

ACLU of Alaska

# Rethinking Alaska's Corrections Policy

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AVOIDING AN EVERYDAY CRISIS



MARCH 2010



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## **Rethinking Alaska's Corrections Policy: Avoiding an Everyday Crisis**

PUBLISHED MARCH 2010

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.



AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION  
1057 West Fireweed Lane, Suite 207  
Anchorage, AK 99503  
(907) 276-2258  
[www.akclu.org](http://www.akclu.org)

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The staff of the Alaska Department of Corrections was extremely helpful in allowing visits by attorneys and law students to meet with prisoners. Commissioner Joe Schmidt was extremely cooperative in enabling these visits and maintaining a working relationship with the ACLU of Alaska. Superintendents and staff at every facility went to great lengths to accommodate our interviews and to help us understand the workings of the Department.

The cooperation of more than 150 prisoners in the custody of the Alaska Department of Corrections was essential to this report.

## PROLOGUE

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The ACLU of Alaska met with representatives from the Alaska Department of Corrections (ADOC), including Commissioner Joe Schmidt, in the fall of 2008 to discuss this research project. At that time, the ACLU of Alaska was guaranteed free access to the facilities involved in the research project and the cooperation of the prison superintendents and staff. Throughout November and December, 2008, and January, 2009, representatives of the ACLU of Alaska met with prisoners all over the state. At each location, the ACLU of Alaska made arrangements with the superintendent in advance, and the staff at each facility fully accommodated the visit. During the investigation, the Department lived up to its guarantee.

After the writing process had begun, Commissioner Schmidt hired a special assistant, Carmen Gutierrez, to work on special projects for the Department. Starting in the summer of 2009, Ms. Gutierrez worked closely with the ACLU of Alaska in developing the drafts of the reports. Where more data was requested, Ms. Gutierrez reached out to other members of the Department and ensured that the ACLU of Alaska found data that was important to the development of the report: population figures, cell dimensions, interviews with high-level officials, Department procedures and guidelines, etc.; the ACLU of Alaska found transparency infrequently encountered in the world of corrections. To this end, the ACLU of Alaska is deeply grateful to Commissioner Schmidt, the many individuals in the Department who provided materials and answered questions, and Ms. Gutierrez.

The ACLU of Alaska would also like to note that, while some concerning trends and incidents are chronicled in this report, the prison system in Alaska does many things right, especially relative to dysfunctional prison systems in other states. Even though concerns are raised in this report about medical care and suicide prevention in Alaska prisons, the overall mortality rate in Alaska compares well to that of most other states. Alaska prisons lack the pervasive gang presence that makes prisoner-on-prisoner violence a frequent event in other states, like California; only three in custody prisoner-on-prisoner homicides are known to have occurred in Alaska facilities. The degree of overcrowding, while serious in Alaska, has not reached the same level seen in many other jails and prison systems around the nation. Regardless of the comparative merits of the Alaska prison system, the ACLU of Alaska believes that improvement should occur wherever possible to meet the legal needs of the prisoners of Alaska.

Particularly encouraging is an attitude in the Department administration reflecting a desire to improve rehabilitation efforts and to reform the Department as a whole. Examples of the ongoing efforts include reports from Department officials that the prisoner classification system is undergoing reform and that new efforts to set prisoners up for re-entry into the community will begin at the time of a prisoner's admission to the facility. Given that 95% of all prisoners will ultimately be released from custody, the Department has expressed enthusiasm for the benefits to society, public safety, and the prisoner when

prisoners are supported by proper housing, employment, and medical and mental health care upon release. The ACLU of Alaska hopes that the Department will continue to build on its successes and the spirit of reform to improve conditions around the state.

The ACLU of Alaska would also like to note that the work of Alaska correctional officers and administrators is an exceptionally challenging one, frequently having to cope with limited resources and the unique challenges of running a prison system in Alaska, which include weather, geographical distance, and lack of infrastructure. We hope that throughout the report we have acknowledged these challenges, and we ask readers to keep in mind the difficulties attending the day-to-day operation of a correctional facility.

## EXECUTIVE SUMMARY

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From the fall of 2008 to the spring of 2009, the ACLU of Alaska conducted a survey of prisoners in the Alaska prison system in order to review conditions in Alaska facilities and the major privately-run facility in Arizona that houses Alaska prisoners. One attorney from the ACLU of Alaska and four law students from Yale Law School interviewed more than 150 prisoners in every major correctional facility housing Alaska prisoners.

In looking overall at the correctional system, the ACLU of Alaska has concerns bearing more investigation in these areas:

- Significant overcrowding, particularly in pretrial facilities;
- Anecdotal prisoner accounts of mismanagement of medical treatment;
- Under detection and under treatment of mental illness among prisoners;
- A need for continuing expansion of rehabilitation efforts;
- Difficulties in developing rehabilitative programs for Alaska Native prisoners and in implementing those programs for women in pretrial facilities; and
- A prisoner complaint process viewed with suspicion by prisoners and that is without a necessary outside review.

The survey was funded by the Human Rights Project of the national ACLU organization, with the intent that the outcome of the survey would be reviewed in light of contemporary international human rights standards. The survey was designed to assess prisoner perceptions of the correctional system and review anecdotes from prisoners to find common threads of experience reported by prisoners. The research and writing of the report was accomplished with substantial cooperation from the Department of Corrections.

### Overcrowding

Due to increased prosecution, harsher sentencing, fewer pretrial prisoners being released, and more probationers and parolees returning to custody, the growth of the prison population in Alaska continues year by year. In 2007 and 2008, Alaska prisons faced terrible overcrowding conditions. Due to some intelligent management of the prison population – mostly the expanded use of the community corrections centers and increased use of electronic monitoring as alternatives to traditional prisons – the overcrowding briefly stabilized in the spring of 2009 but, by late 2009, has returned to the levels seen in late 2007 and early 2008. The original ingredients of prison overcrowding remain in place and, without intervention, the growing population will surely continue to crowd existing facilities at least until the completion of Goose Creek Correctional Center being built in the Matanuska-Susitna Borough and due for completion in 2012.

One unfortunate means to redress this problem has been moving prisoners out of state to contract prisons run by for-profit corporations. At these facilities, the prisoners are thousands of miles away from home and family, which limits the prospects for their ultimate rehabilitation at the time of release. Prisoners have also been held in private facilities, where 2 or 3 officers supervise 360 prisoners, leading to high incidences of assault. The situation has changed with ADOC's decision to move Alaska's out of state prisoners to a new facility near Denver, Colorado.

In light of the serious concerns regarding overcrowding, the ACLU of Alaska recommends:

- A unified effort among the many governmental entities managing the criminal justice sector to develop a plan to address factors contributing to growth in the prison population and diminish long-term overcrowding;
- Improved rehabilitative and re-entry programming to prevent the return of prisoners to custody after release;
- Increased availability of diversionary programs to prevent those convicted of minor offenses from ending up in prison;
- A review of prosecutorial and police procedures to ensure thoughtful crime prevention while minimizing use of incarceration;
- The creation of a statewide sentencing commission to propose revisions to existing sentencing laws, and to review the existing mandatory sentencing minimums for the efficacy of use of state resources;
- A review of the role of Alaska probation and parole officers, the Alaska judiciary, and the Alaska parole board in probation and parole violation proceedings to find inconsistencies and irregularities in the process;
- Elimination of the usage of "boats" – mattresses in plastic shells placed on the floor – to house prisoners; and
- The return of the designated facility population capacity of the Alaska system to 2002 levels.

## Medical and Mental Health Care

The provision of medical care and mental health care across more than a thousand miles and in a dozen institutions presents a huge challenge for the state of Alaska. The ACLU of Alaska identified several areas of concern in the administration of medical and mental health care, some of which arose in both the medical and mental health fields:

- Limited statistics regarding the number of patients seen made assessments of overall quality of care challenging;
- The level of staffing for the medical and mental health services raised concerns about its adequacy for the provision of health care in widely dispersed institutions;
- Complaints of prisoners not receiving prompt or adequate treatment, or of receiving care inconsistent with prior medical care;

- Suicide prevention protocols at odds with national standards; and
- Under detection and under treatment of mental illness among prisoners.

In light of the concerns raised in the study, the ACLU of Alaska recommends:

- Improved statistical reporting of numbers of patients seen, speed of response to patient requests, review of negative outcomes;
- Systematic review of major medical complaints;
- Designation of more resources for medical and mental health care;
- Reformation of suicide precaution procedures to bring Department in-line with national standards;
- Improved internal and external review of inmate deaths to prevent future deaths;
- Monitoring of intake and follow-up procedures to ensure that prisoners with mental illnesses do not go undiagnosed; and
- Review of basic dietary and exercise provisions – particularly for diabetic prisoners – to prevent illness, to minimize costs, and to improve prisoner health.

## Rehabilitation

Rehabilitation is an excellent way to minimize recidivism; funds devoted to rehabilitation usually represent a cost-savings to the state based on preventing the costs of further incarceration. In the early part of this decade, most state funding for in-custody rehabilitative programming was cut under the Murkowski administration. In the past two years, the legislature has begun to restore the funding for substance abuse and sex offender treatment programming in prison facilities. New efforts are underway to manage the re-entry of prisoners newly released into society to ensure that, upon release, prisoners have housing, employment, and have been connected with appropriate community resources to succeed outside the prison walls. Review of prisoner complaints and studies in the area revealed that:

- Four of every five prisoners have some kind of substance abuse problem;
- Alaska has the highest sexual assault rate in the nation;
- Two of every three prisoners will return to prison within three years of release;
- In 2008, 287 prisoners with felony convictions were released into the community every month, with 95% of prisoners eventually returning to the community; and
- Numerous prisoners reported that they were unable to obtain housing or employment on release and were forced to stay in homeless shelters.

In light of these findings, the ACLU of Alaska recommends:

- Continuing efforts to improve resources for in- and out-of-custody rehabilitative programming;
- Continuing efforts to develop a re-entry protocol to ensure that each prisoner has

- access to housing, employment, and medical and mental health care upon release; and
- Further development of rehabilitative programming in rural areas.

## Equal Treatment

Alaska Natives comprise twice the proportion of the prison population relative to their proportion of the statewide population. Untangling the origins of that overrepresentation is extremely complicated. As one potential cause, many Alaska Native prisoners complained that they were required to stay in Anchorage during a parole or probation sentence because the prisoner could only receive services in Anchorage.

Women held in custody in Alaska are mostly held in the Hiland Mountain Correctional Center in Eagle River. However, women awaiting trial must be held close to their trial site; this means that in the many pretrial facilities around the state, small groups of women are housed inside larger majority-male prisons. In these locations, the need to keep the female prisoners separate from male prisoners often results in limited access to important resources for women in the pretrial facilities, like rehabilitative programming or the law library.

In light of these findings, the ACLU of Alaska recommends:

- Review of the long-term plans for prison plant expansion in light of the need for prison resources in Alaska Native majority areas and the special needs of women in pretrial facilities;
- Increased rehabilitative programming in Alaska Native majority areas; and
- Design of rehabilitative programming targeted at the unique cultural needs of Alaska Natives.

## Grievance Procedure

Any time a prisoner has a complaint about conditions or treatment inside the facility, his first action under the Department's procedures should be to seek informal resolution, usually by filing a request to see the appropriate officer – a form called a cop-out. If the situation is not resolved, the prisoner can file a formal complaint called a "grievance" to formalize his request and to seek a solution to the problem. If the matter is not resolved, the prisoner then has several layers of appeals to go through. Review of prisoner complaints and studies in the area revealed that:

- Prisoners expressed distrust for the grievance system and felt their grievances were not taken seriously;

- Prisoners complained that their grievances were sometimes reviewed by the same officer identified in the complaint or by a close relative of that officer; and
- Prisoners complained that their cop-outs and grievances could not be found after being filed.

In light of these findings, the ACLU of Alaska would recommend:

- The introduction of an outside monitor to manage the grievance process;
- A system to ensure that prisoners can receive an instant record of filing a grievance or cop-out, such as a stamped carbon copy or a numbered ticket indicating the time and date of filing; and
- Improved internal monitoring of the grievance process to prevent superficial investigation of complaints or retaliation against prisoners for filing complaints.



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# I. INTRODUCTION

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Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

- Eleanor Roosevelt, "In Your Hands," 1958.<sup>1</sup>

## A. Why Should We Care About Prisoners' Rights?

It is not always easy to be sympathetic to the interests of prisoners. After all, many prisoners have made appalling decisions for which they deserve to be punished. Many have committed acts that have exacted a terrible toll on innocent victims. Moreover, the prisoners' confinement means that they are largely out of sight and out of mind. Thus, it is easy to ignore what happens to our state's prisoners. But ignoring what happens in Alaska's prisons both allows for serious violations of human rights and undermines a core function of the criminal justice system: rehabilitation.

Today more than 1 in every 100 adult Alaskans is in a prison, a halfway house or under the direct supervision of the Department of Corrections (DOC)<sup>2</sup>—an incarceration rate equivalent to the United States' nationwide rate, which is the highest in the world.<sup>3</sup> The people who end up in custody do not come from some foreign place; they come from within our communities. While some prisoners certainly pose a safety threat to society, the typical prisoner in Alaska does not fit this mold. Some of the men and women interviewed for this report were incarcerated for crimes related to underlying substance abuse problems or mental illness, or for statutory violations such as driving with a suspended license or failure to pay child support. Some are awaiting trial and may never be convicted of a crime.

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1 Roosevelt, Eleanor, An Address to the United Nations Presenting "In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights" *available at* <http://www.udhr.org/history/inyour.htm>.

2 Alaska Department of Corrections, 2008 OFFENDER PROFILE, at 7 (indicating that, on average, 5,344 Alaskans were confined in a correctional facility, a community corrections center, or on electronic monitoring during the year of 2008), *available at* <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>. See also Jenifer Warren et al., Pew Center on the States, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS, at 43 (2009), *available at* [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=49382](http://www.pewcenteronthestates.org/report_detail.aspx?id=49382).

3 Pew Center on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2009), *available at* [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=35904](http://www.pewcenteronthestates.org/report_detail.aspx?id=35904).

More than 1,000 prisoners are in custody for violations of the terms of their probation or parole (usually for a relapse of drug or alcohol addiction while on probation or parole)<sup>4</sup> or for offenses against public order and administration (a catch-all category of non-violent offenses like contempt of court or failure to appear).<sup>5</sup> Less than half of all prisoners are in prison for violent or sexual offenses.<sup>6</sup>

The troubling size of our prison population can largely be attributed to statutes creating new crimes, requiring lengthy mandatory sentences for existing crimes, increased punishment for violations of probation and parole, and increased prosecution of nonviolent crime. Past failures to rehabilitate inmates may have led to high rates of recidivism,<sup>7</sup> further increasing the size of the prison population. Rehabilitation is a crucial role for a prison system where 95% of all Alaskan prisoners will eventually be released, and where 287 felons are released to the streets every month.

Sudden growth in the prison population from 2002 to 2007 made Alaska's prisons seriously overcrowded and fiscally burdensome. This report will consider the state of this system, as observed through interviews conducted with 153 inmates, or roughly 3% of the total prison population, in all 13 facilities where Alaska houses its prisoners. The report will also lay out proposals for reform to remedy these deficiencies, in particular, recommendations to reduce the overall prison population by 30% and to establish an external monitoring mechanism to investigate prisoner complaints.

The criminal justice system in Alaska ought to endeavor to treat prisoners more humanely and promote rehabilitation. Overcrowding and inadequate prison conditions tend to exacerbate, rather than treat, the problems behind criminal behavior. Even though advocacy for prisoner rights is often dismissed as something for "bleeding hearts" to concern themselves with, ignoring problems in our justice and corrections system has led to higher costs and the release of unrehabilitated prisoners into our communities.

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4 The almost unanimous finding of our survey of prisoners, upon asking prisoners who were in custody solely for violations of probation or parole, was that the violations that returned them to custody were for the use of alcohol or drugs. That finding included both prisoners who reported probation or parole violations directly stemming from alcohol or drug use (e.g., a positive drug test) and violations indirectly related to alcohol or drug use (e.g., not reporting to a probation officer because the probationer knew that when tested he would be positive, or not reporting to a probation officer because the prisoner was busy seeking drugs or was too drunk to report). The dramatic rise in the number of prisoners held for probation and parole violations (from 216 in 2002 to 734 in 2008) can be attributed both to the abandonment of rehabilitative programming by the Department of Corrections in 2003 and an attitude among some probation and parole officers that they ought to "get" released prisoners – to catch them in some technical violation of the rules of probation or parole – rather than help them rehabilitate.

5 Alaska Department of Corrections, 2008 OFFENDER PROFILE, at 16 available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

6 *Id.* at 18.

7 A study by the Judicial Council of Alaska found that 59% of prisoners released were re-arrested at least once for committing a new offense within the three years following their release. Including parole and probation violations, a total of 66% of prisoners were reincarcerated at least once within three years. Alaska Judicial Council, CRIMINAL RECIDIVISM IN ALASKA (Jan. 2007) available at <http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf> [www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf](http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf).

## B. Why use International Human Rights to Examine Prison Conditions?

Since its founding, the United States has led the way in recognizing the inalienable rights of human beings, including those accused and convicted of crimes. The Constitutions of both the United States and Alaska have enshrined these rights. In accordance with this tradition, the United States has helped draft, and has signed and ratified, international treaties that guarantee rights of dignity and humane treatment to all people, including accused and convicted individuals, and has participated in creating international bodies that interpret and enforce these rights. We have set ourselves out as, in the words of former President Ronald Reagan, “a shining city on a hill,”<sup>8</sup> a model of liberty for the rest of the world. President Reagan noted that the United States “participated actively and effectively” in the drafting of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>9</sup> in order to “clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world.”<sup>10</sup> International human rights standards manifest the intent of the United States and fellow nations to bind themselves to universal principles of humane treatment. The United States and the State of Alaska have set out to implement these principles, in part, through a mature system of justice and punishment that rises above vigilantism. We have sworn to bring justice to those who wrong society, but to also treat them with the dignity to which they are entitled as human beings.

We have sworn to bring justice to those who wrong society, but to also treat them with the dignity to which they are entitled as human beings.

As the debate over prison conditions has receded from the public sphere, however, the measure of what courts accept as humane prison conditions has been sliding down an ever-more slippery slope. Now is the time to live up to the international human rights principles that the United States has promoted and held up as the standard for all nations, including our own nation. These principles not only bear relevance to the inherent dignity of our fellow Alaskans, but also are necessary for ensuring that our corrections system works effectively and serves its primary rehabilitative function.

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8 Reagan, Ronald, Farewell Address to the Nation, January 11, 1989 (referring to John Winthrop’s characterization of the Massachusetts Bay Colony) *available at* [http://www.reaganlibrary.com/pdf/Farewell\\_Address\\_011189.pdf](http://www.reaganlibrary.com/pdf/Farewell_Address_011189.pdf) .

9 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S., 85, *ratified by* U.S. Oct. 21, 1994, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>.

10 Reagan, Ronald, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, May 20, 1988 *available at* <http://www.reagan.utexas.edu/archives/speeches/1988/052088f.htm>.

### C. What Will Reform Cost?

The Alaska Governor's Office projects that the Department of Corrections (DOC), which controls 11,000 prisoners, detainees, parolees, and probationers, will consume almost a quarter of a billion dollars in 2010.<sup>11</sup> Successful reform, while costing money in the short run, is a wise investment that will help to reduce costs significantly in the medium- to long-term and could save more than \$300 million over the next two decades.<sup>12</sup> In a state where two of every three prisoners released from prison will return to prison,<sup>13</sup> reform efforts should begin by revamping programs that treat the leading causes of recidivism: alcoholism, drug abuse, and mental illness.<sup>14</sup> The provision of in-custody substance abuse treatment and appropriate follow-up treatment after release can reduce recidivism by as much as 40%.<sup>15</sup> Alaska sorely needs a new approach that takes into account the special circumstances of Alaska native prisoners, who are also significantly more likely to be re-incarcerated.<sup>16</sup>

Successful rehabilitation requires the provision of appropriate counseling, treatment programs, basic medical care, and an environment that is humane. The Alaska Sentencing Commission has found that rehabilitation efforts are not successful in overcrowded facilities.<sup>17</sup> All citizens who wish to see their tax dollars spent wisely, crime decreased, and healthy, productive Alaskans reintegrated in and contributing to our society have a critical interest in seeing that this system is reformed.

