabilitation units shall create the least restrictive environment necessary for the safety of residents, staff, and the security of the facility.

(ii) Persons in segregated confinement shall be allowed out-of-cell at least four hours per day, including at least one hour for recreation. Persons in residential rehabilitation units shall be allowed at least six hours per day out-of-cell for programming, services, treatment, and/or meals, and an additional minimum of one hour for recreation. Recreation in all units shall take place in a congregate setting, unless exceptional circumstances mean doing so would create a significant and unreasonable risk to the safety and security of other incarcerated persons, staff, or the facility.

(iii) Persons in segregated confinement and residential rehabilitation units shall: . . . (c) if in a residential rehabilitation unit be able to retain all their property with them; (d) have comparable access to all services and materials as in general population; and (e) be able to retain program materials, complete program assignments, and continue upon return all uncompleted programs they were in prior to placement in segregated.

(iv) Within ten days of admission to a residential rehabilitation unit, an assessment committee comprised of program, rehabilitation, mental health, and security staff shall administer an assessment and develop in collaboration with the resident an individual rehabilitation plan, based upon the person's medical, mental health, and programming needs, that identifies specific goals and programs, treatment, and services to be offered, with projected time frames for completion and release from the residential rehabilitation unit.

(v) Residents in residential rehabilitation units shall have access to programs and jobs comparable to all core out-of-cell programs in general population. Such residents shall also have access to additional out-of-cell, trauma-informed therapeutic programming aimed at promoting personal development, addressing underlying causes of problematic behavior resulting in placement in a residential rehabilitation unit, and helping prepare

for discharge from the unit and to the community.

(vi) If the department establishes that a person committed an act defined in subparagraph (iii) of paragraph (J) of this subdivision while in segregated confinement or a residential rehabilitation unit and poses a significant and unreasonable risk to the safety and security of other residents or staff, the department may restrict that person's participation in programming and out-of-cell time as necessary for the safety of other residents and staff. If restrictions are imposed in segregated confinement, the department must still provide at least two hours out-of-cell time. If restrictions are imposed in a residential rehabilitation unit, the department shall develop a new rehabilitation plan, provide at least three hours out-of-cell time, and on each day programming restrictions are imposed provide at least two hours of out-of-cell one-on-one therapy with the resident and one hour of out-of-cell recreation. The department shall remove all restrictions within fifteen days. . .

(vii) Restraints shall not be used when residents leave a cell or housing area for on-unit operations, unless a resident was found at a hearing to have committed an act of violence on the residential rehabilitation unit within the previous seven days or is currently acting in an unacceptably violent manner, and not using restraints would create a significant and unreasonable risk to the safety and security of other residents or staff.

(viii) There shall be a presumption against the imposition of misbehavior reports, pursuit of disciplinary charges, or imposition of additional time in segregated confinement for individuals in segregated confinement or residential rehabilitation units. . . . No resident shall receive segregated confinement time while in segregated confinement or a residential rehabilitation unit except where it is determined pursuant to a disciplinary hearing that he or she committed one or more act listed in subparagraph (iii) of paragraph (j) of this subdivision while on the unit, and that he or she poses a significant and unreasonable risk to the safety of residents or staff, or the security of the facility.

(J)

(i) The department may place a person in emergency confinement without a hearing if necessary for immediately defusing a substantial and imminent threat to safety or security of incarcerated persons or staff. . . .

(iii) The department may place a person in extended segregated confinement or a residential rehabilitation unit only if, pursuant to an evidentiary hearing, it determines the person committed, while under department custody, or prior to custody if the commissioner or his or her designee determines in writing based on specific objective criteria the acts were so heinous or destructive that general population housing creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, one of the following acts:

- (a) causing or attempting to cause serious physical injury or death to another person;
- (b) compelling or attempting to compel another person, by force or threat of force, to engage in a sexual act;
- (c) extorting another, by force or threat of force, for property or money;

- (d) coercing another, by force or threat of force, to violate any rule;
- (e) leading, organizing, or inciting a serious disturbance that results in the taking of a hostage, major property damage, or physical harm to another person;
- (f) procuring deadly weapons or other dangerous contraband that poses a serious threat to the security of the institution; or
- (g) escaping, attempting to escape or facilitating an escape from a facility, or while under supervision outside of such a facility, resulting in physical harm or threatened physical harm to others, or in major destruction to the physical plant.

(iv) No person may be held in segregated confinement for protective custody. . . .

(K)

(i) All hearings to determine if a person may be placed in short term or extended segregated confinement shall occur prior to placement in segregated confinement unless a security supervisor, with written approval of a facility superintendent or designee, reasonably believes the person fits the criteria for extended segregated confinement. If a hearing does not take place prior to placement, it shall occur as soon as reasonably practicable and at most within five days of transfer unless the charged person seeks more time. . . . Persons at all hearings shall be permitted to be represented by any pro bono or retained attorney, or law student; or any paralegal or incarcerated person unless the department reasonably disapproves of such paralegal or incarcerated person based upon objective written criteria developed by the department concerning qualifications to be an assistant at a hearing.

(ii) On notification a person is to be placed in segregated confinement and prior to such placement, he or she shall be assessed by relevant licensed medical, social, and/or mental health professionals to determine whether he or she belongs to any special population as defined in subdivision thirty-two of section two of this chapter. If a person disputes a determination that he or she is not in a special population, he or she shall be provided a hearing within seventy-two hours of placement in segregated confinement to challenge such determination.

(L) . . .

(i) Any sanction imposed on an incarcerated person requiring segregated confinement shall run while the person is in a residential rehabilitation unit and the person shall be discharged from the unit before or at the time that sanction expires

(ii) Within thirty days of admission to a residential rehabilitation unit and every sixty days thereafter, the assessment committee shall review each resident's progress and discharge a resident unless it determines in writing through credible and reliable evidence that there is currently a substantial likelihood that the resident will commit an act listed in subparagraph (iii) of paragraph (j) of this subdivision.

(iii) Within one hundred days after admission to a residential rehabilitation unit and every one hundred twenty days thereafter, a rehabilitation review committee, comprised of correctional facility executive level program, rehabilitation, and security staff shall

discharge a resident from a residential rehabilitation unit unless it determines in writing, after considering the resident's oral statement and any written submissions by the resident or others, that:

- (a) there is currently a substantial likelihood that the resident will commit an act listed in subparagraph (iii) of paragraph (j) of this subdivision, significant therapeutic reasons exist for keeping the resident in the unit to complete specific program or treatment goals, and remaining in the unit is in the best interest of the resident; or
- (b) the resident has committed an act listed in subparagraph (iii) of paragraph (j) of this subdivision during the one hundred twenty days prior to the review.

(iv) If a resident has spent one year in a residential rehabilitation unit or is within sixty days of a fixed or tentatively approved date for release from a correctional facility, he shall be discharged from the unit unless he or she committed an act listed in subparagraph (iii) of paragraph (j) of this subdivision within the prior one hundred eighty days or he or she caused the death of another person while under department custody or escaped or attempted to escape from department or other police custody and the rehabilitation review committee determines he or she poses a significant and unreasonable risk to the safety or security of incarcerated persons or staff. . .[H]owever, under no circumstances shall any such person be held in the residential rehabilitation unit for more than three years unless the rehabilitation review committee determines he or she committed an act listed in subparagraph (iii) of paragraph (j) of this subdivision within one hundred eighty days prior to the expiration of the three year period and poses a significant and unreasonable risk to the safety or security of incarcerated persons or staff.

(v) After each assessment committee and rehabilitation review committee decision, if a resident is not discharged from the residential rehabilitation unit, the respective committee shall specify in writing (a) the reasons for the determination and (b) the program, treatment, service, and/or corrective action requirements for discharge. . . .

(M) All staff, including supervisory staff, working in a segregated confinement or residential rehabilitation unit shall undergo a minimum of forty hours of training prior to working on the unit and twenty-four hours annually thereafter, on substantive content developed in consultation with relevant experts, including trauma, psychiatric and restorative justice experts, on topics including, but not limited to, the purpose and goals of the non-punitive therapeutic environment and dispute resolution methods. Prior to presiding over any hearings, all hearing officers shall undergo a minimum of forty hours of training, and eight hours annually thereafter, on relevant topics, including but not limited to, the physical and psychological effects of segregated confinement, procedural and due process rights of the accused, and restorative justice remedies.

(N) The department shall make publicly available monthly reports of the number of people as of the first day of each month, and semiannual and annual cumulative reports of the total number of people, who are (i) in segregated confinement; and (ii) in residential rehabilitation units; along with a breakdown of the number of people (iii) in segregated confinement and (iv) in residential rehabilitation units by (a) age; (b) race; (c) gender; (d) mental health level; (e) health status; (f) drug addiction status; (g) pregnancy status; (h) lesbian, gay, bisexual, transgender, or intersex

status; and (i) total continuous length of stay, and total length of stay in the past sixty days, in segregated confinement or a residential rehabilitation unit.

This section concludes with three excerpts that raise questions about the drivers of reform and the extent to which architecture and culture are barriers to reform. Keramet Reiter argues that the current infrastructure of isolation was crafted in part in response to courts' Eighth Amendment jurisprudence and thus raises questions about how law intersects with prison architecture and budgets. A recent article from the *Denver Post* describes the psychological consequences of working as a correctional official in a segregation unit. Protests about the overuse of isolation comes from correctional officers in Texas, objecting to the automatic placement of death-row inmates in isolation.

The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2000

Keramet Ann Reiter^{*}

When courts have considered individual challenges to supermaxes, or, in a very few instances, certified class action challenges to the institutions, their criticisms and reforms of the institutions have been extremely limited. Indeed, the jurisprudence of supermaxes reflects the (much more frequently explored) jurisprudence of the death penalty, developed in federal courts since the 1970s. Federal courts evaluating challenges to both long-term solitary confinement and death sentences have focused mainly on two kinds of claims: (1) the application of scientific evaluations (of mental health, competency, DNA evidence, etc.) to highly individualized cases and (2) the procedural rights that should accompany either a sentence to death or an assignment to solitary confinement. This chapter argues that the resistance of supermaxes to systemic constitutional challenges is partially attributable to the role the courts played in the preceding decades in shaping the ultimate design of the modern supermax. . . .

Between the late 1970s and early 1980s, prisons across the United States returned to the practice of punishing through imposition of long-term solitary confinement. Starting in 1972 and 1973, portions of prisons in California, Illinois, and Massachusetts, to name just a few examples, were "locked down" following riots; prisoners were no longer allowed to leave their cells for meals, work, or other programming. The lockdowns lasted first for months, and then years at a time Within a decade, in the early 1980s, the federal Bureau of Prisons, and a number of state departments of corrections, began building new facilities to maintain these prisoners in even more restrictive conditions of indefinitely long-term solitary confinement. This was the beginning of the supermax phenomenon. . . .

[E]ight state-based case histories of litigation addressing isolation, segregation, or solitary confinement conditions in the 1970s suggest that federal court interventions in state prisons in

^{*} *Excerpted from* 57 *STUDIES IN LAW, POLITICS, AND SOCIETY* 71-124 (Austin Sarat, ed., 2012). Reprinted with permission from Emerald Group Publishing and author.

the 1960s and 1970s influenced the design of the prisons that were built in the 1980s and 1990s, especially the design of supermax institutions, which would institutionalize the practice of maintaining prisoners in long-term solitary confinement. . . .

A successive hierarchy of federal courts in *Hutto* [v. *Finney*] not only found conditions in Arkansas prisons unconstitutional, but these courts ordered specific changes to prison conditions. For instance, Judge Henley ordered: legislative allocations of funds to the Arkansas prison system, the elimination of a system in which some prisoners acted as guards over other prisoners, improvements in basic living conditions, and limitations on the durations of confinement in isolation cells (*Holt v. Sarver*, 1970). A few years later, Henley enjoined prison officials from taking specific actions in retaliation against prisoners filing lawsuits, and threatened to close down certain prisons entirely if prison officials did not comply with his orders (*Holt v. Hutto*, 1973). Henley made multiple, in-person visits himself to the state's prisons. Over time, Henley's orders became increasingly detailed, setting acceptable overcrowding levels; specifying healthcare provisions, grievance procedures, and visiting regulations; and requiring both affirmative action hiring and prisoner desegregation plans (*Finney v. Hutto*, 1976).

Finally, in 1978, the U.S. Supreme Court agreed to hear an appeal, brought by Arkansas corrections officials, of these sweeping district court orders. . . . In a detailed, 40-page opinion, to which only Justice Rehnquist dissented in its entirety, the Supreme Court upheld the Arkansas district court's remedial order. Although the Court did not explicitly consider the lower courts' findings that conditions in the Arkansas prisons violated the Eighth Amendment prohibition against cruel and unusual punishment, the affirmations of the lower courts' remedial orders implicitly affirmed the underlying finding of unconstitutionality. And so, in 1978, the highest court in the United States placed its stamp of approval on the general practice, increasingly common across the United States, of prisoners bringing sweeping, class action lawsuits in federal court to challenge a variety of conditions in state prisons.

While *Hutto* is notable for the conditions the Court found to be unconstitutional and to justify intrusive remedial measures from the district court, the case is also notable for what the Court did not find. Specifically, the *Hutto* Court did not find any single aspect of the isolation conditions in Arkansas to be unconstitutional alone. The Court noted the conflation of factors, including terrible food in the form of "grue" and indefinite confinement, but did not find that any one factor alone created an unconstitutional condition. In other words, indefinite isolation was acceptable, within strict limits, as defined by federal courts. . . .

Three years after *Hutto*, in 1981, the Supreme Court heard its second major case regarding the application of the Eighth Amendment to prison conditions: *Rhodes v. Chapman*. . . . In *Rhodes*, however, the Supreme Court did not find the same interdependence of multiple deprivation conditions that had existed in Arkansas, as raised in the *Hutto* case, and so refused to uphold the district court's order that the Southern Ohio Correctional Facility stop double-celling its prisoners.

While the Court found no constitutional violation in the Ohio double-celling practice, the majority was quite concerned to delineate the specific facts, down to the square footage of cells, and the exact number of hours per day prisoners spent in these cells, that did not rise to the level

of a constitutional violation. Similarly, the Court was concerned to delineate a different, specific set of facts – regarding food and health – that would rise to the level of a constitutional violation. This level of specificity is indicative of the degree to which courts defined the precise conditions under which extreme punishments, like long-term isolation, could take place. The close and focused eye the Court turned to examining Ohio’s practices indicated that correctional administrators were not free to use just any punitive practice. . . . Although the Court did not find the same egregious violations in *Rhodes* that it had found in *Hutto*, nor allow the same sweeping remedial orders, the case still contributed to the canon of Eighth Amendment law describing minimum standards for prisons, and especially standards of confinement for the longest-term prisoners, in the most restrictive conditions. For instance, those 350 double-celled prisoners in Ohio, who were permitted 6 hours or less per week of out-of-cell time, at least had adequate ventilation, adequate nutrition, and limited exposure to violence. And this was critical to the *Rhodes* Court’s finding of constitutionality.

The vast majority of Eighth Amendment standards, however, were set not by the Supreme Court, but in lower federal courts, in cases in which district courts found violations so egregious that the officials in charge of the offending prisons either did not appeal the lower court’s remedial orders, or did appeal and were summarily dismissed by the circuit courts. . . . [A]s in both *Hutto* and *Rhodes*, no court ever held that these conditions were absolutely unconstitutional in all circumstances. Instead, the courts placed a number of restraints on the uses of punitive isolation. This combination of permitting isolation, but specifying the exact conditions under which it would be permissible, contributed to the development of the modern supermax. Of course, the exact relationship between courts, social policy, and institutions like prisons is often hard to trace definitively. . . .

Strikingly, of the [eight] states [included in this study and where courts found] unconstitutional prison conditions in the 1970s and 1980s, every one subsequently either transformed an existing section of a prison into a supermax unit, or built a brand new supermax. In these institutions, numerous design features resolve problems the courts raised with health, safety, and routines in earlier high-security prisons. For instance, these units all contain prisoners for extended periods of time in isolation; solitary confinement minimizes crowding and the often-associated problems with violence. Cells are grouped into pods of 8-to-10 with one or two showers and a single, attached outdoor exercise yard, sometimes called a dog run, because it is the size of a cell, or a few cells combined; the pod groups are carefully structured to allow each prisoner in the pod adequate weekly access to the solitary outdoor exercise yard and the showers. As the architect who designed the first supermax in Arizona said, the pod-design “allowed us to put an inmate in his cell, to take him to his cell, and [allowed] a time to go [to] exercise, and get those guys through a daily routine never requiring two inmates in the room at the same time. We cut the staff ration to 1:4, instead of 1:1.”

Similarly, the use of [twenty-four hour] fluorescent lighting, smooth, concrete walls, and modern, automated temperature control systems minimize problems with inadequate lighting, hygiene, and ventilation. In Arizona and California, even though the lights in the supermax cells remain on [twenty-four hours] per day, prisoners can vary the brightness by tapping a switch in their cell. As the Arizona Architect described it:

They give the inmates control of the lights. I think that unit up there [in California], and our units [in Arizona] have what they call a touch-bolt. It's another reaction to [the idea that] 'inmates tear everything up.' It's a carriage-head-bolt with a flat, round head, and that bolt comes through the light fixtures, and when you touch it, the static electricity in your body sends a charge into that bolt, and on the other end of it is a sensor so there's no moving parts You've seen the lamps, where you walk up to it and touch it? That's the same technology. . . .

In a sense, supermax prisons represent the opposite of the many abuses courts documented in the 1970s and 1980s prison reform cases. The supermax prison keeps people in absolute isolation; no overcrowding. The supermax prison is brand new – made of clean steel and smooth concrete, with technologically advanced central control rooms, from which officers can open and close cell doors at the push of a button without even the necessity of human sound, let alone contact; no dilapidation, no filth. Heavy doors with perfect seals muffle the sounds; no intolerable din. Supermax prisons keep individual prisoners contained, each in his own concrete box, for 23–24 hours every day; no violence. . . .

[N]o lawyer has successfully convinced a federal judge that supermaxes inherently involve Eighth Amendment violations. Given the specificity with which courts in the 1970s, 1980s, and 1990s, as discussed in the previous section, determined what conditions of isolation and solitary confinement would and would not comport with the requirements of the Eighth Amendment, their recent hesitation to find any violation of the prohibition against cruel and unusual punishment inherent in the conditions of modern supermaxes, built at least in part to compensate for the constitutional violations found in earlier decades, is not surprising. . . .

The *Wilkinson* case represents two notable trends in late twentieth century review of prisoner cases. First, the federal appellate courts have been much more reluctant to tell correctional administrators how to run their prison facilities than district courts have been. Of course, appellate decisions are binding on multiple courts and institutions, whereas the kinds of settlement agreements and consent decrees district courts have the flexibility to negotiate are, at least in terms of binding precedent, off the record, and therefore binding only on one institution or state at a time. Indeed, the federal district court in Ohio presided over a settlement of the OSP prisoner's Eighth Amendment challenges, complete with a rigorous consent decree; only the due process procedures in place at the prison were ultimately held in a published decision to be in violation of the Constitution.

In other words, although the plaintiff's lawyers in *Wilkinson* negotiated critical improvements in conditions at OSP, those improvements are not codified in a publicly searchable legal opinion, and have not joined the ranks of valuable legal precedent that might help to shape institutional standards in other districts and states. . . .

Although the courts have come full circle regarding the constitutionality of isolation and solitary confinement in the last 200 hundred years, the courts played a critical and often overlooked role in the interim, especially between the 1960s and 1980s. Specifically, courts did hear a significant number of cases regarding isolation conditions and solitary confinement in these years; courts scrutinized isolation conditions quite carefully, down to questions of precise

amounts of square footage, light, and out-of-cell hours required to render conditions constitutional; and courts ordered very specific remedies to the violations they found. In response, states across the United States built a specific kind of structure, neatly streamlined, at least in part, to respond to the conditions courts mandated: the supermax. The role of the courts in this correctional phenomenon, shaping a very specific outcome, demonstrates the ways in which courts not only set policies, but sometimes even create specific structures. Once created, these structures are all the harder to challenge, even if they replicate the torturous conditions courts were seeking to avoid, because they are literally physical embodiments of judicial precedent.

The Effect of Prison Isolation Policies on Officers' Lives

A March 2014 article in *The Denver Post* highlighted the toll on officers from working in segregation units. Those problems are especially acute at Florence ADX, the federal supermax prison in rural Fremont County, Colorado. As Caterina Spinaris, the director of the non-profit Desert Waters Correctional Outreach Center, noted: “prison work bleeds over into your private life. You go into restaurants, you sit with your back to the wall. You want to see all the entrances and exits, and you notice if somebody is carrying something bulky. You can't turn these skills off.”

See Bruce Finley, *Prison Horrors Haunt Guards' Private Lives*, THE DENVER POST, (March 20, 2014), available at http://www.denverpost.com/ci_5510659 (last visited July 1, 2014).

