



Yale Law School

ARTHUR LIMAN PUBLIC INTEREST PROGRAM

January 19, 2016

JOHANNA KALB
Director
and Visiting Associate Professor
of Law
Telephone 203 436-3520
johanna.kalb@yale.edu

American Correctional Association
Standards Committee and Committee on Restrictive Housing
206 N. Washington Street
Alexandria, VA 22314

KATHERINE LAWTON
Program Assistant
Telephone 203 432-9165
katherine.lawton@yale.edu

Re: 2016 ACA Restrictive Housing Proposed Revisions

JUDITH RESNIK
Arthur Liman Professor of Law
and Founding Director
Telephone 203 432-1447
judith.resnik@yale.edu

Dear Members of the Standards Committee and Members of the
Restrictive Housing Ad-Hoc Standards Committee:

We write on behalf of the Liman Program at Yale Law School where, in conjunction with correctional professionals, faculty, and students, we do research on and teach about prisons.* We submit this letter to support the effort to revise the policies of the American Correctional Association (ACA) on restrictive housing and to offer comments, as requested, on the proposed Revised Standards presented by ACA's Restrictive Housing Ad-Hoc Standards Committee. We suggest strengthening the proposals' potential to bring about needed changes.

During the last few years, a consensus has emerged that isolating conditions within prisons are harmful and overused. Rather than seeing restrictive housing as a *solution*, it has come to be understood as *the problem* to be solved. The question is now less about a willingness to make changes and more about *how* the shared goals of reducing the use of isolation can be translated on the ground, in practice.

* The Arthur Liman Public Interest Program was endowed to honor Arthur Liman, who graduated in 1957 and who personified the ideal of commitment to the public interest. In the 1970s, he co-authored *Attica: The Official Report of the New York State Special Commission on Attica*. The concerns about treatment of prisoners, recorded in that report, remain all too relevant today. The Liman Program continues to work in his memory in the hopes of improving access to and the practices of justice. See *The Arthur Liman Public Interest Program*, YALE LAW SCH., <http://www.law.yale.edu/centers-workshops/arthur-liman-public-interest-program> [<http://perma.cc/J7SC-H5ZU>].

We are keenly aware of the difficulties of making changes, given that the system of restrictive housing has been built up for decades. Our suggestions are based on what we have learned from studying restrictive housing and on the examples provided by many United States correctional professionals who have found innovative ways to reduce their use of restrictive housing.

We believe that the Revised Standards make important steps and that further revisions are in order. Thus, we applaud the decision to revisit the ACA standards, and we endorse several of the specific modifications. Below, we propose additional changes to provide greater specificity and illustrations to help correctional systems to reduce their use of isolation. We first summarize the scope of the problem and the increasing scrutiny of restrictive housing by judges and legislators, and we then outline revisions that would, we believe, help to implement the goals of reducing the numbers in isolation and diminishing the degrees of restrictive housing's isolation.

I. The Expansive System of Restrictive Housing Currently in Place

During the past several years, through work with the Association of State Correctional Administrators (ASCA), we have learned how entrenched the system of restrictive housing is. To do so, Liman and ASCA first researched the policies governing administrative segregation.² Second, we surveyed prison systems to learn about the number of people in restrictive housing and the conditions in which they live.³

By reviewing policies from 47 jurisdictions, we learned that most jurisdictions gave substantial discretion to administrators to determine who is placed in restrictive housing, and for how long. Under the policies existing in 2013, getting into restrictive housing was easy because the criteria for entry were broad.

For example, many jurisdictions defined administrative segregation as a form of separation from the general population for an inmate who requires a higher degree of supervision because the inmate poses “a threat” or “a serious threat” to “the life, property, security, or orderly operation of the institution.”⁴ Under this formulation, a variety of behaviors, as well as concerns about gang affiliations, could land a person in restrictive housing. Moreover, our 2013 review found that, while some policies included step-down and

² See Hope Metcalf, Jamelia Morgan, Samuel Oliner-Friedland, Judith Resnik, Julie Spiegel, Haran Tae, Alyssa Roxanne Work & Brian Holbrook, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies* (Yale Law Sch., Pub. Law Working Paper No. 301, 2013) [hereinafter *Liman Administrative Segregation Policies 2013 Report*], <http://ssrn.com/abstract=2286861> [<http://perma.cc/DBU3-P48H>].

³ See Sarah Baumgartel, Corey Guilmette, Johanna Kalb, Diana Li, Josh Nuni, Devon E. Porter & Judith Resnik, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (Yale Law Sch., Pub. Law Working Paper No. 552, 2015) [hereinafter *ASCA-Liman Time-In-Cell 2014*], <http://ssrn.com/abstract=2655627> [<http://perma.cc/QJ9X-RLSN>].

⁴ *Liman Administrative Segregation Policies 2013 Report*, *supra* note 2, at 5.

level discussions, few policies focused on the importance of getting people out of restrictive housing.