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11 State of Alaska, FY2010 Governor's Operating Budget, Department of Corrections, Overview, available at [http://gov.state.ak.us/omb/10\\_omb/budget/DOC/dept20.pdf](http://gov.state.ak.us/omb/10_omb/budget/DOC/dept20.pdf).

12 Martin, Stephanie and Colt, Stephen, The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs? available at [http://www.iser.uaa.alaska.edu/Publications/research-summ/RS\\_71.pdf](http://www.iser.uaa.alaska.edu/Publications/research-summ/RS_71.pdf) (projecting that modest spending on rehabilitative programs could decrease the future prison population and save more than \$300 million over the next 20 years).

13 Alaska Judicial Council, Criminal Recidivism in Alaska (Jan. 2007) available at <http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf>.

14 *Id.*

15 One study of a prison-based treatment community program in Delaware showed that only 31% of prisoners who went through the treatment community and participated in an aftercare program had a new arrest after three years, compared to 71% among prisoners who had no treatment. Martin *et al.*, *Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare*, 79 PRISON JOURNAL 294 (1999).

16 Alaska Judicial Council, CRIMINAL RECIDIVISM IN ALASKA (Jan. 2007) available at <http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf>.

17 Alaska Sentencing Commission, Annual Report to the Governor and the Alaska Legislature 1 (1992), available at <http://www.ajc.state.ak.us/reports/sent92.pdf>.

## D. Overview of the Alaska Prison System

### *i. Alaska and its Geography*

Alaska is by far the largest state in the union in terms of area, yet one of the smallest in terms of overall population. It also harbors the most extreme climate of any state in United States. Moreover, Alaska's geography leaves many areas off the main road network, hampering the provision of many services to those regions. These factors present unique challenges to criminal justice and correctional programming in Alaska. Notably, the combination of vast physical size and a small, scattered population regularly presents the Department of Corrections with difficulties in terms of allocating resources. Centralizing prisoners and resources in the Anchorage area can alienate non-local prisoners from their families and prevent rehabilitation in the community where the prisoners reside. On the other hand, dispersing the prisoners and resources to smaller communities can be expensive and limit the efficacy of some rehabilitation efforts.

### *ii. Alaska and its People*

Both African Americans and Alaska Natives make up a disproportionately high percentage of Alaska's prisoners.

Alaska embraces a very diverse population. The state is a site for temporary employment for many non-residents, especially in the fields of oil and gas extraction, fishing and canning, and tourism. It also has the largest proportion of native population of any state in the United States, with roughly 13 percent identifying as native. Alaska Natives hail from diverse traditions and tribal affiliations and, in many areas, comprise the majority of the local population. There are dozens of different native languages, some of which have thousands of living speakers.

Despite their significant number, Alaska Natives remain a vulnerable minority community. From the earliest days of settlement, Alaska Natives were subject to horrendous persecution and discrimination. European and American expansion in Alaska went unaccompanied by the treaties associated with expansion in the lower 48 states. As a result, aboriginal claims for land were extinguished in 1971 by a statute enacted by Congress, the Alaska Native Claims Settlement Act; today, almost none of the traditionally native territory of Alaska is on reservation lands. When Alaska was settled, native families were separated, native children were sent to far-off schools to be "civilized," and native culture and language were suppressed. The civil rights of Alaska Natives were severely limited: the right to vote was denied, Alaska Natives were frequently refused work or accommodations in shops and hotels, and the Alaska Native population lacked substantial political representation for many years. In the criminal context, Alaska Natives were freely

arrested for little or no cause.

Today, in small rural villages, many residents still survive on a subsistence lifestyle of hunting, fishing, and gathering berries and other edibles. Odd jobs, crafts, or seasonal work supplement this lifestyle with some cash income. Alcoholism is rampant throughout the state but particularly afflicts native villages. The incidence of sexual assault is far higher in Alaska than any other state in the union,<sup>18</sup> and native areas are particularly affected. Alaska Natives are far over-represented as defendants in such cases, comprising more than half of all prisoners in custody for sex offenses.<sup>19</sup>

Both African Americans and Alaska Natives make up a disproportionately high percentage of Alaska's prisoners. Alaska Natives, who represent 18% of the state's population, com-



Prisoner [iStockphoto.com/William Mahar]

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18 Rosay, Andre, "Forcible Rapes and Sexual Assaults in Anchorage," 20 ALASKA JUSTICE FORUM (Winter 2004).

19 Alaska Natives comprise 50.8% of all prisoners in custody for a sex offense. Alaska Department of Corrections, 2008 Offender Profile at 21 available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

prise 36% of the state's prisoners.<sup>20</sup> While accounting for only 4% of the state population, African Americans comprise 10% of its prisoners.<sup>21</sup> Caucasians, Hispanics and Asian & Pacific Islanders are underrepresented overall in the prison population. The reasons for the dramatic overrepresentation of African-Americans and Alaska Natives are complex. This report will seek to address this topic in a limited manner, but will not provide a comprehensive answer.

### *iii. Alaska and its Prisons*

The DOC holds roughly 3,500 prisoners at twelve Alaska prisons. The Department is unusual in that it maintains both sentenced prisoners and pretrial prisoners within the same system. Both pretrial and sentenced prisoners can be found in every prison in Alaska. Alaska is only one of six states that operate in this manner.<sup>22</sup> Until recently, the Department also contracted out the placement of roughly 750 prisoners, one in every five Alaskan prisoners, to Correctional Corporation of America. These prisoners were held at the Red Rock Facility in Eloy, Arizona, outside of Phoenix. In December of 2009, these prisoners were transferred to the Hudson Correctional Facility in Colorado. A few prisoners may also be held at other out-of state facilities at any one time.

The Department operates several halfway houses (Community Residential Centers or CRCs in the Department's terminology). These facilities are designed as transition centers for prisoners who have been released into society. The DOC lists 13 such centers as potential holding centers for prisoners, but the most recent census indicates that only nine halfway houses actually hold more than two prisoners on parole or pre-release.<sup>23</sup> These nine centers together house a maximum of more than 700 prisoners at any one time.<sup>24</sup> The Department also operates a growing electronic monitoring system, available in Anchorage, Fairbanks, Kenai, Sitka, and Ketchikan. The system monitors more than 200 prisoners at a time.<sup>25</sup>

The most recent population statistics show that in-state facilities, out-of-state facilities, halfway houses, and electronic monitoring hold more than 5,300 inmates.

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20 *Id.* at 12.

21 *Id.* at 12.

22 Other states that have a hybrid correctional system are Vermont, New Hampshire, Hawaii, Delaware, and Connecticut. Bureau of Justice Statistics, Department of Justice, Prisoners in 2007, at 9.

23 Alaska Department of Corrections, 2008 Offender Profile at 21 *available at* <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

24 In order to reduce crowding in prisons, the CRCs have been running at or near capacity since the beginning of 2009. Alaska Department of Corrections, 2006-09 Inmate Count Sheet (showing populations between 673 and 702 at CRCs in Alaska).

25 Alaska Department of Corrections, 2006-09 Inmate Count Sheet (showing between 215 to 226 individuals being supervised on electronic monitoring in mid-2009). According to the Department, expansion into Kodiak is being considered.

## II. METHODOLOGY

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The ACLU of Alaska and its partners interviewed 153 prisoners in the Alaska prison system, or roughly 3% of all Alaska prisoners, for this report. An attorney from the ACLU of Alaska traveled to every prison in the state, as well as to the Red Rock Correctional Facility in Eloy, Arizona, which housed the majority of out-of-state Alaska prisoners until the recent transfer to Hudson Correctional Facility. Four students from Yale Law School visited Anchorage and interviewed dozens of prisoners in the Southcentral region. Typically, prisoners signed up on a publicly-posted sign-up sheet the day prior to the visit. During the visit, prisoners were called down to the visiting room and spoke with the interviewer for anywhere from a half-hour to over an hour.

A standard interview form was used for all interviews recorded.<sup>26</sup> While the form changed slightly over the course of the interview process, the majority of the questions remained the same. The prisoner responses were recorded and tracked in a database.

Other sources of information used in compiling this report were letters sent from prisoners, phone calls received from prisoners, records obtained from the Department of Corrections, personal interviews with released prisoners, other third parties (like family members or attorneys), media reports, and formal reports prepared by other organizations.

Conducting prisoner interviews inside a closed facility will always present unique difficulties. Several prisoners reported that other prisoners were “scared” to talk to the interviewer or feared retribution. Others expressed their own anxiety that staff might question why they spoke to an interviewer from the ACLU of Alaska. Whether or not those fears were grounded in truth, some prisoners may have been deterred from meeting with an interviewer.

Unlike the prisons located in Alaska, the Red Rock Correctional Center in Eloy, Arizona, run by the Corrections Corporation of America, did not permit the posting of the interview sign-up sheet. Representatives of the facility insisted that it was such a high-security facility that permitting prisoners to sign up for interviews would threaten institutional security. Instead, the attorney was only able to interview a limited number of prisoners whose names were obtained from other sources. Some prisoners with legitimate concerns may not have been able to request an interview.

Another challenge to the interview process was posed by the prisoners in higher security sections, who, in some cases, took a longer time to interview because of heightened preparation to bring the prisoners for an interview. Faced with the choice of speaking to fewer, high-security prisoners or more low-security prisoners, the interviewers often

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<sup>26</sup> A sample form is provided in the Appendix.

sought a higher volume of low-security interviewees. Future research into the conditions in the most insular and high-security housing units, such as segregation units and mental health units, should be seriously considered.

Throughout the report, prisoners with whom the ACLU of Alaska conducted interviews are referred to with pseudonyms to protect their privacy. In cases in which distinguishing information was used from personal interviews, the prisoner was consulted and consented to the release of the information. In other cases, information was obtained from media reports, not through consultation with the prisoner. Prisoners who are now deceased are referred to by their true first names and last initial.

Because not every individual allegation can be verified, in analyzing the data the ACLU of Alaska has sought to report only systematic allegations of neglect and some isolated allegations of abuse. The ACLU of Alaska understands that it is possible that not every prisoner was wholly truthful with the interviewer and that within every system some individuals will complain. The ACLU of Alaska does not contend that the group of prisoners interviewed constitutes a representative sample or that any findings have statistical validity. Based on statistics supplied by the Department, roughly 20% of all prisoners file at least one grievance in a year; about 60% of the prisoners interviewed filed grievances in 2008, indicating that the prisoners interviewed tended to have more complaints than ordinary prisoners.<sup>27</sup> The ACLU of Alaska has sought to report only information that has been corroborated by documentary evidence or reliable patterns of complaints reported by numerous prisoners. Many uncorroborated prisoner accounts were left out of the report because they could not be confirmed.

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27 This corresponds with the information the ACLU of Alaska obtained from prisoners. Roughly one-third of all prisoners interviewed indicated that they had never filed a grievance; a further one-third of all prisoners interviewed indicated that they had filed one to three grievances in their whole history of incarceration.

### III. LEGAL FRAMEWORK

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#### A. International Law and American Prisons

International law imposes binding obligations on the United States and the state of Alaska regarding treatment of prisoners, and sets forth standards that can provide guidance for reform.

Treaties or conventions are the most important source of international law. In becoming party to a treaty, States assume binding international obligations. In the United States, treaties must be signed by the President and ratified by the Senate. According to the U.S. Constitution, once ratified, treaties are the “supreme law of the land,”<sup>28</sup> on par with federal statutes. Since the atrocities of World War II, one of the most important functions of treaties has been to define basic norms of human decency, including the humane treatment of prisoners. Treaties signed and ratified by the United States of particular importance to the treatment of prisoners include the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR)<sup>29</sup>, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>30</sup>

Another important source of international law is customary international law, which results from “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>31</sup> The U.S. Constitution refers to customary international law as “the law of nations”<sup>32</sup> and the Supreme Court has long recognized customary international law as a source of legal obligation on the United States.<sup>33</sup>

An additional source of international law is resolutions adopted by the United Nations General Assembly. The U.N. has adopted three particularly important instruments embodying international standards relating to the treatment of prisoners: the United Nations Standard Minimum Rules for the Treatment of Prisoners,<sup>34</sup> the Body of Principles for the

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28 U.S. CONST. art. VI.

29 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *ratified by U.S.* June 8, 1992, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

30 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S., 195, *ratified by U.S.* Oct. 21, 1994, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3940.html>.

31 Restatement [3d] of Foreign Relations Law 102[2].

32 *See, e.g.*, U.S. CONST. art. I, sec. 8.

33 *See e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *The Paquete Habana*, 175 U.S. 677 (1900).

34 United Nations, Standard Minimum Rules for the Treatment of Prisoners (Aug. 30, 1955), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>.

Protection of All Persons Under Any Form of Detention or Imprisonment,<sup>35</sup> and the Basic Principles for the Treatment of Prisoners.<sup>36</sup> Together with the Universal Declaration of Human Rights,<sup>37</sup> these instruments establish basic standards related to the treatment of prisoners through which the United States' legal obligations under the ICCPR, the CAT, the CERD, customary international law, and domestic laws should be interpreted. While these three instruments do not impose binding obligations on the United States and the state of Alaska, they provide substantive guidance to states in the furtherance of their treaty obligations to protect prisoners' rights and signal the emergence of new norms and customary international law.<sup>38</sup>

## B. Domestic Law and American Prisons

The main basis for much of American prison law is the Eighth Amendment, which prohibits "cruel and unusual punishment."<sup>39</sup> While a prison official may sometimes go out of his way to inflict such punishment, the most common problems in prisons arise from neglect or indifference. To cope with the conditions in prison, the United States Supreme Court has fashioned a standard of "deliberate indifference" – prison officials are liable for their actions when they act or fail to act knowing of a risk of harm to a prisoner.<sup>40</sup> The Eighth Amendment also only addresses specific kind of harms: "unnecessary and wanton infliction of pain"<sup>41</sup> and the deprivation of "the minimal civilized measure of life's necessities."<sup>42</sup> These necessities include many and varied interests: among them the right not to be housed in an environment which exposes a prisoner to danger from other prisoners;<sup>43</sup> the right to necessary medical treatment;<sup>44</sup> and the right not to be housed in foul and over-

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35 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), available at <http://www.unhcr.org/refworld/docid/3b00f219c.html>.

36 Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, U.N. Doc. A/RES/45/111 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r111.htm>.

37 Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. Doc. A/810 (Dec. 10, 1948), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

38 International law, including treaties, customary international law and U.N. resolutions may also guide courts and policy-makers in the interpretation of domestic laws. The Supreme Court, for example, has found international authorities instructive in its interpretation of what treatment constitutes "cruel and unusual punishment" proscribed under the Eighth Amendment of the U.S. Constitution. See e.g., *Roper v. Simmons*, 543 U.S. 551, 578 [2005] (in striking down the juvenile death penalty under the Eighth Amendment holding that "[t]he opinion of the world community...provide[s] respected and significant confirmation for our own conclusions.").

39 U.S. Const., Amdt. VIII.

40 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

41 *Hope v. Pelzer*, 536 U.S. 730, 738 [2002] quoting *Whitley v. Albers*, 475 U.S. 312, 319 [1986]; *Gregg v. Georgia* 428 U.S. 153, 173 [1976] quoting *Furman v. Georgia*, 408 U.S. 238, 392-93 [1972] (Burger, C.J. dissenting).

42 *Rhodes v. Chapman*, 452 U.S. 337, 347 [1981].

43 *Farmer*, 511 U.S. at 843-45.

44 *Estelle v. Gamble*, 429 U.S. 97, 103-04 [1976].

crowded facilities.<sup>45</sup>

The right against “cruel and unusual punishment” applies only to those actually undergoing punishment – sentenced prisoners. Pretrial detainees are held awaiting trial, not as punishment for a crime. The rights of those detained by the state while awaiting trial are secured by the Due Process Clause of the Fourteenth Amendment.<sup>46</sup> Pretrial detainees have the right not to be punished at all, by cruel and unusual means or otherwise, as they have not yet been shown to be guilty.<sup>47</sup> The treatment of pretrial prisoners must then be “reasonably related to a legitimate governmental objective” and not “arbitrary or purposeless.”<sup>48</sup> The protections provided to pretrial detainees must be at least as strict as those provided to sentenced prisoners.<sup>49</sup>

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45 *Hutto v. Finney*, 437 U.S. 678, 688 (1978).

46 *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

47 *Id.*

48 *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

49 *City of Revere v. Massachusetts General Hosp.* 463 U.S. 239, 244 (1983).

## IV. ANALYSIS OF ISSUES

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### A. Overcrowding

We have 5% of the world's population; we have 25% of the world's known prison population. We have an incarceration rate in the United States, the world's greatest democracy, that is five times as high as the average incarceration rate of the rest of the world. There are only two possibilities here: either we have the most evil people on earth living in the United States; or we are doing something dramatically wrong in terms of how we approach the issue of criminal justice.

- Senator Jim Webb, Address to the Senate, March 26, 2009.<sup>50</sup>

In March 2008, Alaskan inmate Berry J. filed a complaint accusing his cellmate at Anchorage Correctional Complex (also called Anchorage Jail), Elmer S., of rape. Berry J. claimed Elmer S. would approach him after lights out, touching him inappropriately, threatening to beat him if he protested, and promising to have him killed if he reported the incidents. Berry J. claimed his cellmate raped him 23 times over the course of five days. Fearing for his life, Berry J. did not report the incidents until he was transferred to another mod. Elmer S. was ultimately arraigned and charged with the rape of Berry J.<sup>51</sup>

Elmer S. had originally been incarcerated in October 2007 for murdering his friend with a skillet, dismembering his body, and hiding the parts in his grandmother's freezer. Berry J., on the other hand, was being held in Anchorage Jail on charges of theft and forgery. During the time of Berry J.'s confinement, the Anchorage Jail experienced exceptional overcrowding. Ordinary steps taken in many institutions to sort violent and nonviolent prisoners fell by the wayside as the jail struggled to simply house these prisoners. As local news sources reported, "[a]bout 38,000 people are processed through Alaska penal institutions every year and the Department just doesn't have the money or staff to thoroughly examine the past behavior of every person who shows up charged with a crime."<sup>52</sup> A positive sign

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50 Senator Jim Webb, Floor Speech to Introduce "The National Criminal Justice Commission Act of 2009," March 26, 2009 available at <http://webb.senate.gov/issuesandlegislation/Senator-Webbs-floor-speech-introducing-the-criminal-justice-legislation.cfm>.

51 Elmer S. remains unconvicted, with a trial scheduled for 2010, according to court records.

52 Holland, Megan, "Anchorage jail inmate files rape charges" ANCHORAGE DAILY NEWS, 7 March 2008, available at: <http://www.adn.com/crime/story/337593.html>; see also Moore, Jason, "Alleged prison rape raises cellmate assignment questions," 7 March 2008, available at <http://www.ktuu.com/global/story.asp?s=7985064>

of the changed orientation at the Department of Corrections is represented by the reported on-going implementation of a revised classification system. Under the new system, similarly classified inmates will be housed together.

Between 2002 and 2007, the prison population increased 22%.<sup>53</sup> Prior to this time, in 2001, judicial supervision over the prison system ended. In 2002, the last major correctional facility completed by the Department began accepting prisoners and, until December 2008, no new space had been constructed.<sup>54</sup> The increase in prison population was essentially accommodated by installing more beds and increasing the population cap in the existing space by 15%.<sup>55</sup> In addition, in three of the pretrial facilities, overflow prisoners have been housed on mattresses on the floor and in gymnasiums.

The overcrowding problem stems primarily from forces outside the control of the Department of Corrections. The ACLU of Alaska recognizes that the Department of Corrections has limited resources and little control over how many prisoners are admitted to the Department's custody. Other government bodies, such as the Department of Law, municipal police departments, the Alaska State Troopers, and the Alaska judiciary have direct influence over the prison population. Recent efforts to expand prison capacity – including the construction of Goose Creek Correctional Center and expansion at existing facilities – will have some impact on prison overcrowding. However, no realistic plan for prison expansion will keep up with expansion of the population comparable to the 22% growth seen from 2002 to 2007.<sup>56</sup> Addressing the root causes of the increased prison population is a necessity. As more and more individuals are arrested every year, overcrowding

As a result of increased prosecution and incarceration, diminished efforts to rehabilitate prisoners, and elimination of judicially-imposed population caps, the Alaska prison population has grown by a fifth in the last seven years.