Ms. Spinaris received emails and calls from 168 correctional officers asking for help, many on the brink of suicide. This is often a consequence of their efforts to “harden themselves to survive inside prison . . . ; [they] . . . find they can't snap out of it at the end of the day. Some seethe to themselves. Others commit suicide. Depression, alcoholism, domestic violence and heart attacks are common. And entire communities suffer.” The staff recognizes the negative impacts of their work. Hondray Simmons, 36, an Iraq war veteran now working in the Colorado State Penitentiary, summarized his experience in a simple statement: “You're not normal anymore. . . .”

Correctional officers face life expectancies as low as 59 years, and a 39% higher suicide rate than other occupations. According to official records, at least nine federal corrections officers at Florence ADX have committed suicide since 1994. Veteran correctional officer Gary Kapolites told *The Denver Post* that over 10 years,

he became uncomfortable with what seemed like sensory deprivation to break prisoners' will [and] quit after the last time he was called to lead an “extraction” —removing a recalcitrant inmate from a cell.” Additionally, there were also mental health, social, and family consequences: “he found himself hard-pressed to get out of bed, while his schoolteacher wife raced to her work with passion. . . . Correctional officers, he said, “are doing time too. . . . A lot of them are not able

to detach. . . . Alcohol problems. Domestic violence. They have a propensity. The very things they are supposed to be against, they end up doing. You can't just wash it off like in a shower.”

Letter Regarding Revisions to Texas Death Row Plan (2014)

Lance Lowry, President, AFSCME Local 3807

January 20, 2014

Greetings,

As the president of the largest correctional professional organization in Texas I am calling on the Texas Department of Criminal Justice to change the death row plan to positively impact both the correctional staff and offenders on Texas death row. After the November 1998 escape of Offender Martin Gurule, the Texas Department of Criminal Justice engaged in a knee jerk reaction regarding the administration of Texas death row inmates.

Staff incompetency and lack of proper security equipment were the biggest factors resulting in Gurule's escape from the O.B. Ellis death row. As a result of the escape the agency ignored the root of the problem and addressed the lack of security equipment by increasing the physical perimeter security, in addition to the number of firearm rounds issued to perimeter pickets. Lack of staff competency was never addressed in a positive manner and has resulted in a less experienced force securing Texas death row.

The changes in the death row plan following the Gurule escape have resulted in the solitary housing of “D1” offenders who were capable and had additional privileges which could be used as management tools for negative behavior. As a result of the changes to the Texas death row plan, inmates have very few privileges to lose and staff become an easy targets.

The Texas death row plan needs to address tools that can manage positive behavior. D1 offenders who are work capable should be utilized. Housing death row D1 offenders in a solitary cell is a waste of valuable security personnel and money. D1 offenders should be housed 2 offenders to a cell and treated similar to G3 offenders in terms of privileges such as work assignment and allowed TV privileges by streaming over the air television to a computer tablet using a closed WiFi network. Use of technologies such as computer tablets and streaming TV should be offered to offenders who exhibit positive behavior. Lack of visual or audio stimulation result in increased psychological incidents and results in costly crisis management.

Staff incompetency should be addressed by offering death row officers a salary differential and substantially increase their training for staff committed to working death row. A greater pay differential will insure we have the best officers watching Texas most dangerous population. Other correctional agencies have successfully used differentials to address staffing issues. Let's make Texas a model for successful death row criminal justice reforms.

LEGITIMACY AND AUTHORITY IN PRISON

How can prisons maintain order and safety? Research on procedural justice focuses on how individuals subject to rules perceive their legitimacy. Research on various institutions—such as policing and courts—as well as from the United Kingdom demonstrates that a key aspect of legitimacy is the perceived fairness of the ways in which the authority was exercised. The questions are how to apply these insights to segregation and to prison systems more generally, and whether such approaches permit not only decreased reliance on segregation but also prisons without long-term isolation.

Legitimacy and Procedural Justice in Prisons

*Jonathan Jackson, Tom R. Tyler, Ben Bradford, Dominic Taylor, and Mike Shiner**

All social situations are ‘ordered’ in some way, comprising a constantly changing set of relationships that establish the structure within which human action occurs. In many circumstances this order is hidden, even ephemeral; we are barely aware of its presence. But this is not the case in prisons. Social order in prison is in many ways highly visible: it is established and managed by the omnipresent rules that govern prison life. In large part these rules are oriented toward reproducing the extant regime. They lay down apparently strict criteria for what constitutes order and what is to be done if it is breached.

But what is meant by order in prison? Most social scientists would agree that order is not merely the absence of disorder (or violence) brought about by adherence to a set of implicit or explicit rules or norms. Rather, social order has an effective or ‘positive’ dimension. It implies a degree of regularity and a sense of trust among those involved that their social environment will reproduce itself in comprehensible ways. Liebling defines order in prison as “the degree to which the prison environment is structured, stable, predictable and acceptable”, adding the last criterion in recognition of the fact that concentration camps and other highly oppressive settings might be structured, stable and predictable but, by their very inhumanity, are not *orderly* in any normatively viable sense of the term.

Social order in this sense—of structure, stability, acceptability—is vital for the smooth running of prisons as much as it is vital for any other social institution. Indeed many have argued that such order is paradoxically *more* necessary in prison than elsewhere. Despite the coercive methods of control available to prison authorities, it remains the case that order in prison depends on the acquiescence and cooperation of the prisoners themselves. Without the active cooperation of most inmates, most of the time, prisons could not function effectively. Absent such cooperation, at the very least prisons would have to be far more oppressive and institutionally violent than is currently the case, with all the implications this would have in terms of the well-being of the inmates, staff safety, and probably cost. Furthermore, in most UK prisons staff/inmate ratios and security arrangements are such that the prisoners could simply take over if they chose to do so. . . . [T]hat they do not – and that prisons do function in a more or less orderly fashion – is in itself something of a mystery.

* *Excerpted from* PRISON SERVICE JOURNAL, 4-10 (2010). Reprinted with permission from authors.

Prisons are not only – or even primarily – warehouses for incarceration. Recidivism rates may remain high, but it is still a goal of prisons to act as agents of rehabilitation. The crimes for which people are in prison are in most instances crimes against the values of society, and it is important to address these value deficits in an effort to reconnect prisoners with mainstream social values. After all, most prisoners will not spend their lives in prison and it is hoped that they can rejoin society more willing to follow social rules.

In the face of these apparent contradictions, several students of prison and prison life have turned to the idea of legitimacy. But what does it mean for an authority to *be* legitimate? What does it mean for a prison to command willing acceptance of its rule by those subject to it? And how do processes of legitimation operate – how do authorities come to be seen as legitimate by those they govern? Notwithstanding the role of naked coercion, or conversely ‘dull compulsion’, in prison life, these authors have stressed that legitimacy – and its attendant problems – can offer important insights into how and why order is maintained in these institutions.

In this paper we apply the key precepts of the procedural justice model to the legitimacy of British prisons. Our contribution is conceptual – what do these ideas mean in relation to prison life? But it is also practical – what are some of the policy implications for a model of legitimacy that stresses procedural justice above all else? . . .

Legitimacy in the criminal justice system: Procedural justice, legitimacy, and prison life:

In criminal justice settings, legitimacy is the widespread belief among members of the public (and inmates) that the police, the courts, the prisons and the legal system are authorities entitled to make decisions and who should be deferred to in matters of criminal justice. Recent discussions of policing suggest that the police help secure public compliance and cooperation when the public feels that the police are entitled to make decisions and issue directives, we might say that to see the police as legitimate is to feel personally obligated to obey officers (even if one disagrees with the specifics of the order); to judge the police to be very broadly in line with one’s own ethical and moral value systems; and to believe that the police follow their own internal rules and regulations. Importantly, cooperation and compliance with criminal justice agencies obtained via legitimacy is ethically more desirable, more cost effective, and ultimately more durable than systems maintained ‘down the barrel of a gun’.

Court administrators have also focused their efforts on designing court systems to gain and retain the trust and confidence of the public. The importance of understanding how individuals who deal with legal authorities experience their encounters is being more widely recognized. Crucially, research suggests that legitimacy (irrespective of how it is defined) is linked to the fairness of the procedures through which authorities exercise their authority. This includes allowing people a voice to present their side of the story when dealing with authorities; to be governed by rules neutrally and consistently applied; to be treated with dignity and respect for their rights; and to be under authorities who are sincerely concerned about their well-being. When authority is exercised in these ways, people feel that they are receiving procedural fairness.

Applied to correctional settings, legitimacy in the sense outlined in Tyler’s work entails prisoners accepting prison authority and authorizing prison officials to dictate appropriate

behaviour (irrespective of whether prisoners agree with the need for the specific behaviours and the rules which govern these behaviours). According to the procedural justice perspective this authorization springs most importantly from the fairness with which prisoners feel they are treated. Sparks & Bottoms describe this as the ‘representational dimension’ of encounters and treatment: people view the behaviour of officials as representing the system as a whole. One such authorization is granted, and irrespective of the risk of sanction or detection (the chances of being caught and punished if one broke the rules) or whether a particular rule is seen as right or wrong, prisoners will comply with rules in part because they (a) believe it is right and proper that a prison regime has rules and laws, and (b) that the prison officers enforcing those rules are fair in their means of exercising power and therefore command authority. In other words, prisoners who perceive the prison regime to be legitimate believe that the prison should have rules and that these rules should be followed.

These patterns will be found in any system of legitimate power relations, or when a process of legitimation is occurring. But this notion of legitimacy seems particularly apposite in the prison setting. On the one hand, any particular prison is in essence governed by externally developed and mandated rules (laid down by the Prison Service and ultimately Parliament). The provenance and empirical content of a given rule is likely to be rather distant from the situation and certainly the personnel involved in its application. Many rules will often therefore seem unnecessary, pointless or even capricious. A sense that a rule should be followed because it emanates from a legitimate authority will at the very least lubricate the cogs of prison life, easing friction between guards and inmates and reducing the number of ‘trigger points’ for tension.

On the other hand, prison is unlike other contexts in that surveillance and force are much more readily available than elsewhere. Prisoners can (up to a point) be forced to do as they are told to a far greater degree than those on the outside. Yet prison could not function on this basis. Order in the sense outlined above could certainly not be maintained, and it is likely that excessive use of force against prisoners who did not see the regime as legitimate would result in more rule-breaking, inducing a downward spiral of resistance and retribution. Ironically, in a setting where legitimacy might appear unnecessary because force is apparently so available, ways to avoid using force may be even more important than elsewhere. The central focus becomes one concerned with how the authorities exercise their authority, since none of those involved – prisoners or guards – play an important role in defining what the rules will be (cf. Liebling’s, 2004, discussion of prisoner officers as peace keepers). We turn, therefore, to a more detailed discussion of procedural fairness.

How does procedural justice ‘work’?

According to US work on procedural justice, the core factor that shapes people’s evaluations of the police and the courts is the fairness of the ways in which the authority was exercised—procedural justice. The idea here is that legal authorities legitimate their decisions by making them through fair procedures. This then leads people to be more willing to voluntarily accept those decisions and to follow them across time, irrespective of whether their behaviour is being monitored. Furthermore when authorities act fairly, they create legitimacy and encourage general rule-following behaviour in the everyday lives of people. General judgments about the fairness of the authorities shape people’s everyday compliance with the law as well as their willingness to cooperate with efforts to maintain social order in their communities. When the police and the courts are viewed as acting fairly, they are seen as legitimate and they enjoy

public trust and confidence. This then motivates supportive public behaviour, including compliance with rules and cooperation with authorities.

The four key issues affecting the generation of procedural justice in prisons have already been mentioned: voice, neutrality, treatment with respect and dignity, and trust in authorities. Voice means providing opportunities for inmates to participate in decision making processes. It is important to provide opportunities for inmates to state their case before decisions are made by the staff in situations of everyday disagreements and conflicts. One reason why informal dispute resolution mechanisms are popular is that participating in decision-making allows people to voice their own personal concerns, stating what they think the issues involved are and make suggestions for how they should be handled. Such opportunities for voice need not involve a formal or elaborate mechanism; studies of police street stops, for example, indicate that when officers provide people an opportunity to tell their side of the story before they take action, people are much more likely to feel fairly treated.

Neutrality refers to making decisions based on the consistent application of rules based on proper procedure rather than on personal opinions or prejudices. A prison environment provides considerable opportunity for the capricious and arbitrary exercise of power, and for authorities to act based on personal prejudice and implicit bias. By acting based on rules and by applying those rules evenly across people and time, authorities are viewed as acting fairly. Because rules typically are explicitly specified in prison settings, the authorities have considerable capacity to shape and explain their actions by reference to the rules. It is relatively easy for prison authorities to be seen to be following the rules in many situations because the rules are codified and known to all (at least in theory).

Treatment with respect and dignity is consistently one of the most important issues that concern people when they are dealing with authorities. When people feel demeaned or subjected to negative stereotypes, they view themselves as diminished as people and disrespected beyond what is appropriate when dealing with the law. Conversely, acknowledging people's rights and acting with courtesy leads them to feel fairly treated. Finally, people are influenced by their inferences about the motivations of the authorities with whom they are dealing. If people feel that authorities are acting out of a sincere desire to do what is right, then they view the authorities as acting more fairly. If people think that an authority is not concerned about their well-being then they react negatively to its actions. How can authorities communicate trust? They can give people a chance to explain their concerns, show that what people say is being considered, and explain why and how decisions are made.

The exact manner in which the elements of fair treatment are enacted depends on the setting and will vary depending on whether that setting involves the courts, the police, or prisons. For example, in the courts, judges have been encouraged to explain the basis for their actions and to avoid actions that communicate disrespect, such as reading or signing orders when litigants are speaking. For the police, model procedures involve presenting people with a written statement that specifies their rights, tells them how they can complain if they feel that unfair treatment has occurred, and explains why actions such as street stops are occurring. General courtesy toward the people with whom they are dealing is another method for creating legitimacy. It is not necessary for all four elements outlined above to be present—indeed, the

absence of one, for example of 'voice' in settings, such as arrest suites, where it would be inappropriate or dangerous if it would lead to conflict with others present, can be compensated for by an emphasis on one or more of the others (such as treating people with dignity and respect even in difficult or otherwise oppressive situations).

In a prison setting—where contact between authorities and inmates is more involved and longer term—several types of policy can be enacted to create more procedurally just correctional practices. A core contribution of recent work by Franke et al. (2010) is its suggestion that a larger set of issues might be involved in reactions of inmates to their experience. Beyond the quality of interpersonal treatment and the fairness of decision making, inmates might react to the degree that authorities help them learn meaningful skills and develop opportunities to enter the post-prison world with viable possibilities for a noncriminal life. They also might react to whether the guards create a safe and less dangerous environment for them to live in as prisoners. Recognizing the importance of inmates' feelings about their treatment as this affects the legitimacy of prison authorities suggests a general need to examine the sources of those feelings. This point clearly includes traditional procedural justice issues, but it also might extend beyond those issues to other sources of legitimacy that can be tapped to enhance the positive consequences of imprisonment. We thus move beyond the idea of legitimacy, which typically refers to authority, expressed consent and the moral justification of power relations. Liebling's (2004) broader notion of the 'moral performance' of a prison brings in a range of relational and quality of life issues, including include safety, dignity, humanity, respect, opportunities for personal development, and so forth—all of which may themselves be important to the construction and reproduction of legitimacy.

Some barriers to justice and legitimacy in prisons:

In prisons in England and Wales, particular challenges in achieving justice and legitimacy are the consistent and disproportionate negative outcomes and the subsequent feelings of procedural injustice experienced by a large number of inmates. Consider the position of Black and minority ethnic (BME) prisoners. BME prisoners are overrepresented in the use of a range of sanctions: in their experience of 'Use of Force' where Black prisoners are 90% more likely to have force used on them by staff than White prisoners; in segregation for reasons of good order or discipline (GOOD), where Black prisoners are 76% more likely to be subject to this sanction; and in the allocation to one of the three privilege levels of the Incentives and Earned Privilege scheme (IEP) where Black prisoners are 54% more likely to be placed on the lowest 'Basic' level. These disproportionate outcomes occur in a prison system that suffers from a more fundamental race imbalance: BME prisoners make up 26.5% of the prison population compared with 8.7% of the UK population. Race inequality is thus seen first by BME prisoners overrepresented within prisons in England and Wales, and second in specific outcomes experienced by individuals (as well as arguably constituting a harm to prisoners in itself).

What does this have to do with procedural justice and legitimacy? Disproportionate outcomes – such as use of force, segregation and privilege levels – are chiefly issues of distributive not procedural justice. And the experience of distributive justice has been shown (in US research) to be less important than procedural justice in explaining levels of legitimacy. Might unequal outcomes amongst prisoners have little impact on prison legitimacy?

On the contrary, it seems likely that unequal outcomes are experienced by those prisoners concerned as procedural as well as distributive injustice. In a prison in which many individuals from minority ethnic groups experience a loss of privilege, the use of force, and so forth, prisoners will likely experience this most keenly as the failure of procedure: a failure to treat them fairly and with dignity; a failure to be clear about what the rules are and to apply them consistently and fairly; and a failure to be neutral in decision-making and treatment. Disproportionate use of force, or greater use of segregation, seem almost certain to communicate disrespect, a denial of voice, and the failure to wield authority in a fair, unbiased and neutral manner. The subsequent de-legitimising sense of unfairness may be chiefly procedural.

Since the highly critical report in 2003 by the Commission for Racial Equality on the state of race equality in the Prison Service, there has been widespread agreement that substantial improvements have been made through actions and monitoring aimed at tackling race inequality. The figures above illustrate, however, that the experience of BME prisoners has not been transformed. The common perception among BME prisoners of unfair negative treatment has not been eliminated by local and national ethnic monitoring of many sanctions and activities, a closely scrutinised and managed racist incident reporting system, or equality management teams chaired by governing governors or their deputies. This is hardly surprising given the data pointing to significant race-inequality. Neither the numbers nor the subjective experience of prison life have moved far enough in the right direction. Until they do so the experience of unfairness among BME inmates will continue to threaten the legitimacy of prison regimes.

Improving procedural justice and legitimacy:

We finish with some policy implications that emerge from the perspective outlined in this paper. Analysis of the ethnic monitoring data for activities and sanctions within prisons suggests that race disproportionality is less likely where a more structured and formalised process is involved, such as in adjudications (disciplinary proceedings against prisoners, administered by senior prison managers locally). In outcomes where use of discretion (by autonomous staff in front-line operational roles) is a significant determining factor – as in all three categories detailed above – disproportionately is more likely to result.

In the light of this, and the race-neutral factors consistently identified by staff as driving their use of discretion (despite the consistent net effect of all these decisions being disadvantageous along race lines), the Race and Equalities Action Group within NOMS has considered a number of studies of potential relevance in tackling this disproportionality. The notion of aversive racism suggests that individuals who believe themselves to be non-prejudiced and are “conscious, explicit, sincere supporters of egalitarian principles” may nonetheless hold “unconscious negative feelings and beliefs about Black and other historically disadvantaged groups”. Results from Harvard’s Implicit Association Test support this idea, providing further incentive to explore the potential benefits of approaching the problems of guard-prisoner interactions in new ways.

Even unintended unfairness powerfully affect prisoners. The procedural justice approach stresses that it is the subjective experience of unfairness which is a key determinant of dissatisfaction, anger and the delegitimation of prison regimes. Such a process poses a significant problem for the reproduction of order in prison. Simply assembling prison staff in

classrooms and working towards overt consensus on egalitarian professional practice is not fully addressing this issue. We need now to focus on changing situational factors, slowing down and structuring interactions in order to improve decision-making. This is analogous to work already undertaken in military, aviation and clinical settings to improve professional communication.

REAG is piloting in Spring 2010 a project aimed at evaluating a set of structured communication tools. It is hoped that three structured communication tools; SBAR (Situation, Background, Assessment and Recommendation), surgical-style checklists and an assertiveness tool designed to work alongside them (RECODE), may reduce cognitive error overall as seen in surgical setting . . . and also help avoid negative outcomes resulting from communication breakdowns affecting; the way prisoners make requests and respond to instructions and staff use their discretion. Individuals and groups of prisoners currently treated less favorably in prisons as a result of decisions influenced by irrelevant factors of race may be protected from these outcomes by a structured communication approach. Where unequal treatment does still occur, or is perceived, prisoners may benefit from the use of a authorized and supported structured communication tool to address the situation. That is, they may benefit from being given a voice. Widely understood communication tools within a prison setting may embed reflective practice, reduce unwitting discrimination through a simple and easily understood check-list approach and create a framework in which prisoners are encouraged to express their concerns and other important information, pro-socially and with the authority of simple recognized tools. By enabling parties in a transaction to focus more effectively on its important aspects, the significance of unconscious bias may be reduced.

To be sure, structured communication tools may have an adverse important impact: they may take spontaneity and warmth out of encounters, thus eroding some of the more nebulous dimensions of procedural justice. This is important because prisoners should not feel they are being subjected to a rather clinical and bureaucratic form of exchange. To be successful, structured communication tools need to become part of everyday interaction: embedded in routine and professional ways of behaving.