Further, through responses by 46 jurisdictions to a 2014 survey asking some 130 questions, we learned that reliance on restrictive housing has become widespread. As of the fall of 2014, we identified more than 66,000 people in restrictive housing in 34 jurisdictions responding to our survey. Those systems housed about 73% of the country's prisoners.⁵ Hence, the best estimate is that some 80,000 to 100,000 individuals were then in restrictive housing.⁶ As a consequence, about one person in every fifteen individuals incarcerated in prisons in the United States was in restrictive housing.

Another study, published in 2015 by the Bureau of Justice Statistics (BJS), confirms the extensive use of restrictive housing. The BJS's 2011-2012 survey of 91,177 inmates in 233 state and federal prisons and in 357 jails found that almost 20 percent of those surveyed had been held in restrictive housing within the prior year.⁷ In short, spending time in restrictive housing is a part of the experiences of many of the nation's prisoners.

But, as the Revised Standards reflect, what we also learned is that innovative correctional administrators across the country are reducing their reliance on isolation of prisoners. The harm inflicted by isolation is one reason to make changes. As some correctional leaders have explained, limiting isolation is "the right thing to do."⁸ Moreover, shifting away from harsh isolation aims to protect the safety of both those who live and those who work in prisons, and of the communities to which prisoners will return.

II. Legal and Political Scrutiny of Isolation in Prison

Correctional professionals are part of a national consensus that has put the issue of restrictive housing on the agenda of imperative reforms in the criminal justice system. Across the United States, courts and legislators, at both the federal and local levels, are focusing on how to do so.⁹

⁵ *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at ii.

⁶ This tally does not include local jails, juvenile facilities, or military and immigration detention centers and at least some of the individuals held by private correctional centers.

⁷ See Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, BUREAU JUST. STAT. (Oct. 2015), <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> [<http://perma.cc/4V2B-YB64>]. BJS did not find a correlation between a higher use of restrictive housing and improved institutional safety; to the contrary, institutions with greater use of restrictive housing also exhibited greater disorder.

⁸ *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 58 tbl.22.

⁹ See *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 2-7.

In 2005, in *Wilkinson v. Austin*, the U.S. Supreme Court concluded that prisoners have the constitutional right to procedural protections before being placed in isolating conditions that result in substantial and atypical hardships.¹⁰ In 2015, Justice Anthony Kennedy, who had authored the *Wilkinson* decision, addressed the issue again in his concurrence in *Davis v. Ayala*.¹¹ Justice Kennedy noted that Hector Ayala, who had been sentenced to death in 1989, had spent most of “his more than 25 years in custody in ‘administrative segregation’ or, as it is better known, solitary confinement.” If following “the usual pattern,” Mr. Ayala had been held for decades “in a windowless cell no larger than a typical parking spot for 23 hours a day . . . [and] allowed little or no opportunity for conversation or interaction with anyone.”¹²

Justice Kennedy called for more “public inquiry or interest” into conditions of confinement. And by way of protest, he suggested that when imposing a capital sentence, a judge tell such a defendant that “during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.”¹³ Moreover, Justice Kennedy raised the prospect that solitary confinement violated substantive constitutional rights. “[T]he judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”¹⁴ Justice Kennedy’s concerns about isolation were echoed soon thereafter by Justice Breyer who, joined by Justice Ginsburg, condemned the “dehumanizing effect of solitary confinement.”¹⁵

At the lower courts, several decisions have addressed isolating conditions for subsets of prisoners, such as those with serious mental illness or other disabilities and juveniles, as well as the population in general. Within the past two years alone, courts have approved settlements in class actions in Arizona, California, Illinois, New York, and Pennsylvania specifying the predicates to and limits on the use of isolation.¹⁶ In addition to constitutional

¹⁰ *Wilkinson v. Austin*, 545 U.S. 209 (2005).

¹¹ *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

¹² *Id.*

¹³ *Id.* at 2209.

¹⁴ *Id.* at 2210.

¹⁵ *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting, joined by Ginsburg, J.).

¹⁶ *See* Stipulation, *Parsons v. Ryan*, No. CV 12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014), ECF No. 1185; Settlement Agreement, *Ashker v. Brown*, No. C 09-05796 CW (N.D. Cal. Sept. 1, 2015), ECF No. 424-2; Order Approving Certain Policies, *R.J. v. Jones*, No. 12-cv-7289 (N.D. Ill. Apr. 24, 2015), ECF No. 135 (approving Defendant’s Submission of Policies Pursuant to Paragraph I(3) of the Remedial Plan, *R.J. v. Jones*, No. 12-cv-7289 (N.D. Ill. Apr. 20, 2015), ECF No. 133); Settlement Agreement, *Peoples v. Fischer*, No. 11-CV-2694 (S.D.N.Y. Dec. 16, 2015), ECF No. 137-1; Settlement Agreement, *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-006535-JEJ (M.D. Pa. Jan. 9, 2015), ECF No. 59.