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53 Alaska Department of Corrections, 2003 Offender Profile; Alaska Department of Corrections, 2008 Offender Profile available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

54 Construction at Palmer Correctional Center allowed the Department to add a total of 47 beds in December 2008 and January 2009. Further construction is planned or ongoing at Wildwood, Spring Creek, and Yukon-Kuskokwim Correctional Centers. Goose Creek Correctional Center, with a projected 1,536 medium security beds is slated for completion in June 2012.

55 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the statewide cap in April 2002 was 3,206 and the statewide cap in December 2007 was 3,696).

56 Alaska Department of Corrections, 2003 Offender Profile; Alaska Department of Corrections, 2008 Offender Profile available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

has become the norm instead of the short-term exception,<sup>57</sup> and prison conditions have violated international human rights norms and standards.

### *i. Introduction to Overcrowding in Alaska*

As a result of increased prosecution and incarceration, diminished efforts to rehabilitate prisoners, and elimination of judicially-imposed population caps, the Alaska prison population has grown by a fifth in the last seven years. Since no major space was created from 2002 to late 2008, the prison system was forced to house the new population in the same space. The population caps have been increased from levels previously set by the state and by the courts, even though only one facility has actually increased the space available to prisoners.<sup>58</sup> In three Alaska facilities, three prisoners are sometimes forced to sleep in cells designed for two prisoners, or even cells designed for one, with one prisoner sleeping on the floor on a foam mattress. Other prisoners have found themselves housed in gymnasiums.<sup>59</sup> Such overcrowded facilities create dehumanizing living conditions, limit effective supervision of the prison population, and inhibit successful rehabilitation of prisoners.

### *ii. Legal Standards Relating to Prison Overcrowding*

#### **1. International Standards**

The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights guarantee all persons the right to an adequate standard of living and the right to the highest attainable standards of physical and mental health.<sup>60</sup> Furthermore, under the International Covenant on Civil and Political Rights, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.<sup>61</sup> Overcrowding in prisons leads to conditions that violate these basic and universal rights. The United Nations Standard Minimum Rules for the Treatment of Prisoners provides the most comprehensive list of the minimum

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57 The prison population seems to have stabilized somewhat, thanks in part to efforts to manage the population numbers by the Department of Corrections. However, the problem of overcrowding, as depicted in this report, continues to exist at levels comparable to those seen at the time of the prisoner survey. The bulk of the prisoner interviews took place from November 2008 to January 2009 – during that period the average population of in-state prisons was 3,477. From April 2009 to June 2009, the average population of Alaska prisons increased to 3,486. The bed space in that time expanded by 30 beds.

58 See footnote *supra* describing ongoing construction projects.

59 Some of the prison gymnasiums have returned to use as gymnasiums. The Lemon Creek Correctional Center no longer holds prisoners in the gymnasium; the Fairbanks Correctional Center uses its gym on most days for recreation, but does handle occasional overflow by putting prisoners on mattresses in the gym at night.

60 Universal Declaration of Human Rights, Art. 25; International Covenant on Economic, Social and Cultural Rights, Arts. 11 and 12.

61 International Covenant on Civil and Political Rights, Art. 10. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1.

requirements for treatment of incarcerated persons covering the areas of housing, sanitation and hygiene, and exercise.<sup>62</sup>

Each prisoner should be housed in a cell or room by himself or herself; “it is not desirable to have two prisoners in a cell or room.”<sup>63</sup> Where dormitories are used, the prisoners assigned to them should be selected as suitable to associate with one another, and regular supervision should be provided at night.<sup>64</sup> All accommodations, in particular sleeping accommodations, should meet health requirements, with special attention paid to climatic conditions such as cubic space, minimum floor space, lighting, heating, and ventilation.<sup>65</sup>

For sanitation and hygiene, prisoners must be able to use the toilet facilities as needed and do so in a “clean and decent” manner.<sup>66</sup> In addition, prisoners should have access to adequate bathing and shower installations to allow for the maintenance of general hygiene.<sup>67</sup> In order to maintain personal hygiene, prisoners should also have access to water and the necessary toiletries.<sup>68</sup> Prisoners who are not permitted to wear their own clothing should be provided with clothes that are both clean and suitable for the climate.<sup>69</sup> Clothing, including undergarments, and bedding should be changed and washed as necessary to ensure cleanliness.<sup>70</sup>

## 2. Domestic Standards

The general constitutional rule relating to overcrowding has been that overcrowding becomes a constitutional violation based not so much on a defined prison population that constitutes overcrowding, but when the conditions of confinement “alone or in combination . . . deprive inmates of the minimal civilized measure of life’s necessities.”<sup>71</sup> While

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62 In at least one instance, a U.S. court has recognized the Standard Minimum Rules for the Treatment of Prisoners as relevant to Eighth Amendment claims regarding conditions of confinement. In *Lareau v. Manson*, the U.S. District Court for the District of Connecticut held, “The ‘evolving standards of decency’ with which overcrowding of inmates ... are incompatible include the Standard Minimum Rules for the Treatment of Prisoners, which were adopted by the United Nations Economic and Social Council ... and thus form part of the body of international human rights principles establishing standards of decent and humane conduct by all nations.” *Lareau*, 507 F. Supp. 1177, 1192-93 (D. Conn. 1980).

63 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 9; see also *id.*, Rule 86 (“Untried prisoners shall sleep singly in separate rooms. . .”).

64 *Id.*

65 *Id.*, Rule 10.

66 *Id.*, Rule 12.

67 *Id.*, Rule 13.

68 *Id.*, Rule 15.

69 *Id.*, Rule 17.

70 *Id.*

71 *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

double-celling prisoners is not per se unconstitutional under the federal constitution,<sup>72</sup> some courts have found that double-celling can be an unconstitutional practice when the housing practices lead to poor sanitation, poor ventilation, and the presence of vermin.<sup>73</sup> On the other hand, at least one court has upheld the use of triple-celling.<sup>74</sup> American court decisions rarely make any general rules about how much crowding is constitutionally permissible, since the decisions tend to be very fact specific.

### **iii. Overcrowding in Alaska Prisons**

#### **1. History of Overcrowding and the Cleary Litigation**

Overcrowding in Alaska's prison facilities has existed for decades, and the problem has intensified in the last six years, with the total population peaking in 2007.<sup>75</sup> In 1982, Alaska incarcerated one out of 224 adults, equal to 0.45% of the state's adult population.<sup>76</sup> In 2007, Alaska incarcerated one out of 88 adults, equal to 1.14% of the state's adult population.<sup>77</sup> Between 1982 and 2007, the adult incarceration rate grew 154%, and the state of Alaska now has the 11<sup>th</sup> highest adult incarceration rate in the United States.<sup>78</sup> The growth of non-incarcerative punishment has been dramatic as well: one in 36 adults in Alaska is now under supervision by the Department of Corrections as a probationer, parolee, detainee, or prisoner.<sup>79</sup> In 1982, only one in 90 adults was under supervision.<sup>80</sup>

The first efforts to tackle overcrowding in Alaska's prisons emerged in a decades-long class-action suit, *Smith v. Cleary*, a suit on behalf of prisoners complaining of multiple constitutional violations, but primarily concerns of overcrowding. The suit was first filed in 1981. As a part of the litigation, the Superior Court of Alaska established presumptive population caps for all Department of Corrections institutions in Alaska in 1984, but over the following decade, the population caps were periodically exceeded. In 1990, the state and the plaintiffs reached an agreement, which would leave the prisons under

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72 *Bell v. Wolfish*, 441 U.S. 520, 543 (1979).

73 *Tillery v. Owens*, 907 F.2d 418, 427-28 (1990).

74 *Hubbard v. Taylor*, 538 F.3d 229 (3d Cir. 2008).

75 The largest population in the prison system came in November 2007 when the total population of all in-state prisons hit an average of 3,759 detainees for the month. The number of prisoners in in-state facilities in 2009 ranged from 3,601 in March 2009 to 3,436 in May 2009. Alaska Department of Corrections, Inmate Counts.

76 See Jenifer Warren et al., Pew Center on the States, *One in 31: The Long Reach of American Corrections*, at 43 (2009), available at [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=49382](http://www.pewcenteronthestates.org/report_detail.aspx?id=49382).

77 *Id.* at 43.

78 *Id.* at 43.

79 Pew Center on the States, *One in 31: The Long Reach of American Corrections: Alaska Fact Sheet* (2009) available at [http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact\\_Sheets/PSPP\\_1in31\\_factsheet\\_AK.pdf](http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact_Sheets/PSPP_1in31_factsheet_AK.pdf).

80 *Id.*



Summer - Denali [© iStockphoto.com/Paul Tessier]

court supervision. During that decade, a court-appointed monitor periodically inspected the prisons. After years of supervision, the Alaska legislature passed the Alaska Prison Litigation Reform Act, which was intended to eliminate court supervision of the correctional system; in 2001, the Superior Court terminated the prospective relief created in *Cleary*, suspending enforcement of the population caps.

## 2. Current State of Overcrowding

Since the suspension of the population caps, Alaska's per capita prison population has grown at four times the national rate, faster than the prison population in all but two states.<sup>81</sup> Between 1999 and 2008, the Alaska Attorney General increased the number of prosecutions by more than 20%,<sup>82</sup> even while the crime rate decreased by 10% and the

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81 From 2000 to 2007, the Alaska prison population increased by 106 prisoners per 100,000 residents. Only Kentucky and West Virginia had a greater increase in per capita prison population. During that same period of time, the per capita prison population of twelve states actually decreased, while nationally the rate of incarceration increased by only 28 prisoners per 100,000 residents. Bureau of Justice Statistics, United States Department of Justice, *Prisoners in 2007*, at 5.

82 Alaska Department of Law, 2008 Annual Report, chart at 18 (showing fewer than 25,000 prosecutions in 1999, and more than 30,000 in 2007).

total number of crimes reported increased only 8%.<sup>83</sup> The rate of admission to the Alaska prison system has increased by 10%.<sup>84</sup> The Alaska prison population has expanded by 24%.<sup>85</sup> The increase of the incarceration rate has stretched the prisons' capacity to meet international human rights standards for the treatment of prisoners.

The expansion in the Alaska prison population has not come from increased incarceration of violent or dangerous offenders. Since 2002, the total number of sex offenders in custody has *declined* by 22%.<sup>86</sup> The number of offenders held for violent crimes has increased only modestly – by 4%.<sup>87</sup> The sudden growth in the prison population has come primarily from two sources. First, the number of prisoners held for probation and parole violations (largely for abusing alcohol and drugs while on probation and parole) has more than tripled since 2002.<sup>88</sup> Second, the number of prisoners held for offenses against public order and administration (a catch-all category of non-violent offenses, like violating bail conditions

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83 Alaska Department of Public Safety, Uniform Crime Report: 2000 at 31-32 (showing that in 1999 the state population was 567,947, the total number of crimes reported was 24,922); Alaska Department of Public Safety, Uniform Crime Report: 2007 at 31-32 (showing that in 2007 the state population was 683,478, the total number of crimes reported was 26,941). The crime rate as a whole has dropped over that period, from 4,387 crimes per 100,000 people to 3,942 per 100,000 people. *Id.* The Uniform Crime Reporting statistics have their own deficiencies, in terms of partial and inconsistent reporting of data from some municipal agencies. See Darryl S. Wood, *Measures of Outcomes Associated with Alcohol Abuse in Alaska*, 21 ALASKA JUSTICE FORUM 5 (Spring 2004) available at [http://justice.uaa.alaska.edu/FORUM/21/1spring2004/c\\_measuresofalcohol.html](http://justice.uaa.alaska.edu/FORUM/21/1spring2004/c_measuresofalcohol.html). However, the year-upon-year trends are still worth considering, even when taken with a grain of salt. Insofar as year-on-year trends are inaccurate, the likelihood is that the earlier data *understates the crime rate relative to recent data because more agencies are reporting data than in 1999*. Alaska Department of Public Safety, Uniform Crime Report: 2000 at 23 (showing that the reporting agencies in 1999 accounted for districts holding 92% of the state population); Alaska Department of Public Safety, Uniform Crime Report: 2007 at 24 (showing that reporting agencies in 2007 accounted for districts holding 97.4% of the state population). Given the increased reporting, the crime rate as a whole likely dropped *more* than reported between 1999 and 2007.

84 The Alaska Department of Corrections made 33,674 admissions in 2008. Alaska Department of Corrections, 2008 Offender Profile at 8 available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>. In 1999, the DOC made 30,366 admissions. Alaska Department of Corrections, 2002 Offender Profile at 8.

85 The 1999 prisoner population in in- and out-of-state correctional institutions was 3,428. Alaska Department of Corrections, 2002 Offender Profile at 10. The 2008 prisoner population in in- and out-of-state correctional institutions was 4,274. Alaska Department of Corrections, 2008 Offender Profile at 8 available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

86 Alaska Department of Corrections, 2008 Offender Profile at 17 (showing 569 sex offenders in custody) available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 725 sex offenders in custody).

87 Alaska Department of Corrections, 2008 Offender Profile at 15 (showing 1,405 offenders in custody for crimes against the person) available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 1,346 offenders in custody for crimes against the person).

88 During the prisoner interviews for this report, prisoners in custody solely for probation and parole violations were asked the basis for their return to custody. Almost all reported the cause of the violation was a return to the use of drugs or alcohol. The population of prisoners in custody for probation and parole violations grew from 216 in 2002 to 734 in 2008. Alaska Department of Corrections, 2008 Offender Profile at 15 available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Alaska Department of Corrections, 2002 Offender Profile at 15. While the population of prisoners under probation or parole supervision increased somewhat over that same time (and one would naturally expect an increase in violations in proportion to the population under supervision), the increase in the supervised population was only 18%, nowhere near the tripling in the number of violators. Alaska Department of Corrections, 2008 Offender Profile at 64 (showing 5,813 probationers and parolees under Department supervision in 2008); Alaska Department of Corrections, 2006 Offender Profile at 64 (showing 4,927 probationers and parolees under Department supervision in 2002).

or failing to appear in court) has also tripled since 2002.<sup>89</sup> The higher levels of prosecution and incarceration of these two categories of offenders have increased the prison population in Alaska by 700 in six years; had these two populations remained at their 2002 levels, the prison population would have actually dropped since 2002.<sup>90</sup>

### 3. Initial Response to the Recent Prison Overcrowding

The sudden population growth as described above took place between 2002 and 2007. This growth left the Department of Corrections in an undesirable position, where the Department had little control over the rate of admissions to the prison system but all the responsibility for managing the newly admitted prisoners. The rise in the prison population and in admissions to the prisons, while sudden, was also constant and foreseeable over that period. None of the government bodies with direct impact over the prison population – the Department of Law, the legislature, the court system – took decisive action to curtail the growth of the prison population. Faced with a growth in population that it had limited capacity to control, the Department of Corrections went over the designated caps in several facilities. While the Department may have had little or no alternative to put more prisoners at each facility, the ACLU of Alaska believes the new population caps violate basic Constitutional standards previously imposed by the court system.

Facing a prison population that increasingly pushed the designated capacities of the prisons, in April 2006, the Department of Corrections filled the gymnasiums at Fairbanks, Mat-Su Pretrial, and the Anchorage Correctional Complex with bunks and made each gymnasium a housing unit.<sup>91</sup> In addition, the Department put a second bunk in about 70 one-man cells at Spring Creek and in most single cells at the Anchorage Correctional Complex.<sup>92</sup>

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89 Alaska Department of Corrections, 2008 Offender Profile at 15 (showing 317 offenders in custody for public order and public administration offenses) *available at* <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 99 offenders in custody for public order and public administration offenses).

90 Alaska Department of Corrections, 2008 Offender Profile at 10 (showing 4,274 offenders in institutional custody) *available at* <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Alaska Department of Corrections, 2002 Offender Profile at 10 (showing 3,625 offenders in institutional custody).

91 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (indicating that the gymnasiums at all three institutions were converted to bunk space in April of 2006).

92 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (indicating that all single cells at Spring Creek and most at Anchorage were converted to double cells). Comparing the inmate count sheets from August 2007 and November 2007 indicates that the cap at Spring Creek increased from 486 to 557 in the recalculation of the capacities of each facility. Alaska Department of Corrections, Instate Inmate Count – August 2007; Alaska Department of Corrections, Instate Inmate Count – November 2007. In the recalculation, the Department swapped its terminology – what once was called the “maximum capacity” became the “emergency capacity.” Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009]. The total capacity of the ACC-W facility went from 403 to 430 from August to November of 2007, although the size of the facility did not change.

The rise in the prison population and in admissions to the prisons, while sudden, was also constant and foreseeable over that period. None of the government bodies with direct impact over the prison population ... took decisive action to curtail the growth of the prison population.

By November of 2007, the prison population had risen to their highest historic levels, and crowding had become a serious problem. The total detained population (including those detained in out-of-state prisons, community correction centers, and on electronic monitoring) had risen 15% from the time of the opening of the last new facility – the east wing of the Anchorage Correctional Complex – in April of 2002.<sup>93</sup> While some of the prison population could be shifted to private out-of-state facilities, the in-state prison population overshot the previously designated population caps by 15%.<sup>94</sup> The Department made further efforts to use any space available. After a statewide recount of beds, the capacity of the state prisons grew from 3,206 to 3,696.<sup>95</sup>

The population caps at each facility were set by agreement between the state and the prisoner plaintiffs in 1990.<sup>96</sup> In the course of eleven years of direct

court supervision from 1990 to 2001, any efforts to raise the caps were scrutinized by Alaska courts. Each party – the Department and the plaintiff prisoners – had chances to challenge whether the caps should rise or not. For instance, the Spring Creek Correctional Center was built in 1988. During the Cleary supervision, the Department of Corrections was permitted twice to raise the population cap – once by 4 beds and once by 54 beds.<sup>97</sup> Following the cessation of court supervision, approximately 70 cells at Spring Creek were double-bunked, and the population cap increased.<sup>98</sup> The ACLU of Alaska contends this represents overcrowding. We do not know if the Cleary court previously refused the state permission to double-bunk these cells at Spring Creek, or if the Department did not request court permission to do so. However, that the population cap at Spring Creek was not

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93 Alaska Department of Corrections, 2003 Offender Profile at 7 (showing a total of 4,653 individual detained in all facilities in April of 2002); Alaska Department of Corrections, 2008 Offender Profile at 10 (showing a total of 5,327 individuals detained in all facilities in November of 2007) available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>; Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (indicating that the east wing of the Anchorage Correctional Complex was opened in April of 2002).

94 Alaska Department of Corrections, Instate Inmate Count – August 2007 (showing that the in-state prison population for August 2007 averaged at 3,721 – 15% over the designated cap of 3,248).

95 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the statewide cap in April 2002 was 3,206 and the statewide cap in December 2007 was 3,696).

96 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the Cleary Final Settlement Agreement put the system-wide cap at 2556).

97 *Id.* (showing expansion at SCCC in 1993 and 1992).

98 The Department of Corrections reports that most beds had previously been installed, but never had been added to the total capacity of the facility.

increased during the Cleary supervision, suggests to us that – while the state began to pay millions of dollars to house prisoners in private facilities – such an increase would have been judged excessive, either by the court or by the Department itself.

At Spring Creek and other facilities which existed in 1990, the Department raised the population caps above the Cleary levels in 2006 and 2007. In total, the statewide population cap rose by 490 beyond the increase which resulted from the opening of the east wing of Anchorage Correctional Complex in April 2002.<sup>99</sup> 143 of the new beds were in gyms at Fairbanks, Mat-Su Pretrial, and the west wing of the Anchorage Complex.<sup>100</sup> The bulk of the other 347 beds were single cells turned into double cells at various institutions.<sup>101</sup> The population cap at Yukon-Kuskokwim went up from 92 to 131 (an increase of 43%), without any major changes to the facility.<sup>102</sup> The cap at Hiland Mountain went from 311 to 404 (an increase of 30%).<sup>103</sup> The dimensions and physical plant of these facilities have generally not changed. While, absent the Cleary supervision, the cap increase does not violate a court order, the ACLU of Alaska believes that the 2006/2007 expansion of the population cap represents an unacceptable and unconstitutional reversal of previously agreed-upon standards for the prison population.

While the expansion of the population caps was unfortunate, the Department also took positive steps to cope with overcrowding. The Department of Corrections expanded the use of community correctional residences and electronic monitoring to manage the existing population while easing the crowding within the prisons. The Department has also created several new freestanding dorms at the Palmer Correctional Center, one of the best-run institutions in the state; ongoing construction at Wildwood Correctional Complex will add 32 beds. Planned expansions at other facilities and the new construction of Goose Creek Correctional Center<sup>104</sup> should help to ease some of the crowding as well.