We began this article by discussing the issue of order in prison. Prison regimes are orderly not only when there is an absence of disorder, but when they are acceptable to the prisoners living within them. The problem of order in prisons is at least in part a problem of legitimacy. The procedural justice framework described briefly above provides consistent empirical evidence that the legitimacy of criminal justice authorities is established and reproduced through the fairness with which those authorities treat those they govern.

This is not some abstract argument, or merely an issue of ‘tea and sympathy.’ The experience of BME and other prisoners – both historically and in terms of new projects such SBAR – demonstrates that issues of voice, neutrality, respect, and trust are deeply embedded in Prison Service procedures and practices. We can – and should – work to improve procedures and practices, to increase the experience of procedural fairness among prisoners, and therefore enhance the legitimacy of prison regimes.

III. THE POLITICAL ECONOMIES OF CHANGE: SETTING AGENDAS

A vast amount of political will exists to change the criminal justice system. Yet questions and disagreements exist about what to change and how. This chapter addresses efforts to restructure policies and practices to refocus the system on incarcerating fewer people; and to enable the release of more prisoners, help their reentry, and support them and their communities.

In this chapter, we explore the current proposals for reform, the stakeholders supporting various proposals, and the conceptual frameworks of reform efforts. The questions include understanding what interventions have had an impact, what has been missing from the reform agenda, and how politics enable or inhibit opportunities for profound change.

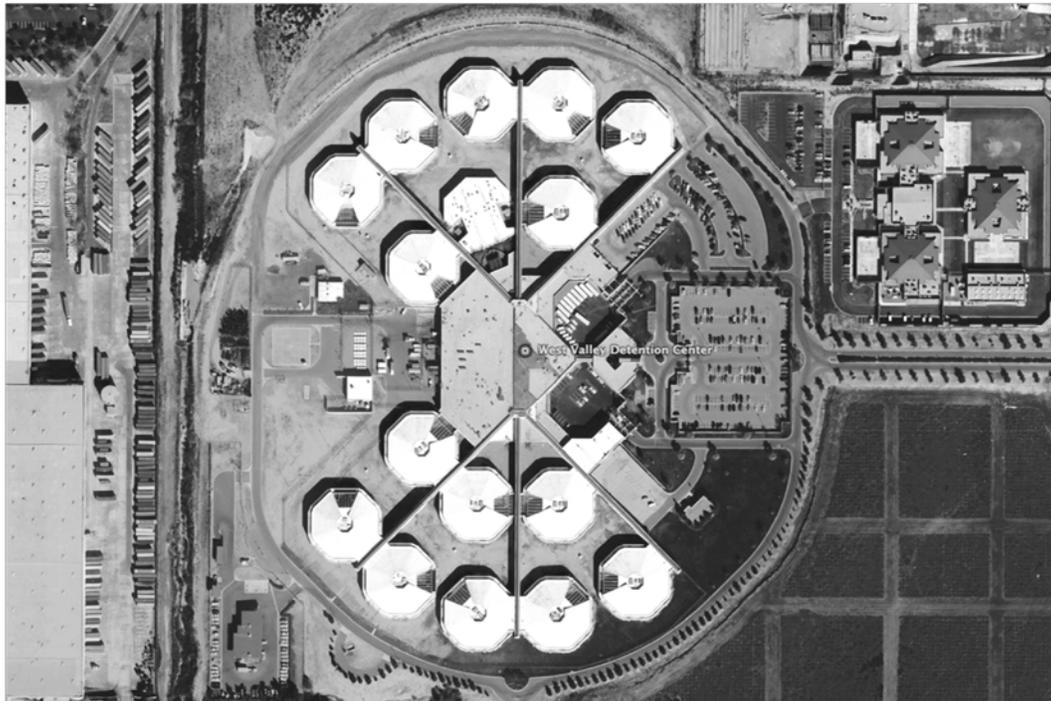


Photo: *West Valley Detention Center, San Bernardino, CA* (2011); courtesy of Joe Day, *CORRECTIONS AND COLLECTIONS: ARCHITECTURES FOR ART AND CRIME* (Routledge 2013).

GETTING OUT OF WHERE WE ARE: FRAMING HOW AND WHY WE GOT HERE

The commentators excerpted below share a sense of urgency about the need to produce change, as they offer overlapping yet conflicting claims about the sources of current policies and how to alter them. Michelle Alexander proffered the paradigm of “Jim Crow” as both an explanation of current policies and a platform from which to produce change; James Forman questioned whether that framing captures the present and opens doors to a different future, and James Byrne added a third account of the “great prison experiment,” as he proposed alternative ways to invest in the reduction of crime.

Reform of specific sentencing policies is the focus of 2013 testimony from Chief Judge Patti Saris, chair of the U.S. Sentencing Commission, who identified the impact of mandatory minimums for drug crimes in crowding federal prisons. Prison culture is the topic of Amy E. Lerman’s analysis of the effects of socialization of inmates and correctional staff and the larger impact on strategies that aim for de-carceration.

Understanding Mass Incarceration as “The New Jim Crow”

In her 2010 book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argued that

“because drug crime is racially defined in the public consciousness . . . the electorate has not cared much about what happens to drug criminals—at least not the way they would have cared if the criminals were understood to be white. It is this failure to care, really care across color lines, that lies at the core of this system of control”

Alexander linked the “racial caste system” created by mass incarceration and the Jim Crow laws of the former Confederate states. Moreover, she believed that unless Americans confront head on the fact that mass incarceration is a means of controlling individuals of color, particularly young men, the country will never arrive at a lasting solution. In her view,

“those who believe that advocacy challenging mass incarceration can be successful without overturning the public consensus that gave rise to it are engaging in fanciful thinking, a form of denial. Isolated victories can be won—even a string of victories—but in the absence of a fundamental shift in public consciousness, the system as a whole will remain intact. To the extent that major changes are achieved without a complete shift, the system will rebound. The caste system will reemerge in a *new form*, just as a convict leasing replaced slavery, or it will be *reborn*, just as mass incarceration replaced Jim Crow. . . .”

Challenges to racial order that are “colorblind,” bring about reforms “that are, if not entirely symbolic, at least not critical to the operation of the racial order.” Alexander warned that, “in the absence of a truly egalitarian racial consensus, these predictable cycles inevitably give rise to new, extraordinarily comprehensive systems of racialized social control.” Thus, criminal justice

reform initiatives should be perceived as means, not an end—a means to building a society-wide movement whose overarching aim is to “successfully disrupt the nation’s racial equilibrium.”

Alexander recommended that “a new human rights approach conscious of race brought about within a society-wide movement . . . be adopted. . . . It would offer a positive vision of what we can strive *for*—a society in which all human beings of all races are treated with dignity, and have the right to food, shelter, health care, education, and security.” ID. AT 234-41, 258-59.

Racial Critiques of Mass Incarceration: Beyond the New Jim Crow (2012)

*James Forman, Jr.**

The Jim Crow analogy has much to recommend it, especially as applied to the predicament of convicted offenders. Building on the work of legal scholars who have examined the collateral consequences of criminal convictions, the New Jim Crow writers document how casually, almost carelessly, our society ostracizes offenders. Our mantra is “Do the Crime, Do the Time.” But, increasingly, “the time” is endless, as people with criminal records are permanently locked out of civil society. . . .

Consider all of a conviction’s consequences. Depending on the state and the offense, a person convicted of a crime today might lose his right to vote as well as the right to serve on a jury. He might become ineligible for health and welfare benefits, food stamps, public housing, student loans, and certain types of employment.

These restrictions exact a terrible toll. Given that most offenders already come from backgrounds of tremendous disadvantage, we heap additional disabilities upon existing disadvantage. By barring the felon from public housing, we make it more likely that he will become homeless and lose custody of his children. Once he is homeless, he is less likely to find a job. Without a job he is, in turn, less likely to find housing on the private market—his only remaining option. Without student loans, he cannot go back to school to try to create a better life for himself and his family. Like a black person living under the Old Jim Crow, a convicted criminal today becomes a member of a stigmatized caste, condemned to a lifetime of second-class citizenship.

While the Jim Crow analogy is most compelling as applied to those convicted of crimes, it applies more broadly as well. Just as Jim Crow defined blacks as inferior, mass imprisonment encourages the larger society to see a subset of the black population—young black men in low-income communities—as potential threats. This stigma increases their social and economic marginalization and encourages the routine violation of their rights. Intense police surveillance of black youths becomes accepted practice. Their misbehavior in school is reported to the police and leads to juvenile court. Employers are reluctant to hire them. Thus, even young, low-income

* *Excerpted from* 87 N.Y.U. L. REV. 21, 107-15, 120-121, 123-128, 131-38, 141-46 (2012). Reprinted with permission from author.

black men who are never arrested or imprisoned endure the consequences of a stigma associated with race.

Taken together, these two forms of exclusion—making permanent outcasts of convicted criminals while stigmatizing other poor blacks as potential threats—have had devastating effects on low-income black communities. While the New Jim Crow writers are not the first to have raised these issues, their analogy usefully connects the dots: It highlights the cumulative impact of a disparate set of race-related disabilities. [Michelle] Alexander is especially persuasive in this regard. . . .

In stating my objections, I do not mean to suggest that mass incarceration is anything less than a profound social ill, or that racial disparity, racial indifference, and even outright racial animus in the criminal justice system are yesterday's concerns. Nor do I argue that the Jim Crow analogy fails because mass incarceration is not exactly the same as Jim Crow. After all, the best of the New Jim Crow writers—especially Alexander—acknowledge important differences between the two racial caste systems. . . .

My objection to the Jim Crow analogy is based on what it obscures. Proponents of the analogy focus on those aspects of mass incarceration that most resemble Jim Crow and minimize or ignore many important dissimilarities. As a result, the analogy generates an incomplete account of mass incarceration—one in which most prisoners are drug offenders, violent crime and its victims merit only passing mention, and white prisoners are largely invisible. . . . [T]he analogy directs our attention away from features of crime and punishment in America that require our attention if we are to understand mass incarceration in all of its dimensions. . . .

[I]n emphasizing mass incarceration's racial roots, the New Jim Crow writers overlook other critical factors. The most important of these is that crime shot up dramatically just before the beginning of the prison boom. Reported street crime quadrupled in the twelve years from 1959 to 1971. Homicide rates doubled between 1963 and 1974, and robbery rates tripled. Proponents of the Jim Crow analogy tend to ignore or minimize the role that crime and violence played in creating such a receptive audience for Goldwater's and Nixon's appeals. . . .

Nor were white conservatives such as Nixon and Goldwater alone in demanding more punitive crime policy. In *The Politics of Imprisonment*, Vanessa Barker describes how, in the late 1960s, black activists in Harlem fought for what would become the notorious Rockefeller drug laws, some of the harshest in the nation. Harlem residents were outraged over rising crime (including drug crime) in their neighborhoods and demanded increased police presence and stiffer penalties. The NAACP Citizens' Mobilization Against Crime demanded "lengthening minimum prison terms for muggers, pushers, [and first] degree murderers." The city's leading black newspaper, *The Amsterdam News*, advocated mandatory life sentences for the "non-addict drug pusher of hard drugs" because such drug dealing "is an act of cold, calculated, pre-meditated, indiscriminate murder of our community."

Rising levels of violent crime and demands by black activists for harsher sentences have no place in the New Jim Crow account of mass incarceration's rise. As a result, the Jim Crow analogy promotes a reductive account of mass incarceration's complex history in which, as

Alexander puts it, “proponents of racial hierarchy found they could install a new racial caste system. . . .”

So what do incarceration rates look like in [a] majority-black city with substantial local control over who goes to prison and for how long? They mirror the rates of other cities where African Americans have substantially less control over sentencing policy. Washington, D.C. (a majority-black jurisdiction), and Baltimore (a majority-black city within a majority-white state) have similar percentages of young African American men under criminal justice supervision. Detroit, an overwhelmingly African American city in a majority-white state, has a smaller proportion of adults under criminal justice supervision than Washington, D.C. One in twenty-five Detroit adults are in jail or prison, on probation, or on parole, compared to one in twenty-one adults in D.C.

These data indicate the limits of the Jim Crow analogy, which attributes mass incarceration entirely to the animus or indifference of white voters and public officials toward black communities. While racial animus or indifference might explain the sky-high African American incarceration rates in Baltimore and Detroit, they do not explain those in Washington, D.C. And just as the analogy fails to explain why a majority-black jurisdiction would lock up so many of its own, it says little about blacks who embrace a tough-on-crime position as a matter of racial justice. . . .

To this point, I have focused principally on crimes of violence and the state’s response to such crimes. I part company with the New Jim Crow writers in this regard. They focus almost exclusively on the War on Drugs. . . . The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow. One of Jim Crow’s defining features was that it treated similarly situated blacks and whites differently. For writers seeking analogues in today’s criminal justice system, drug arrests and prosecutions provide natural targets, along with racial profiling in traffic stops. Blacks and whites use drugs at roughly the same rates, but African Americans are significantly more likely to be arrested and imprisoned for drug crimes. As with Jim Crow, the difference lies in government practice, not in the underlying behavior. The statistics on selling drugs are less clear-cut, but here too the racial disparities in arrest and incarceration rates exceed any disparities that might exist in the race of drug sellers.

But violent crime is a different matter. While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses. For example, the African American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate. Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending.

In making this point, I do not mean to suggest that discrimination in the criminal justice system is no longer a concern. There is overwhelming evidence that discriminatory practices in drug law enforcement contribute to racial disparities in arrests and prosecutions, and even for violent offenses there remain unexplained disparities between arrest rates and incarceration rates. Instead, I make the point to highlight the problem with framing mass incarceration as a new form

of Jim Crow. Because the analogy leads proponents to search for disparities in the criminal justice system that resemble those of the Old Jim Crow, they confine their attention to cases where blacks are like whites in all relevant respects, yet are treated worse by law. Such a search usefully exposes the abuses associated with racial profiling and the drug war. But it does not lead to a comprehensive understanding of mass incarceration.

Does it matter that the Jim Crow analogy diverts our attention from violent crime and the state's response to it, if it gives us tools needed to criticize the War on Drugs? I think it does, because contrary to the impression left by many of mass incarceration's critics, the majority of America's prisoners are not locked up for drug offenses. Some facts worth considering: According to the Bureau of Justice Statistics, in 2006 there were 1.3 million prisoners in state prisons, 760,000 in local jails, and 190,000 in federal prisons. Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug offenses, and 8% for public order offenses. In jails, the split among the various categories was more equal, with roughly 25% of inmates being held for each of the four main crime categories (violent, drug, property, and public order). Federal prisons are the only type of facility in which drug offenders constitute a majority (52%) of prisoners, but federal prisons hold many fewer people overall. Considering all forms of penal institutions together, more prisoners are locked up for violent offenses than for any other type, and just under 25% (550,000) of our nation's 2.3 million prisoners are drug offenders. This is still an extraordinary and appalling number. But even if every single one of these drug offenders were released tomorrow, the United States would still have the world's largest prison system.

Moreover, our prison system has grown so large in part because we have changed our sentencing policies for all offenders, not just drug offenders. We divert fewer offenders than we once did, send more of them to prison, and keep them in prison for much longer. An exclusive focus on the drug war misses this larger point about sentencing choices. This is why it is not enough to dismiss talk of violent offenders by saying that "violent crime is not responsible for the prison boom." It is true that the prison population in this country continued to grow even after violent crime began to decline dramatically. However, the state's response to violent crime—less diversion and longer sentences—has been a major cause of mass incarceration. Thus, changing how governments respond to all crime, not just drug crime, is critical to reducing the size of prison populations. . . .

Avoiding the topic of violence in this manner is a mistake, not least because it disserves the very people on whose behalf the New Jim Crow writers advocate. After all, the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime. And the two phenomena are mutually reinforcing. . . .

Jim Crow has another distinctive characteristic that threatens to lead us astray when contemplating mass incarceration. Just as Jim Crow treated similarly situated blacks and whites differently, it treated differently situated blacks similarly. An essential quality of Jim Crow was its uniform and demeaning treatment of all blacks. Jim Crow was designed to ensure the separation, disenfranchisement, and political and economic subordination of all black Americans—young or old, rich or poor, educated or illiterate.

Indeed, one of the central motivations of Jim Crow was to render class distinctions within the black community irrelevant, at least as far as whites were concerned. For this reason, it was essential to subject blacks of all classes to Jim Crow's subordination and humiliation. That's why Mississippi registrars prohibited blacks with Ph.Ds from voting, why lunch counters refused to serve well-dressed college students from upstanding Negro families, and why, as Martin Luther King, Jr. recounts in his "Letter from Birmingham Jail," even the most famous black American of his time was not permitted to take his six-year-old daughter to the whites-only amusement park she had just seen advertised on television.

Analogizing mass incarceration to Jim Crow tends to suggest that something similar is at work today. This may explain why many—but not all—of the New Jim Crow writers overlook the fact that mass incarceration does not impact middle- and upper-class educated African Americans in the same way that it impacts lower-income African Americans. This is an unfortunate oversight, because one of mass incarceration's defining features is that, unlike Jim Crow, its reach is largely confined to the poorest, least-educated segments of the African American community. High school dropouts account for most of the rise in African American incarceration rates. . . . [A] black man born in the 1960s is more likely to go to prison in his lifetime than was a black man born in the 1940s. But this is not true for all African American men; those with college degrees have been spared. As Bruce Western's research reveals, for an African American man with some college education, the lifetime chance of going to prison actually decreased slightly between 1979 and 1999 (from 6% to 5%). A black man born in the late 1960s who dropped out of high school has a 59% chance of going to prison in his lifetime whereas a black man who attended college has only a 5% chance. Although we have too little reliable data about the class backgrounds of prisoners, what we do know suggests that class, educational attainment, and economic status are powerful indicators for other races as well. Western estimates that for white men born in the late 1960s, the lifetime risk of imprisonment is more than ten times higher for those who dropped out of high school than for those who attended some amount of college. . . .

Changes of this magnitude require us to modify how we discuss race. Historically, racial justice advocates have been reluctant to acknowledge how class privilege mitigates racial disadvantage. This reluctance is partly a byproduct of the structure of the affirmative action argument. One of the most potent arguments against race-based preferences is the claim that wealthier blacks do not deserve them. Affirmative action's defenders often respond by pointing out the various ways in which even privileged blacks suffer racial discrimination. At the same time, racial profiling reinforces the notion that class differences within the black community matter little. After all, racial profiling is the area in which skin color routinely trumps one's bank account or accumulated graduate degrees. As David Harris argues, "'driving while black' is not only an experience of the young black male, or those blacks at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation or social station." . . .

The Jim Crow analogy also obscures the extent to which whites, too, are mass incarceration's targets. . . . Many whites—most of them poor and uneducated—are now behind bars. One-third of our nation's prisoners are white, and incarceration rates have risen steadily even in states where most inmates are white. That's a lot of "collateral damage." Those white

prisoners are sometimes subjected to ghastly mistreatment, as an ACLU attorney recently alleged in a lawsuit challenging conditions of confinement in a prison in Idaho, where 77% of the prisoners in state facilities are white. He reported, “In my 39 years of suing prisons and jails, I have never confronted a more disgraceful, revolting and inexcusable case of mass abuse and federal rights violations than this one.” For some categories of offenses where our laws are especially severe, such as possession of child pornography, most of the defendants are middle-aged white men. Prosecutions for sexually explicit material offenses have risen by more than 400% since 1996. In addition to the dramatic rise in the number of cases filed, the sentences imposed for all child–pornography related offenses have become increasingly severe, rising from an average of 2.4 years in 1996 to almost 10 years in 2008. Moreover, although whites remain relatively underrepresented as drug offenders, the percentage of drug offenders who are white has risen since 1999, while the percentage of drug offenders who are black has declined.

Hispanic prisoners also receive little attention . . . , even though they constitute 20% of American prisoners. The fact that quality data on Hispanics in the prison systems is often lacking may be partly to blame for this omission. But it is important to remember that during the Jim Crow years, Hispanics in many jurisdictions were subject to forms of exclusion, segregation, and disenfranchisement not unlike those inflicted on African Americans. And given what we do know about current Hispanic incarceration rates, it is clear that Hispanic prisoners deserve the attention of all who write about the prison system. The Hispanic prison population climbed steadily during the 1990s, to the point where one in six Hispanic males born today can expect to go to prison in their lifetime. The available data suggest that Hispanic incarceration rates are almost double the rates for whites, and many observers believe that these data undercount the true rate at which Hispanics go to prison. Most Hispanic prisoners, like most blacks and whites, are serving time for violent offenses, and about 20% are in prison for drug offenses.

Thus, the data on white and Hispanic prisoners reminds us that while African Americans are incarcerated in numbers grossly disproportionate to their percentage of the overall population, the fact remains that 60% of prisoners are not African American. As I will argue in the conclusion, anyone analyzing mass incarceration must keep that 60% squarely in mind. . . .