concerns, statutory bases for objections to isolation come from a variety of sources, including the Americans with Disabilities Act.¹⁷

As courts have acted to limit the use of restrictive housing, so too have legislators. Some of the efforts are, again, focused on vulnerable groups, including juveniles, the mentally ill, and the disabled. For example, states including Colorado and Massachusetts have imposed significant limits on the isolation of the mentally ill.¹⁸ At the federal level, Senators Chuck Grassley, Richard Durbin, John Cornyn, Sheldon Whitehouse, Mike Lee, Chuck Schumer, Lindsey Graham, Patrick Leahy, and Corey Booker have joined forces to co-sponsor new legislation proposing a sharp curtailment of isolation for the few juveniles in the federal system.¹⁹ That legislation follows on congressional hearings, including the 2014 hearing, “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences,” convened by Senators Richard Durbin of Illinois and Ted Cruz of Texas.²⁰ Thereafter, at Senator Durbin’s request, the federal prison system agreed to an independent audit of its use of restrictive housing; the auditors raised a series of concerns about the overuse of restrictive housing, the need for diagnosis and treatment of mental health needs, and the importance of providing prisoners in restrictive housing with programs and privileges akin to what is available to the general prison population.²¹

The developments in the United States are part of a transnational effort to limit isolating conditions. In the spring of 2015, proposed U.N. provisions (called “the Mandela Rules” and drafted with input from U.S. correctional leaders) defined confinement of prisoners for twenty-two hours or more per day for a period exceeding fifteen days to be “cruel, inhuman or degrading treatment.”²² The rules call for banning isolation of vulnerable

¹⁷ See generally Elizabeth Alexander, *“This Experiment, So Fatal”*: Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement, 5 U.C. IRVINE L. REV. 1 (2015).

¹⁸ See COLO. REV. STAT. ANN. § 17-1-113.8(1) (West 2015); MASS. GEN. LAWS ANN. ch. 127 § 39A(b) (West 2015).

¹⁹ S. 2123, 114th Cong. § 212 (2015).

²⁰ *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (Feb. 25, 2014), <http://www.judiciary.senate.gov/meetings/reassessing-solitary-confinement-ii-the-human-rights-fiscal-and-public-safety-consequences> [perma.cc/RFD7-8XKZ].

²¹ Kenneth McGinnis, Dr. James Austin, Karl Becker, Larry Fields, Michael Lane, Mike Maloney, Mary Marcial, Robert May, Jon Ozmint, Tom Roth, Emmitt Sparkman, Dr. Roberta Stellman, Dr. Pablo Stewart, George Vose & Tammy Felix, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, CAN ANALYSIS & SOLUTIONS (Dec. 2014), http://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal_123014_2.pdf [perma.cc/72N8-AN2K].

²² 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) state that “[s]olitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority.” See U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. ESC Comm. on Crime Prevention & Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 22, 2015) [hereinafter *Mandela Rules*], http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN15_2015_L6Rev1_e_V1503585.pdf [perma.cc/BL8Y-4EF4]. Rule 44 of the Mandela Rules states that “For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without

prisoners, limiting isolation's use to exceptional circumstances, and ensuring visiting opportunities for those in isolation. Thus, ACA's work in revising standards on the use of restrictive housing is both timely and necessary.

III. Reframing the Problem to Focus on the Time Spent in Restrictive Confinement

Whether in a standard or as an introductory statement of purposes, we think it critical to clarify the central goals: that individuals ought *not* be kept for prolonged periods of time in isolation and that restrictive housing itself should be *less* restrictive.

The Revised Standards provide an important beginning towards these goals. By shifting away from the justifications for isolation (discipline, protection, administration) and using the umbrella term of "restrictive housing," the Standards reflect that whatever the justifications, the central harms of this form of housing is that it puts someone inside a cell for most of the hours of a day and for days on end.

We suggest a further step. Instead of continuing the current template reliant on the categories of administrative, protective, and disciplinary segregation as the rubrics and hence focusing on the *justifications* for placements in restrictive housing, the revisions should use the *time spent* inside cells as its framework. The concept of restrictive housing could then be placed in a binary time-frame: a first period of less than 15 days that could be analogized either as a kind of urgent-care or a need for urgent-discipline. Ideally, if 15 days is the maximum permitted, the Standards would be in accord with the Mandela Rules. However, if a second time period of placement in any restrictive setting for longer than 15 days is deemed necessary, then another set of rules would be relevant.²³ In addition, attention needs to be paid to the 24-hour day itself, to consider how many in-cell hours are needed to constitute "restrictive housing" so as to provide as much out-of-cell time as possible.

Having two sets of rules divided by the 15-day presumptive maximum would help to clarify the extra work, repeated decision-making, and different conditions that would be required if people are held for longer than 15 days. Simply put, after 15 days, restrictive housing should not be permitted to be as isolating as it currently is.