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99 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the statewide cap in April 2002 was 3,206 and the statewide cap in December 2007 was 3,696).

100 *Id.*

101 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the double-celling of single cells, the “reconfiguring of space,” and the use of gymnasiums were major ways of creating more beds).

102 Alaska Department of Corrections, Instate Inmate Count – August 2007; Alaska Department of Corrections, Instate Inmate Count – November 2007. The Department contends that these beds also had been added years beforehand, but never added to the capacity of the facility.

103 Alaska Department of Corrections, Instate Inmate Count – August 2007; Alaska Department of Corrections, Instate Inmate Count – November 2007.

104 The Department aims for the Goose Creek facility to emulate existing rehabilitative programs at Palmer Correctional Center, with an aim to encourage prisoners by rewarding good behavior and progress in programming, with diminishing privileges for prisoners who fail to complete programs or for a record of misbehavior.

## 4. Life in an Overcrowded Alaska Prison

### a. How Space is Used in Prisons

Most prison cells in Alaska were originally intended for the use of only one prisoner, a practice consistent with international law.<sup>105</sup> Most cells designed for single occupancy in Alaska, however, have been re-designated as acceptable for two-person occupancy and have double bunks installed against the wall.<sup>106</sup> One inmate illustrated this shift by explaining that the top bunks in many prisons today were originally intended to be shelves for the use of the single occupant. With the exception of cells for the disabled, most cells at the Anchorage Correctional Complex are between seven and eight feet wide and between eleven and twelve feet deep.<sup>107</sup> These cells range from 90 to 93 square feet in size.<sup>108</sup>

In addition to the double bunks, each cell usually has a combination toilet and sink unit installed. The occupants can place their personal property underneath the lower bunk. With this configuration, the remaining floor space gives the prisoners a space about four feet wide in which to stand upright next to their bunks. To give a practical example of the size of the cells, typical housing units in the east wing of the Anchorage Correctional Complex hold 32 cells with a total space dedicated to prisoner cells of 3,078 square feet.<sup>109</sup> When each of those cells has two occupants, 64 men sleep in 3,078 square feet of space. Adding in the size of the common space available when the prisoners are able to leave their cells, the whole housing unit has 7,036 square feet of space for all 64 prisoners.<sup>110</sup> The newly-designated prison capacities<sup>111</sup> account for what the Department calls “hard beds” – actual permanent beds or bunks.

In early 2009, the Alaska correctional system as a whole fell within the designated population caps; from July 2009 on, the system has returned to an overcapacity, running at 103% or 104% as of October 2009. In the area of overcrowding, pretrial facilities pose a special and persistent problem because pretrial detainees must be kept close to the site of their proceedings and because the numbers of pretrial detainees may rise suddenly. The

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105 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 9.

106 “Most of our facilities, in order to keep up with an ever increasing inmate population, added beds. While they tried to maintain the Cleary standards, in most cases they exceeded the design capacity as well as the Cleary standards set for each facility. . . . Most facilities attempted to accomplish this by double bunking all of their single cells. . . .” Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007[revised July 13, 2009].

107 Alaska Department of Corrections, Square Footage of Cells and Day Rooms (ACC-E, ACC-W).

108 *Id.* Other cells in the Anchorage complex include two units of one-man cells (76 square feet each) and one ADA-compliant cell (144 square feet) on most housing units.

109 *Id.*

110 *Id.*

111 The ACLU of Alaska does not agree that the present population caps represent an appropriate or Constitutional measure of overcrowding. See discussion *supra*.

Anchorage Complex, the Mat-Su Pretrial facility, and the Wildwood Pre-Trial facility have tried to meet the demands of overflow through the practice of “triple-celling,” in which the facility houses a third prisoner in a two-person cell, a cell that may have originally been designed for one prisoner. Since the cell is only equipped with two bunks, the third prisoner must sleep on the floor of the cell on a foam mattress laid in a hard plastic shell, commonly called a “boat.”<sup>112</sup> During the daytime, the “boat” is rolled up and stored out of the way. When the “boat” is rolled out, however, it occupies the bulk of the existing floor space, leaving only a four to six-inch strip of floor space between the bunk and the “boat.” This is in direct violation of international human rights standards.<sup>113</sup>

The American Corrections Association (ACA), the organization which prescribes correctional industry standards, produces a list of standards on running correctional institutions. They provide that each inmate should have 25 square feet of “unencumbered space” for each single cell occupant; “unencumbered” meaning that the space occupied by furnishings like the bunks and the toilet/sink unit must be discounted from the total.<sup>114</sup> However, where prisoners spend at least 10 hours a day in a cell, each prisoner must have at least 80 square feet of floor space per occupant.<sup>115</sup> These standards do post-date the construction of most of the in-state facilities, so the Department has enacted procedures requiring that double cells be 80 square feet in size and 90 square feet if the prisoners spend 10 hours or more in the cell.<sup>116</sup> However, even the Department’s own standards would require 140 square feet or more for a cell housing three prisoners.<sup>117</sup> The ACA further prohibits the use of such “boats” outright – saying that each inmate must have “a sleeping surface and mattress at least 12 inches off the floor; storage for personal items; and adequate storage space for clothes and personal belongings.”<sup>118</sup> The ACA is not an inmate-rights organiza-

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112 The Department states that “boats” are used only to manage overcapacity. The Department states that “boats” will never be included in the overall capacity of any facility; only permanent or “hard” beds will count towards those population caps.

113 Rule 9(1) of the UN Standard Minimum Rules requires, “Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.” Since triple-celling has now become a long-term practice in many Alaskan prisons, it not only violates the short-term exception in the Minimum Rules, but it also involves three people per cell, above and beyond the reluctantly-accepted two-person-per-cell policy. Furthermore, the European Prison Rules require that due regard must be paid to providing “floor space” and “cubic content of air” when designating sleeping accommodations. European Prison Rules, Art. 18.1. The worst overcrowding happens typically in pretrial facilities. International law takes special note of the condition of untried prisoners and states, “Untried prisoners shall sleep singly in separate rooms. . . .” U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 86.

114 American Correctional Association, *Standards for Adult Correctional Institutions*, 4th Ed., 4-4131, at 36.

115 *Id.*

116 “In all future facilities, general population cells or rooms must have a minimum of 60 square feet for one prisoner, 80 square feet for two prisoners, and 140 square feet for three prisoners. Cells for prisoners locked down more than 10 hours per day must have a minimum of 80 square feet for one prisoner, 90 square feet for two prisoners, and 150 square feet for three prisoners.” Alaska Department of Corrections, Policy 801.01: Institutional Design Standards, Facility Modifications & New Construction *available at* <http://www.correct.state.ak.us/corrections/pnp/pdf/801.01.pdf>.

117 *Id.*

118 American Correctional Association, *Standards for Adult Correctional Institutions*, 4th Ed., 4-4134, at 37.

tion. It is a reputable national correctional standards organization, whose standards are recognized by the Department as authoritative within the industry.<sup>119</sup>

The practice of triple-celling, once an exception, is now frequently used in some pretrial facilities in Alaska. Triple-celling was reported by several prisoners each at the Anchorage Complex (which primarily houses pretrial prisoners), at Mat-Su Pretrial, and at Wildwood Pre-Trial. Out of 141 prisoners interviewed, 25 said that they were currently housed in double occupancy cells with two or more other people. A total of 90 prisoners said that they had been housed, at some point, in a double occupancy cell with 3 or more people; five prisoners even indicated that in during the worst overcrowding situations, they had been housed in four-person cells for a few days. Nine prisoners said they were held in segregation cells with three people for extended periods of time; overcrowding in segregation cells is particularly concerning, as prisoners in segregation cells are restricted to a small cell for 23 hours a day with almost no time outside the cell.

The Department's population figures for the period when interviews of prisoners were conducted indicate that at several of these facilities, the population counts were close to or at maximum capacity, not substantially over the designated capacity.<sup>120</sup> However, the institution-wide population numbers do not show with certainty whether prisoners are being triple-celled. Individual housing units within an institution at or under its cap may be overfull, while other units may have openings. The Department does not report day-by-day populations by housing unit, so the ACLU of Alaska cannot confirm that such local overflows are occurring. However, this problem can be seen in related population numbers within the prison system: one wing of the Anchorage Complex may be over its cap while the other is under its cap,<sup>121</sup> or the pretrial unit of the Wildwood facility may be over its cap while the unit for sentenced prisoners is under its cap.<sup>122</sup> The Department does have a

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119 The Department of Corrections uses ACA standards as references throughout its official policies and procedures. See, e.g., Alaska Department of Corrections, Policy 806.01: Institutional Sanitation (citing to ACA standards as a source for the policy) available at <http://www.correct.state.ak.us/corrections/pnp/pdf/806.01.pdf>.

The Department also cites ACA standards in contracts with private prison contractors. Alaska Department of Corrections, Contract #2054861, Appendix B, at 40 (requiring the Corrections Corporation of America to comply "with all applicable ACA and NCCHC regulations").

120 In November 2008, the prison population at Anchorage East was 467, 51 prisoners over the max cap of 416; in December 2008, the number declined to 421; and in January 2009, 423. Alaska Department of Corrections, Inmate Counts 2006-2009. On the west side, the population of Cook Inlet Pretrial was 454 in November 2008, 24 over a max cap of 430, then declined to 423 in December, but rose to 432 in January 2009. At Mat-Su Pretrial, the population was 103 in November of 2008, one over the max of 102, but dropped below the cap to 101 and 99 in December 2008 and January 2009. *Id.* At Wildwood Pre-Trial, the prison population in November 2008 was 119, over the cap of 117; in December, the average population fell below the cap to 104, but rose again to 128 in January 2009. *Id.* Even these numbers are averages of daily numbers over the month; the prison population could have been higher or lower than the monthly average on any given day.

121 This can be seen in the population records for the Anchorage Complex. From January 2006 to June 2009, the east wing has never had a monthly population count under the population cap of 416. *Id.* The entire complex fell under its total cap of 846 prisoners in December 2008 with an average monthly population of 845. *Id.* Even though the east side remained overpopulated, the complex as a whole remained under capacity.

122 The population records at the facility for sentenced prisoners at Wildwood show that the population has not exceeded its current maximum capacity since January 2006.

policy that prisoners should be moved from one housing unit to the next and among related institutions whenever possible to prevent crowding. While housing unit populations are not available for review, periodic inconsistencies between the two units of the Anchorage and Wildwood Complexes show that overcrowding does occur, even when another wing of the same institution has openings.

The worst crowding is seen in the Anchorage Correctional Complex, where 28 out of 30 prisoners reported being triple-celled at some point in their detention. The majority of prisoners who had experienced triple-celling stated that it lasted for a period of months. According to such reports, the Anchorage Correctional Complex housed 60 people in a space designated for 48 people and 80 people in a space designated for 64 people. Three-quarters of the prisoners interviewed at Mat-Su reported they were currently being triple-celled; four of nine prisoners interviewed at Wildwood complained of triple-celling. Almost half the prisoners interviewed at Wildwood reported the same.

The practice of triple-celling, once an exception, is now frequently used in some pretrial facilities in Alaska.

Not all inmates in overcrowded facilities are triple-celled. Some facilities, such as Yukon-Kuskokwim and Mat-Su, house inmates in dorms that are designed for 20 people. Almost half the prisoners placed in such dorms reported that the dorm housed more than 20 prisoners at the time of the interview, indicating that the additional people were forced to sleep on the floor. The facilities at Fairbanks, Mat-Su, Lemon Creek, and Wildwood converted their gyms to house more prisoners in 2006;<sup>123</sup> Fairbanks used its gym to house male inmates, and Mat-Su and Wildwood have housed female inmates in their gyms for months at a time. In Anchorage Jail, more than 40 prisoners are housed in bunks lined up in rows within the gyms at both facilities. The gyms in Fairbanks and Lemon Creek have returned to use as gymnasiums, not as housing, although Fairbanks periodically houses overflow prisoners on the floor of the gym, on “boats”. However, gymnasium housing at the Anchorage and Mat-Su Pretrial facilities continues, and the population caps at both facilities include the gym space.<sup>124</sup> At the time of the expansion of the prison capacity, the Department referred to the use of gyms as housing for prisoners as “crisis overflow inmate housing.”<sup>125</sup> What was once labeled “crisis” housing has now become standard housing.

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123 Memorandum from Bryan Brandenburg to Sam Edwards, Department of Corrections, August 23, 2007 [revised July 13, 2009] (noting that the capacity at Fairbanks, Mat-Su Pretrial, and Anchorage Jail were expanded by converting the gymnasiums to housing units).

124 *Id.* [showing temporary beds removed from Fairbanks gym capacity April 2009].

125 State of Alaska, FY2008 Governor’s Operating Budget: Department of Corrections Facility-Capital Improvement Unit Component Budget Summary, at 2, available at [http://gov.state.ak.us/omb/08\\_OMB/budget/DOC/comp696.pdf](http://gov.state.ak.us/omb/08_OMB/budget/DOC/comp696.pdf).

## **b. Risk of Harm to Prisoners**

Overcrowding poses risks to the safety of the prisoners because they face physical hazards in such crowded facilities. Two prisoners reported injuring themselves when they climbed down from the top bunk and tripped over the “boat.” Two other prisoners reported injuries from falls related to the overcrowded conditions in gymnasiums used as dormitories.<sup>126</sup>

When a space not designed as living quarters - a facility’s gymnasium - becomes a living space, unanticipated problems can arise. One prisoner in Anchorage reported that the gymnasium had no heating; another reported that the thermometer in the gym read 42 degrees one morning in late 2008,<sup>127</sup> and a third reported that the gym was cold enough to keep him from sleeping and that he had to use three blankets to keep warm at night. This failure to provide appropriate ventilation and temperature control violates international human rights standards outlined in the UN Minimum Standard Rules for the Treatment of Prisoners.<sup>128</sup>

When discussing overcrowding and the implications crowding has on prisoners, one must recall that a prisoner lives in a small cell - typically 90 or 93 square feet at the Anchorage Correctional Complex<sup>129</sup> - that functions as both bedroom and bathroom for prisoners. When a third prisoner must sleep in this space, he sleeps on a foam mattress, laid inside a plastic shell, on the floor. Given the limited space, the “boat” and the individual lying in it rests a foot or two away from an open toilet. This leaves limited room for a cellmate wishing to use the toilet at night. Because of the proximity to the toilet, individuals sleeping on the floor at facilities where prisoners were triple-celled complained about the odors coming from the toilet or of splashed or spilled urine on the floor.<sup>130</sup> Taking a small room that serves as both a bedroom and a bathroom and housing three prisoners in it, with one on

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126 In order to protect prisoner confidentiality, the names of those prisoners injured were not revealed to the Department; as such, the Department cannot address these claims.

127 The Department states that the temperature never sank below 56 degrees. The Department further indicates that the heating in the gymnasium was fixed.

128 The rules require that the prison system pay “due regard . . . to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.” UN Standard Minimum Rules for the Treatment of Prisoners, Rule 10.

129 Alaska Department of Corrections, Square Footage of Cells and Day Rooms [ACC-E, ACC-W].

130 Domestic courts have found that exposure to human waste evokes health concerns and general standards of dignity embodied in the Eighth Amendment. See *DeSpain v. Uphoff*, 264 F.3d 965, 974-975 (10th Cir. 2001) (noting that “exposure to human waste carries particular weight in the conditions calculus.”); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) (“unquestionably a health hazard” to live in “filthy water contaminated with human waste”); *Fruit v. Norris*, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (“common sense” that “unprotected contact with human waste could cause disease . . . [and] courts have been especially cautious about condoning conditions that include an inmate’s proximity to human waste”); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir.1989) (three days in cell with feces smeared on walls not within “civilized standards, humanity, and decency”); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) (“Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.”); *Michaud v. Sheriff of Essex County*, 458 N.E.2d 702, 705-06 (Mass. 1983) (listing cases showing “an intolerance for confinement which requires persons to live in close proximity to their own human waste and that of others”). Furthermore, with regard to sleeping accommodations, the European Prison Rules demand that due regard be paid to “health and hygiene.” European Prison Rules, Art. 18.1.

the floor, inevitably leads to affronts to basic human dignity.<sup>131</sup> No one would ask someone else to sleep on the floor of a public restroom.

In response to problems with some prisoners flushing the toilets excessively, flush regulators were installed on the toilets in prisoner cells in most institutions. These regulators prevent the toilets from flushing more than twice in five minutes. If a prisoner flushes the toilet twice in five minutes, the toilet shuts down for an hour. The added demand imposed on the toilets from a third prisoner – and periodic cases of a full but unflushable toilet making a cell hard to inhabit for an hour<sup>132</sup> – generated numerous complaints from prisoners. While the need to prevent excessive flushing and flooding of cells is important, the combination of the flush regulators and triple-celling imposes an unpleasant hardship on prisoners. Overcrowding transformed what might otherwise be a reasonable policy decision to prevent vandalism into one that created further problems within the prison system.

Some prisoners also reported an insufficient number of bathroom facilities to serve the population.<sup>133</sup> One prisoner housed in the Anchorage gym reported that there were only two toilets, two urinals, three sinks, and one shower provided for 40 or more prisoners. Another prisoner in a dorm full of 40 prisoners stated that they also only had two toilets available for use and a total of three sinks, but only one of the sinks was functioning properly. A third inmate reported that while housed for two months in one facility's gym, only 2 bathrooms were available for the 100 prisoners. Yet another inmate reported spending 5 months in a gym in another facility with 20 other prisoners with only one toilet in the corner. The American Corrections Association requires one toilet for every 12 male prisoners and for every 8 female prisoners. Several of the facilities using gyms as dormitories violated the ACA rules on the availability of toilets.<sup>134</sup>

Aside from insufficient bathroom facilities, prisoners also noted other sanitation and hygiene issues. Prisoners complained of mold and dust in the cells, even hair falling out of the vents. At one facility, the interviewer was able to observe an abnormally heavy coating of dust and hair collected in the interview area. In addition, several prisoners reported that they were not receiving clean changes of clothing and bedding on an adequate basis. This failure to pay “due regard” to ventilation for these prisoners amounts to a violation of

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131 See ICCPR, Art. 10; CAT, preamble; see also European Prison Rules, Art. 18.1, UN Standard Minimum Rules for the Treatment of Prisoners, Rule 60(1).

132 The UN Minimum Rules for the Treatment of Prisoners states, “The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.” UN Minimum Rules for the Treatment of Prisoners, Rule 12. If a prisoner cannot access a clean toilet for an entire hour, he cannot “comply with the needs of nature when necessary.” See also European Prison Rules, Art. 19.3.

133 The reports of insufficient bathroom facilities came from prisoners housed in the gyms at Fairbanks, Wildwood, and Anchorage.

134 American Correctional Association, *Standards for Adult Correctional Institutions*, 4th Ed., 4-4137, at 38. Urinals may count as toilets, but only for up to half the total for male institutions. *Id.*



Prison cell interior [© iStockphoto.com/Giorgio Fochesato]

international human rights standards.<sup>135</sup>

Vermin was not widely reported, with one exception. Female prisoners at Hiland reported a shrew problem within the facility. The Department indicates that since the interviews were conducted, Hiland has received monthly visits from an exterminator to address the shrew problem.

While overcrowding does not necessarily cause all of the above sanitation and hygiene issues, these conditions have combined in some Alaskan prisons to create an environment that offends the dignity of incarcerated persons.

Confinement within cramped and crowded spaces also creates health hazards such as increased risks of infections and contagious diseases. Prisoners interviewed at both Anchorage facilities, Hiland, Fairbanks, Wildwood, Seward, and Mat-Su reported that staph infections existed within their prison. Several commented that the prison staff wore gloves to protect themselves from infection, as diseases can be communicated through touching commonly used surfaces. One prisoner stated that he was placed in a cell with an inmate with scabies and caught it soon after. In general, prisoners reported eczema, boils, and other common skin infections as some of the more common health complaints.

A media-reported fear is the presence of a drug-resistant infection known as methicillin-resistant staphylococcus aureus (MRSA). Prisoners interviewed by the ACLU of Alaska

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<sup>135</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Rule 10, Rule 11a. See also European Prison Rules, Article 18.1, Art. 21.

rarely reported confirmed MRSA infections. The reports included no personal accounts of infection, nor did any prisoners report knowing of more than one prisoner with MRSA. The Department indicated that the common practice is to culture any skin infections that do not respond to initial treatment. The testing performed so far indicates that the level of MRSA infections is very low.