I conclude by briefly indicating a way forward. What follows is not intended as a set of policy prescriptions; instead, I offer four themes that must remain central if we are to scale back our prison system and reduce the damage that incarceration causes. . . .

First, combating mass incarceration will require a multiracial movement. . . . If whites and Hispanics disappear from view in discussions of mass incarceration, they are less likely to see a campaign against it as speaking to and for them. This is a missed opportunity—especially now, when fiscal considerations could motivate large numbers of voters to demand reductions in our bloated prison system.

Second, an effective response to mass incarceration requires that moral appeals on behalf of mass incarceration’s direct targets be combined with broader arguments on behalf of community safety. . . . [A] substantial number of Americans care primarily about being able to walk home without being mugged or seeing drug sellers lurking on the corner. Progressives

should acknowledge such concerns and make the case that mass incarceration is detrimental to community safety, rather than necessary to secure it.

The good news is that such a case can be made. In the past decade, even as the nation's prison population has grown, four states have reduced their prison populations while also cutting crime. New York City's success in lowering crime rates has been widely chronicled, but new research by Franklin Zimring reveals a less well-known fact: New York City reduced crime while also reducing the number of residents sent to prison. In the short term, such a policy change requires pulling various criminal justice levers—for example, expanding alternatives to incarceration, reducing the time served in prison, reducing parole revocations, and making better use of probation resources. Over the longer term, it requires human capital investments of the sort that both the New Jim Crow writers and I endorse.

Among the most important of such investments is education. . . . [T]here is a close connection between incarceration rates and educational attainment: Blacks and whites who have dropped out of high school are ten times more likely to be incarcerated than those who have attended college. While correlation is not causation, these facts suggest that appropriate educational (and other social-service) interventions may be, in addition to their other benefits, crime-fighting measures.

Third, an effective response to mass incarceration requires increased attention to how we treat prisoners. Even if the movement to challenge mass incarceration is ultimately successful, America will continue to have an enormous system of prisons and jails for a long time to come. And even if our prison population shrinks substantially, some people will always need to be locked up—hence the urgency of attending to the conditions in which prisoners are held. . . .

Fourth, advocates for a more parsimonious use of punishment must take violence, and the fear of violence, seriously. There is nothing wrong (and a lot that is right) about emphasizing the profound racial disparities in incarceration rates for drug crimes. But there is everything wrong with accounts of crime policy that fail to mention the fear, disorder, and violence that accompanied city life in much of the 1970s, 1980s, and early 1990s. . . .

After the Fall: Assessing the Impact of the Great Prison Experiment on Future Crime Control Policy (2013)

*James M. Byrne**

. . . The decision to send an individual offender to prison represents a critical policy choice with consequences for both offenders and communities that are important to understand. We sanction for a number of different reasons, including punishment, deterrence, rehabilitation, and incapacitation. It is assumed that an *effective* sentencing strategy will achieve these aims and, in the process, improve community safety and foster individual desistance; but if this is true, then

* *Excerpted from* 77 FED. PROB. 3 (2013). Reprinted with permission of the Administrative Office of U.S. Courts.

we must also consider the possibility that an *ineffective* sentencing policy will have the opposite effect, resulting in communities that are less safe and offenders who are less likely to desist from crime.

Beginning with the 1964 United States Presidential campaign, the advocacy of “get tough” prison-focused crime control policies as a way to solve the crime problem has been a dominant—and generally successful—political strategy at every level of government. But success as an election strategy may not translate into success as an effective criminal justice policy. Consider the following brief summary of our four-decade experiment in mass incarceration:

In the 1970s the United States embarked on one of the largest policy experiments of the 20th century—the expanded use of incarceration to achieve greater public safety. Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 5.6 million living Americans had spent time in a state or federal prison—nearly 3 percent of the U.S. population. Having so many people imprisoned over the course of 30 years raises an obvious question: *has this experiment worked?*

The short but definitive answer to this question is that the great prison experiment has failed. First, a sizable amount of research strongly suggests that sentencing an individual to prison—and to longer sentences in particular—does *not* work as a specific deterrent. Second, there is little evidence to support the notion that prisons foster individual offender; in fact, recent research strongly suggests that prisons are criminogenic, an assessment that is reinforced by examining the post-release failure rates of prisoners. Third, prison has been found to have at best only a modest (2-4 percent) general deterrent/incapacitation effect. Even the research identifying modest general deterrent/incapacitation effects has been criticized on methodological grounds. The sole remaining justifications for prison are incapacitation and retribution, but these seem to be an insufficient rationale for current mass incarceration policies, especially when the research on incapacitation effects is critically reviewed, the problem of false positives is considered, and the crime mix of convicted federal, state, and local prisoners is examined.

It has been argued that the use of *prison-based* sanctions would make communities safer places. This has not proven to be the case, particularly in the small number of communities where crime is the most likely to occur, and where offenders reside before and after their time in prison. As Sampson and Loeffler have documented, “Like the geographically concentrated nature of criminal offending by individuals, a small number of communities bear the disproportionate brunt of U.S. crime policy’s experiment with mass incarceration.” Putting large numbers of individuals living in poverty-pocket, high-minority-concentration neighborhoods in prison has done little to alleviate the crime problem in these areas; in fact, there is considerable evidence that this strategy increased the level of crime in these communities.

Given the failure of the great prison/mass incarceration experiment, the question becomes: Where do we go from here? Faced with the rising cost of incarceration and a body of empirical research that challenges the continuation of this policy of mass incarceration, there

appears to be both broad public and bipartisan political support in many parts of the United States to downsize prisons and to spend at least some of the money now allocated to prisons on a new set of crime control policies that will have a larger impact on crime in our communities, while supporting long-term desistance from crime among individuals.

This strategy has been described broadly as justice reinvestment, but there is currently a debate on the nature and extent of this reinvestment strategy, focusing primarily on how best to reallocate resources in order to make communities safer. Some have advocated for the reallocation of funds within the corrections resource pie, with a greater proportion of funds allocated for individual offender treatment in both institutional and community settings, while others argue for increased funding for a broad range of crime prevention strategies in targeted high-risk/high-crime communities, including both *criminal justice-focused* strategies based on increasing the number of police in targeted, high-crime areas, and *non-criminal-justice-focused* strategies designed to address the root causes of crime (poverty, education level, inequality, economic opportunity). . . .

It certainly appears that our current corrections system can be described in the following manner: We are better at identifying *risk level* than we are at developing strategies that result in *risk reduction*. However, it is in fact not clear that current sentencing schemes are accurately described as risk-focused, in that many offenders we send to prison are there for punishment purposes, not because they have been identified as high risks to the community. Regardless of an offender's predicted risk level, punishment by use of a prison sanction is imposed in whole or in part as a specific deterrent. Is it possible that the use of this sanction has the opposite effect?

It has been argued that the *prison experience* increases the risk posed by prisoners upon release to the community; indeed, this is the finding reported in two recent studies. The study by Cid compared two sanctions, prison and suspended sentences, and found that the use of prison increased recidivism risk. A similar finding was reported by Bales and Piquero's comparison of offenders sanctioned to either prison or to Florida's Community Control program. Even after controlling for differences between the two groups (age, sex, race, current offense, prior record) as recommended by Nagin et al., Bales and Piquero identified a significant criminogenic effect of prison on subsequent offender behavior upon release. However, it is important to note the limitations of the body of research identifying the criminogenic effects of the prison experience. As Bales and Piquero observed, "We did not unpack what it is about imprisonment that produced more crime and alternately what it is about community control that led to less crime after release." While it is clear that we need more high-quality research in this area, there is sufficient evidence supporting the contention that prisons—as currently organized—make offenders worse.

A review of the available research on the impact of the prison experience reveals that classical, deterrence-driven strategies do not have a sound empirical foundation. Prisons not only don't deter, they also appear to make offenders worse. However, it should also be noted that evidence of positive individual offender change—using a combination of control and treatment—can be found in *both* institutional and community settings. Although the reported effect sizes for prison treatment programs are modest (a 10 percent absolute reduction in recidivism), there is reason to anticipate improvements in these effects in prison systems designed to focus more on offender change rather than on short-term offender control. In other words, *comprehensive assessment-oriented and intensive treatment-focused prisons* may be the

appropriate classification for some convicted offenders, but not because there is evidence that the prison experience will deter these individuals from future involvement in crime. Rather, prison may represent the appropriate location (and control level) for the provision of the types of treatment and services targeted to the offender typology being used (e.g., sex offender, drug offender, mentally ill offender, batterer, violent offender, etc.). This is precisely the point being argued by those in favor of downsizing prisons and by advocates of prison reform (or rather prison transformation), who argue that we need to replace “bad” control-oriented prisons with “good” change-oriented prisons. These research findings suggest that we need to rethink our prison (in/out) typology focusing on individual offender control concerns rather than on the false promise of specific deterrence. As Durlauf and Nagin recently observed, “The fact that incapacitation might be appropriate for some criminals does not mean that imprisonment needs to be nearly so widespread as it is.” Given the research on specific deterrence, it would be hard to disagree with this understated assessment. . . .

Does prison work as a general deterrent? . . . One underlying assumption of general deterrence is that the costs of a particular prohibited behavior must outweigh the benefits of the action, but only marginally, for an individual to be deterred. There is no assumption that more punishment translates into more compliance with the law. Indeed, too much punishment could have the opposite effect. Two recent studies provide support for this contention, suggesting that there is a “tipping point” for incarceration levels that can be demonstrated at both the state level and the neighborhood level. Incarceration reduces crime, they argue, but only up to a point. Once the incarceration rate hits a certain level—at the state level this tipping or inflection point appears to be about 325 inmates per 100, 000 population—crime rates actually increase. Although they do not identify a specific neighborhood-level tipping point, Rose and Clear explain why they believe this also occurs at the local level:

High rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of maintaining social order through families or social groups, crime rates go up.

The implication of this research on possible tipping points is not the abandonment of prison as a sanction, but rather greater parsimony in its application. When viewed in this context, it is apparent that definitions of the “in-prison” group were expanded in the 1980s to include “large numbers of nonviolent marginal offenders.” Since there is no evidence that this expanded definition had an added effect on crime rates, it makes sense to consider earlier, more restricted definitions of who should be considered for prison, which focused primarily on the identification of serious, violent offenders. . . .

It is worth noting that much of the research on general deterrent effects does not include an examination of various “what if” scenarios. What if we spent the same money used to expand our prison capacity on other strategies designed either as a general deterrent (for example, more police) or as a community-level risk-reduction strategy of investment in education, treatment, employment, housing, health care, or increased wages? According to Stemen, only about 25 percent of the major crime drop that occurred in the United States between 1990 and 2005

appears to be linked directly to our increased use of incarceration. The other 75 percent of the drop can be linked to a variety of other factors, including fewer “at risk” youth in the general population, decrease in crack cocaine markets, lower unemployment rates, higher wages, higher graduation rates, the recent influx of Latino immigrants, and of course, changes in police strength and arrest tactics. A review of the research on several of these factors suggests that they are likely to offer more crime reduction benefits than prison expansion does, and at much less cost. Consider the following:

(1) *Police*: Levitt found that a 10 percent increase in the size of a city’s *police force* was associated with an 11 percent lower violent crime rate and a 3 percent lower property crime rate (using county-level data); however, other more recent analyses and reviews suggest that increasing police force size will have no impact on the violent crime rate, and only marginal improvement (1-3%) in property crime rates.

(2) *Employment*: According to several studies, a 10 percent decrease in the state’s *unemployment* rate corresponded with a 10–16 percent reduction in property crime, but had no effect on violent crime (state and county-level data);

(3) *Income*: a 10 percent increase in *real wages* was associated with a 13 percent lower index crime rate, a 12 percent lower property crime rate, and a 25 percent lower crime rate at the national level; state-level analyses identified a 16 percent lower violent-crime rate; and individual-level analyses reveal that a 10 percent increase in real wages is associated with a 10 percent decrease in crime participation;

(4) *Education*: a one-year increase in the average *education* level of citizens resulted in a 1.7 percent lower index crime rate, while a 10 percent increase in graduation rates resulted in a 9.4 percent reduction in the index crime rate and a 5-10 percent reduction in arrest rates, through the increased wages associated with graduation.

While the link between police strength (more police per capita), arrest levels (more arrests, especially for public-order offenses) and subsequent reductions in crime is certainly consistent with deterrence-based strategies, few research studies have compared the crime-reduction effects of criminal justice-focused and noncriminal justice-focused strategies. It seems clear from our brief review that research on the general deterrent effect of incarceration needs to be examined and its effects compared to other possible criminal justice-focused strategies, such as strategies designed to increase certainty and celerity. However, these criminal justice-focused strategies are only one piece of a much larger puzzle, and they need to be considered in the broader context of the wide range of non-deterrence-based social policy changes that may achieve the greater crime reduction effects at a fraction of the cost. . . .

As Robert Sampson and Charles Loeffler pointed out in a recent essay, “Incarceration in the United States is now so prevalent that it has become a normal life event for many disadvantaged young men, with some segments of the population more likely to end up in prison than attend college.” In the aftermath of the dual crisis of confidence in both our economic and mass incarceration policies, there is a search for alternatives among both liberals and conservatives across the United States. One emerging crime control strategy that is currently being embraced across the political aisle comes immediately to mind: justice reinvestment.

However, it is becoming increasingly clear that the term justice reinvestment has different meanings, both within and across countries. In the United States, there are essentially three justice reinvestment strategies that have been proposed to date:

1. A *treatment investment* strategy, which would increase the level and quality of treatment provided in both institutional and community corrections systems at the federal, state, and local level;
2. A *police investment* strategy, which would increase the certainty of apprehension by increasing the size of the police force in targeted, high-crime communities, and by shifting “the focus of the police from people to places”; and
3. A *community investment* strategy, which would focus on reallocating corrections resources currently expended on prisons to a variety of crime prevention strategies, including strategies focused on addressing the root causes of crime in targeted high-risk communities. . . .

Each of these strategies of justice reinvestment has empirical support and each strategy should be considered carefully. Side-by-side comparisons of the known crime reduction effects of these strategies need to be conducted, both in terms of individual change/desistance from crime, and community safety. Before the relative merits of these three variations on the justice reinvestment strategy can be assessed, we need to know much more than we do about the potential impact of these policies on both offenders and communities.

Consider for example the notion that we should allocate more resources within corrections for offender treatment, both in prison and in the community. We can identify the effects of this strategy on cohorts of offenders, but we know very little, if anything, about the impact of this type of treatment investment strategy on crime rates in the targeted high-risk communities where most offenders reside. . . .

Examination of the research on the impact of various non-criminal justice factors on community crime rates can be divided into two categories: 1) research on the implementation and impact of various community crime prevention strategies; and 2) research on the community context of crime that links changes in various community-level factors (such as education level, poverty level, income inequality, size of immigrant population, racial concentration, housing stock, and health care) to increases and declines in the rate of violent and property crime. However, we need to know much more about the impact of both targeted community crime-prevention strategies and broader, general community-change strategies (gentrification, relocation, economic redevelopment, and community activism) on changes in crime rates. . . .

We have conducted a nearly four-decade-long experiment with mass incarceration, and the results from this experiment point to the need to move in a different direction. But we need to do so carefully, based on a full assessment of alternative strategies and an objective review of high-quality research. It certainly makes sense to weigh the relative impact of both criminal justice-focused *and* noncriminal justice-focused strategies on public safety in targeted, high-risk communities. Before we move further in the development of justice reinvestment strategies, we need to examine the available research and develop crime-control policies based on a comparative assessment of a full range of individual- and community-change strategies. We

cannot focus narrowly on only those strategies within the criminal justice system (e.g., more police or more treatment). . . .

It seems likely that the great prison experiment is over in most, if not all, regions of the United States. However, it is too soon to tell whether we have learned anything useful from this experiment that can improve community safety and support long-term desistance from crime in targeted high-risk communities.

Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences (2013)

Chief Judge Patti B. Saris, Chair, United States Sentencing Commission *

[The] need to address the problems caused by the current mandatory minimum penalties . . . [is] urgent. Even as state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has continued to grow, increasing by almost four percent in the last two years alone and by about a third in the past decade. The size of the Federal Bureau of Prisons' (BOP) population exceeds the BOP's capacity by 38 to 53 percent on average. Meanwhile, the nation's budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety. Federal prisons and detention now cost more than \$8 billion a year and account for close to one third of the overall Department of Justice budget. For these reasons, the Commission feels . . . strongly . . . that congressional action is necessary and has also identified reducing costs of incarceration as a Commission priority for this year. . . .

The Commission found that certain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties are often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission unanimously recommends that Congress consider a number of statutory changes. The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We recommend that the provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. We further recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory

* *Excerpted from* Hearings Before the Senate Judiciary Comm., 113th Cong. (Sept. 13, 2013).

minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted. Finally, the Commission recommends that the safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases. . . .

[Editors' note: On March 13, 2014, Attorney General Eric Holder endorsed the U.S. Sentencing Commission's recommendation to reduce current mandatory minimum sentences for low-level drug offenders.]

The Modern Prison Paradox: Politics, Punishment, and Social Community (2013)

*Amy E. Lerman**

. . . [T]he choices states make about how to respond to crime play an important role in shaping the way individuals engage with one another. Both a period of incarceration as an inmate and days spent "behind the walls" as a correctional officer result in the separation of individuals from their family networks and familiar social supports for long and intensive periods. Simultaneously, these individuals are immersed in a new institutional context that has profound implications for the character of their social networks and the types of norms these networks foster. In particular, the level of threat individuals perceive as they go about their daily lives, as well as the resources they have at their disposal, will influence the social groups they are likely to join. . . .

Adapting to incarceration in a higher-security prison can actually increase the scope of an individual's social networks. However, these social ties may be largely criminal, as indicated by evidence that those assigned to higher-security prisons have more friends in gangs than do those assigned to less punitive prisons. Perhaps more important, these new social ties can alter social attitudes. This is most evident in norms governing interpersonal relationships. Inmates assigned to higher-custody settings are significantly more likely to report aggressive attitudes toward others and are subsequently more likely to recidivate following release.

Differences in the formal and informal culture of prison have consequences for correctional officers' adaptation processes, too. Prison work can strain officers' relationships with friends and family, and shape social interactions and work-related problem solving within the prison context. In addition, new officers assigned to higher-security prisons become less supportive of rehabilitation programs and come to perceive inmates more negatively than officers in lower-custody institutions; they are less likely to consider inmates "regular people" and more likely to perceive them as dangerous and deviant.

These findings add to a growing list of collateral consequences associated with policies of mass incarceration. First, and most basically, it has not gone without notice that imprisonment in the United States is now a substantial site of public spending. . . . In addition to its growing

* *Excerpted from* THE MODERN PRISON PARADOX: POLITICS, PUNISHMENT, AND SOCIAL COMMUNITY 167-79 (2013). Reprinted with permission from Cambridge University Press.

fiscal burden, American prison policy levies a substantial non-monetary cost. Scholars have convincingly shown that incarceration reduces job prospects, harms health, and decreases political trust. Moreover, these individual effects have aggregate consequences. Because low-income and minority individuals are over-represented among the currently and formerly imprisoned, mass incarceration exacerbates racial and income inequality, further stratifying American society. . . .

Mass imprisonment also has explicitly political consequences. Inmates, parolees, and probationers face a “complex network of invisible punishments” that include restrictions on welfare receipt, public housing eligibility, federal education grants, professional licenses, and a host of other material benefits and markers of social standing. Nearly all states also restrict voting rights to felons for some period of time. The result is that, across the country, almost 9 million U.S. citizens, or about 1 of every 40 adults, are now restricted from voting due to a felony conviction. The proportion is significantly higher among black Americans. In this group, 1 of every 13 is disenfranchised, and in three states, more than 1 in every 5 blacks is denied the right to vote. Elsewhere, in work that I conducted in collaboration with Vesla Weaver, we find that the increased prevalence of incarceration has also remade the nature of Americans’ subjective experience of government. When the most frequent or memorable experience citizens have with government is through its institutions of confinement, they come to see politics as something to be avoided rather than participated in. . . .

[A] prison is not a “deep freeze” and individuals do not enter and exit prison unchanged. Instead, time spent in prison can be deeply formative for individuals’ social attitudes and beliefs. . . . [S]cholars must not only attend to, and contend with, the proportion of Americans who experience prison, but also the types of prison they experience. . . .

First, . . . prisons are socializing institutions. . . . Individuals adapt to the institutional and social dynamics of their surroundings, in substantial part by transforming their own conceptions and practice of appropriate interpersonal interaction; prison culture creates “a psychological environment within the physical environment provided.” Variation in the way prison institutions are constructed has significant consequences for the way prisons are experienced by those who pass through them. Thus, the type of society we promote in prison dictates the types of citizens these institutions produce.