If individuals are housed for a period of more than 15 days, standards should require significantly greater opportunities for time out of cell. The term "ten and ten" (ten hours out for programs and ten for other activities) has entered the parlance as jurisdictions put such

meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days." *Id.* Rule 44. The Rules conclude that such confinement constitutes "torture or other cruel, inhuman or degrading treatment or punishment." *Id.* Rule 43(1). The Mandela Rules were developed in consultation with a wide range of experts from around the globe, including correctional leaders in the United States.

²³ This suggestion reflects but is not identical to the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules). Mandela Rules, *supra* note 22.

plans into their policies.²⁴ Another approach is to ensure 3-6 hours out of cell, each day. More generally, the new ACA standards ought to incorporate the emphasis on out-of-cell time.

Thus, we suggest that the new standards include an introductory, aspirational statement to orient readers—first, that fewer people should be placed in restrictive housing, and the presumption ought to be against any stays of more than a total of 15 days; and second, that efforts should be made to minimize the degree of isolation within restrictive housing, and that the obligation to do so increases as the time in isolation continues.

Further, an introduction should explain that the decision-making process and the collection of data are key methods of implementing these goals. The central office ought to be involved if exceptions are made to the presumptive 15-day limit, and then keep track of who is being held for those 15 days, and why, as well as any persons held for longer periods of time. Data in a searchable form should include demographic information, the reasons for extending restrictive housing, and the efforts made to begin the transition to less restrictive settings as soon as possible. Below, we detail how, through more specificity about decision-making, conditions in cells, and record-keeping, the standards could be strengthened.

A. Operationalizing Presumptions against Reliance on Restrictive Housing

Given the large numbers of people currently held in restrictive housing, we suggest that new standards clearly state that using restrictive housing with isolating conditions should be the exceptional, unusual response. Sub-policies could follow, so as to make plain that longer-than-15 days is the exception, in need of special justification and constant review.²⁵ Thus, in addition to the important Revised Standards, which would expressly ban the use of restrictive housing for juveniles, pregnant women, and based exclusively on a person's gender identity,²⁶ new standards should cabin the role of restrictive housing for all prisoners.²⁷

²⁴ One way to operationalize this requirement is to call for “increased time out of cell for programming and recreation, no less than 20 hours per week.” This formulation is based on policies in Colorado and Washington State and related to practices in Connecticut as well. In contrast, the ACA Revised Standards 4-4270 and 4-4273 (pages 028 and 030) call for 5 hours of recreation per week and an unidentified amount of time for programming.

²⁵ The Revised Standards move in this direction. For example, Standards 4-4250 and 4-4253 (pages 008, 011) propose a review of initial placement in restrictive housing; that such a review take place within 24 hours by “an appropriate and higher authority” not involved in the initial placement; and that thereafter a classification committee “or other authorized staff” review the placement every 7 days for the first 60 days, and then “at least every 30 days thereafter.”

²⁶ See Revised Standard #5 (page 037); Revised Standard #6 (page 038); Revised Standard #7 (039). These Standards reflect both the evolving approaches of correctional leaders and the law on the use of restrictive housing for juveniles, pregnant women, and gender identity.

²⁷ We should note that such an approach may well prove to be efficient in protecting institutional and individual safety. The Revised Standards recognize the need to build in protections for the mentally ill and for those who can become ill from isolation. See, e.g., Revised Standard #2 (page 034) (prohibiting use of restrictive housing for the mentally ill “unless they present a clear and present danger to staff and other inmates . . . that is not associated with their diagnosed mental illness”); Revised Standard 4-4256 (page 013) (requiring evaluation of all prisoners remaining in restrictive housing by a

Another way to implement this approach comes from comments that have been provided to you from a group of professors, led by Professor Margo Schlanger at the University of Michigan. That group suggested that

Prolonged restrictive housing shall be used only when necessary for safety or security, and for as short a time as possible. After fifteen days in restrictive housing, only those limitations and restrictions of privileges, property, and programming that are individually necessary for safety or security should apply. For all non-disciplinary assignment to restrictive housing, the agency should, after fifteen days, develop a plan to facilitate the return of the prisoner to general population as soon as safely possible.²⁸

In addition, we suggest adding a general statement about the importance of privacy and of social interactions to human dignity. Restrictive housing ought to be configured to provide sufficient space for privacy and to enable interaction with other people. As the Revised Standards now do, double-celling needs to be addressed specifically, but we suggest standards that call for more modifications if two people are in restrictive housing cells.²⁹