Legislators and members of the general public ought to care about the overcrowding in Alaska facilities, because overcrowding is debilitating to the mental health of the individual and inhibits rehabilitation. As described above, the sights, sounds, smells, and sensations of such close quarters violate prisoners' rights to human dignity. Many prisoners enter these facilities already struggling with anxiety and depression. These prisoners also may be going through withdrawal from substance addiction, dealing with frustrating familial situations, or coming back from court with bad news about the progress of their cases. In an overcrowded cell, a prisoner lacks a space to call his own. Add to these stressors a toilet which limits flushing and limited opportunities to move outside the cell or get exercise, and imagine whether the effect of staying in such a crowded institution tends to reform an individual or to make him feel more degraded.

Taking a small room that serves as both a bedroom and a bathroom and housing three prisoners in it, with one on the floor, inevitably leads to affronts to basic human dignity.

### *c. Overcrowding and Movement within the Prison*

Overcrowding and the conditions associated with it are further exacerbated by the lockdown conditions in the Anchorage Complex. During lockdown, prisoners are only allowed to use common areas, like the dayroom, in 90-minute shifts, alternately spending 90 minutes in their cells and 90 minutes out. Twenty-one out of 33 prisoners held in the Anchorage facilities reported that the prison had instituted lockdowns.<sup>136</sup> The Department of Corrections indicated that the practice is done when individual housing units at the Anchorage facilities are overfull, since there is not enough room for all the prisoners to leave their cells at one time. On a typical housing unit with 32 cells, the common spaces are sufficient for 64 prisoners; when the population on the unit goes substantially above the 64 prisoner limit, the prisoners on that unit cannot simultaneously use the unit's dayroom. Rather than permit an unsafe number of prisoners to use the dayrooms, the officers keep some prisoners in their cells while others use the dayroom. The common areas are used, essentially, in shifts. While the practice may be necessary in an overcrowded facility, it is done at the expense of the prisoners, who remain in their cramped quarters for a total

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<sup>136</sup> Forty-four out of 136 of the prisoners interviewed reported lockdowns. Eight out of 14 prisoners at Seward cited this as a problem.

of 12 to 18 hours a day overall.<sup>137</sup>

The practice of lockdown and the conversion of gyms into housing facilities deny the prisoner access to exercise, recognized by international human rights standards as an important need for prisoners.<sup>138</sup> Every prisoner not employed in outdoor work should have at least one hour of suitable exercise in the open air daily, weather permitting. Furthermore, those prisoners of suitable age and physique should have access to physical and recreational training as well as the space and equipment necessary for this. When prisoners have no gym to go to, they must choose between going to the outdoor exercise yard (if one is available) and getting no exercise at all. And when the corrections officers declare that the weather is too foul or too cold for exercise in the yard, prisoners are simply unable to exercise. In Alaska, the coldest state in the United States, this happens frequently, leaving the prisoners without any options for exercise. Even after the conversion of gyms back into recreational spaces, some prisoners at Lemon Creek and Fairbanks reported that they could not use the gym or the yard because of insufficient staff available to monitor them.

Overcrowding of Alaska's prisons has led the Department of Corrections to send hundreds of Alaskan prisoners to Arizona, where they are kept in the custody of a private prison contractor. The move was promoted in 1995 as a temporary relief for overcrowding in Alaska. Fourteen years later, between 750 and 879 inmates<sup>139</sup> have been in the custody of the Corrections Corporation of America at the Red Rock Correctional Center in Eloy, Arizona, which is 3,000 miles from Alaska.<sup>140</sup> Not only are these prisoners held outside the reach of their families, but they are also further removed from the Department of Corrections' monitoring of prison conditions. The Department of Corrections is only able to run monthly audits<sup>141</sup> of conditions at the Arizona facility. Hopefully, these prisoners will be able to return to the state of Alaska after the construction of the Goose Creek facility.

International standards require that pretrial and convicted prisoners alike should be treated with dignity, and that unconvicted persons, in light of their presumed innocence,

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137 American Corrections Association standards note that if "confinement exceeds 10 hours per day," the cell must contain at least 80 square feet of space. The same provisions also demand that each prisoner confined to a cell at least 10 hours a day have "a sleeping surface and mattress at least 12 inches off the floor." The practice of triple-celling in conjunction with the prevalence of lockdowns violates these industry standards. American Correctional Association, *Standards for Adult Correctional Institutions*, 4<sup>th</sup> Ed., 4-4131, at 36-37.

138 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 21. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also recognized the need for daily outdoor exercise for all prisoners, without exception. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2nd General Report, CPT/Inf(92)3, at 18. See also *European Prison Rules*, Article 27.1.

139 Monthly averages of the Alaska prisoner population at Red Rock have ranged in 2009 from 750 in August of 2009 to 879 in January. Alaska Department of Corrections, 2006-09 Inmate Count Sheet.

140 The difficulty of visiting family members in an Arizona facility is a more dramatic manifestation of a problem inherent in the whole prison system. A family from rural Alaska might have trouble visiting a prisoner held in Southcentral Alaska.

141 Under the recent administration, periodic visits to Red Rock have taken place each month since August 2007, by the contract monitor and the Director of Institutions. The Department also has probation officers located in Eloy two weeks of each month.

be treated accordingly.<sup>142</sup> They should not be detained as a general rule<sup>143</sup> and, if detained, they should be kept separate from convicted prisoners.<sup>144</sup> The Alaska prisons do not meet these standards, with multiple prison facilities mixing pretrial and convicted prisoners in the same housing units. In those institutions, the sentenced prisoners have better access to jobs, rehabilitative programs, and medical care,<sup>145</sup> since those programs are often reserved to sentenced prisoners and only sentenced prisoners can obtain certain medical treatments. The Department is currently working with other community based organizations to create a new plan for the re-entry of prisoners.

#### ***iv. Recommendations on Overcrowding***

##### **1. Attorney General's Office**

The Attorney General's office needs to review their prosecution policies. Even as violent crime rates and homicide rates decline, the Attorney General's office continues to lodge more and more cases, resulting in more and more individuals being held awaiting trial, and more and more individuals sentenced to lengthy terms. Almost a third of all prisoners held in custody are in on alcohol, drug, and property crimes. The Attorney General's office should seriously consider expanding the use of diversionary programs and prosecutorial discretion in order to limit the number of cases brought and the number of individuals who end up in custody.

Further, the Attorney General's office needs to work more with tribal governments and rural villages to resolve some cases at the village level. Tribal governments can and should be trusted to resolve misdemeanor and less serious felonies. Most of these crimes are rooted in social ills, like alcoholism. These ills are better addressed in the village community than in a correctional facility. The promotion of therapeutic and preventive efforts was a major recommendation of the fine inquiry already done by the Alaska Rural Justice Commission. Rather than adopting these sensible and important goals, the state's major response seems to be the hiring of more prosecutors and troopers to prosecute. The state appears ready to oppose federal legislation which could lead to improved justice admin-

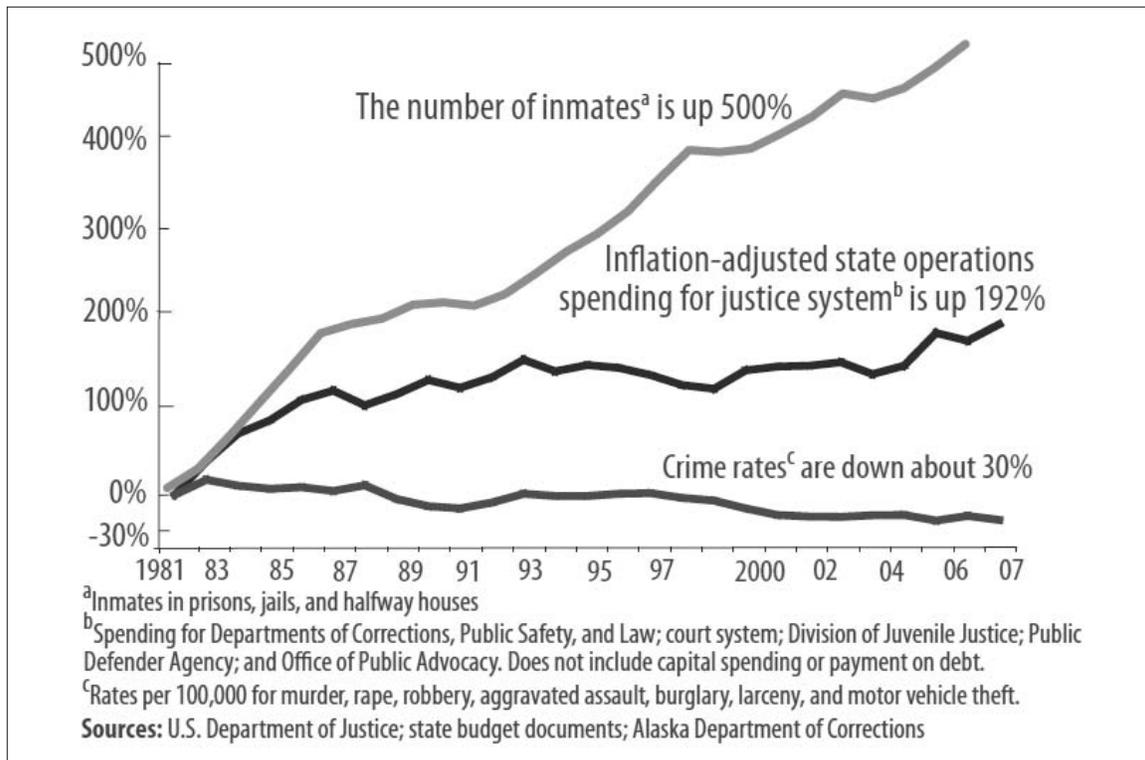
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142 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 84(2), Rule 85. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 8.

143 Alaska Const., Art. 11 ("The accused is entitled . . . to be released on bail . . ."); AS § 12.30.030 ("The defendant in a criminal proceeding is entitled to be admitted to bail before conviction as a matter of right if the alleged victim can be reasonably protected through the imposition of bail and conditions of release.").

144 International Covenant on Civil and Political Rights, Art. 9.3 and 10.2. See also European Prison Rules, Article 18.8.

145 Certain procedures are permitted to sentenced, but not unsentenced, prisoners. For instance, most dental care (other than tooth extractions), preventive screenings (including Pap smears, mammograms, and prostate exams), hearing aids, glasses, hepatitis C treatment, and preexisting joint injuries are not provided to unsentenced prisoners. Alaska Department of Corrections, Policy 807.02, Attachment A: Prisoner Health Plan, Appendix at 39-40 available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.02aa.pdf>.



Changes in Prison Population, Prison Spending, and Crime Rate: 1981-2007 [From: Martin, Stephanie and Colt, Steve, *Institute for Social and Economic Research*, "The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?"]

istration in rural Alaska and decreased strain on the court and corrections systems.<sup>146</sup> The Alaska Sentencing Commission noted many years ago that tribal courts, in resolving some quasi-criminal matters, had "credibility" within the community and were "effective" in resolving the problems facing the community.<sup>147</sup> Prosecution of rural crimes may be an important goal, but failing to adopt the other important goals of the Alaska Rural Justice Commission may make increased prosecution counterproductive.

## 2. Legislature

The legislature plays an important role in determining the amount of time prisoners spend in custody. First, by decriminalizing harmless activity, the legislature could limit the initial number of arrests. The ACLU of Alaska has diligently fought the legislature's effort to reintroduce a state law criminalizing the use of small amounts of marijuana in private

<sup>146</sup> Demarban, Alex, *State Opposes Senate Effort to Increase Alaska Tribal Police Powers*, TUNDRA DRUMS, Aug. 6, 2009 (indicating Deputy Attorney General Svobtny had opposed the introduction of S. 797, the Tribal Law and Order Act, a federal bill which would permit the extension of criminal jurisdiction to 5 tribal courts in Alaska).

<sup>147</sup> Alaska Sentencing Commission, 1992 Annual Report to the Governor and the Alaska Legislature) at 20, available at <http://www.ajc.state.ak.us/reports/sent92.pdf>.

homes. The legislature's effort to criminalize essentially harmless behavior shows that the legislature does not take the problems of prison overcrowding and the heavy judicial caseloads seriously. Even if many marijuana possession cases would not result in prison sentences, the more cases that are added to the judicial caseload, the more other trials will be delayed, extending the length of stay of pretrial detainees throughout the system. The legislature should comprehensively review other criminal statutes and question whether the actions they target deserve criminal penalties.

The legislature should create a sentencing commission with the authority to review and recommend changes to the sentencing laws in Alaska. In the early 1990's, Alaska had a Sentencing Guidelines committee which produced numerous well-thought out suggestions for criminal justice reform; unfortunately, too few of the suggestions were enacted by the legislature.<sup>148</sup> The current pattern of piecemeal legislation creates an uneven patchwork of sentencing policies and encourages enactment of excessively harsh penalties. A recent example was the increase of mandatory sentencing minimums on sex offenses. In 2006, the legislature amended the sentencing statute to make the mandatory minimum for a first-time sexual assault against a person 13 years old or older a twenty year sentence.<sup>149</sup> The mandatory minimum for a sexual assault against a child under 13 is now a twenty-five year sentence.<sup>150</sup> While sex offenses are serious ones, the new statutory minimums were enacted despite ample evidence that first-time sex offenders are in fact those *least* likely to reoffend.<sup>151</sup> Such harsh penalties create perverse incentives. The mandatory minimum sentence for first-degree murder in Alaska is a twenty year sentence.<sup>152</sup> The legislature has made the mandatory minimum for killing a child less onerous than the mandatory penalty for sexually abusing a child. To avoid the creation of such perverse incentives, the legislature should create a sentencing commission to recommend criminal justice bills to the legislature and to supervise wholesale revision of the sentencing procedures in Alaska.

Another means for preventing the overcrowding of Alaska facilities would be to enact legislation that would require the provision of fiscal impact statements to be provided with every bill that would introduce a new offense, increase the mandatory minimum for an

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148 The Alaska Sentencing Commission produced two important reports during its period of commission from 1990 to 1993. Alaska Sentencing Commission, 1990 Annual Report to the Governor and the Alaska Legislature] *available at* <http://www.ajc.state.ak.us/reports/sent90.pdf>; Alaska Sentencing Commission, 1992 Annual Report to the Governor and the Alaska Legislature] *available at* <http://www.ajc.state.ak.us/reports/sent92.pdf>.

149 AS § 12.55.125 (i)(1)(A)(ii) (2009).

150 AS § 12.55.125 (i)(1)(A)(ii) (2009).

151 A recent study found that, for prisoners released in 2001, 68% of sex offenders were returned to custody, while 72% of non-sex offenders were returned to custody; 54% of sex offenders were arrested for new charges, while 68% of non-sex offenders were arrested for new charges; and 39% of sex offenders were convicted of a new offense, while only 35% of non-sex offenders were convicted of a new offense. McKelvie, Alan R., *Recidivism of Alaska Sex Offenders*, 25 Alaska Justice Forum 14 (2008) *available at* [http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/g\\_recidivism.html](http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/g_recidivism.html). The study found that there was no significant difference in the incidence of rearrest for a sex offense between sex offenders and non-sex offenders. *Id.*

152 AS § 12.55.125 (a) (2009).

If the legislature continues to mandate long sentences and neglect the prison system, the prison system will rapidly become more crowded than manageable.

offense, or increase the grading or sentencing range for an offense.<sup>153</sup> As an example above, the cost of incarcerating a single person for 25 years exceeds one million dollars. Enacting broad-brush legislation that sends dozens of offenders to million-dollar sentences is a costly policy, when the overall likelihood of recidivism is no higher than for other felons.

Imposing these stiff penalties – especially in a prison system already crowded with its current prison population – could even threaten public safety. If the legislature continues to mandate long sentences

and neglect the prison system, the prison system will rapidly become more crowded than manageable. A potential result of an intractable crowding situation could be a judicial order to release a certain number of prisoners. The legislature is better off making its own reasoned and thoughtful decisions about criminal justice; irresponsible expansion of criminal penalties will result in judges making decisions about who should be released at a later time.

Mandatory minimum statutes, by their nature, play a sentencing role exclusively in the case where the judge considers that the unique characteristics of the case indicates that the defendant should get a sentence less than that required by statute. A “one size fits all” penalty is appropriate for few, if any, crimes. The legislature should return to judges the authority to take into consideration the particulars of the crime and the particulars of the defendant in rendering a sentence, and instead allow a sentencing commission of criminal justice professionals to suggest guidelines for how judges ought to sentence prisoners.

The legislature should continue to fund and encourage the Department of Corrections in its ongoing efforts to restore the system of rehabilitative programs for prisoners. This is a crucial part of fixing overcrowding. Two-thirds of all prisoners released from custody are re-incarcerated within three years. Fourteen percent of all prisoners in custody are in custody for probation and parole violations. Most of the probation and parole violations are substance abuse-related, either for positive drug tests, reports of a return to substance abuse, or absconding from supervision related to substance abuse. By successfully treating substance abuse and other problems, the Department of Corrections can decrease the number of individuals returning to prison.

Closely tied to this effort should be the institution of a re-entry program, where staffers would assist prisoners awaiting release to find a job or public benefits, housing, and appropriate medical and psychiatric care on release. While some prisoners have families,

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<sup>153</sup> A similar program has been introduced in Virginia, which requires the Virginia Sentencing Commission to produce a statement of costs for any legislation which would impose a heavier burden on the corrections system. Va. Code Ann. § 30-19.1:4 (2009).

homes, and jobs to return to, far too many find themselves jobless and living in homeless shelters upon release from custody. That environment is possibly the worst imaginable circumstance for an individual trying to escape a criminal past or an addiction.

The issue of reformation, reentry, and rehabilitation programs will be considered further in an upcoming report to be released in 2010. The discussion here is intended to be merely a brief summary of the relevant points.

### 3. Judiciary and Parole Board

The courts play an important role in the overcrowding issue because the courts are the gateway for prisoners at two crucial points. First, the imposition of excessive bail and restrictive bail conditions keeps many inmates who are low flight-risk detainees in custody. Especially disturbing is the overuse of the third-party custodian term, requiring that a detainee be constantly in the presence of someone while out on bail. Judges frequently impose the third-party requirement without making the statutorily required inquiry as to whether that level of supervision is necessary.

The second gatekeeper role of the courts is in the role of dealing with probation violations. The parole board handles alleged violations of parole for released prisoners on parole. Fourteen percent of all prisoners in the Alaska correctional system were in custody for parole or probation violations in 2007. While many violations of probation and parole conditions are very serious, probationers and parolees are sometimes brought before a judge or the parole board for minor violations.<sup>154</sup> For instance, a parolee under supervision in the Mat-Su Borough would typically not be allowed to leave the borough. Yet that same parolee might need to travel to Anchorage for medical care or to see family members. In those circumstances, an hour-long drive to Anchorage could result in a jail term. Another common problem is the problem of relapse. Frequently, an alcoholic or drug addict will return to substance abuse. Relapsing three or four times is extremely common; in the terms of rehabilitative programs, relapse is part of the process. Long-term incarceration is generally not appropriate for a relapse, especially if the parolee remains sincerely willing to try to beat his or her addiction. The judiciary and the state parole board should take care to deal with minor infractions without resorting to incarceration, and should deal with relapse as an understandable part of curing an addiction.

As noted previously, the number of prisoners in custody for violations of parole and proba-

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<sup>154</sup> In response to points raised by this report, the Department reviewed probation records from the municipality of Anchorage office. The Department reported that 49% of all probation or parole revocations in Anchorage took place as a result of new convictions; the remainder was for “technical violations” – violations of other terms of probation or parole.

tion has tripled in the last six years.<sup>155</sup> The judiciary or the Alaska Judicial Council should consider launching a study of probation and parole violations and sentencing for probation and parole violations. Numerous questions about the origin of this expansion of incarceration for probationers and parolees arise: do particular judges hand down disproportionately harsh sentences to prisoners for probation and parole violations? Are particular probation and parole officers responsible for a disproportionate number of violations? Do violations occur disproportionately in geographic areas where substance abuse treatment and other rehabilitative programs are non-existent, scarce or subject to long waiting lists?