Second, prisons are social institutions. Individuals do not experience prison alone. Rather, they become part of a highly structured social context. Learning to navigate more punitive prisons entails a process of social adaptation and integration, and the particular form of social organization that develops in prison can be predicted by the context in which it is created. While the specific forms of social connectedness that are adopted and entrenched in prison may serve inmates and officers well within the culture of the prison, it does not create the types of social ties that are likely to help them reintegrate into the families and communities that will welcome them home. This explains, at least in part, the effects of higher-security prisons on the recidivism rates of inmates and on the work–family conflict experienced by officers.

In the modern era of the punitive prison, it is therefore not only the case that fewer inmates receive rehabilitation services, despite larger numbers of inmates needing such help than ever before. Nor is it only the case that officers encounter more violence in the workplace, even as they report that they have no reliable place to turn for support when work-related issues arise.

Certainly these are important consequences of the punitive turn, which each result in more people exiting prison with unmet needs. At the same time, though, America's harsher prison environments are creating new needs. That is, the experience of incarceration can itself become a factor in shaping social deficits, producing individuals who are less capable of contributing to their communities in positive ways. . . .

The most obvious way to mitigate the negative results I have described is to reduce the number of individuals sent to prison, irrespective of the culture of the particular institution. This could be accomplished by stemming the pipeline to prison, enacting policies that address the educational deficits and acute poverty that are highly predictive of criminal offending. . . .

De-carceration is hardly a novel suggestion. However, as I have written elsewhere and as others have similarly noted, the danger in hailing declining incarceration rates as a singular sign of progress is that they may be accompanied by declining expenditures for in-prison services. . . . If this is the case, then lowering the prison rate will decrease the total number of individuals who are exposed to a potentially criminogenic prison environment but will potentially increase problems for the many who will inevitably be left behind.

It is therefore critical that scholars, practitioners, and policymakers continue to take a serious look at the reigning culture and character of the modern American prison. Observers of criminal justice practice in the United States today have expressed grave concerns about the effects of "heavy-handed attempts to reduce crime." As such, calls for a reduction in the imprisonment rate have long been a central feature of the reform agenda. However, in the push to decrease the use of prisons, we must not lose sight of the need to simultaneously improve them.

[P]rison is not a violent place solely, or even primarily, because inmates are violent. . . . Even holding constant the prior "criminality" of inmates entering prison, America's increasingly punitive correctional institutions yield results that run counter to their crime-reduction mission. . . . In order to reduce the prevalence of prison violence, and thereby change the culture that helps motivate processes of negative socialization, corrections administrators would be wise to pay attention not only to the individual offender, but to how institutional context shapes the types of relationships and communities that form within each prison.

A substantial reduction in overcrowding would go a long way toward alleviating the pressures of prison time. Tensions are bound to arise when people are forced to live on top of each other, triple-bunked in hallways and gymnasiums. . . . Addressing other institutional factors that contribute to negative prison culture – particularly the proliferation of prison gangs – is likewise essential. This is an issue that wardens and other prison administrators are already taking seriously in most correctional systems. Increasingly, however, suppression and isolation have been the primary tactics employed to control gang behavior inside prisons. . . . While placing people inside "prisons within a prison" might be successful at reducing short-term gang-related tensions, pursuing this goal might come at the expense of the long-term health of these individuals and their communities. . . . In light of these concerns, some prisons have recently begun to switch gears. Rather than imposing isolation on suspected gang members, they now "actively promote integration. . . ."

Many of the lessons learned from these gang interventions can also be applied to the general population. Providing all inmates with structured opportunities in which to build

supportive, pro-social networks is likely to be critical in channeling individual socialization during incarceration. There are three ways this could proceed. First, contact with those in the general public might play an important role. Maintaining contact with family members outside prison might serve as one way that the pro-social norms of mainstream society can be communicated and maintained, helping inmates to (re-)engage with the norms and habits of the broader social and legal culture. To facilitate this process, many correctional systems would need to alter their current practices in order to ensure that inmates, whenever possible, are imprisoned in geographic proximity to the spouses, partners, and children who might provide a positive social influence.

Second, correctional administrators might actively promote the regular (if controlled) movement of outsiders within the prison who can interact productively with groups of inmates. For instance, prison administrators might forge productive and ongoing partnerships with outside groups, making prisons systematically more accessible to non-profits, researchers, churches, and other visitors. Some prisons already do this through organizations such as Narcotics Anonymous and Alcoholics Anonymous, which form groups within prisons that are often facilitated by an outside volunteer. However, many more do not. For instance, according to data from the CCOS, fully 54 percent of California correctional officers report that community members, excluding inmates' friends and family members, either never enter the prison facility where they work or do so only rarely.

Finally, prisons might also think critically about how to safely foster positive social ties between incarcerated inmates. By allowing individuals to interact in controlled environments where cooperative behavior is encouraged, and by providing strong and clear incentives for this behavior, prison programs can encourage inmates to engage with others in shared and meaningful experiences. This, in turn, might help reduce conflict between groups. Peer tutoring programs, education classes, AA meetings, group therapy, and inmate religious communities might therefore serve as important counterbalances to other types of prison associations, such as gangs, that urge the adoption of violent and aggressive attitudes. These types of programs may also help to provide "identity alternatives" to gang members and others with a criminal history, giving individuals a source of self-identification that is not rooted solely in their ties to the gang or their criminal past.

Reconceptualizing prison programs in this way would require us to expand our conception of rehabilitation to incorporate the role of the inmate community. Currently, prison-based interventions and their effects are most often studied and understood as being about the individual. They are designed to "fix" people who are deemed to be broken or flawed. However, when well-conceived, these programs might do more than address the needs of individual inmates; they might also help to create and bolster new social bonds through which positive norms can develop. . . . The promise of these programs is that the norms they cultivate within the group will be transferred to interpersonal interactions more broadly, influencing relationships throughout the prison and into the world beyond. . . .

Criminal justice researchers, policymakers, and administrators interested in reconceiving corrections would also be well advised to incorporate the legitimate concerns of correctional workers into their efforts. On the front lines of the prison system, correctional officers, perhaps more than anyone else, directly affect the practice of incarceration in the way that they perform their jobs. Because of this, correctional programs and policies can have little chance of success

without their buy-in. In fact, inattention to the attitudes and experiences of correctional officers can actually exacerbate existing conflicts between the prison organization and its rank-and-file staff. In one study, Nancy Jurik and Michael Musheno find that when a correctional professionalization movement fails to follow through on promises of “professional training, upward mobility and formal services for inmates . . . many of the officers hired in the reform era either quit their jobs or turned to union organizing to make their grievances known to the media and state’s policymakers.” Likewise, when a prison system makes an ideological shift in prison management that is at odds with the traditional custodial role, the resulting role ambiguity can lead to significant frustration among officers; a conflicted sense of the professional role has been shown to be correlated with a variety of undesirable individual and systemic outcomes, including levels of psychological stress, job satisfaction, work–family conflict, and burnout. Role conflict can also have detrimental consequences for inmates, leading officers to compensate by becoming more likely to use their discretion punitively. . . .

[C]orrectional administrators will likely go a long way toward alleviating the stress and strain caused by prison work if they focus on reducing exposure to violence; on this dimension, inmates and officers have a common interest. Working in a violent environment can take a substantial toll on officers’ psychological health, and the results presented in this book add to the growing body of studies that report high levels of work-related stress and low levels of job satisfaction among correctional officers. Prison administrators have a moral responsibility to ensure that everything possible is done to keep officers protected in the workplace. This means ensuring that they have the appropriate training and the high-quality equipment they need to do their job safely and well.

Just as introducing real prison reforms will have positive consequences that go beyond the health of individual inmates to affect the larger inmate community, so, too, might transforming the experience of officers result in changes that will positively benefit the system in its entirety. . . .

Prisons, like other public institutions, can produce salient social networks, consisting of meaningful social ties. However, it is difficult to argue that more punitive prisons produce the type of social capital that Putnam describes when he suggests that “a community blessed with a substantial stock of social capital . . . might have powerful implications for many issues on the American national agenda – [for instance] for how we might overcome the poverty and violence of South Central Los Angeles.” Not only does government allow for the conditions under which oppositional subcultures arise by failing to alleviate poverty and address disorder; it actively reshapes social networks in meaningful and sometimes unintended ways. . . .

[B]y cycling a large and growing group of people through an increasingly punitive criminal justice system, American prisons decrease levels of social trust, increase interpersonal hostility and aggression, amplify the scope and strength of criminal associations, and increase criminal offending. It is therefore not only the case that individuals within a society choose the type of institutions they prefer. Additionally, the particular choice of public institutions will, in turn, have an active hand in shaping the scope and quality of social connections.

Enforcing legal compliance is an essential function, and a necessary part, of organized governance. However, to the extent that characteristics of modern prisons shape interpersonal ties in ways that have durable consequences for individuals and communities, it might not be

only the decline of bowling leagues, political organizations, or even welfare supports that account for the changing social dynamics of the nation. Rather, America's "punitive turn," which has resulted in a growing number of citizens spending ever longer periods of time in increasingly harsh institutions, has also indelibly altered the American social landscape.

REFORMATTING PRISON PRACTICES: REINVESTING IN WHAT?

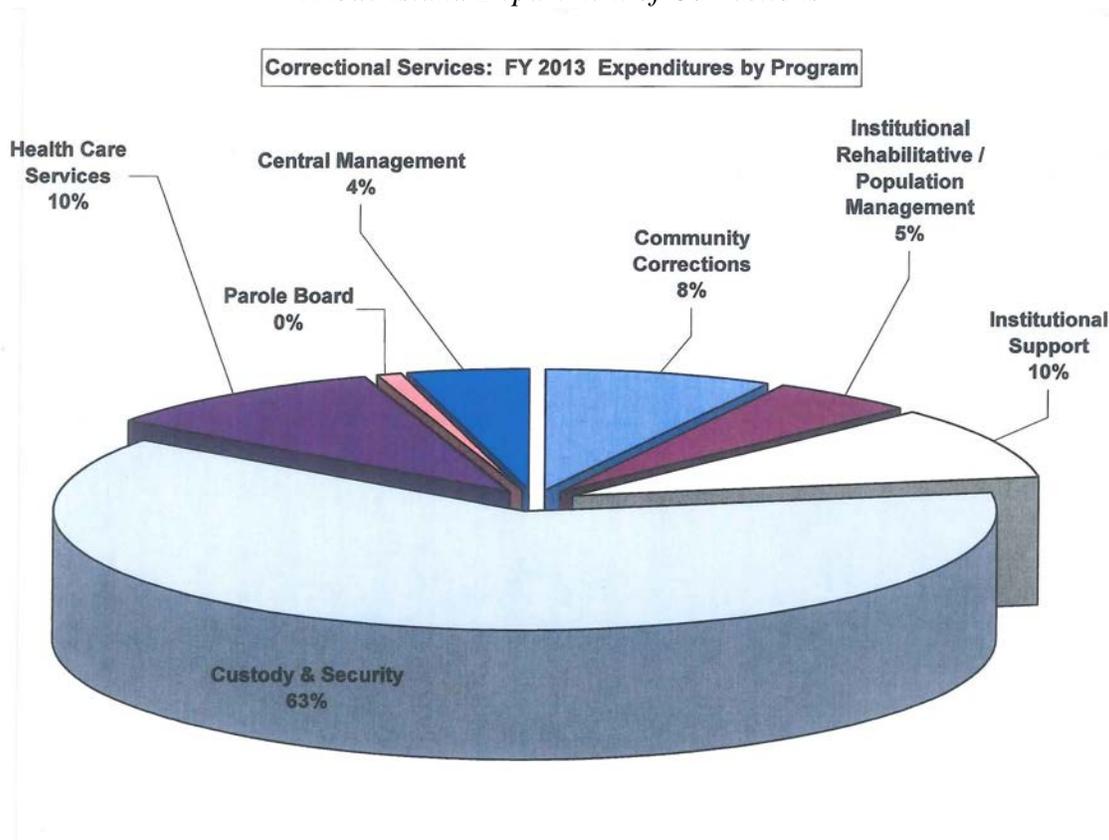
Contemporary approaches are captured by the phrase “justice reinvestment” and the term “de-carceration.” The questions include first, how funds are currently spent, and second, how investment policies ought to shift, and third, what political will can be garnered to do so.

Below, we provide snapshots of the spending in correctional systems as a way to think about the challenges of shifting dollars to non-custodial services and of changing the allocations within prison spending. We turn then to the impact that federal funding has had on criminal justice and why attention is focused on how to change the priorities.

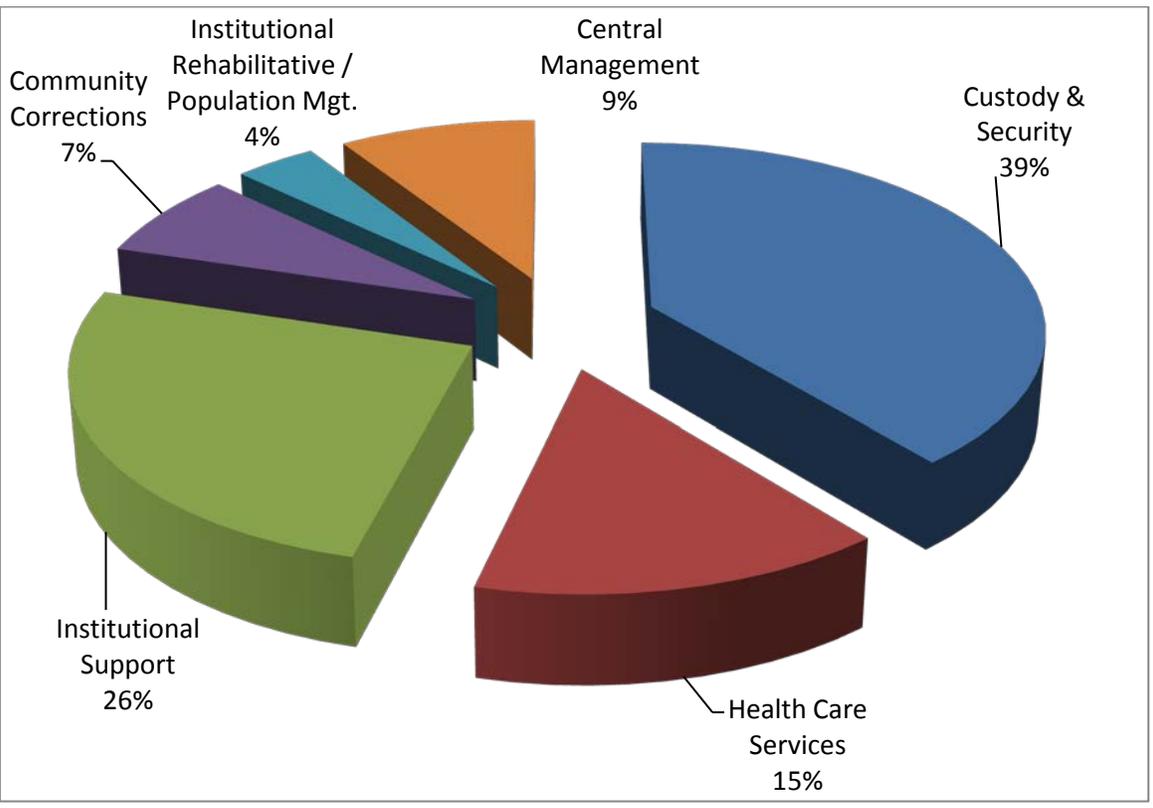
The Current Spending Paradigm: A Snapshot

Expenditures Chart for Fiscal Year 2013

Rhode Island Department of Corrections

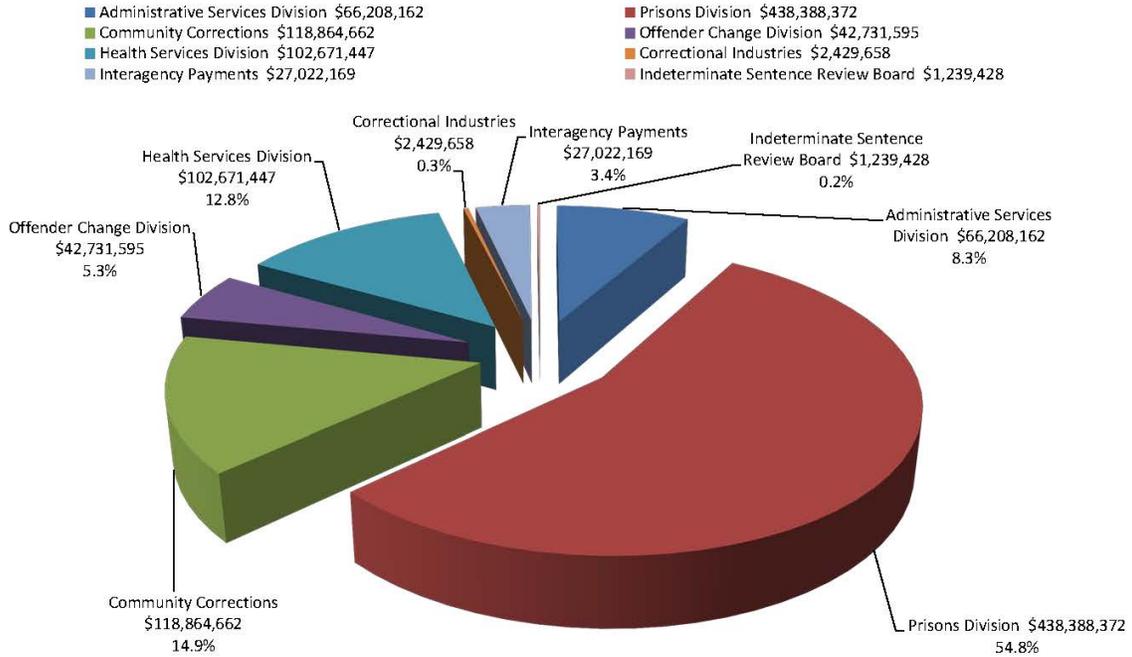


Expenditures Chart for Fiscal Year 2013
Virginia Department of Corrections



Expenditures Chart for Fiscal Year 2013 Washington State Department of Corrections

Washington State Department of Corrections Fiscal Year 2013 Expenditures By Operational Leader



The “Reinvestment Paradigm”

In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, which funded the construction of new state prisons across the country. In 2010, Congress adopted a different approach by appropriating funds to assist states in reducing incarceration levels rather than in building more prison beds. The Justice Reinvestment Initiative (JRI), run by the Bureau of Justice Administration, provides federal funding and technical support for states to research and reform the drivers of high incarceration rates. The idea is that states can learn how to take savings in the costs of corrections and “reinvest” those funds in programs to increase public safety and offender accountability. Some commentators believe that JRI has begun to reverse the trends of the previous decades, while others critique its effectiveness in reducing prison populations in the long term. How to distinguish “real” from “pyrrhic” victories is the question.

Justice Reinvestment Initiative State Assessment Report (2014)

*Urban Institute**

States across the country are increasingly seeking cost-effective and evidence-based strategies to enhance public safety and manage their corrections and supervision populations. One such effort emerged in the mid-2000s, when several states experimented with a criminal justice reform effort built on a foundation of bipartisan collaboration and data-driven policy development. This model—justice reinvestment—yielded promising results, supporting cost-effective, evidence-based policies projected to generate meaningful savings for states while maintaining a focus on public safety. In response to these early successes, Congress appropriated funds to the Bureau of Justice Assistance (BJA) to launch the Justice Reinvestment Initiative (JRI) in 2010 in partnership with the Pew Charitable Trusts (Pew). The initiative formalized the process and provided both financial support and in-kind technical assistance for states to engage in this work. . . .

[States participating in JRI] develop data-informed policy solutions that target justice system population and cost drivers identified through comprehensive data analysis. Through legislative changes and other policy modifications, these solutions are incorporated into the state’s criminal justice operations, both to protect public safety and to contain corrections costs. States also engage a wide array of stakeholders such as judges, prosecutors, defense attorneys, victims’ advocates, corrections staff, law enforcement agencies, and service providers to build support for and consensus on JRI policy solutions.

Following the passage of JRI legislation, states may allocate upfront investment to support implementation of evidence-based efforts or reinvest a portion of the resulting savings [in policies or practices of their choice] after reforms are enacted. . . .

Although JRI states have enjoyed both measurable successes and positive cultural and organizational changes as a result of their reform efforts, they have also encountered a number of challenges in the process. Developing and sustaining consensus on JRI reforms was complicated in the face of policymaker turnover, high-profile incidents, and lack of public education.

* *Excerpted from* JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT (2014).

Ending Mass Incarceration: Charting a New Justice Reinvestment (2013)

*James Austin, Eric Cadora, Todd R. Clear, Kara Dansky, Judith Greene, Vanita Gupta, Marc Mauer, Nicole Porter, Susan Tucker, and Malcolm C. Young**

. . . [U]nless a more aggressive and focused JRI emerges soon, high incarceration rates that persist today will become the status quo. There are five major limitations to the current approach.