Yet another route to this approach would be a general standard that because restrictive housing is to be used only for exceptional cases and as sparingly as possible, jurisdictions should develop and use alternatives to restrictive housing before resorting to the segregation or isolation of prisoners. For example, as we understand it, some correctional systems have a version of a “time-out” space for juveniles, and its use is kept to a few hours.³⁰

mental health professional within 7 days of placement, as well as at least every 30 days if isolation continues beyond 30 days). Limiting the use of restrictive housing more generally could prove, over a longer term, to be an economical response. Focusing on the fact that everyone put into restrictive housing is potentially at risk reduces the work of trying to identify and to predict those individuals at special risk and then modifying conditions for that subset. Again, our suggestions grow out of the Revised Standards. For example, Standard 4-4256 (page 013) calls for a mental health professional to review any inmate in segregation “within 7 days of placement” and thereafter, “at least every 30 days” or “more frequently if prescribed by the chief mental health authority.” Standard 4-ALDF-2A-48 (page 043) likewise calls for review on 7 days for first six months and 30 days thereafter. What these Standards do not do, however, is provide presumptive end points.

²⁸ Letter from Margo Schlanger on behalf of Professors to the American Correctional Association Standards’ Committee at 2 (Jan. 15, 2016).

²⁹ See Revised Standard 4-4141 (page 004). We suggest that in addition to calling for more space, this Standard should call for areas of privacy, such that the shared toilet space has some way to be screened off, consistent with security needs, so that prisoner-prisoner privacy is maintained. In this regard, we also raise questions about reliance on prisoners, rather than staff, for protecting other prisoners from risks of suicide. Hence we suggest revisiting Standard 4-4257 (page 014) in consultation with the American Psychiatric Association.

³⁰ See generally *51- Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems*, LOWENSTEIN CTR. PUB. INTEREST (Oct. 2015), <http://www.lowensteinprobono.com/files/Uploads/Documents/Pro%20Bono/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.pdf> [perma.cc/JW9X-G94T].

We also wanted to emphasize that, to the extent any prisoner is to be held for 15 days or more in restrictive housing, an individualized plan needs to be created through a team consisting of mental health and correctional professionals about how that person would be returned to less restrictive settings. Further, standards could require Directors of Corrections or designated committees located in central administrations to approve decisions, at least weekly, to continue the placement of individuals in restrictive housing for periods of 15 days or more.³¹

B. Increasing the Time Out of Cells

What we learned from *Time-in-Cell* is that 82% of jurisdictions reporting kept prisoners in cells 23 hours a day and that almost 30% kept prisoners in cells 48 hours straight on weekends.³² Further, some prisoners were in such conditions for months and years on end.³³

We believe the standards should state that the importance of time spent out-of-cell grows with every day spent in restrictive housing. (Here again, the less restrictive housing is used and the shorter the time spent in it, the less extra efforts to deal with those in restrictive housing is needed.) One model comes from proposed legislation in Massachusetts, calling to make restrictive housing less limiting by requiring, for all segregation cells, “regular meals, fully furnished cells, at least one hour per day of exercise and recreation, outside if weather permits, rights of visitation and communication”³⁴

Revised Standard 4-4270 (page 028) addresses the question of time out of cells, and proposes the minimum of one hour, five days a week. The discussion of exercise time in Revised Standard 4-ALDF-2A-64 (page 058) likewise references the five hours a week approach. The call for programming (Revised Standard 4-4251, page 009) does not specify an amount of time for it.

These provisions are inadequate to diminish the degree of isolation that individuals within restrictive housing experience. As mentioned above, some jurisdictions have moved to a “ten and ten” system, that calls for ten hours out for recreation, and ten for programming each week (in addition to time for showers and medical visits). While this formulation is an improvement over the current 22-23 hour confinement that is commonplace, we also suggest that the focus be on each day, to see if 3-6 hours of time out of cells can become the norm, and that no one is held for 48 hours straight (as is a practice

³¹ To do so, one could modify Standards 4-4250 and 4-4253 (pages 008, 011) to require such reviews for any placements exceeding 15 days.

³² *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 38-39.

³³ *Id.* at 27-29.

³⁴ H.R. 1475, § 2, 189th Legislature (Mass. 2015).

in some jurisdictions on weekends). New standards ought to require that time outside a cell has to increase as the duration of restrictive housing increases.

C. Greater Specificity and Definitions

We suggest revisiting the wording of several standards, evidently aiming to constrain the use of restrictive housing but lacking sufficient specificity to do so. For example, the comment to Revised Standard 4-4251 (page 009) calls for protective custody to be used for “short periods of time.” The text also permits “long-term protection” with documentation. But the materials do not define what constitutes a “short period” or provide parameters for either “short” or “long-term.”³⁵

Similarly, the comment to Revised Standard 4-4253 (page 011) calls for a “hearing” for any inmate spending “more than seven continuous days in administrative segregation and protective custody;” the Standard also proposes that hearings be held repeatedly at seven-day intervals for the first 60 days and at 30 day intervals thereafter. Yet, the comment does not provide information about what constitutes “a hearing.” We learned from our 2013 review of policies that “hearings” are defined differently in many jurisdictions. Some policies include oral exchanges and others do not; some permit third parties, and others do not; some provide for assistance including lawyers and others do not.³⁶ Standards need to address the criteria for placement in restrictive housing, the information needed for decisions, the opportunities for prisoners to participate, the availability of oral hearings, and the need for a review processes by the central administration. In short, much more guidance on the form and the substance of hearings is needed.