Similarly, the tripling in the number of individuals in custody for public order and public administration offenses in that same period is worrisome.<sup>156</sup> Many of these cases arise from judicial actions, like setting bail. For instance, in 2002, nine people were in prison for failure to appear; in 2008, 51 people were in custody for failure to appear.<sup>157</sup> In 2002, ten people were in prison for violating bail conditions; in 2008, 50 were in prison for violating bail conditions.<sup>158</sup> Prisoners in custody for those two offenses comprise almost one-third of the 317 prisoners in custody for public order or public administration offenses. The judiciary or the Alaska Judicial Council should take a careful look at why judges are sending so many people to jail for not appearing in court or for violating the terms of release. While judges understandably wish to address problems of failure to appear for trial and other proceedings, the sudden rise in the number of individuals - from nine to 50 - incarcerated for failure to appear over a six year span suggests that some judges may have overreacted to a failure to appear or added excessive amounts of bail. A defendant who gets a court date confused and shows up a day late for court does not present the same future risk of flight as a defendant who leaves town and is captured by state troopers months later. If some judges have begun "throwing the book" at more defendants who miss court because of carelessness, as in the first example, rather than reserving the harshest penalties for deliberate flight, as in the second example, then you might see this sudden rise in incarceration for failure to appear. The increased number of individuals incarcerated for failure to appear may also be a product of the increased number of cases brought by the Department of Law; the more defendants there are, the more chance that defendants will not show up for a court date.

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155 Alaska Department of Corrections, 2008 Offender Profile at 15 (showing 734 offenders in custody for probation and parole violations); Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 216 offenders in custody for probation and parole violations).

156 Alaska Department of Corrections, 2008 Offender Profile at 15 (showing 317 offenders in custody for public order and public administration offenses); Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 99 offenders in custody for public order and public administration offenses).

157 *Id.*

158 *Id.*

## B. Special Institutional Focus: Red Rock Correctional Center

The best practice for housing prisoners, and the desired policy of the Department of Corrections, is to house prisoners in their home communities. As a result of the increased population burdens imposed on the correctional system and limited resources in rural areas, keeping prisoners in remote communities is often difficult or impossible. When prisoners must be housed in one centralized location, certainly the best answer is to house prisoners in an area accessible to the most number of families, such as Southcentral Alaska. The Alaska Supreme Court has recognized the key role that visitation plays in rehabilitation. Family visitation is “critical to . . . the ultimate rehabilitation of the prisoner by strengthening his ties with the ‘free world.’”<sup>159</sup> Although distances within Alaska are daunting for some families, especially from rural areas, thousands of prisoners are held in Southcentral Alaska, the major population center for the state. The Department reports that all pretrial detainees would ideally be held in their home district where possible, while prisoners serving a year or longer sentence would be moved to a central facility in Alaska where rehabilitative programming is available. In a system where housing all prisoners in their home communities would be difficult, housing prisoners in Southcentral Alaska is the next best option, since fewer prisoners will find themselves at long distances from their families. Housing prisoners out of state presents more challenges for more prisoners and their families than in-state housing.

In 1995, the Department of Corrections began moving prisoners to private facilities in Arizona to relieve overcrowding in Alaska prisons. This was described at the time as a “temporary measure.” From 1995 through 2009, prisoners have been housed out of state, first at the Central Arizona Detention Center, then the Florence Correctional Center, then the Red Rock Correctional Center, yet because of continuing stress on the correctional system this “temporary” relief for overcrowding in Alaska prisons has not been eliminated. As of August of 2009, the Department of Corrections signed a new contract with the Cornell Corporation to house Alaska prisoners at a private facility in Colorado. Since the legislature and the Department of Law have not taken steps to manage the growth of the prison population, a one-time temporary fix has become a fixture.

Most prisoners, who are largely indigent, miss important visits from family, friends, or loved ones once moved to the Red Rock Correctional Center.<sup>160</sup> While in-state travel can be expensive, the distance and cost of travel to Arizona would be almost insurmountable for

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159 *Brandon v. Dep’t of Corrections*, 938 P.2d 1029, 1032 (Alaska 1997) quoting ABA Standards for the Administration of Criminal Justice, 14 AM. CRIM. L. REV. 377, 502 (1977).

160 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 37, Rule 87, Rule 92. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15, Principle 16(1), Principle 19.; European Prison Rules, Article 17.1, Article 24.

an impoverished family.<sup>161</sup> On visiting the facility, the interviewer met with many prisoners who had been in Arizona for many years, moving from the Central Arizona Detention Center to Florence to Red Rock. Some had never received a family visit in all their time in Arizona. The lack of family visits inhibits the eventual rehabilitation of the prisoners by preventing the maintenance of family bonds that play a crucial role at the time of release. Recognizing the importance of family bonds, the Department plans to install a videoconferencing system at the new facility to allow prisoners in Colorado to see and speak to family members in Alaska when in-person visits are not possible.

Family visitation is “critical to . . . the ultimate rehabilitation of the prisoner by strengthening his ties with the ‘free world.’”

The difficulty of family visits prevents inspection of the facility by one potential group of prisoner advocates: prisoner families. The distance and expense of travel also inhibits groups like the ACLU of Alaska or media organizations from making visits to examine the prisoners’ conditions. The major investigator at the facility is the Department-employed contract monitor, a former prison warden, who makes monthly visits to the facility to ensure that the terms of the contract are observed and enforced. As the Department moves Alaska prisoners to the new facility in Colorado, a

different monitoring regime will begin; by Colorado law, the Cornell Corporation must maintain investigators at its facilities. The Department will continue to have periodic visits by the contract monitor and the Director of Institutions. Alaska probation officers will also work at the facility regularly.

Another difference between the Red Rock Correctional Center and Alaska facilities is the fact that Red Rock is a privately-run facility and the only for-profit facility in the Alaska system. A persistent concern about the entry of private facilities into the correctional market is that these corporations will increase their profits by eliminating some fixed costs, like reducing staffing levels or eliminating services. The major restraint on the private facilities violating the contract is continued monitoring and enforcement of the terms of the contract by the home state. Since the public awareness of prison conditions and the political pressure to monitor conditions at private facilities are minimal, in some states, contract monitoring can be poor, providing no incentive for the facility to maintain the contractually required standards. In Alaska, the monitoring was initially irregular; even though monthly monitoring visits were described in the contract, the contract monitor did

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161 A quick survey of the Alaska Airlines Web site (using the low fare calendar feature) revealed that the cheapest round-trip flight from Nome to Phoenix would cost \$936, while the cheapest flight from Nome to Anchorage would cost \$450. The cheapest flight from Barrow to Phoenix would cost \$1,091, while the cheapest flight from Barrow to Anchorage would cost \$577. The cheapest flight from Bethel to Phoenix would cost \$946, while the cheapest flight from Bethel to Anchorage would cost \$421. The only destination where the costs of travel to Anchorage and to Phoenix were comparable was for travel from the city of Ketchikan. The cheapest flight from Ketchikan to Phoenix would cost \$476, while the cheapest flight from Ketchikan to Anchorage would cost \$461.



Guard Tower [© iStockphoto.com/Sherwin McGehee]

not begin making consistent monthly visits until August 2007.<sup>162</sup> Since regular visits began in August 2007, however, the contract monitor has made regular visits and sent regular memos on her visits to the Department of Corrections.<sup>163</sup> Even when states carefully monitor the conditions at contract facilities, enforcing the terms of a contract can prove challenging against a private entity determined not to comply. Where the amount of money at stake is less than the cost of conducting the litigation, even an identified problem can prove challenging to fix.

A major cost-cutting measure at Red Rock has been staff reduction. Even though required staffing is set by contract between Corrections Corporation of America (CCA) and the Department of Corrections, the staffing at Red Rock has consistently fallen below contractual levels. This understaffing has led to numerous high-profile fights, brawls, and

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162 Memorandum from Kay Walter to Garland Armstrong, September 7, 2007 (indicating that the monitor made one visit in March 2007 and did not return until August 2007). The contract monitor reports that she also made monthly visits from April 2001 to October 2005.

163 The ACLU of Alaska has received memoranda describing monitor visits from January of 2008 to January of 2009.

stabbings far above the level and frequency of such violent incidents seen in other Alaska institutions. Since the Red Rock facility opened, the staffing has regularly left 20-30 security positions unfilled. Between June and December of 2006, Department staffing reports indicate that CCA had filled on average 81 of 113 open staff positions during the opening of the facility,<sup>164</sup> with 32 vacant security positions, an average of 71% of positions filled.<sup>165</sup> Even after the initial fluctuation associated with the opening of a new facility, CCA still had 28.5 vacancies in its 2007 security staff.<sup>166</sup> In the spring of 2008, CCA had left 23 security positions unfilled.<sup>167</sup> The facility management may have instituted some use of overtime to accommodate the low numbers employed by the facility (an expense incurred by CCA); however, the amount of overtime accounted for roughly one employee's hours, not the 30 or so security positions that remained unfilled.<sup>168</sup>

At the time of the ACLU of Alaska visit in February of 2009, the staffing shortages were apparent. In one housing unit, at the time of the visit, only two corrections officers were on duty supervising all six housing pods, which housed 358 prisoners. Three corrections officers are assigned to supervise an ordinary housing unit during the day, with only two officers working at night. According to the applicable employment contract, five security officers ought to be on duty during daytime hours in each ordinary housing unit, with ei-

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164 Although the facility was still filling up in 2006, the number of required security positions increased proportionally with the prison population. The average population of the facility from June 2006 to December 2006 was 550. Alaska Department of Corrections, Institutional Monthly Report, June-December 2006. The number of allocated security positions during that same period was 113. *Id.* By the time the facility was full in 2007, the Red Rock population was 938 and the total number of allocated security positions was 184. Alaska Department of Corrections, Institutional Monthly Report, January-October 2007. The percent increase of required staff in that time was 62%; during that same period the prison population increased by 70%.

165 Alaska Department of Corrections, Institutional Monthly Report, June-December 2006. During the same period, most Alaska institutions were staffed to at least a 90% level. *Id.* The 90% staffing level is also – at least nominally – the official goal of CCA. One criterion in the periodic audit of the facility was that the Human Resources manager maintains a roster of employees showing a vacancy rate of no more than 10%. Office of General Counsel, Corrections Corporation of America, Audit Final Report: Red Rock Correctional Center, September 27, 2007, at 4. The internal auditor rated the result of that criterion as “NI[Needs improvement].” *Id.*

166 Memorandum from Kay Walter to Garland Armstrong, October 4, 2007. The memorandum indicates that the tracking of statistics left it unclear which positions were required under the contract and whether all of them were for the Alaska contract. *See also* Alaska Department of Corrections, Institutional Monthly Report, January-October 2007 (showing that Red Rock had an average of 33 positions unfilled during the report period).

167 Memorandum from Kay Walter to Garland Armstrong, March 10, 2008.

168 From June 2006 to December 2006, Red Rock paid out 864 hours of overtime to security staff, or less than the hours of one full time position. Alaska Department of Corrections, Institutional Monthly Report, June-December 2006. Filling just one full-time position in that period entirely by overtime would require 1,040 hours (26 weeks x 40 hours/week). Somewhat more overtime was paid out from January 2007 to October 2007: 1,825 hours, only slightly more than enough to account for one position, not the average of 33 positions that remained unfilled. Alaska Department of Corrections, Institutional Monthly Report, January-October 2007. Filling one position for the 10 months from January to October would have required 1,760 hours of work (44 weeks x 40 hours per week).

ther four or five on duty at night.<sup>169</sup> All in all, the statistics and criteria for tracking vacancies are somewhat opaque. Untangling the individual meaning of any one staffing statistic is challenging. Based on the consistency of reports from late 2006 to early 2008 of 20-30 vacancies at Red Rock, the ACLU of Alaska feels the consistency of these reports bear out the concerns of understaffing.

Understaffing the facility not only violates the terms of the contract and deprives the Department of Corrections and taxpayers of the services for which they have paid, but it also puts prisoners at risk of being assaulted. In a housing unit supervised by only two officers, the officers on duty cannot respond safely or effectively to any kind of assault. One officer must always remain behind in the control unit or “bubble,” where officers operate the controls for the gates to the housing unit itself and to the individual housing pods. When two officers are on duty and one must remain in the control unit, the lone guard on the floor cannot safely respond to a fight among prisoners.<sup>170</sup> The contract monitor hired by the Department of

Corrections, an experienced former prison warden, considered this practice and informed the Director of Institutions: “Working with only one staff on the floor [and one in the control room] with 360 prisoners is unsafe.”<sup>171</sup>

In one housing unit, at the time of the visit, only two corrections officers were on duty supervising all six housing pods, which housed 358 prisoners.

A potential explanation for understaffing might be a lack of applicants; however, the Red Rock facility was not accepting applications during the time of the ACLU of Alaska visit. While present at the institution in February of 2009, an ACLU of Alaska representative twice observed young men walking into the facility seeking work as a correctional officer, yet both were told that Red Rock was not hiring any corrections officers at that time. The problem of understaffing is not unique to Red Rock, but is one observed by the federal

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169 Alaska Department of Corrections, Contract # 205486, Appendix F (indicating that housing units G and L should be staffed by five officers on all three shifts, while housing unit F and J should be staffed by five officers during shift 1 and shift 2, but by four during the third, overnight shift). The contract monitor indicates that one of the two officer positions in the control unit goes unfilled, since a second control officer was deemed not needed at the new facility. Another position – the senior correctional officer position – was reportedly turned into a correctional counselor position, with joint security and administrative roles. None of the records reviewed by the ACLU of Alaska indicate that these changes were properly accounted for in an amendment to the contract or even acknowledged in written form by the Department.

170 Staffing a housing unit with only two officers should happen only overnight according to the staffing plan adopted by Red Rock. The risks of this staffing overnight are somewhat lessened because prisoners are locked down in their cells. However, a guard could still not safely respond to a cellmate-on-cellmate fight by himself. Further, personal observation on one visit showed that one unit was staffed with only two uniformed security officers during the day, raising concerns about how well the staffing plan is observed.

171 Memorandum from Kay Walter to Garland Armstrong, March 10, 2008.

Bureau of Prisons in surveys of other CCA facilities.<sup>172</sup> The persistence of the practice in CCA facilities and the availability of willing applicants leave no obvious explanation, other than a profit motive. The state of Alaska has paid an agreed-upon price to have its prisoners kept safe in a fully-staffed prison, yet the Corrections Corporation of America has failed to keep its institution staffed consistent with its contractual obligation, apparently in order to increase its own profit margin. A real concern for state governments who transfer prisoners out of state to private facilities is that these facilities will seek to increase profits by cutting personnel and other costs. While a superintendent of a public facility can simply be ordered to comply with Department regulations or be replaced, the government has far less control over a sub-contractor. Only diligent investigation and enforcement can prevent cutting corners in contract facilities. In April 2008, the longstanding staffing shortage was formalized into a new staffing standard, which cut six security positions from each housing unit, with the apparent concession of the Department of Corrections.<sup>173</sup> The contract was originally drafted to staff the Florence Correctional Center. When the shift was announced to a new facility in 2006, a little more than a year into the contract, enforcement of the terms of the contract became challenging. New terms for staffing the new facility were not made explicitly in writing. As such, deciphering what positions went unfilled during what time presents a particular challenge. The Department seems to have entered into an unwritten understanding about reduced staffing for the Red Rock facility without a corresponding reduction in costs. Subsequent monitoring and staffing figures may reflect different standards than those originally drawn up for the Florence Correctional Center; tabulating the exact amount of understaffing is a challenge. However, it is clear that the Red Rock facility remained staffed below the level originally stipulated in the contract and, as a result, the Department of Corrections has paid substantial sums for the salaries of prisoner guard positions that were never filled.<sup>174</sup> With the enforcement of the original contract having become complicated by the transfer of prisoners to the new facility, the Department ultimately settled its claims against CCA for more than \$400,000; the reduced staffing plan remained in place.

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172 Lappin *et al.*, Federal Bureau of Prisons, "Evaluation of the Taft Demonstration Project: Performance of a Private-Sector Prison and the BOP," at 9 (indicating complaints of understaffing and excessive prisoner assaults at a CCA facility in North Carolina); *id.* at 33 (indicating that at a South Carolina CCA facility anywhere from between 14 and 59 positions went unfilled).

173 "I also confirmed with the Chief the mandatory security posts to be 36 staff on days, 34 on swings and 19 on nights. Per the Chief the mandatory number in each living unit is 1 in control and 2 on the floor for days and swings, 1 in control and 1 on the floor for nights. This is the number I will begin auditing against." Memorandum from Kay Walter to Garland Armstrong, April 29, 2008. *See also* Alaska Department of Corrections, Contract # 205486, Appendix F (indicating that housing units G and L should be staffed by five officers on all three shifts, while housing unit F and J should be staffed by five officers during shift 1 and shift 2, but by four during the third, overnight shift). The Department indicates that since the original contract was drawn up for Florence Correctional Center, and the control room for each unit at Red Rock is smaller than the control rooms at Florence, the original contract's requirement of two control officers was unnecessary, allowing CCA to cut one control officer from the budget. Even allowing for the removal of one control officer, the units should still be staffed with four officers during the day and on swing shifts, with at least three at night.

174 During the 2007 year, after the transition to new facility, Department records indicate that the Red Rock facility remained understaffed by, on average, 33 security positions from January to October of 2007. Alaska Department of Corrections, Institutional Monthly Report, January-October 2007. The base salary for a corrections officer was \$27, 771 per year. Alaska Department of Corrections, Contract # 205486, Appendix G. The salary of 33 entry-level correctional officer positions for the year 2007 would have been \$916,000 in total.

This level of staffing is an invitation to large-scale prisoner-on-prisoner violence. Even if the staffing levels at Red Rock had filled the contractual requirements, it would still have fallen far short of national norms: the contract itself indicates that the proposed ratio of prisoners to correctional staff was 8.7 to 1, while the national average was reported in the contract as 5.5 to 1.<sup>175</sup> In reality, the ratio of prisoners to correctional staff is 12.7 to 1.<sup>176</sup>

Not surprisingly, the incidence of assaults has been substantial at Red Rock Correctional Center. Between January and October of 2007, Red Rock reported 38 prisoner-on-prisoner assaults.<sup>177</sup> During that same period, all Alaska prisons reported 43 prisoner-on-prisoner assaults, even though the Alaska prisons held more than three times as many prisoners as Red Rock.<sup>178</sup> In January of 2009, a brawl among seven prisoners landed two prisoners in the hospital with serious injuries.<sup>179</sup> In 2007, a sergeant in the control unit attempted to open doors in an area holding Alaska prisoners and accidentally opened all cell doors in the Hawaiian protective custody unit, and a Hawaiian prisoner was stabbed in the ensuing fight.<sup>180</sup> After the 2007 incident, investigation following the outcry from inmates revealed that the doors in other units, some holding Hawaiian and some holding Alaska prisoners, had been inappropriately opened on four occasions.<sup>181</sup>

The problems within the control units remained at the time of the ACLU of Alaska visit in 2009. At that time, however, sluggish action in the central control unit caused the problems, though it was unclear if understaffing in the control room was the problem. At one point, travel from the point of entry to the main yard at Red Rock took about ten minutes to walk a hundred yards through four gates. At each gate, staff and visitors queued up for several minutes. At points, five or six employees waited on either side of a gate. The slow response in opening gates could pose a serious safety threat at an institution where housing units are understaffed.<sup>182</sup> If the circumstances described above represent a trend, then the difficulties in promptly and appropriately opening and closing gates could pose

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175 Department of Corrections, Contract # 205486, Appendix F, at 100 (indicating that the projected ratio of correctional staff for the facility was 8.7 to 1, and the national average was 5.5 to 1). The national average security staff to prisoner ratio has risen in recent years to 8.98 prisoners to correctional staff.

176 The contractual statistic assumed 92 correctional staff and 800 prisoners, for a ratio of 1:8.7. The count of Alaska prisoners at Red Rock Correctional Center was 879 in December 2008. Alaska Department of Corrections, 2008 Offender Profile. At the time the staffing vacancies were last calculated relative to the original contract, Red Rock had 23 security positions unfilled, leaving only 69 security staff supervising 879 prisoners, for a ratio of 12.7 prisoners to every corrections staff member. Memorandum from Kay Walter to Garland Armstrong, April 29, 2008.