Insufficient Targeting of the Key Corrections Reduction Policy Mechanisms

Correctional populations are a function of two factors: admissions (including revocations to prison from probation and parole) and length of stay. If policy makers want to reduce the costs of corrections, they have to reduce the number of people who enter the system, their length of stay, or both. This point is important, because, many reform efforts shy away from policy mechanisms that can reduce lengths of stay or overall admissions in favor of programmatic strategies that seek to reduce recidivism rates. For example, reducing recidivism and re-incarceration is a laudable goal in and of itself, and recidivism reduction measures might have an impact on correctional populations.

But recidivism reduction measures are insufficient to check overall corrections growth, which has more significant drivers such as new commitment admissions and increases in length of stay—especially for people convicted of violent crimes. Too many of the current reform efforts try to achieve population reductions by programmatic initiatives, such as increasing the availability of drug treatment slots, strengthening reentry-related services and supervision, and funding police reform. These tactics have limited capacity to reduce admissions or lengths of stay. For example, in January 2013, a JRI legislative package put forth a set of proposals to West Virginia lawmakers that focused almost exclusively on reducing recidivism. Its proponents projected that adopting the package would result in a 2018 prison population largely unchanged from its 2012 size. The package contained no recommendations to reduce new commitments or length of stay. Reform efforts that are founded on programmatic changes cannot affect prison population in substantial ways.

Limited Involvement of Well Established Local and State Advocacy Groups

. . . Organizing and maintaining demand for an ambitious vision of criminal justice reform requires the inclusion of reform coalitions rooted in the longer-term interests and sustainable commitment of state and local constituencies, especially minority leaders and elected representatives of high incarceration communities, who are often markedly missing. But this cannot be accomplished through meetings with these constituencies in which the participants are not partners in decision-making. Local leaders and advocates genuinely brought into the process could work to reduce incarceration rates, for example, by advocating for a change in policing strategies at the local level while also making the case for state law reform. They have a vested interest in ensuring reinvestment into high incarceration communities while sharing political risk with state lawmakers.

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For example, the JRI entered Oklahoma in 2011 to work with a bipartisan working group of state officials. JRI recommendations focused on providing increased funding for police departments via an arrest-rate-driven grant program and allowing prosecutors to have veto power over an individual's request for sentence modification. The primary reform focus was no longer prison population reduction; it had shifted to increasing funding for law enforcement and probation/parole staff, with a secondary emphasis on cost containment. These concessions to law enforcement were made early on, before any local advocacy organizations or community groups were brought into the discussion. This resulted in a weak bill in 2012; notably, the state's 2014 budget contains no mention of the 2012 law and the law's original supporters are now urging repeal.

Limitations of Short-Term Technical Assistance

Under the current model, a state applies for JRI assistance to analyze and assess the drivers of its correctional population. Based on that analysis, the state receives a set of recommendations that includes estimated impacts of proposed reforms on populations and budgets. The state then drafts legislation to adopt the recommended reforms. The entire process typically takes approximately six months to complete, and allows limited time or resources, if any, for implementation oversight, tracking the impact of reforms, or assuring that projected savings are reinvested. One side effect of this strategy is the absence of input from well-established justice reform advocates; another is that no one is on board to ensure that reforms are implemented as intended. Absent local analytical capacity or participatory authority to track and oversee JRI implementation and reform outcomes, short-lived technical assistance eventually gives way to increasingly watered-down, risk-averse policy mechanisms and inadequate quality assurance of implementation. While it is true that the BJA has recently funded Phase 2 follow-up technical assistance and monitoring grants, these monies were awarded to the Vera Institute as opposed to local organizations.

Insufficient and/or Misdirected Reinvestment

The original idea of Justice Reinvestment proposed that savings from reduced correctional populations be used to build stronger infrastructure in exceedingly high incarceration communities. The reasoning for this was simple: these communities are the feeder system for prisons, jail, probation and parole, and strategic investment in them would be essential for long-run reduction of demand for "correctional services." This was also an ethical argument. Individually and collectively, residents of these communities—already suffering from social exclusion due to race, poverty, disenfranchisement, etc.—have been disproportionately subjected to the further destabilizing and downwardly mobile consequences of high incarceration rates; therefore, it is incumbent upon policy leadership to make investments that promote greater economic and social equality and stability.

The current JRI has not maintained the logical, pragmatic, and ethical links between prison reductions and reversing the systemic social and economic obstacles facing communities with high concentrations of criminalized residents. In fact, we worry that some of the more recent reinvestment packages are likely to strengthen the very corrections policies that have played such a prominent role in the system's growth in the first place. Increased funding for "intensive community supervision" (i.e., closer control and scrutiny) can result in higher rates of return to prison by widening the net of social control. Even investment in rehabilitation services,

such as drug treatment, can backfire if services are inappropriate for the individual or sub-par since relapse (which is common among recovering addicts) can result in revocation to prison. . . .

Failure to Reduce Structural Disincentives to Local Innovation That Reduce Corrections Populations

Some of the chief impediments to reducing the overuse of state prison are the structural disincentives (financial and risk) inherent in current law enforcement and corrections systems. If localities seek to develop alternative approaches to state prison, it is the localities which must bear the financial burden of establishing and maintaining those alternatives, which discourages local innovation and reinforces the easier and cheaper (to localities) option of prison, where the state picks up the costs. Similar disincentives are present in probation and parole systems, where the risk of taking a less punitive approach falls squarely on individual officers, who have no incentive to take the risk of a client's being rearrested—unless, of course, an administration deliberately and intentionally reverses the structural incentives to discourage revocations and encourage early discharge from probation, as has happened recently at the NYC Department of Probation. . . .

JustLeadershipUSA (2014)

Policy Statement

What is JustLeadershipUSA?

JustLeadershipUSA (JLUSA) is a nonpartisan membership organization whose mission is to strengthen and elevate the voices of individuals and communities directly impacted both by crime and by the criminal justice system, and to support them in becoming more powerful reform partners on the local, state and national levels. JLUSA, founded by Glenn E. Martin—who in his youth spent six years in New York state prisons—strongly believes in the principles of united purpose, united voice and the united power of the people and communities impacted by crime and the criminal justice system to drive, amplify and sustain criminal justice policy reform efforts. These principles guide our approach to reform.

We have an ambitious goal at JLUSA: To reduce the number of people in prison by half by the year 2030 through a strategy of federal and state-specific decarceration campaigns. . . . According to Bureau of Justice statistics, in 2012 about 2.9 percent of the U.S. resident adult population—upwards of 7 million adults—are under correctional supervision (including in prisons, local jails, or on probation or parole).

People of color and the poor are heavily overrepresented among the incarcerated. Today, one in every 10 black male in his 30s has been in prison or jail. Contrary to what many believe, it is not violent crime but rather misguided (and often tacitly racist) public policies such as the “war on drugs,” mandatory minimum sentencing, “three strikes” laws, stop and frisk, reductions in the availability of parole or early release that are, in fact, the main reasons for the burgeoning incarceration rates in the U.S.

What We Do

To help achieve our audacious vision, JustLeadershipUSA believes that we must:

1. Develop and support leaders
2. Reshape public opinion
3. Engage in policy advocacy efforts on the federal, state, and local levels

Leadership Development

At JustLeadershipUSA, each year formerly incarcerated leaders from around the country will be supported to produce quality criminal justice reform outcomes that are sustainable and transformative. Partnering with DKB Wave, JLUSA will develop and employ an inclusive and culturally competent leadership model.

Reshaping Public Opinion

JustLeadershipUSA works with impacted persons and communities to identify and share their stories. Recognizing the strong correlation between communications and social change, JustLeadershipUSA uses the power of stories, media and technology to retell the tales and ultimately make the world a more enriched place by diversifying the field. Storytelling will be used to provide a human context to a national problem that has been historically influenced by deeply ingrained stereotypes.

Advocacy

In partnership with our members, JustLeadershipUSA engages in decarceration policy advocacy on the federal, state and local levels, making sure to constantly and meaningfully infuse the voices, vision and leadership of people and communities directly impacted. In order to eliminate mass incarceration as a response to crime, JustLeadershipUSA aims to truly “re-form” how advocates reach tangible results in the criminal justice arena. JLUSA provides member organizations (private and nonprofit) the opportunity to use their membership donations to provide scholarships for incarcerated members—essentially allowing them to advocate on a micro level.

The Dangers of Pyrrhic Victories Against Mass Incarceration (2010)

Robert Weisberg and Joan Petersilia *

Campaigns against mass imprisonment have varied motives and sources. These motives and sources are not necessarily mutually inconsistent, but the differences counsel caution. It is perfectly right to view mass incarceration as a civil rights disaster and a national moral embarrassment. The implications of mass incarceration in terms of inequality of social and economic opportunity are as wide and foundational as the concerns about social and economic opportunity that motivated the civil rights movement of the 1960s. But if that un-deniably valid characterization of mass incarceration fuels a mostly “liberationist” approach to reducing incarceration, it runs the risk of terrible backfire. Its beneficiaries, at least in the short run, will be millions of young men who maybe relieved of the immediate burden of formal state custody but

* *Excerpted from* 139 DAEDALUS 6-9 (Summer 2010). Reprinted with permission from authors.

will hardly be prepared to enjoy all the potential benefits thereof. The civil rights movement ran the risk of not succeeding according to some expectations, but it did not run the risk of failing in the way that prison reduction could. If the hard work is not done, we may face another round of backfire, disillusionment, and susceptibility to political demagoguery.

From one perspective, alleviating mass imprisonment hinges on rehabilitation and reentry programs that can make re-integration possible and can truly lower recidivism. From another, it is a matter of undertaking tough, smart triage in sorting prisoners for release and in deciding which prisoners are amenable to which forms of alternative sanction. We know much more today about how to identify the subset of offenders who will truly benefit from rehabilitative programming, and we should not waste taxpayer monies on those who will not. The rehabilitation programs themselves will have to be run by very well-trained, and therefore very expensive, functionaries who know how to rely on the available evidence-based protocols for measuring and predicting the potentially dangerous and for adjusting practices to $\frac{1}{2}$ t with different kinds and degrees of supervision. It will require recognizing that drug rehabilitation and other cognitive behavioral programs are very hard work and that they normally take months of engaged commitment by offenders to succeed.

Thus, a strictly morals-driven approach to mass incarceration risks ignoring these crucial minefields in criminal justice reform. But the apparently opposite motivation for reform, coldly pragmatic concerns about economics, is risky in its own way. It is good for politicians to view criminal justice more as a regulatory system subject to cost-benefit analysis than as a temple of political theology. In this regard, the emerging fiscal concerns of a few years back that pushed politicians in a more regulatory direction were salutary. However, if fiscal concern becomes too self-justifying a motivator for criminal justice reform, it will prove just as dangerously shortsighted as the liberationist approach, especially now that modest fiscal concern has turned into a huge fiscal exigency in the states.

Recent events in California illustrate this truth all too well. For the first time in recent memory, the prison population is declining in California; recent legislative budgets, interacting with federal court intervention, will force further declines. For those who decry mass incarceration, there is a dangerous temptation to see this reduction as a possible silver lining to the economic crisis. Although it has arisen partly because of the federal court injunction and partly because of deep-seated constitutional obstacles in the structure of California's government, it may well be the reality of fiscal disaster that will lead to further reductions in prison overcrowding. But a dysfunctional political economy brought the state to this fiscal disaster, and that dysfunction will survive the imminent prison reduction. Just as the legislature reluctantly accepted a very compromised prisoner reduction plan—mostly a parole reform plan—to satisfy both the courts and the accountants, it also took the perverse next step of slashing hundreds of millions of dollars from adult prison and parole rehabilitation programs. Thus large prisoner release orders may facilitate only an interim prisoner reduction, because if nothing changes in the determinate sentencing and parole laws, no bureaucratic alteration in parole supervision practices will hold up for long a massive return of released people to prison, if they re-main criminally active.

Many reformers promote the principle of risk-needs assessment as a tool of criminal justice policy; in doing so they move beyond blind belief in the value of prison reduction per se. But even here, there is a risk that reform will only pay rhetorical fealty. In September 2009, California released the results of its actuarial prediction instrument, known as the California Static Risk Assessment (CSRA). The results showed that of the 148,706 prisoners considered in the CSRA, almost 76 per-cent had a moderate-to-high risk to re-offend. A detailed analysis by criminologist Susan Turner and her colleagues shows that within the moderate risk group, percent can be expected to be rearrested for a felony within three years of their prison release (22 percent for a violent felony). Within the high risk group, 82 percent are predicted to be rearrested for a felony within three years (38 percent for a violent felony).

California prisoners have high needs, most of which go untreated during incarceration. Two-thirds of all prisoners were identified on the CSRA as having a moderate-to-high substance abuse risk, and nearly half (45 percent) exhibited moderate-to-high anger problems. Yet in 2009, when the prison population equaled more than 170,000, there were just 11,000 substance abuse treatment slots and just 200 anger management treatment slots in California prisons. California has no sex offender treatment in prisons despite the fact that about 9 percent of the California prison population is serving a current term for a sex crime conviction. Similar treatment scarcity exists in California's parole system: in July 2009, there were just 521 substance abuse treatment slots for the 128,554 parolees coming home. In the September 2009 report, California's Inspector General called the results "expected and alarming" and urged increased investment in the state's re-habilitation programs. The report concludes, "Without consistent funding and support for rehabilitative programming, lasting reform can never be achieved."

Ironically, just two days after that report was released the state legislature passed a budget slashing prisoner education, drug treatment, and job training programs. The cuts, totaling more than \$250 million, represent more than a third of the previous year's entire budget for adult prison programs. Prison substance abuse programs will be shortened to three months (compared to the current six to thirty-six months) of treatment, and treatment staff will be reduced by 50 percent. Traditional classroom education will be replaced by "self-directed" programs, and the classroom instruction that does remain will often be taught by volunteers and inmate teaching assistants, resulting in teacher layoffs numbering between six hundred and eight hundred. Parolee programs are being similarly decimated, with reductions in day reporting centers, reentry partnerships, and residential multiservice centers. Public safety is at serious risk if release of moderate- and high-risk offenders is done without regard to reentry. But it is also at risk when reentry is done but done badly, especially at a time when unemployment is increasing. This compounding factor puts parolees in competition with free citizens for jobs and benefits that are already scarce.

California is not alone in this regard. While prison and parole populations are decreasing across the United States, the very programs necessary for success in reentry are disappearing. We can choose our favorite metaphoric cliché: this is a perfect storm, a recipe for disaster, a crash-and-burn scenario. Reductions in prison population may end up being blamed—sometimes wrongly, but sometimes rightly—for the outcomes. The current situation may provide another opportunity to set alternative sanctions and reentry support on the right course. But if we fail in

this respect yet again, we might face awful recidivism in the coming years, and we will enter another dismal cycle in which “nothing works” will be the old-new mantra.

Rather than speaking of mass incarceration, we should redefine our terms and focus on curtailing unnecessary incarceration. Liberal reforms often pay rhetorical fealty to the trope of “public safety.” If incarceration is to become a rational tool of social regulation, reformers will have to be more than rhetorical in acknowledging that many, or perhaps most, people convicted of serious crimes need to spend a portion of their lives behind bars. However misguided and excessive were the harsh new criminal laws and determinate sentencing systems created thirty years ago, the justifying purposes of retribution, incapacitation, and deterrence still have moral and utilitarian purchase. To put it differently, on the one hand, given the history of racial and economic injustice in America, a deep and plausible moral argument can be made that great numbers of people now in prison do not de-serve to be there, nor, in a similar sense, has American society earned the right to keep them there. On the other hand, when government makes choices at particular decision points within the criminal justice system, from apprehension to prosecution to trial to sentence, those choices are only to a limited degree the causes of mass incarceration; they are also the effects of the deeper causes of mass incarceration. Just as deliberate governmental decisions to imprison are not necessarily the dominant cause of the problem, the simple decision not to imprison cannot itself be the dominant solution.

Alternative nonprison sanctions may prove very cost-efficient for the state and salutary for society because they mitigate the metastatic effects of imprisonment on the economic and social lives of ex-inmates. Therefore, they will morally mitigate, if not justify, the costs of criminal prosecution. The notion of alternative sanctions, however, poses the risk of inducing reformers to view it sentimentally. Nonprison sanctions are still sanctions that often involve serious restrictions on liberty and movement. They also entail intrusions on privacy because law enforcement officers who are monitoring probationers, parolees, and the like have enhanced powers of search and seizure, and these officers have many behavioral criteria beyond the strict test of probable cause to justify the intrusions. Some of the most promoted forms of alternative supervision, from the halfway house to the much-touted global positioning systems (gps), involve the “carceral discipline” often decried by social critics as the modern culture of control (to use sociologist David Garland’s words) or as “governing through crime” (legal scholar Jonathan Simon’s words). In effect, we may have a triumphantly broad reading of the Eighth Amendment that tosses us against a very narrow reading of the Fourth Amendment. . . .

But a key lesson of the history of criminal justice reform is that academics must pay their dues on the less magisterial, more mundane side of the issues as well. Those interested in translating the “what works” literature into operational programs must make certain that the programs are implemented fully and coherently, not dismantled or watered down through the political process in ways that undermine their effectiveness. This fact certainly does not deny the great value of the work already done; indeed, that work will complement the new studies. Academics must now recognize that the gritty detailed work of figuring out how to do reentry right is part of their professional obligation. This task will entail ground-level, state-by-state studies to determine which programs work in prisons, which ones work outside prisons, which prisoners can be helped and which cannot: all the questions on which policy-makers and front-line officials need urgent guidance.

Prisons as Providers of Social Services: Education's Potential and Political Freight

Prison reformers of the nineteenth century had programmatic agendas for penitentiaries. Today's reformers do as well, as prisons provide an array of social services, from the gender-responsive programming discussed in Chapter I to mental health services in focus in Chapter II. Below we glimpse efforts to use prisons as schools, providing education to those in detention. In a meta-analysis of available data, researchers at RAND concluded that education had great efficacy in reducing recidivism. The complexity of creating substantial educational opportunities stems from the challenges for teachers when designing curricula, the scale and variety of educational needs, and political hostility to funding programs.

Evaluating the Effectiveness of Correctional Education (2013)

Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders, Jeremy N. V. Miles *

Our meta-analytic findings provide additional support for the premise that receiving correctional education while incarcerated reduces an individual's risk of recidivating after release. After examining the higher-quality research studies, we found that, on average, inmates who participated in correctional education programs had *43 percent lower odds of recidivating* than inmates who did not. These results were consistent even when we included the lower-quality studies in the analysis. This translates into a reduction in the risk of recidivating of 13 percent-age points for those who participate in correctional education programs versus those who do not. . . . Using more recent studies and ones of higher quality, our findings . . . provide . . . further support to the assertion that correctional education participants have lower rates of recidivism than nonparticipants.

Given the high percentage of state prison inmates who have not completed high school, participation in high school/general education development (GED) programs was the most common approach to educating inmates in the studies we examined. Focusing only on studies that examined this kind of program relative to no correctional education, we found that inmates who participated in high school/GED programs had *30 percent lower odds* of recidivating than those who had not. In general, studies that included adult basic education (ABE), high school/GED, postsecondary education, and/or vocational training programs showed a reduction in recidivism. However, we could not disentangle the effects of these different types of educational programs, because inmates could have participated in multiple programs, and the amount of time that they spent in any given program was rarely reported.

* *Excerpted from* Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders, Jeremy N. V. Miles, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, Rep. RR-266 (RAND 2013). Available under open license.

Long-Term Offender Pilot Program (2014) *California Department of Corrections and Rehabilitation*

The California Department of Corrections and Rehabilitation (CDCR) is launching a pilot program offering targeted rehabilitative services to inmates serving long-term sentences. The Long-Term Offender Pilot Program (LTOPP) provides evidence-based programming during incarceration and services upon release to allow inmates an easier transition back into society. “Due to the length of incarceration, long-term offenders are often not prepared for the significant changes in technology and day-to-day living that have occurred since they were first incarcerated,” said Millicent Tidwell, CDCR Division of Rehabilitative Programs Director. “Giving these offenders the tools they need to be successful in their own rehabilitation both inside and outside prison is imperative.”

The program is intended to serve inmates who have been identified as having moderate to high risk of criminal behavior and are serving indeterminate sentences with the possibility of parole. The LTOPP is a voluntary program which will include evidence-based treatment for:

- Substance abuse
- Criminal thinking
- Victim impact
- Anger-management issues
- Improvement of family relationships

The LTOPP will initially be implemented at the following institutions: California State Prison, Solano in Vacaville; Central California Women’s Facility in Chowchilla; and California Men’s Colony in San Luis Obispo. Inmates who are serving indeterminate sentences at non-pilot institutions may be allowed to temporarily transfer to a pilot location in order to participate . . . Additionally, CDCR is creating Long-Term Offender Reentry Facilities that will help long-term offenders during their transition back into society, including housing, employment, and community-based services. Locations for these reentry facilities are still being determined. The pilot program will be in effect for 24 months, during which the CDCR division of Rehabilitative Programs will monitor implementation and effectiveness of the program. . . . The LTOPP is being implemented in accordance with the 2012 CDCR Blueprint in which the department was tasked with increasing the percentage of inmates served in rehabilitative programs prior to release to 70 percent of the target population.