Similarly, the Revised Standards call for additional, prompt reviews of the placement of prisoners in segregation and for documentations of such reviews.³⁷ As noted above, one way to use procedures to help limit the numbers of people placed in isolation and the duration of their confinement is to require that for any person held more than 15 days, the Director or designee in central administration has to approve the continued detention. This suggestion is modeled after policies that already exist in some jurisdictions, which require

³⁵ Yet, other revisions make plain the areas in which change is expected. For example, Standard 4-4250 (page 008) calls for review of segregation “within 72 hours by the appropriate authority,” while the Revised Standard calls for decisions to remove individuals from the general population to be reviewed “within 24 hours by an appropriate and higher authority who is not involved in the initial placement.”

³⁶ See *Liman Administrative Segregation Policies 2013 Report*, *supra* note 2, at 11-14. Thirty-eight states then required a hearing, but the provisions were far from uniform. *Id.* at 11. For example, the majority permitted prisoners to present evidence, but some jurisdictions did not. *Id.* at 12. Some jurisdictions authorized decision-making by committee, while others delegated this authority to a hearing officer. *Id.* at 12. The time frame for and conduct of hearings also varied. *Id.* at 11-12.

³⁷ See Revised Standards 4-4250 (page 008), 4-4251 (page 009), 4-4242 (page 010).

director approvals if a person is to remain in segregation for specified time periods, such as six months.³⁸

The Revised Standards themselves provide models of such clear statements. Revised Standard #1 (page 033) calls for written policies seeking to ensure that “offenders are not to be released directly into the community” and that prisoners be provided with a “pre-release step down program.” We should add that the need for such direction is well documented. The *ASCA-Liman Time-in-Cell Report* learned from 30 jurisdictions collecting and reporting data for 2013 on release that 4,400 prisoners were released from segregation directly into their communities.³⁹ Further, if the individualized plan we suggested above was in place for each prisoner in restrictive housing for 30 days or more, that plan would provide a significant buffer against the direct-release to the community.

IV. Conditions within Restrictive Housing and Opportunities for Interpersonal Exchanges

In our 2014 survey, we documented how conditions of segregation and the degrees of prisoners’ isolation varied significantly from jurisdiction to jurisdiction. Nonetheless, some generalizations were possible.⁴⁰ The cells were small, ranging from 45 to 128 square feet, sometimes for two people.⁴¹ In the majority of jurisdictions, prisoners spent twenty-three hours in their cells on weekdays, and in 30% of jurisdictions, prisoners spent forty-eight hours straight on weekends.⁴² Opportunities for social contact, such as out-of-cell time for exercise, visits, and programs, were limited, ranging from three to seven hours a week in many jurisdictions.⁴³ Phone calls and social visits could be as infrequent as once per every three months, once a month, or only when emergencies arose. Other jurisdictions provided more opportunities.⁴⁴ Moreover, in most jurisdictions responding to the *ASCA-Liman* survey, prisoners’ access to visits, calls, programs, and exercise, as well as what prisoners were allowed to keep in their cells, could be limited as sanctions for misbehavior.⁴⁵

³⁸ See *Liman Administrative Segregation Policies 2013 Report*, *supra* note 2, at 16. For example, as of the policies in 2013, Maine required approval by the commissioner for segregation longer than 6 months, Maryland required approval by the commissioner for segregation longer than one year, and Colorado required that the deputy director meet personally with an inmate to determine propriety of segregation longer than one year. *Id.*

³⁹ *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 29.

⁴⁰ See *id.* at 39.

⁴¹ *Id.*

⁴² *Id.* at 37-39.

⁴³ *Id.* at 41-49.

⁴⁴ *Id.* at 46.

⁴⁵ *Id.* at 49-50 tbls.16-17.

Reading these current standards taught us that they provide more opportunities than were reported as available in the responses to the ASCA-Liman surveys. The gap can be explained as a lack of training or compliance, or by standards that are so general and that have exceptions so permissive as to license holding prisoners in more restrictive conditions. This difference between the standards and the reports of practices in 2014 underscores the importance of clearer guidance.

A central issue is the physical environment. Standards should require access to direct natural light and, when possible, the opportunity to see both the sky and outdoor space other than another brick wall; heat and coolness controls appropriate to the climate; darkness for nighttime sleeping hours; and reasonable amounts of time during which quiet prevails. These improvements will help both prisoners and staff by alleviating the stress that comes from extreme heat (reported in some institutions in summer months to exceed 100 degrees) and from high levels of noise. We understand that, given the architecture of prisons, our proposals are challenging, but standards need to state goals and to specify what constitutes humane confinement.