177 Alaska Department of Corrections, Institutional Monthly Report, January 2007 to October 2007.

178 *Id.*

179 "Two Alaska Inmates Injured in Prison Brawl", JUNEAU EMPIRE, Jan. 12, 2009.

180 Dayton, Kevin, "Arizona Prison Mistakes Trouble Hawaii Officials," HONOLULU ADVERTISER, July 22, 2007.

181 *Id.*

182 To illustrate the hazards of delaying response times, one major failure in responding to a riot at a CCA prison was the delayed response of staff to a prisoner demonstration and the delayed arrival of a security team. Colorado Department of Corrections, After Action Report, Inmate Riot, Crowley County Correctional Facility: July 20, 2004, available at <http://www.afscme.org/docs/col1004.pdf>.

a security threat. Two officers cannot safely respond to a fight in a housing unit, which means that other officers must come in to reinforce the guards in that unit. However, if the responding officers cannot be allowed through the gates separating one portion of the facility from another in a timely manner, fights are more likely to spiral out of control. Further, an already-understaffed facility cannot expect reinforcements from other units that are similarly understaffed. While no prison can expect the elimination of fights among prisoners, the staffing patterns at Red Rock allows a constant stream of prisoner-on-prisoner violence and risks the outbreak of larger-scale brawls or even riots.<sup>183</sup>

While conditions improved somewhat towards the end of the contract as monitoring became more regular, the use of contract facilities should be a stopgap to cope with prison overcrowding, not a regular means of holding hundreds of Alaskans far from home.

The opportunity to start a new contract with a new provider will hopefully provide better care for prisoners than the CCA contract did. The overall experience with the CCA contract showed poor performance and left Alaska prisoners without sufficient protection from prisoner-on-prisoner violence. Private prisons pose special difficulties for monitoring and enforcement of contractual terms. While conditions improved somewhat towards the end of the contract as monitoring became more regular, the use of contract facilities should be a stopgap to cope with prison overcrowding, not a regular means of holding hundreds of Alaskans far from home.

Alaska must change the way its whole criminal justice system works to end our practice of housing prisoners in private facilities. The Goose Creek facility being constructed will hold about 1,500 prisoners; taking back the prisoners held out-of-state will take

up half the capacity of the facility. Emptying gymnasiums around the state and returning facility levels to their original 2002 capacities would likely consume another 400 or more beds. No one can say for certain what the growth in the prison population will be over the next three years, but, without a serious attempt to control the rate of admission to the prison system, the state prison population could conceivably grow by 300 or 400 to fill the remaining space by the time the facility opens.

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183 A riot broke out at a CCA-run prison housing Colorado and other out-of-state prisoners during a state of comparable understaffing. Colorado Department of Corrections, After Action Report, Inmate Riot, Crowley County Correctional Facility: July 20, 2004, at 16, available at <http://www.afscme.org/docs/col1004.pdf>. At the time of the 2004 riot, 33 security officers were supervising 1,122 prisoners. *Id.* at 17. At time of the riot, individual and undermanned unit officers were unable to defend the housing units and retreated. *Id.* at 19. The riot resulted in serious injury to 19 prisoners. *Id.* at 56. At 7 P.M., the hour when the Crowley County riot took place, Red Rock had only 34 guards on duty supervising between 1,200 and 1,500 prisoners. Memorandum from Kay Walter to Garland Armstrong, April 29, 2008 (indicating that the swing shift – late afternoon and evening – would require only 34 on-duty security officers).

## C. Medical Care in the Alaska Prison System

Medical care is always difficult to assess on a system-wide basis; assessing the effectiveness of a prison medical system is even more challenging. Unfortunately, a lack of systematic data tracking makes strong statements about the effectiveness of the system as a whole almost impossible. Prisoner accounts suggest that the challenges of a dozen geographically dispersed facilities have left the quality of care uneven, even leaving some prisoners vulnerable to abuse in isolated circumstances. The total picture of the health care system suggests that further study and improved accountability is needed. An increase in staffing and a redirection of the system towards a public health model could improve health care while managing costs for the Department.

### i. Legal Standards for Prison Medical Care

#### 1. International Standards

International human rights law outlines strong protection for prisoners in regards to accessing quality medical care and promotes the responsibility of the State in providing medical services to prisoners. The ACLU of Alaska believes that international law provides a standard to which American facilities should aspire, although we recognize that the costs and difficulties associated with these standards are substantial. Under international law, the rights of prisoners to health care are not diluted by their incarceration. International standards state that prisoners shall have access to health services available in the country without discrimination on the grounds of their legal situation.<sup>184</sup> Prisons must also ensure that treatment is offered free of charge.<sup>185</sup> Recognizing that prisoners are wholly dependent upon prison medical officers and custodial staff to provide adequate care, international guidelines emphasize the duty of medical officers to provide prisoners in their care with the same quality and standard of treatment given to patients who are not imprisoned: a standard also guaranteed in the Alaska Department of Corrections Policies and Procedures.<sup>186</sup> Indeed, international instruments set out a high yet clear standard for the duties of a medical officer to an incarcerated patient: “The medical officer shall have the care of the physical and mental health of the prisoners and should *daily see all*

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184 International Covenant on Economic, Social, and Cultural Rights, Art. 12.1 (recognizing the right of everyone to the enjoyment of the highest attainable standard of physical and mental health); United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly in its Resolution 43/173, of 9 December 1988, Principle 9. See also European Prison Rules, Art. 40.3.

185 United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly in its Resolution 43/173, of 9 December 1988, Principle 24.

186 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Principle 1; Alaska Department of Corrections, Access to Medical Care, Policy 807.02(VI)(A) (“The Department shall ensure that sentenced and unsentenced prisoners shall have access to medical, dental, and mental health care services comparable in quality to those available to the general public.”) (emphasis added) available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.02.pdf>.

*sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.*"<sup>187</sup>

In order to provide constant and consistent care, prisons must ensure that they have sufficient medical officers on staff and available to provide daily services. In large institutions, at least one full-time medical officer should reside on the premises of the institution or in its immediate vicinity.<sup>188</sup> In other institutions, the medical officer should visit daily and should reside near enough to be able to attend without delay in cases of urgency.<sup>189</sup> Where a prison service has its own hospital facilities, it should be adequately staffed and equipped to provide the prisoners referred to them with appropriate care and treatment.<sup>190</sup>

International standards require that each prisoner be allowed to make requests or complaints to the institution regarding medical care on each week day.<sup>191</sup> These requests or complaints should be promptly handled, without undue delay, unless the complaints are evidently frivolous or groundless.<sup>192</sup> The Inter-American Court of Human Rights has stated that the State must allow and facilitate – though not necessarily pay for – the examination of prisoners by a physician of their choice or chosen by their legal representative.<sup>193</sup> Similarly, European standards provide that prisoners have the right to request or petition a judicial or other authority for a second medical examination or opinion, subject only to reasonable conditions to ensure security and good order.<sup>194</sup>

The denial or failure to provide adequate medical assistance has been found to violate human rights law. The Inter-American Court of Human Rights (IACHR) has recognized the duty of the State to provide detainees with regular medical examinations, assistance, and adequate treatment whenever required.<sup>195</sup> According to the IACHR, the lack of adequate medical as-

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187 *Id.*, Art. 25.1 (emphasis added).

188 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 8, Art. 52.1. *See also* European Prison Rules, Art. 41.1 (stating that "every prison shall have the services of at least one qualified general medical practitioner.").

189 *Id.*, Art. 52.2. *See also* European Prison Rules, Art. 41.2-41.3 (stating that "arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency" and "where prisons do not have a full-time medical practitioner, a part-time medical practitioner shall visit regularly").

190 *Id.*, Art. 22.2. *See also* European Prison Rules, Art. 46.2.

191 Standard Minimum Rules for the Treatment of Prisoners, Art. 36.1

192 Standard Minimum Rules for the Treatment of Prisoners, Art. 36.4.

193 *See, e.g., Tibi v. Ecuador*, Inter-American Court of Human Rights, para. 154 (Sept. 2004).

194 Body of Principles for the Protection of All Persons, Art. 25.

195 *Garcia-Asto and Ramirez-Rojas v. Peru*, Inter-American Court of Human Rights, para. 225-27 (Nov. 2005) (finding that the lack of adequate medical assistance in the case did not meet the minimum material requirements for humane treatment under Article 5 of the American Convention). *See also* Principle for the Protection of All Persons Submitted to Any Form of Detention or Imprisonment, Principle 24 ("[A]ny person detained . . . will be provided . . . medical care and treatment whenever necessary.")

sistance can be a direct violation of the right to have physical, mental, and moral integrity respected, and may also constitute a direct violation of the right to be free from torture or from cruel, inhuman, or degrading punishment or treatment.<sup>196</sup> As the guarantor of prisoner rights, the State has the affirmative duty to offer prisoners the medical attention required.<sup>197</sup> Other regional and international bodies, including the European Court of Human Rights, the African Commission, and the International Criminal Tribunal for the Former Yugoslavia have also found that lack of adequate medical treatment may amount to cruel treatment.<sup>198</sup>

Medical officers' responsibility towards prisoners in their care begins at intake and continues throughout a prisoner's time in custody.<sup>199</sup> Medical personnel have an affirmative duty to report conditions that are injurious to the prisoner's physical or mental health.<sup>200</sup> The medical officer should regularly inspect and advise the superintendent on: the quantity, quality, preparation and service of food; the hygiene and cleanliness of the institution as well as prisoner hygiene needs; the sanitation, heating, lighting and ventilation of the institution; the suitability and cleanliness of the prisoners' clothing and bedding; and the observance of rules concerning physical education and sports, in cases where there are no technical personnel in charge of these activities.<sup>201</sup>

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196 Case of Montero Aranguren et al. (Detention Center of Catia), Inter-American Court of Human Rights, para. 103 (2006) (finding that lack of adequate medical assistance could be considered per se a violation of Articles 5(1) and 5(2) of the American Convention, depending on the specific circumstances of the person, the type of ailment, the time spent without medical attention and its cumulative effects).

197 See, e.g., Miguel Castro-Castro Prison v. Peru, Inter-American Court of Human Rights, para. 295, 302 (Nov. 2006) (finding that the State violated its duty by not providing adequate care to injured prisoners).

198 See, e.g., Kudla v. Poland, No. 30210/96, para 93-94, ECHR 2000-XI (stating that, "under [Article 3 of the Convention], the State must ensure that . . . , given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance"); Odafe and Others v Attorney-General and Others, African Commission, para. 2-3 (2004) AHRLR 205 (NgHC 2004) (declaring that prisoners with HIV/AIDS had a right to medical treatment and that the failure to provide them with such treatment amounted to inhuman and degrading treatment in violation of Article 5 of the African Charter on Human and People's Rights); Prosecutor v. Limaj et al. (Trial Judgment). IT-03-66-T. International Criminal Tribunal for the former Yugoslavia (ICTY). 30 November 2005. Online. UNHCR Refworld, available at <http://www.unhcr.org/refworld/docid/48ac17cc2.html> (finding that the lack of provision of medical treatment, in addition to other inhumane treatment, amounted to cruel treatment).

199 Standard Minimum Rules, Art. 24 (stating that a medical officer should see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work); see also European Prison Rules, Arts. 40.4 and 42.1.

200 Standard Minimum Rules, Art. 25.2. See also European Prison Rules, Art. 43.3 ("The medical practitioner shall report to the director whenever it is considered that a prisoner's physical or mental health is being put seriously at risk by continued imprisonment or by any condition of imprisonment, including conditions of solitary confinement.").

201 Standard Minimum Rules, Art. 26.1. See also European Prison Rules, Art. 44. According to Article 26.2, the director must take into consideration the medical officer's reports and advice, either taking immediate steps to give effect to the recommendations or submitting his own report and the advice of the medical officer to a higher authority. See also European Prison Rules, Art. 45. It should be noted that many of these roles will be filled in an ordinary American facility by non-medical personnel. Health and regulatory-compliance inspections will be done by trained inspectors, not physicians. In Alaska, many of these roles are filled by the "technical personnel" described in the rule, not physicians. The state of Alaska employs a dietician, for instance, to ensure that meals adequately meet the nutritional needs of prisoners.

International standards provide many guidelines and rules of practice for medical staff operating in prisons, in order to secure the protection of prisoners' physical and mental health. The conditions in the Alaska prison system and the pattern of complaints from prisoners raise concerns that should be addressed by systematic improvement in resources devoted to prisoner health care and reform of the prison medical system.

## 2. Domestic Standards

The Eighth Amendment prohibition on "cruel and unusual punishment" includes protection of prisoners from "deliberate indifference" on the part of prison administrators and health care providers to "serious medical needs."<sup>202</sup> This standard does not make prisons liable for basic medical negligence or call into question legitimate medical judgment;<sup>203</sup> instead, only objectively unreasonable medical treatment, such as refusal of care, lack of adequate medical staffing, unreasonably delayed care, or care that is objectively unreasonable constitutes a violation of the prisoner's rights.<sup>204</sup>

### ii. The Alaska Prison Medical System

#### 1. The Structure of the System

Gauging the extent of any problems with delivery of medical care in the prisons is a challenging task. First, the whole health care system in America has its own unique problems, even outside the correctional system. Most people could recount stories of 15-minute medical visits and providers who didn't answer all the patient's questions. Medical malpractice occurs in private settings as well. What makes prison medical care different is that, by taking a prisoner into custody, the state takes on full responsibility for the prisoner's care. The prisoner is not at liberty to go and get medical care of his choosing, look up information on his condition, or seek a second opinion.<sup>205</sup> The state needs to provide health care of sufficient quality to overcome the natural consequences of incarceration.

In trying to understand the health care system in prison, one cannot rely exclusively on prisoner accounts, as prisoners may have misunderstood or misstated what medical

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202 *Estelle*, 429 U.S. at 104-05.

203 See, e.g., *Jackson v. McIntosh*, 90 F.3d 330, 332 (9<sup>th</sup> Cir. 1996) [noting that a physician who chooses one treatment among several "medically acceptable" alternatives is not liable and that the prisoner must show that the treatment was "medically unacceptable" in order to succeed].

204 See, e.g., *Johnson v. Karnes*, 398 F.3d 868, 876 (6<sup>th</sup> Cir. 2005) [finding failure to provide follow up treatment from surgery constituted deliberate indifference to the prisoner's medical needs].

205 The Department authorizes the provision of care by outside specialists; however, except in cases of emergency, approval of the medical director is needed. Provision of outside specialist care is always discretionary. Alaska Department of Corrections, Access to Health Care Services, Policy 807.02, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.02.pdf>.

treatment is realistic or appropriate for their health. On the other hand, using medical records to illustrate the quality of medical care would be exceptionally difficult; to obtain medical records for enough prisoners to create a full picture of the state of medical care in Alaska's prison system would be an expensive and time-consuming process. A better way to look at the medical system in Alaska's prison system is to identify the potential areas of concern and to see whether prisoner complaints match up against those areas of concern.

To identify these areas of concern, one must first understand the nature of the Department of Corrections' medical service. Each facility is different, in size, in medical needs, and in location. Large facilities in Southcentral Alaska, like the Anchorage Complex or Hiland Mountain, have a large medical staff on duty most or all of the day and receive at least weekly visits from one of the Department's two physicians. Anchorage Jail has an infirmary unit providing 24-hour care to the sickest prisoners. Mid-size facilities outside Southcentral Alaska – such as Lemon Creek in Juneau or the Fairbanks Correctional Center – have fewer than ten providers on staff and receive services from contract physicians in the community. Facilities in small towns – such as in Bethel, Nome, or Ketchikan – have two or three providers, with part-time medical coverage supplemented by telemedicine and the availability of care from local hospitals.

The National Commission on Correctional Health Care (NCCHC) indicates that the general rule for staffing facilities is to have at least one physician on the grounds of the facility for 3.5 hours per week per 100 prisoners.<sup>206</sup> The NCCHC rules do permit that a mid-level practitioner, such as a nurse-practitioner or a physician assistant can substitute for some, but not all, of a physician's time. The American Public Health Association recommends that one full-time physician be provided for every 200 to 750 prisoners.<sup>207</sup> Yet some individual facilities have infrequent physician visits. At Wildwood Correctional Complex in Kenai, a physician visits only once a month to treat a prison population of 350 or more and to manage a medical staff of 5 nurses, with a nurse practitioner visiting twice a week. At Anvil Mountain in Nome, the Department employs a part-time physician assistant and two registered nurses. The

[B]y taking a prisoner into custody, the state takes on full responsibility for the prisoner's care. The prisoner is not at liberty to go and get medical care of his choosing, look up information on his condition, or seek a second opinion.

206 National Commission on Correctional Health Care, 2008 STANDARDS FOR HEALTH SERVICES IN JAILS (2008), JC-07 at 42. The Department of Corrections notes that it is not NCCHC-certified, but complies with appropriate Alaska statutes and administrative code provisions. However, the Alaska statutes provide little substantive guidance, only that the Commissioner of Corrections "shall provide necessary medical care . . . including examinations for communicable and infectious diseases." AS 33.30.011. The Administrative Code similarly states only that the Commissioner shall provide "adequate medical services. . ." and that prisoners with medical needs shall receive "needed treatment." 22 AAC 05.120. By contrast, the NCCHC's guidelines are developed by health professionals, reviewing recent studies in the field, and provide detailed guidance in numerous specific areas of prison health care.

207 American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (2003), at 17.

institution receives only one visit every three months from a Department physician. Yukon-Kuskokwim also relies on a physician assistant or nurse practitioner to provide higher level care, and the physicians do not have regularly scheduled visits. In these places, the facilities depend instead on the emergency departments at local hospitals or on a 24/7 on-call telemedicine consult with a Department physician.

## 2. The Intake System

The duties of the health care providers within the Department of Corrections include providing routine medical care to prisoners in response to their requests for medical assistance, as well as providing screenings at intake or when a prisoner is transferred to a new institution. Just keeping up with the initial screening process represents a huge challenge. Every prisoner should have an initial screening by a health care provider within 24 hours of admission. The constant stream of arrests brings 33,000 detainees into the corrections system each year.<sup>208</sup> Even a peremptory 20-minute screening for each detainee would require 11,000 hours of work each year (more than 5 full-time positions) just to keep up with the steady intake.

At facilities serving primarily as pretrial detention facilities, the impact of the intake traffic is particularly acute. At the Anchorage Complex, 17,000 detainees are admitted every year.<sup>209</sup> The Anchorage Jail maintains 24-hour coverage of the booking unit, where a nurse is available at all hours to conduct admissions. In each 12 hour shift, the Anchorage Complex admits, on average, more than 22 prisoners; one must also remember that individual shifts will have more admissions than others (such as weekends, holidays, night shifts, etc.).<sup>210</sup> Other pretrial institutions with small staffs but large numbers of prisoners admitted in a year lack the personnel to dedicate one person exclusively to admissions. Anvil Mountain in Nome has only two staff members serving the facility from 11 A.M. to 11 P.M., yet it admits 1,600 prisoners a year.<sup>211</sup> Mat-Su Pretrial has two staff members, plus a mid-level provider shared with two other facilities in the Mat-Su Valley; the facility admits about 3,700 prisoners a year.<sup>212</sup> At some point, screening 1,500 prisoners in a year must tax the ability of even the most dedicated professional to attend to each individual carefully. In times of sudden spikes in intake, the provider will also likely feel pressure to complete the screenings quickly as the backlog of prisoners increases. Providing an effective initial intake is essential to treating prisoners' initial medical needs, removing contagious inmates from the general population, ensuring that newly-admitted prisoners receive needed medication, and targeting prisoners for follow-up and treatment. When

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208 Alaska Department of Corrections, 2008 Offender Profile, at 8.

209 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at A-2.

210 17,000 annual admissions divided by 365 days divided by three eight-hour shifts per day.

211 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at A-8.

212 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at A-28.

facilities do not receive enough resources to screen this population, one possible result might be that prisoners would be identified with some illnesses not at admission but in follow up visits and that prisoners would complain about not receiving medications on admission and not receiving appropriate follow-up care.<sup>213</sup>

### 3. Prisoner Requests for Medical Care and Complaint Procedures

Responding to prisoner requests for treatment is another important role for medical staff. The typical procedure for prisoners requesting medical care begins with filing a “request for interview” form, commonly known in prisons as a “cop-out.” This request should be promptly reviewed by medical staff, and security staff should arrange the transport of the prisoner to the in-house medical examination room. Usually, registered nurses or physician assistants review these initial requests and see the prisoner when the prisoner is brought down for examination.