Educating Felons: Reflections on Higher Education in Prison (2006)

*Heather Jane McCarty**

Designing a college-level class for prisoners requires a different approach than in noncarceral institutions, not just because of the limitations imposed by book options available but also because of the limited access to resources. Unlike colleges and universities on the outside, prisons do not have extensive academic libraries. . . .

A limited library makes selecting assignments for history courses particularly challenging. As a historian, I think that students need to complete historiographical essays and original research papers in order to truly understand the craft. . . . Prisoners at San Quentin work thirty-five to forty hours per week, and oftentimes job assignments conflict with prison library hours. I quickly discovered that if I wanted my students to analyze primary sources and make their own arguments, I needed to supply them with the majority of the research materials. Creativity is a requirement for those teaching behind prison walls, and it often means thinking through assignments in ways we take for granted when teaching outside. For example, prisoners do not have Google or access to the Library of Congress Web site from their prison cells. . . .

In addition to limited resources, larger pedagogical issues play out in the classroom that vary from traditional dilemmas faced in a classroom outside of prison. Basic things like accounting for attendance become a daily problem. Students miss class not because they were out partying the night before and slept through their alarm clocks, but because their wing of the prison was on lockdown — meaning that no prisoner is allowed to leave his cell. Sometimes the entire prison winds up on lockdown, and the semester extends beyond the original timeline to make up lost days. Lockdowns are not the only complicating factor in class attendance. There are involuntary work assignment changes, transfers to other prisons, and other administrative matters that interfere with class time in addition to regular free-world problems like illness. . . .

In the winter of 2014, the governor of New York announced a statewide initiative to provide a college education to prisoners in ten facilities (at a cost of \$5,000 per inmate per year) with the goal of reducing recidivism. Some legislators objected to “Attica University” and argued it was wrong to spend money on prisoner education when New York State residents had to pay significant tuition for the state university. These materials thus provide an example of claims of unfairness in providing support to prisoners, when others—seen as more deserving—do not receive state support. Hence the questions are both about allocations of funds in prison and about the challenges of marshaling political will to support new services for prisoners.

* *Excerpted from* 96 *RADICAL HIST. REV.* 87, 90-92 (2006). Reprinted with permission from author.

Governor Cuomo Launches Initiative to Provide College Classes in New York Prisons (February 16, 2014)

Governor's Press Office

Governor Andrew M. Cuomo today announced a new statewide initiative to give incarcerated individuals the opportunity to earn a college degree through funding college classes in prisons across New York. Studies have shown that investing in college education for prisoners dramatically decreased recidivism rates while saving tax dollars on incarceration costs. Those who earn a college degree while in prison are less likely to end up behind bars again, therefore decreasing the number of inmates in New York state prisons.

“Giving men and women in prison the opportunity to earn a college degree costs our state less and benefits our society more,” said Governor Cuomo. “New York State currently spends \$60,000 per year on every prisoner in our system, and those who leave have a 40 percent chance of ending up back behind bars. Existing programs show that providing a college education in our prisons is much cheaper for the state and delivers far better results. Someone who leaves prison with a college degree has a real shot at a second lease on life because their education gives them the opportunity to get a job and avoid falling back into a cycle of crime.”

The initiative will provide college level education at 10 New York State prisons, one in each region of the state. The program would offer both associates and bachelor's degrees. Degrees would take generally 2 ½ to 3 years. The state will be issuing a Request for Proposal (RFP) starting March 3, 2014 that will solicit responses from educational associations that provide college professors and classes in an accredited program in order for inmates to earn their degrees.

“Hell No To Attica University”: No Free College Education for Convicts (Feb. 18, 2014)

*Greg Ball, New York State Senate**

Governor Andrew Cuomo has announced a plan that would provide college-level education at 10 state prisons, at a cost to taxpayers of about \$5,000 per inmate per year. There are an estimated 54,500 inmates currently confined in state prisons.

The last thing New York State should be funding is college tuition for convicts when we have hardworking families in New York State that are struggling to send their children to college. While it is understandable for the need of counseling and rehabilitation, free college tuition for prisoners is a slap in the face to hard working New Yorkers that work multiple jobs and take out exorbitant student loans to pay for the cost of higher education. . . .

* *Excerpted from* New York State Senate website and online petition (Feb. 18, 2014).

Prison College Program Hailed as a Sound Investment (Feb. 24, 2014)

*Tanique Williams, Legislative Gazette**

Gov. Andrew Cuomo recently announced a plan to use tax dollars to fund college classes in ten state prisons. The idea is to reduce recidivism, which in New York is currently 40 percent, according to the governor, and reduce the future burden on taxpayers for incarceration costs. Studies show that with college degrees, inmates have a better chance of finding jobs after their release and are less likely to recommit crimes.

Cuomo has proposed spending \$5,000 a year per inmate to educate prisoners seeking a college degree. Meanwhile the state spends \$60,000 a year to incarcerate one person. "Giving men and women in prison the opportunity to earn a college degree costs our state less and benefits our society more," Cuomo said. "New York state currently spends \$60,000 per year on every prisoner in our system, and those who leave have a 40 percent chance of ending back behind bars. Existing programs show that providing a college education in our prisons is much cheaper for the state and delivers far better results. Someone who leaves prison with a college degree has a real shot at a second lease on life because their education gives them the opportunity to get a job and avoid falling back into a cycle of crime. . . ."

College classes are already offered at 18 state prisons, according to The Associated Press, and are almost entirely privately funded.

The New York State Department of Corrections and Community Supervision has resorted to private funds to provide post-secondary education for incarcerated individuals since the discontinuation of PELL and TAP grants for prisoners in the mid 1990s, according to the governor. However, DOCCS developed a model in 2007 to develop partnerships between a correctional facility, a college in the same region, and a private funding source.

Bard College has a college program in six state prisons, according to the AP, and spends \$5,000 a year to educate one inmate. There are currently 275 inmates enrolled in its programs, which has resulted in a 4 percent rate of recidivism for those students. The college estimates a \$1 million annual return from a \$300,000 investment to educate 60 inmates. . . .

Incarceration rates are disproportionately higher within communities of color. According to the Governor's Office, every one of three African American men will be incarcerated at some point in their life, and one in every six Latino men will be incarcerated—compared to every one in 17 white men. New York's current inmate population is 49.2 percent African American, 24 percent Hispanic, 24.1 percent white and 2.7 identify as other.

Assemblyman Jeffrion Aubry, who previously served as chair of the Assembly Corrections Committee, said Cuomo's plan would "fundamentally change the dynamic of recidivism" in New York. "A college education can open a variety of new paths and opportunities for incarcerated individuals that can empower them to be upstanding citizens,

* *Excerpted from* Tanique Williams, *Prison college program hailed as a sound investment*, LEGISLATIVE GAZETTE, Feb. 24, 2014. Reprinted with permission from Legislative Gazette.

rather than fall into a recurring cycle of criminal activity. This would not only save taxpayer dollars by reducing the size of our prison population, it would also address the disproportionate representation of minorities in prisons," said Aubry, D-Corona. . . .

Opposed to "handouts" for prisoners, Assemblyman Kieran Michael Lalor, R-Fishkill, is drafting legislation that would cut prison spending by 10 percent and offer student loans to inmates.... "We have to cut recidivism rates, but we shouldn't ask taxpayers to pay more and more to do it," Lalor said. "Governor Cuomo seems to be saying we already spend \$60,000 yearly per prisoner; what's an extra \$5,000 for his college plan? That's the wrong attitude. We should be asking why we spend so much and how we can cut it. If we can cut it by 10 percent, we can look at offering student loans to prisoners. Because they're not good credit risks, we'll garnish a percentage of their wages to pay taxpayers back. But, this shouldn't be a handout. Taxpayers can't afford more handouts. . . ."

Two lawmakers are outright petitioning the governor's proposal, noting the rising cost of a college education and student loan debt. As of press time, a petition launched by Sen. Mark Grisanti, R-Buffalo, has garnered 5,898 signatures as of press time. "While I am in favor of rehabilitation and reduced recidivism of inmates, I cannot in good conscience support the Governor's plan when so many individuals and families in New York are struggling to meet the ever-rising costs of higher education," Grisanti said in a statement on the petition's website. . . .

The Vera Institute of Justice — an independent, nonpartisan, nonprofit center for justice policy and practice, with offices in New York City, Washington, D. C, New Orleans and Los Angeles — believes Cuomo is on the right track with his proposal. The organization has developed a partnership with New Jersey, Michigan, and North Carolina through their Pathways from Prison to Postsecondary Education Project, which aims to expand access to higher education, along with supportive reentry services, for people in prison and those recently released. The Vera Institute's President Nicholas Turner said in statement that Cuomo's plan is "part of a growing effort by both Republican and Democratic administrations in states to address the costly challenges of recidivism and reincarceration." According to Turner, college programs in prisons can decrease recidivism by approximately 72 percent.

"Offering men and women in prison the chance to study at a college level is a win-win for New York. It increases the job readiness of previously under-educated individuals, improves their employability and capacity to support their families, and thus improves the communities that 95 percent of incarcerated people will return to. By providing the means to a more secure life, it can also reduce new crime and new victims and help reduce the size of our overburdened and costly prison population," Turner said. . . .

OVERSIGHT OUTSIDE OF PRISON

De-carceration does not necessarily entail the end of state supervision, which has a track record of routing people back to prison. One issue is whether supervision is inevitable upon release, and another is what forms supervision can and should take – either for those sentenced to probation rather than incarceration or for those exiting prisons. The standard set of probation and parole conditions – illustrated below – echoes the strictures imposed on prisons by the legacy of Eastern State Penitentiary. How could conditions be revised and if so, in what ways? What are the means to support people under supervision rather than providing them with a pathway back to prison? Is indeterminate sentencing a necessary artifact of the sanctions for violation? Could supervised release provide an alternative to prison in a form that makes it not an extension of prison?

Adult Probation and Parole Services, General Rules, Regulations and Conditions (2014) *Delaware County, Pennsylvania*

Probation/Parole is granted with the full understanding that you are in the legal custody of the Delaware County Court until the expiration of your maximum sentence, or until such time as you may be legally discharged. The Court has the power at any time during your period on Probation/Parole, in case of a Violation of the Conditions of Probation/Parole, to cause your detention and/or sentence to/or return to a correctional institution.

Your Probation is Granted Subject to the Following Conditions:

1. You **will report regularly**, in person or in writing, to your Probation/Parole Officer according to their instruction. You are not to attend any appointment with a Probation/Parole Officer or with any court ordered program under the influence of drugs or alcohol.
2. **You will live at the address/phone number listed above, and you may not change your residence without permission from your Probation/Parole Department. You will permit a Probation/Parole Officer to search your residence upon their request.**
3. You will comply with all Municipal, County, State and Federal criminal laws, and abide by any written instructions of the Delaware County Court or your Probation/Parole Officer.
4. Notify your Probation/Parole Officer within seventy-two (72) hours of **ANY** arrest or citation.
5. You will make every effort to obtain and maintain employment and support your dependents.
6. You will not travel outside of Pennsylvania or the community to which you have been Probationed/Paroled to as defined by your Probation/Parole Officer, without written permission.
7. Abstain from the unlawful possession, or sale, of narcotics and dangerous drugs, and abstain from the use of Controlled substances within the meaning of Controlled Substance, Drug, Device and Cosmetic Act without a valid prescription. **You will submit to random drug analysis and Breathalyzer test.**

8. Refrain from owning or possessing any firearm, deadly weapon, or offensive weapon. You are not permitted to hunt while under the jurisdiction of the Court.
9. Refrain from overt behavior, which threatens or presents a clear and present danger to yourself or others.
10. You will comply with the following **SPECIAL CONDITIONS**, which have been imposed by the Court or by your Probation/Parole Office pursuant to Order of Court.

Indeterminate Sentencing Returns: The Invention of Supervised Release (2013)

*Fiona Doherty**

The Sentencing Reform Act of 1984 (SRA) emerged from a determinacy revolution that sought to establish certainty and transparency in the length of federal prison terms. The statute prospectively abolished federal parole, which had provided a mechanism for the early, discretionary release of federal prisoners. After the passage of the SRA, a prison sentence imposed by a federal court at judgment was supposed to be “determinate,” or definite, in length. Under this framework, the prison sentence originally imposed would be the prison sentence actually served--with no possibility of the kinds of discretionary adjustments in length that had characterized federal sentencing under the parole system.

In place of parole, the SRA created supervised release, a new system of post-incarceration supervision. Supervised release imposes conditions on a person's behavior after he or she is released into the community, but it does not substitute for part of a prison sentence. It instead follows the completed prison sentence imposed at judgment. Supervised release, as originally conceived, was a form of community supervision that was consistent with the imposition of a determinate prison term. . . .

[S]upervised release, as it has evolved, has usurped the determinacy revolution by making federal prison terms “indeterminate,” or indefinite, in length. It explains how determinacy in federal sentencing unraveled, despite the political and intellectual energy expended on implementing it in the name of “truth in sentencing.”

First, soon after the SRA's passage, Congress created a revocation procedure that allows judges to return people to prison for violating the conditions of their supervised release, including conditions prohibiting behavior that is not criminal. Second, federal courts justified this revocation scheme by framing reincarceration as additional punishment for the underlying crime, as opposed to punishment for the supervised release violation.

These developments render the time spent in prison for the underlying crime variable, creating prison sentences that are structurally indeterminate. The system tailors the period of incarceration based on post-judgment assessments of the rehabilitative progress of the offender and the danger posed to the public by his or her presence in the community. . . .

* *Excerpted from* 88 N.Y.U. L. REV. 958, 1020-30 (2013). Reprinted with permission from author.

Although the supervised release system produces indeterminacy, it does not reflect the principles of the nineteenth-century advocates of indeterminate sentencing. Nor does supervised release serve the goals of certainty and transparency advanced by the twentieth-century proponents of the determinate sentence. In fact, no clear penological or adjudicative principles validate supervised release in its current form. Neither the case law, the academic literature, nor the legislative history contains a conceptual or practical defense of the system as it now exists. And yet, the issue is not an abstract one, given the number of people on supervised release. . . .

The lack of any clear philosophy or purpose has not slowed the growth of supervised release. The last twenty-five years have seen an enormous expansion in its scope, both in terms of the number of people impacted and the breadth of the conditions imposed. Periods of supervised release regularly trigger reimprisonment, meted out at hearings with minimal due process protections and followed by additional periods of supervised release, all attributable to the same underlying crime. Select offenses, including federal drug trafficking crimes, now carry the possibility of lifetime supervised release.

Post-release supervision and revocation have become normalized to such an extent, in both federal and state practice, that it is hard to conceive of a time when such concepts were new and controversial. The documents from the nineteenth century, however, reveal a lively debate about whether any extension of penal control into the community impedes or encourages meaningful reintegration. By explicating the indeterminacy of our current federal sentencing system, I hope to reopen that discussion. . . .

I propose that we consider whether supervised release in its present form should be completely eliminated. Defendants would serve their full prison terms, minus any good time allowances, and then the possibility of prison would be over. Release dates would be predictable and certain, transparency would be restored, and the autonomy of released prisoners would be respected.

In this way, punishment would be confined to the determinate prison term. This would provide for a “good system of punishment”—in the words of the British parliamentary committee that investigated penal transportation in 1837—because at the end of the term, prisoners would be considered to have “atoned” for their crimes. The Department of Probation could still provide post-release services, including drug treatment and job placement, but participation in these programs would be voluntary. . . .

Abandoning conditional release and indeterminacy would not mean abandoning efforts at reintegration. . . . [T]he prison sentence, itself, could be used for rehabilitative treatment, job training programs, and preparing inmates for release. As suggested by the Senate Report on the SRA, transition services implemented by the BOP could replace post-release community supervision as the primary locus of reintegrative efforts. Currently, however, the BOP does relatively little to provide these kinds of services. . . . If the ultimate goal is reintegration, . . . the sizable resources that we now spend on supervised release might be productively transferred to job programs inside and outside prison. . . .

In New York City, a new model of probation allows probationers to receive reduced supervision upon achievement of “merit credits,” which include victim restoration measures, employment retention, educational achievement, sustained program participation, program completion, or pro-social community activities. The implementation of a merit structure redefines successful supervision around incentives, rewards, and community connections. In addition, NYC probation added the Neighborhood Opportunity Network (NeON), which relocates the central probation office into the communities where the probationers live.

How much can this—and other examples below—affect the likelihood of re-incarceration? What role ought communities play in shaping the supervision process? To what extent do the alternatives address the concerns raised by Doherty?

Supervision Conditions of Persons Sentenced to or Placed on Probation (2013)

*New York City Department of Probation**

351.6 Probation Supervision

The goal of probation supervision is to reduce recidivism by achieving a balance between risk management and risk reduction. Probation Supervision is the foundation for that balance and required as follows:

- (a) If the case is an active case, differential supervision shall be based on the results of the assessment instrument and the case plan, as follows:
 - (1) For the Greatest Risk population, the probation department shall conduct a minimum of six probationer contacts, six collateral contacts, and one positive home contact per month.

The probationer contacts shall include one in-person contact per week and two probationer contacts per month. One positive home contact is required each month from case assignment. A positive home contact constitutes one of the required in-person contacts.

After the stabilization period of 3 months for juveniles and 3-6 months for adults has been completed, and if the probationer has complied with the conditions of probation and the case plan, h/she may be considered for Merit Credit. Up to one probationer contact per month may be credited.

- (2) For the High Risk population, the probation department shall conduct a minimum of one in-person contact per week, six collateral contacts per quarter, and one home contact per month. One positive home contact is required during the first month from case assignment. Thereafter, three home contacts are required each quarter, one completed each month

* 9 N.Y.C.R.R. § 351.6(a)-(b).

during the quarter, two of which must be positive home contacts. A positive home contact constitutes a required in-person contact.

After the stabilization period of 3 months for juveniles and 3-6 months for adults has been completed, and if the probationer has complied with the conditions of probation and the case plan, he/she may be considered for merit credit. Up to one in-person contact per month may be credited.

- (3) For the Medium Risk population, the probation department shall conduct a minimum of two probationer contacts per month and two collateral contacts per quarter. The probationer contacts shall include one in-person contact per month. One positive home contact is required during the first forty-five (45) calendar days from case assignment and as needed thereafter. A positive home contact constitutes one of the required in-person contacts.

If the probationer has complied with the conditions of probation and the case plan, he/she may be considered for merit credit. Up to one probationer contact per month may be credited.

- (4) For the Low Risk population, the probation department shall conduct a minimum of one contact per month. Collateral contacts and home contacts will be conducted as needed. Merit credit activities may be used as incentives only.

- (b) **Contact Substitution:** Contact substitutions are available only for Juvenile Delinquent and Persons in Need of Supervision probationers under age 18 at the time of disposition. Contact substitutions, lasting no longer than six months in duration, are specifically for those juveniles on probation supervision who are participating in a community-based treatment or therapeutic program which is evidence-based.

During program participation, in-person contacts and positive home contacts with outside agency program staff may be substituted for probation department required contacts; up to 50 % of the required probationer contacts per month or quarter, as determined by their risk level, may be substituted. During the time of program participation and where substitutions are applied, a probation officer must conduct one of the collateral contacts as required with the agency/program, and document the probationer progress in the case record. Merit credits may not be applied during the period of contact substitution.

Adult Probation and Neighborhood Opportunity Network Initiative (2014)

Peggy McGarry, Allon Yaroni, and Sean Addie
Vera Institute of Justice*

Probation departments have an explicit mandate to deliver community corrections, but have long been criticized for their lack of integration into the communities that they serve. The predominant mode of probation is often described as fortress probation, in which probation offices are located downtown, by courthouses, often far from the communities where probationers live or work. Home visits and other opportunities to interact with probation clients, their families, or employers outside of the central probation office are rare.

In New York City, [the Department of Probation (DOP)] operates central probation offices in each of the city's five boroughs, often in the vicinity of the court. Until the creation of the Neighborhood Opportunity Network initiative in 2011, the vast majority of probationers were required to report in-person to their borough's central office. This meant, for instance, that probationers who live in Harlem were required to report to the central office in lower Manhattan, which is at least a 30-minute train ride away. Furthermore, because each central office served the entire pool of clients in the borough, waiting rooms were often crowded and noisy.

Because supervision was centralized, probation officers were not always familiar with services and supports available in their clients' neighborhoods, nor about their quality. Despite this, they were still expected to make referrals. With few opportunities to interact with probationers outside of the office, officers also had a limited perspective on their clients and the environments in which they were living, their family circumstances, or other factors that might influence their likelihood of reoffending. Officers and policymakers saw centralization and a lack of place-based knowledge as impediments to effective casework, decreasing the likelihood that probationers would receive appropriate services and, in turn, the likelihood that they would successfully complete probation and avoid future contact with the criminal justice system.

The Neighborhood Opportunity Network (NeON) initiative was launched by DOP in August 2011 as a decentralized, community-based probation approach that is tailored to the unique needs of neighborhoods with a high concentration of individuals on probation. The NeON is intended for medium- and high-risk probationers, and its design is firmly rooted in the principles of community justice and justice reinvestment.