We are also aware that these calls for improvements in access to natural light and sights, as well as moderated temperatures and noise levels, may well be needed in many prisons for people in the general population. For example, Revised Standard 4-4140 (page 003) states: “Restrictive housing units provide living conditions that approximate those of the general inmate population.” Here again, aspirations are important. The many prison facilities across the United States that are in need of repair and renovation counsel against using conditions in the general population as the sole baseline, without explanations of what conditions should be.

The Revised Standards discuss layouts of facilities when calling for spaces for “treatment staff consultation” and “[p]rocess [i]ndicators” to “ensure inmates have access to both indoor and outdoor recreation areas.”⁴⁶ Yet the same proposals also include caveats, that “all exceptions” be “clearly documented,” including if exceptions are made to providing access to “indoors and outdoor recreation areas.”⁴⁷

Similarly, in Revised Standard 4-4155 (page 005), important details are provided on minimum sizes of outdoor group and individual yard “modules.” But while calling for “unencumbered space,” the Standard does not specify how prisoners have access to such spaces. Likewise, Revised Standard 4-4273 (page 030) calls for policies providing prisoners in restrictive housing access to a host of services and programs, to the extent possible. Yet we

⁴⁶ Revised Standard 4-4140 (page 003).

⁴⁷ *Id.*

know from the responses to questions in the ASCA-Liman 2014 survey that such programming was not regularly available.⁴⁸

Further, Revised Standard 4-4262 (page 020) on showers continues the current Standard that showers be available “at least three times per week.” The proposal adds requirements that senior correctional supervisors review limits, if imposed, on showers. In Revised Standard 4-ALDF-2A-57 (page 052), the statement is made that exceptions are “permitted only when determined to be necessary.”

Depriving prisoners of showers should *not* be permitted, absent documentation that doing so is to prevent self-harm or harm to others. Further, a decision to do so should be made through consultations with senior mental health professionals and with the approval by the Director or designee. Simply put, limiting showers to fewer than three-a-week should not be used as a sanction. Further, to the extent that disruptive activity takes place when individuals take showers, such behavior should be seen as evidence of the need to involve mental health professionals.

Similarly, current Standard 4-4261 (page 018) states that prisoners should be given “clothing that is not degrading and access to basic personal items for use in their cells,” unless problems of destruction and self-harm are documented. Standard 4-4263 (page 021) specifies the need to provide laundry, hair care, and the like, again with documentation of instances when use is limited. In addition, Revised Standard 4-ALDF-2A-56-1 (page 051) calls for written policies to provide “all inmates in restrictive housing” with “suitable clothing and access to basic personal items” absent an “imminent danger” of destruction of the items or of self-harm.

But no guidance is provided about how to assess when to limit use and how to enable the prisoner to be able to regain clothing and items again. When individuals misuse clothing, they may be doing so as a form of protest or as a sign of mental illness. We suggest more specificity—for example, that clothing, opportunities for personal grooming, and personal items in cells ought not to be taken away absent extraordinary circumstances, and that doing so requires consultation with mental health professionals and a plan for as prompt a return to normal treatment as possible. The Standard could also require that items taken away should presumptively be returned after a set period of time.

Another concern is about opportunities for social contact through visits and phone calls. Standard 4-4267 (page 025) calls for prisoners in restrictive housing to have “opportunities” for visits, unless (as revised) “substantial documented reasons” are given for withholding those opportunities. Standard 4-ALDF-2A-61 (page 055) calls for visits, “unless there are substantial reasons for withholding such privileges;” and denials are to be documented. But the *ASCA-Liman Time-In-Cell Report* found that social visits were

⁴⁸ *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 48-9.

sometimes limited to once every three months, or once a month, and moreover that staff could preclude visits as a sanction.⁴⁹ These Standards do not have enough direction on what constitutes reasons for depriving individuals of visits.

Standard 4-4271 (page 029) addresses the need to provide thorough policies and practices that give inmates in administrative segregation phone call privileges “unless security or safety considerations dictate otherwise” and call for documentation of decisions to deny calls. But the Standard provides no definition of what constitutes phone call privileges. As written, the Standard does not preclude policies that provide for once-a-month (or once every three month) calls of no more than five-minutes.⁵⁰ Further, the Revised Standard offers no details about the importance of limiting the suspension of calling privileges.

In addition, Standard 4-ALDF-2A-65 (page 059) provides that prisoners in disciplinary detention can lose all calls except for family emergencies and those related to the judicial process. Yet even in detention facilities, people can be held in disciplinary segregation for months and years. Preventing access to the outside world undercuts the ability of those persons to regain their place in that world. Thus, the Standards should require increased social contact the longer a person is held in restrictive housing. Any suspensions of social contact should be limited to a specific, brief interval (such as two days).

In short, opportunities for prisoners to socialize in segregation are already constrained. Yet maintaining social, community, and familial ties plays a critical role in supporting prisoners while incarcerated, reducing violence in prisons, and enabling more successful returns to the community and therefore reducing recidivism. The Mandela Standards prohibit limiting access to family visits as a sanction (with the caveat for exceptional circumstances requiring temporary limits to preserve safety).⁵¹ That approach is correct, and to implement it, standards could specify that prisoners should have opportunities for telephone use, legal and social visits, written correspondence, access to reading materials, and access to programming on the same basis as inmates in the general population. Further, decisions to limit such access should only be based on a documented danger to others (including the other prisoners, staff or visitors), or the prisoner himself. Such limits should expire as soon as possible, and if after 15 days, senior staff in the central administration should determine the need to continue the sanctions.

V. Special Populations

⁴⁹ *Id.* at 44-45.

⁵⁰ *Id.* at 45 n.181.

⁵¹ Rule 43 of the Mandela Rules provides: “Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.” Mandela Rule 43(3), *supra* note 22.

A. Confinement of the Mentally Ill

We appreciate that the Revised Standards focus on vulnerable populations in segregation, including the mentally ill. We write to support the commentary provided by Professor Schlanger and her colleagues that the Revised Standards need to be clear in limiting restrictive housing for such individuals. Thus, as the Law Professors letter put it, Revised Standard #2 could be modified as follows:

The agency shall not place in extended restrictive housing persons who are especially vulnerable to mental or physical harm from such placement, unless they clearly present a current significant threat to the safety of staff or other inmates that cannot be ameliorated by alternative management or housing arrangements. If such a person is housed in restrictive housing, the agency shall within 72 hours undertake measures to reduce their social isolation and ameliorate the risk from extreme isolation. This should include structured therapeutic activities, adequate out of cell time, and other ameliorative measures such as access to television, reading materials, etc.

Persons especially vulnerable to mental or physical harm from extended restrictive housing include: inmates with current mental illness or a history of prior significant mental illness or chronic depression; inmates with borderline personality disorders; inmates with intellectual disabilities (whether caused by brain injury or other sources); elderly inmates (over 65) and youthful inmates (under 22).

B. Women in Restrictive Housing

In the 2014 *Time-in-Cell Report*, 38 jurisdictions reported that some 700 women were in administrative segregation, one form of restrictive housing.⁵² Thus, as the Standards reflect, the population is overwhelmingly male.

We welcome that the Revised Standard calls for a ban on the isolation of pregnant women.⁵³ In addition, the Standards ought to recognize the other women who are in such confinement and require attention to their specific health, hygiene, or other needs.

VI. Supervising Staff and Recording the Use of Restrictive Housing

The Revised Standards reflect the challenges that restrictive housing imposes on prison administration. The ASCA-Liman Study detailed the difficulties of staffing such units⁵⁴ and the wide variety of practices in recordkeeping.⁵⁵ Moreover, from the data that

⁵² *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 20-21.

⁵³ Revised Standard #5.

⁵⁴ *ASCA-Liman Time-In-Cell 2014*, *supra* note 3, at 50-51.

were kept, demographic disparities were documented. Racial and ethnic minorities were overrepresented in restrictive housing when compared with a particular prison system's population as a whole.⁵⁶ Thus, we support Standard 4-4259 (page 016) calling for additional training and certification in correctional behavioral health, and Standard 4-4260 (page 017) calling for permanent logs to be reviewed by both the warden and health authority.

But more is needed. We suggest directions be provided on the format of such logs and that throughout the Standards, more detail be given whenever a Standard calls for documentation. The aims should be to have centralized reporting of numbers of individuals in all forms of restrictive housing, to have specific information on the demographics of those in restrictive housing (age, gender, race and ethnicities; reason for incarceration), the reasons for placement, the length of stay, the staffing of units, and incidents of problems in the units. Further, the materials should be recorded and kept in a format that is searchable so that one can learn about patterns that could reveal problems to be addressed.

* * *

We know that the project of Revising Standards for Restrictive Housing is ambitious and entails a host of challenges of financing, staffing, and culture. The proposals made by the Ad Hoc Committee on Restrictive Housing will help to bring about changes that are imperative. Strengthening the new standards will reflect the degree of consensus that has developed about the need to unravel reliance on isolation as a form of incarceration, respond to legal obligations, and provide the necessary roadmap for doing so. The best estimates are, as we noted, that 80,000 to 100,000 people are restrictive housing now in U.S. prisons. Our hope is that, under revised standards, those numbers will decline steeply in the coming years. Moreover, with new standards in operation, the term "restrictive housing" will no longer be a euphemism for isolation.

Thank you again for attention to this important issue and to these comments. We would be happy to provide additional information, if that would be useful.

Sincerely,

Judith Resnik

Sarah Baumgartel

Johanna Kalb

⁵⁵ *Id.* at 53-54.

⁵⁶ *Id.* at 30-36.