A *community justice* approach to probation relocates officers into the neighborhoods of the clients they serve, allowing them to work directly with those communities to develop formal and informal social controls to prevent crime and recidivism (such as implementing a formal peer-mentoring program or engaging the client's family for support); to identify and respond to issues of social need for offenders and the public (through measures such as drug treatment programs, GED [general educational development] classes, and assistance in gaining health insurance); and to promote reparations to victims and communities damaged by crime. By working within probationers' neighborhoods, officers are afforded greater opportunities to forge

* Available at <http://www.nyc.gov/html/ceo/downloads/pdf/policybriefs/neon-policy-brief.pdf> (last visited July 7, 2014). Reprinted with permission from Vera Institute of Justice.

meaningful partnerships with local leaders, service providers, employers, and the police. In a sense, the neighborhood becomes a client, along with the probation client. . . .

NeON sites look quite different from the typical centralized probation office. They have a more welcoming layout, a resource hub with information about benefits and services for which individuals (both probationers and non-probationers) may be eligible, and space where community-based organizations can meet with probation clients. For example, the Staten Island NeON painted its waiting area in bright colors and put in a library where probation clients can lend and borrow books. The South Bronx NeON completely revamped the appearance of the probation office. The traditional waiting space was replaced with a more open waiting area, and space was provided for community-wide services such as GED classes, assistance with signing up for health care coverage, employment counseling, and even a weekly poetry writing and reading class. [34% of New York City's total adult probation NeON clients are assigned to the South Bronx NeON.]

NeON pilot sites were selected by DOP based on areas with high concentrations of probationers, the availability of community-based resources, and the presence of other organizations that serve DOP's clients). The first NeON was launched in Brownsville in December 2011. In 2012, NeON sites opened in East New York, Central Harlem, South Jamaica, Staten Island, and the South Bronx. In addition to these, DOP has established seven satellite NeON offices in strategic community-based locations that allow DOP to co-locate with other service providers. At the end of 2013, DOP opened an additional NeON site in Bedford-Stuyvesant. . . .

About 70 percent of all probation clients who were assessed to be less likely to commit new crimes and most likely to follow the court and DOP orders (low-risk probationers) routinely report to computer kiosks instead of an officer. About 10 percent of probationers are assigned to a NeON office or satellite. This represents about half of all probationers who are medium and high risk—called Client Development probationers—and about 50 percent of all probationers directly supervised by a probation officer. . . .

Where People Live: Probation Goes Back to the Neighborhood (2012)

*Abigail Kramer**

The most immediately remarkable thing about the waiting room of New York City's first neighborhood-based probation office, opened last December in Brownsville, Brooklyn, is the lack of waiting that takes place there. On a recent Tuesday morning, just one probationer sat with her back to the wall. The toddler on her lap had barely begun to squirm before the woman's officer appeared, took the baby in her arms and led her client to an office. Two teenaged boys came next, their fitted caps matching their hightops. One filled out paperwork while the other checked Facebook on a computer at the side of the room. During their 20 minutes in the office, three staff members stopped to ask if they were okay.

* *Excerpted from* 22 CHILD WELFARE WATCH 8-9 (2012). Reprinted with permission from Child Welfare Watch.

The Brownsville office is one of five community-based sites that the Department of Probation (DOP) opened in the past year, each located in a neighborhood with exceptionally high rates of criminal justice involvement. The others are in Harlem, Jamaica, Queens, South Bronx and Staten Island. The sites, which the department calls Neighborhood Opportunity Networks, or NeONs, carry smaller caseloads than the agency's traditional model of a single, centralized office in each borough. The offices are co-located with community-based organizations and city-run service agencies . . . making it easier for probation officers to connect their clients to services that might help them get on their feet.

So far, only the Harlem office works with teens younger than age 16, although that is in the plan for the others. A core focus in all of the NeON offices is men between ages 16 and 24, many of whom participate in mentoring, internship and education programs related to City Hall's Young Men's Initiative. Neighborhood offices present logistical advantages to probationers: Reporting close to home means saving travel money, and makes it easier to organize appointments around jobs and families. But city officials say the NeONs are part of something bigger than convenience—they're one piece of an effort to re-imagine probation's role in people's lives.

"In the past, too much focus has been put on compliance," says Probation Commissioner Vincent Schiraldi. "We're looking at ways we can change that, focus more on clients' needs and connect them to resources that will continue to benefit them after we're out of their lives." Getting people engaged in community organizations is ultimately good for public safety, says Schiraldi. "Our clients tend to hang out with people who are bad influences. We've got plenty of evidence to tell us that people who are involved with their communities in positive ways bust fewer windows and steal fewer cars."

The vision for the NeONs rests on two propositions: First, that rehabilitation is in part a collective process, because probationers tend to build more stable lives if they have connections with social service programs, religious congregations, and other community-centered institutions. And second, that in doing its job as a rehabilitative agency, the DOP has both the responsibility and the capacity to integrate itself into the communities that send the most people into the justice system.

This can be a complicated proposition in a neighborhood like Brownsville, which is infamous both for its high crime rates and for its residents' sometimes contentious relationship with police. One of the most fraught questions facing DOP as it attempts to settle in: Can a criminal justice agency be perceived as a partner, and not just another surveillance arm of a system that many community members regard with deep mistrust?

"Communities have traditionally been the recipients of justice services," says Clinton Lacey, DOP's deputy commissioner for adult services. "We're pushing to find opportunities for communities to be a partner, to play a role in deciding what this looks like. It's something we want to do with communities; not to them." Lacey says he hopes to recruit a community advisory board of Brownsville residents and business owners. Once that's established, the plan is that groups of probationers will design their own service projects, then present their ideas to the

board for input and approval—coming up with projects, as a result, that bring meaningful benefit to the communities where probationers live. “We’re doing everything we can to be open and transparent to the community,” says Karen Armstrong, who directs the department’s adult operations in Brooklyn. “That’s one of the challenges, is getting the community to trust us. It takes time to build relationships.”

When the office held its opening last winter, a group of protestors stood outside, led by Brownsville’s City Councilmember Darlene Mealy. “They should be putting a youth center here,” Mealy told *Politicker* on the day of the opening. “Give us something of hope not despair.” Mealy has since agreed to collaborate with the agency on educational forums for neighborhood residents, but other community activists still question the DOP’s ability to be a beneficial force. “Having a probation office move in, it reinforces negative images of our young black males and females,” says Julius Wilson, the director of People for Political and Economic Empowerment, which works with people transitioning out of the criminal justice system. “That space should be utilized to provide educational opportunities, job development programs, things that would facilitate positive change.”

DOP is working with researchers at John Jay College of Criminal Justice and Rutgers University to study the NeONs’ impact on staff, clients and the community. The results of that study will help determine how big the NeON initiative ultimately grows, says department spokesperson Ryan Dodge. So far, the project’s operational costs have come from shifting resources around within the department’s existing \$83 million budget. “As we expand the initiative, we expect any cost differentials to be offset by improved client outcomes,” says Dodge. . . .

A few systems are trying direct economic incentives to change the forms and impact of supervision. Arizona identifies dollars “saved” when probation departments reduce the number of revocations to prison and sends some of those funds to the departments. In the United Kingdom, the Ministry of Justice has instituted a national “Payment by Results” program whereby the service providers (both public and private) are paid in part on the basis of how supervisees fare while under supervision. Should re-offenses and revocations be the only measures of success? How generative are such efforts, and what is the scope of their impact?

Performance-Based State Initiatives: Arizona (2011)

*Right on Crime**

Arizona's population has doubled in the last 30 years, but the state's prison population has increased tenfold, from 3,377 inmates in June 1979 to 40,477 inmates in June 2010.

In December 2008, Arizona became the first state to implement performance-based adult probation funding pursuant to Senate Bill 1476. Under this incentive-based approach, probation departments receive a share of the state's savings from less incarceration when they reduce their revocations to prison without increasing probationers' convictions for new offenses. Probation departments are required to reinvest the additional funds in victim services, substance abuse treatment, and strategies to improve community supervision and reduce recidivism.

In 2009, the first year of its incentive funding plan, Arizona saw a 12.8 percent decrease in revocations of probationers to prison, including decreases in all but three of the state's 15 counties. There was also a 1.9 percent reduction in the number of probationers convicted of a new felony. In Mohave County, the probation department in 2009 reduced its total revocations by 101 and the percent of its probation caseload revoked for a new felony dropped from 4.6 to 1.1 percent. This saved the state \$1.7 million in incarceration costs that otherwise would have been incurred and Mohave County officials are expecting the state to fulfill its end of the bargain by appropriating 40 percent of the savings to the County in the next budget.

How did Mohave County achieve these results? In short, they implemented evidence-based practices – those techniques that research has shown reduce the risk of criminal behavior. Assistant Probation Chief Alan Palomino noted: “First we looked at our revocation process and at who we were revoking. There were a lot of technical violators who missed appointments or were just not doing exactly what was required of them on their probation. We looked at ways to motivate them toward cooperation and buying into their own probation process.”

The enhancements . . . included:

[1] Training probation officers to utilize motivational interviewing, which is a method of therapy that identifies and mobilizes the client's intrinsic values and goals to stimulate behavior change. Motivation to change is elicited from the client, and not imposed from without. It is assumed that ambivalence or lack of resolve is the principal obstacle to be overcome in triggering change. In an example of motivational interviewing, an officer may ask a probationer questions designed to elicit self-motivational statements such as, “What are you afraid might happen if things continue as they are?” and “What might be some advantages of changing your behavior?” Motivational interviewing has been designated by the National Institute of Corrections as one of eight evidence-based practices that contribute to reduced recidivism.

* Available at www.rightoncrime.com/reform-in-action/state-initiatives/arizona (last visited July 1, 2014). Reprinted with permission from Texas Public Policy Foundation. Right on Crime is a project of the Center for Effective Justice at the Texas Public Policy Foundation, a free-market based think tank located in Austin, Texas.

[2] Separating the minimum-risk offenders from the medium- and high-risk populations and varying supervision and caseload levels for each group, with one officer handling minimum-risk offenders in each city within the county.

[3] Better identification of the needs of each offender such as substance abuse programs, educational programs, and anger management.

[4] Implementing Moral Recognition Therapy, which is a cognitive educational program that helps probationers understand that their own choices have put them into their situations and become accountable for their actions.

[5] Immediate consequences for violations and positive accolades for accomplishments.

Despite this progress, Arizona policymakers are looking at additional options for improving their criminal justice system. They are facing both a budget crisis and a September 2010 projection by the state corrections department that 8,500 new prison beds will be needed by 2017 at a construction cost of \$974 million, not including operating costs of well in excess of \$150 million a year. . . .

Introducing “Payment by Results” in Offender Rehabilitation (2013)

*John Bardens and Gabrielle Garton Grimwood, U.K. Ministry of Justice**

The Ministry of Justice intends to introduce a system whereby a proportion of a provider’s payment will be determined by the reductions in reoffending they achieve. . . .

Payments would primarily be made for an individual offender’s complete desistance from crime for a 12 month period, but providers would also be allocated groups of offenders, and further payments would be determined by the total number of re-offences committed by a group. Providers would only be paid in full if they achieved an agreed reduction in the number of offenders who reoffend and a reduction in the number of offences committed by the group as a whole. The Ministry of Justice has argued that this would prevent providers “gaming” the system by creating an incentive for providers to continue to focus on reducing the reoffending of even the hardest to help and those who have already reoffended. . . .

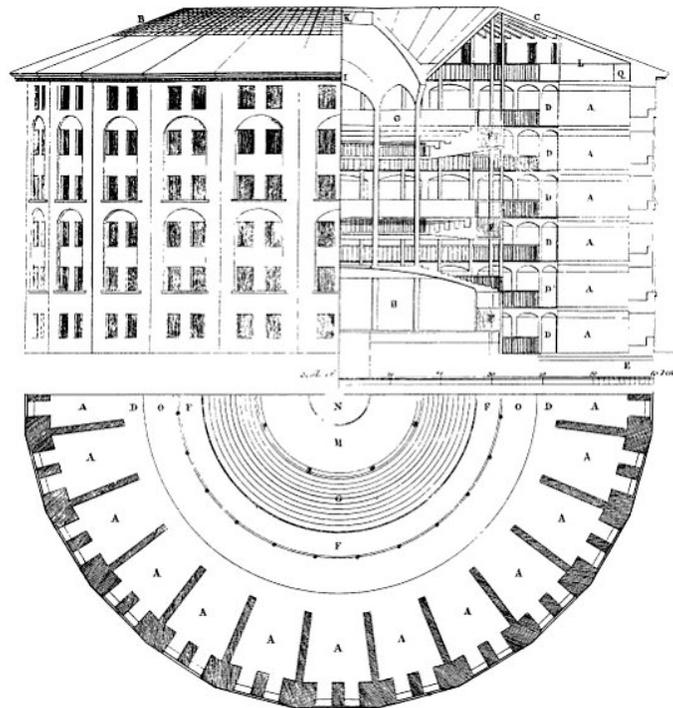
[T]he new payment structure would combine . . . an annual Fee for Service, a Payment by Results element, and financial penalties for underperformance. . . . The final details of the design of the system will be completed by summer 2013 and be in operation by autumn 2014.

* *Excerpted from INTRODUCING “PAYMENT BY RESULTS” IN OFFENDER REHABILITATION AND OTHER REFORMS 13-15 (2013), U.K. MINISTRY OF JUSTICE, available at <http://www.parliament.uk/site-information/copyright/open-parliament-licence> (last visited July 1, 2014) Contains Parliamentary information licensed under the Open Parliament Licence v2.0.*

The Ministry of Justice intends to create and directly manage a new public sector National Probation Service, moving away from the current system of local Probation Trusts. The new National Probation Service would be responsible for carrying out the initial risk assessment of every offender, allocating those of low or medium risk to a lead provider, and directly managing offenders held to be of high risk of serious harm to the public. The Ministry of Justice estimates that the National Probation Service would directly manage around 31,000 offenders . . .

On 9 May 2013, in response to [the announcement of] the reforms, the Shadow Justice Minister, Andy Slaughter, raised concerns about, among other things, the cost of the changes. He questioned whether resources would be available to extend rehabilitation support, introduce resettlement prisons and pay for mentors:

Who will fund the army of mentors, and who will vet them to ensure that the right people mentor offenders? (...) The Justice Secretary places a great deal of faith in reformed old lags helping out, but he admitted on the “Today” programme that they will have to be paid. Professional probation officers sacked and replaced with ex-offenders: is this the Justice Secretary’s brave new world?



Jeremy Bentham, Plan of the Panopticon, *The Works of Jeremy Bentham* vol. IV, 172-3 (1843, originally 1791), courtesy of Wiki Commons.*

* Available at <http://commons.wikimedia.org/wiki/File:Panopticon.jpg> (last visited July 7, 2014).

1972/2014

We began by asking how far we were from the nineteenth century model of Eastern Penitentiary. We conclude by offering a comparison from 1972.

**The Official Report of the New York State
Special Commission on Attica (1972)**

*Arthur Liman, Reporter**

In enunciating the following principles the Commission recognizes that their acceptance and implementation would require far-reaching, indeed radical, changes in the correction system as it now exists. Acceptance of these principles would require a willingness on the part of correction personnel to take risks with the concept of security as now perceived. But the lesson of Attica is that the present system has created more serious threats to security—the frustration and desperation that drive men to rebellion. The Commission believes that the prison system in New York State should be restructured, using the following principles as guidelines.

1. If prisoners are to learn to bear the responsibilities of citizens, they must have all the rights of other citizens except those that have been specifically taken away by court order. In general, this means that prisoners should retain all rights except that of liberty of person. These include the right to be adequately compensated for work performed, the right to receive and send letters freely, the right to have and express political views, the right to practice a religion or to have none, and the right to be protected against summary punishment by state officials. When released from prison, they should not be saddled with legal disabilities which prevent them from exercising the rights of free men.

2. The confinement associated with the deprivation of liberty of person should be the least that is administratively necessary. If a serious attempt is to be made to prepare prisoners for their return to society, they must not be cut off from all contacts with that society until their time is served. The prisons must no longer be shrouded from public view and closed to the communities in which they are located and whose offenders they house. Implementation of this principle requires a number of actions, including the following: removal of restrictions on the free circulation of literature, newspapers, periodicals, and broadcasts; establishments of regular procedures to assure access of the press to the prisons; and creation of programs which let inmates out of the institution on a controlled basis, such as furloughs and work release.

3. The programs and policies associated with confinement should be directed at elevating and enhancing the dignity, worth, and self-confidence of the inmates, not at debasing and dehumanizing them. This means, among other things, the maximum amount of freedom, consistent with the security of the institution and the well-being of all inmates, for inmates to conduct their own affairs. Social responsibility should be thrust upon them, rather than discouraged as it now is. It may even be that the principle of enhancing human dignity can never be implemented within the walls of huge 19th-century fortresses like Attica. Such an impersonal

* *Excerpted from ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA* xvi-xxi (1972), reprinted with permission.

environment, with the necessary emphasis on keeping more than two thousand men in control and in custody, is hardly conducive to instilling a sense of self-confidence and self-esteem.

4. In order to encourage understanding between inmates and members of the community to which they will eventually return, community groups and outside professionals should be allowed and encouraged to participate regularly in the life of each correctional facility. Such services as teaching, running prison libraries, leading group therapy sessions, and providing drug rehabilitation and employment counseling would be appropriate. The correction system cannot solve the problems of crime and rehabilitation unaided. It needs public involvement to gain public understanding and support. Since the correction system is ultimately accountable to the public in terms of success or failure, the members of the public should be drawn into an advisory role as much as possible in the shaping of overall policy.

5. The central dynamic of prison life is the relationship between inmates and officers. If correction personnel are to be more than mere custodians, they must be trained and paid in accordance with the difficulty and responsibility of their assignments. Training for correction officers must sensitize them to understand and deal with the new breed of young inmates from the urban ghettos and to understand and control the racism within themselves. Above all, correctional facilities must be staffed by persons motivated to help inmates. Ex-inmates, who might be especially qualified in this respect, can be hired for custodial assignments in the juvenile detention system, but they are denied eligibility to work in the facilities for adults. That disability should be removed.

6. Vocational training and other educational programs should be conducted in accordance with the preceding principles. Among other things, work assignments should not be part of the punishment-reward system except to the extent that compensation is provided for work done. Inmates should be adequately paid for their work, including work that entails training; and consideration should be given to a requirement that inmates pay the reasonable value of the services provided them by the state.

7. Parole is the principal method by which most inmates leave prison. But, as presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are. For a correctional system to satisfy the principles here enunciated the grant or denial of parole must be measured by clear and comprehensible standards, disseminated to inmates in advance. The inmate must be told promptly if he has been granted parole and, if not, exactly why not. Once parole is granted, efforts must be made to see that the inmate is released as promptly as possible, and effective assistance must be available to find him a job. After release, the conditions and restrictions placed upon the parolee must be rationally related to the legitimate purpose of parole; they must not be petty, demeaning, or of such broad sweep that they lend themselves to arbitrary and selective enforcement by parole officers.

The problem of Attica will never be solved if we focus only upon the prisons themselves and ignore what the inmates have gone through before they arrive at Attica. The criminal justice system is at least as great a part of the problem of Attica as the correctional facility itself.

The process of criminal justice will never fulfill either its promises or its obligations until the entire judicial system is purged of racism and is restructured to eliminate the strained and dishonest scenes now played out daily in our courtrooms. Justice is sacrificed to administrative efficiency, and there are no winners. Experiences with the inequities of bail, with plea bargaining, adjournments, overworked defense attorneys, interminable presentence delays, and disparities in sentences imposed for identical offenses leave those who are convicted with a deep sense of disgust and betrayal. If the criminal justice system fails to dispense justice and impose punishment fairly, equally, and swiftly, there can be little hope of rehabilitating the offender after he is processed through that system and deposited in a prison—even a prison remodeled on the principles enunciated above.

We cannot expect even the most dramatic changes inside the prison walls to cure the evils of our criminal justice system, nor of society at large. On the other hand, eradication of those evils would go a long way toward solving the problems of our prisons. In the meantime the public has a right to expect the state to maintain prisons for the protection of society and to demand that those prisons not turn out men more embittered, more antisocial, and more prone to violence than they were when they entered.

Members of the Commission, individually and collectively, are so persuaded of the urgency of these matters that we do not consider ourselves discharged from our original undertaking except in the most literal sense. The larger obligation to continue the search for a better and a more humane system of criminal justice, from arrest to release after imprisonment, requires the alert attention of every thinking citizen. No aspect of law and order is more urgent than reform of the criminal justice system. . . .

Change should not be lightly undertaken, but the status quo can no longer be defended. The only way to salvage meaning out of the otherwise senseless killings at Attica is to learn from this experience that our Atticas are failures. The crucial issues remain unresolved; and they will continue unresolved until an aroused public demands something better.

September 13, 1972