The prisoners whom the medical staff will see in the prison system present their own challenges. Most prisoners have a substance abuse problem with at least one substance,<sup>214</sup> and thus impose the greater health care challenges and costs associated with heavy alcohol and drug use. Most prisoners come from a poor background and may have had infrequent medical care in the past. Some prisoners have physical disabilities. About 40% of prisoners have a mental illness or mental disability of one kind or another.<sup>215</sup> Some prisoners coming to seek medical care will surely be drug seekers; some will come simply to complain; others will have imaginary ailments fed by isolation or mental illness. Coping with a needy and difficult population of prisoners could quickly leave any provider jaded and cynical. In this atmosphere, one would fear that some providers would too quickly label a prisoner a “malingerer” or a “drug seeker” or a “troublemaker” and dismiss their ailments without providing the necessary treatment.<sup>216</sup>

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213 In point of fact, almost half of all prisoners interviewed did complain about delayed or denied treatment. We recognize that some of the prisoners may be misguided or may be prone to complain. While the complaints do not prove the existence of a lack of prompt or quality medical care, the complaints raise a concern and merit further investigation.

214 North Charles Research and Planning Group, *Substance Abuse Treatment Needs of Alaska’s Newly Incarcerated Prisoner Population Prior to Incarceration: Final Report* (2001), at viii (stating that, according to a survey of Alaska prisoners, 79% of prisoners had a substance abuse problem within 12 months of admission to the prison system). As an example of the prevalence of substance abuse related illness, one study of Maryland prisoners found that 38% of the cohort entered prison with antibodies to Hepatitis C. Vlahov, D. *et al.*, *Prevalence and Incidence of Hepatitis C Virus Infection among Male Prison Inmates in Maryland*, 9 *EUROPEAN JOURNAL OF EPIDEMIOLOGY* 566 (Sept. 1993).

215 Alaska Mental Health Trust, *A Study of Trust Beneficiaries in the Alaska Department of Corrections*, at ii (showing that 42% of all prisoners were beneficiaries of the Alaska Mental Health Trust, which primarily treats individuals with mental illnesses).

216 A major prison and jail manual identifies as a primary pitfall in prison health care the “chronic substance abusers, often labeled as malingerers [who] . . . can go downhill suddenly.” Clark, John, *Providing Correctional Health Care Services*, in *PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY*, at 106. “Malingering is always a diagnosis of exclusion, and the diagnosis is only made after legitimate psychopathology is ruled out.” Johnson, Sally C., *Mental Health Services in a Correctional Setting*, in *PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY*, at 115.

About 40% of prisoners have a mental illness or mental disability of one kind or another.

Simply put, no health care system – in or out of the correctional system – will ever have a system wherein every patient-provider interaction is monitored to prevent the provider from ignoring or failing to document a patient complaint. Yet the concern that a provider will ignore or fail to treat a patient-prisoner is more acute in the corrections context, because of the burnout factor for providers.<sup>217</sup> The consequences of such failure can be even more dire in the prison context, since the prisoner will have no power to get a second opinion or see a new provider.

In most conventional medical systems, the primary means to ensure the efficacy of medical treatment is through an ongoing quality assurance system, wherein the supervising physician reviews patient charts and the providers have an ongoing discussion about the best way to treat individual patients. The NCCHC requires all facilities to participate in a Continuous Quality Improvement Program.<sup>218</sup> The NCCHC requires all facilities to conduct at least two studies per year, and all facilities holding 500 or more prisoners to conduct at least four studies per year.<sup>219</sup> The American Public Health Association similarly advises correctional facilities to maintain quality improvement services, collecting data systemically in internal audits.<sup>220</sup> Identification of a problem should be followed by a study to determine strategies to address the problem.<sup>221</sup> The Alaska Department of Corrections does not track basic statistics about patient care, although a quality assurance nurse does pull prisoner charts at random for review. The prison medical system discontinued an earlier program tracking how many visits were made to prison providers, how many prisoners get tested for tuberculosis, how many get admitted to medical segregation or the infirmary, and other basic information.<sup>222</sup> One reason for the discontinuation of the monthly statistical reporting may have been the difficulty of managing such information without an electronic records system. Another reason – perhaps also related to the lack of an electronic records system – may have been the unreliability or intermittent reporting of data.<sup>223</sup> Creating an electronic records system could facilitate the return of a more effective quality

217 Magee, Catherine *et al.*, *Preventive Care for Women in Prison: A Qualitative Community Health Assessment of the Papanicolaou Test and Follow-Up Treatment at a California State Women's Prison*, 95 AM. J. OF PUBLIC HEALTH 1712 (Oct. 2005) (indicating that understaffing was reported by prison health care providers as a major factor in developing burnout and in rushing care) available at <http://www.ajph.org/cgi/reprint/95/10/1712.pdf>.

218 National Commission on Correctional Health Care, 2008 STANDARDS FOR HEALTH SERVICES IN JAILS (2008), JA-05 at 10.

219 *Id.*

220 American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (2003), at 17.

221 *Id.*

222 The latest report relayed to the ACLU of Alaska came from 2004. Alaska Department of Corrections, Health Care Activity Report: Monthly Statistics (2004). It is not known when exactly the collection of data ended.

223 For instance, the annual summary reports zero activity in all but seven categories for the east wing of the Anchorage Complex for the calendar year of 2004 – including, for instance, no intake screenings, even though Anchorage Jail conducts more intake than any other facility in the state. *Id.* If providers omitted data because they found making written reports too cumbersome, the data provided could be misleading.

assurance system.

In the absence of a systematic, statistical quality assurance program, the primary means of discovering and correcting medical errors comes in response to prisoners' complaints. The primary recourse of a prisoner who feels he receives insufficient care is to file an official complaint, a grievance. The grievance will then be investigated by the Institutional Health Care Officer, usually whichever mid-level provider serves at the institution, who will gather the medical records relating to the incident, review them, and issue a decision.<sup>224</sup> A prisoner dissatisfied with the result of the review can appeal the decision to the Medical Advisory Committee, who will review the medical records and the decision of the Institutional Health Care Officer.<sup>225</sup> The Medical Advisory Committee renders a final decision on the matter.<sup>226</sup>

The review process is one in which only Department staff participate and where only the medical records are reviewed, with prisoners having no right to speak to the investigator or to the Committee and sometimes without any new investigation being conducted beyond review of the chart. One potential concern about such a closed system is that the decisions made will rely excessively on the initial reports of the treating health care worker, a method of investigation which will not help a prisoner who alleges that the health care worker refused to examine him or to treat him in the first place or whose health care worker reported incorrect information in the record. In the outside world, a person with such a complaint could go to a different nearby provider and get seen there. Prisoners have no capacity to seek an opinion from outside the correctional system or to go elsewhere for care, leaving the prisoner vulnerable to the malpractice of one or two providers.<sup>227</sup> This supervision structure violates international standards guaranteeing prisoners access to second opinions and effective complaint procedures.<sup>228</sup>

One route prisoners have to make complaints is through the Office of the Ombudsman. The Ombudsman is charged with the investigation of complaints against state agencies and employees. The Office of the Ombudsman receives complaints and investigates complaints from prisoners, including complaints relating to health care.<sup>229</sup> Since the Office of the Ombudsman has a small staff and is tasked with investigating complaints about the whole of the state government, prisoners cannot expect the Ombudsman to cope with

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224 Alaska Department of Corrections, Prisoner Grievances: Policy 808.03 (VII)(B), available at <http://www.correct.state.ak.us/corrections/pnp/pdf/808.03.pdf>.

225 *Id.*

226 *Id.*

227 The Department notes that some prisoners will see a contract physician, a Department physician, a specialist, and a Department physician assistant or nurse practitioner.

228 See e.g. Body of Principles for the Protection of All Persons, Art. 25

229 Ombudsman, State of Alaska, Ombudsman Complaint A2006-0344 (detailing investigation of a prisoner's complaint regarding needed dentures) at <http://ombud.alaska.gov/reports/dentures%20PR-0344.pdf>.

the hundreds of complaints every year relating to medical concerns.<sup>230</sup> The Office of the Ombudsman has conducted 21 investigations into the Department of Corrections since 1990, while more than 2,500 prisoners filed grievances last year.<sup>231</sup> While the Ombudsman is an important and legitimate state arm for investigation of claims of lack of medical treatment or maltreatment for prisoners, the limited resources and broad docket of the Ombudsman make the office an inadequate substitute for additional internal screening processes.

#### 4. Charging Prisoners for Medical Care

Another policy that gives rise to concern about prisoner health is the assignment of a charge for prisoner health care. While international standards require that medical services should be provided free of charge, the system in Alaska charges inmates \$4 per visit and \$8 to see a dentist. While the policies of the Department do note that medical care will not be withheld if a prisoner has no money in his accounts,<sup>232</sup> the ACLU of Alaska remains concerned that prisoners with some limited funds will be dissuaded from seeking medical care by the fee policy. Some inmates have explained that they stopped requesting medical care because it is too expensive. Other prisoners complained that when they approached medical staff for legitimate medical concerns, they were turned away with token care, such as ibuprofen, and charged four dollars. Charging inmates for medical care violates the international standards outlined above,<sup>233</sup> and is one form of discriminatory denial of care because prisoners with little money are dissuaded from seeking medical care. Numerous organizations, including the National Commission on Correctional Health Care, have opposed the imposition of co-pays on prisoners for the receipt of medical care.<sup>234</sup>

Even if the Department would like to leave a co-pay in place to prevent malingering or

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230 Medical grievances constituted 21.8% of all 2,593 initial grievances filed in 2008. Timothy Lyden, Alaska Department of Corrections, 2008 Annual Grievance Report.

231 Ombudsman, State of Alaska, Fully Investigated Complaints (showing 21 cases relating to the Department of Corrections) at <http://ombud.alaska.gov/invest-table.php>. Ombudsman, State of Alaska, Table of Cases Closed by the Ombudsman in 2008 (showing 2 investigations within the Department of Corrections closed in 2008 – one from 2007 relating to deprivation of psychiatric medications and one from 2007 relating to drug testing standards). Timothy Lyden, Alaska Department of Corrections, 2008 Annual Grievance Report.

232 Alaska Department of Corrections, Prisoner Responsibility for Health Care: Policy 807.07, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.07.pdf>.

233 United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly in its Resolution 43/173, of 9 December 1988, Principle 24.

234 National Commission on Correctional Health Care, Charging Inmates a Fee for Health Care Services, available at <http://www.ncchc.org/resources/statements/healthfees.html>. While the NCCHC does not endorse the use of fees under any circumstances, the NCCHC does provide guidance for those institutions that nevertheless choose to impose a fee. This includes conducting studies to ascertain whether savings could be better made by making the health care system more effective and efficient, and studies tracking the statistics of negative outcomes for prisoners to monitor whether negative outcomes rise after implementing the costs. *Id.* (see guidelines #1, #2, and #10). The Department has not conducted such studies. The requirement of a fee-for-service for prisoners has been written into the Alaska Statutes, the Administrative Code, and the Policies and Procedures of the Department. Alaska Stat. 33.30.028; 22 Alaska Admin. Code 05.121; Alaska Department of Corrections, Prisoner Responsibility for Health Care, Policy 807.07.

abuse of the medical facility, a prisoner should at least have access to medical care twice a month without requiring a co-pay. Prisoners with legitimate medical concerns should not be dissuaded from seeking medical attention. Adding a fee to prison health care could deter prisoners with legitimate health complaints from reporting serious conditions. In the event that the condition is contagious, delay in reporting could endanger the health of other prisoners, guards, and even the community as a whole.

### *iii. Areas of Complaint and Concern within the Medical System*

Having discussed some systemic concerns about the delivery of care, the next question is whether the prisoners' complaints about medical care reflect the concerns raised about the resources and structure of the health care system in the correctional system.

#### **1. Quality of Care and Access to Treatment**

Upon admission and after, almost half of all prisoners interviewed reported difficulties seeing medical personnel.<sup>235</sup> In light of the previously described heavy frequency of prisoner use of the medical system and the large volume of intake at some facilities staffed by two or three nurses, the reports of denied or delayed care make some sense.

Prisoners also complained about the general quality of care. Specifically, 85% of prisoners who had pre-existing conditions that antedated their admission to the prison system reported that the care received after admission to the prisons was inconsistent with the care they had previously received in civilian facilities; many prisoners complained that their access to medications supplied on the outside was temporarily or permanently interrupted on admission.<sup>236</sup> The prisoners' opinions of their care are not, in and of themselves, clearly demonstrative of a problem. However, the frequency of the complaints among prisoners interviewed about the quality of care should raise concerns. The reports that prisoners widely report receiving diminished treatment from that received prior to incarceration and report denial of their medication raises particular concerns. While the prisoners may not be the best judges of the quality of their care, care received on the outside was presumably set by a health care professional and was generally within the bounds of acceptable care.

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235 Of the 111 inmates we interviewed with current medical conditions, 58 (52%) reported having been denied medical care or sick call. Ten more inmates without current medical concerns also reported having been denied medical care or sick call for previous injuries or illnesses. Of inmates with existing medical conditions, 64 (58%) also reported having experienced increased injury or illness as a result of delay of care. Ten more inmates not facing medical conditions at the time of the interview also reported having experienced illness or injury as a result of delayed care. This means 74 (48% of all inmates interviewed) not only reported a delay in medical care, but also reported harm as a result of the delay.

236 Of the 155 inmates interviewed, 111 (72%) inmates reported that they were dealing with some illness or injury. Their illnesses and injuries ranged from minor to very serious. Of the 111 inmates reporting medical conditions, 56 (50%) had not been treated before prison, either because they had not yet had the condition or they were not yet diagnosed with it. Of the 55 inmates who were receiving medical care before prison, only 8 (15%) reported that the medical care they received was consistent with their prior care or treatment. Therefore, 47 (85%) inmates felt they were not receiving treatment consistent with their prior treatment outside of prison.

The judgment of the prior health care provider deserves at least as much credence as that of the prison health care provider. Certainly, in individual cases, a difference in judgment between two professionals does not indicate that one is providing substandard care. One can easily imagine why the prison administration would require a change in medical treatment in some cases. For instance, the prison medical system is reluctant – relative to outside providers – to give out opiate drugs to the prison population.

85% of prisoners who had pre-existing conditions that antedated their admission to the prison system reported that the care received after admission to the prisons was inconsistent with the care they had previously received in civilian facilities.

Even considering all of the legitimate reasons why prescription drugs might be discontinued or a course of treatment might be altered or suspended, finding 85% of prisoners who had received medical care prior to admission to the prison system report that their course of treatment changed raises concerns and merits more investigation. An assessment that a prisoner's course of medical treatment has changed is a much more reliable and objective benchmark than whether the treatment is of good quality. Also concerning is the number of prisoner who indicated that their medications were suspended – even discounting the prisoners taken off narcotic medicines.

Several other common themes arose in prisoner complaints: denial of more than token care to prisoners who were unsentenced or sentenced only to brief terms, even exceeding those terms set by Department guidelines; generally poor care for chronic conditions; insufficient care of prisoners experiencing withdrawal from alcohol or narcotics; and a treatment gap at the time of admission, such that prisoners were left untreated or marginally treated for the first several days or weeks of incarceration. These are problems difficult to substantiate without more investigation, requiring obtaining releases from dozens of individual prisoners and the review of hundreds of pages of medical records. A major dedication of resources for such a project could become a priority for future investigation by the ACLU of Alaska. Unfortunately, such an undertaking was outside the scope of the initial survey of the general prison system.

Considering the scope of the problem outlined by prisoner complaints, the enormous volume of requests for medical attention<sup>237</sup> handled by a limited medical staff, and the difficulty supervising dozens of providers in a dozen cities and towns in Alaska, many separated by hundreds of miles, the prisoner complaints raise serious concerns about whether proper medical treatment is being provided.

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<sup>237</sup> Before discontinuing statistical reporting, the Department of Corrections reported 174,000 patient visits in 2004. Alaska Department of Corrections, Health Care Activity Report: Monthly Statistics (2004).

## 2. Misuse of Medical Segregation

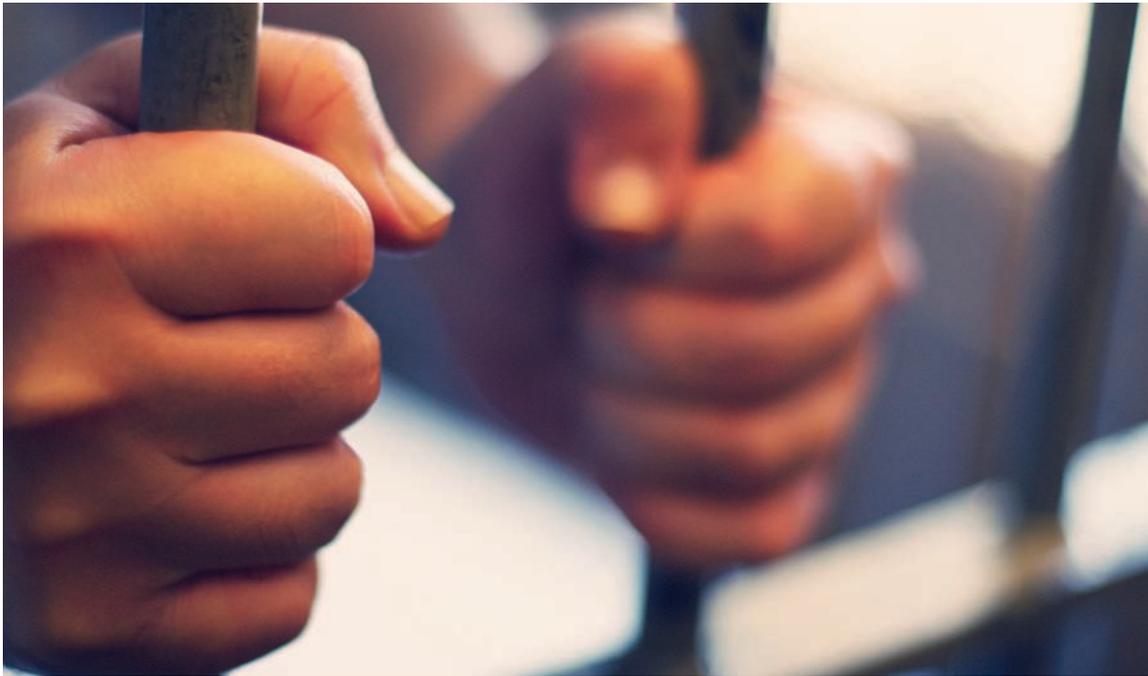
As an example of the difficulty of supervising prison medical staff in locations around the state, numerous prisoners at Fairbanks Correctional Center and others who had previously been incarcerated there complained that the physician assistant there regularly provided minimal treatment, then threatened prisoners who complained with placement in medical segregation.<sup>238</sup> Segregation generally is the higher-security “jail within a jail” in every facility. Prisoners are held in punitive segregation as punishment for jail infractions, locked down most of the day, with little property or materials in their cells. Prisoners are held in administrative segregation for other reasons, such as for their own protection when they are endangered by other prisoners or when they present a threat to security; as in punitive segregation, administrative segregation still involves a loss of most privileges and lockdown conditions 23 hours a day, although prisoners retain their property.<sup>239</sup> Medical segregation is a form of administrative segregation intended to isolate prisoners with contagious diseases or in need of special observation. Multiple prisoners complained that one physician assistant at the Fairbanks Correctional Center would respond to serious medical complaints with perfunctory care: a token gesture, such as providing ibuprofen to the inmate. If the prisoner complained further that the treatment offered was inadequate, the physician assistant would reply that if the prisoner’s condition was so bad, the prisoner could be placed in medical segregation for observation for an extended period of time. Inmates reported that the physician assistant would threaten to place them in medical segregation for ailments for which medical segregation would be totally inappropriate and unnecessary: for example, in response to joint pain. This practice interferes with a prisoner’s right under the international human rights guidelines already discussed to report complaints concerning their medical care and to have those complaints handled without undue delay. These complaints were made spontaneously by numerous inmates, including inmates who had already left Fairbanks Correctional Center. No similar complaints were made about other providers at any other institution.

The account of abuse of power described above illustrates the concerns described earlier about the difficulty of supervising health care workers in small and geographically dispersed facilities. Greater supervision should be put in place to prevent abuse and malpractice. Moreover, prisoners’ rights to medical treatment should be protected by a clear

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238 The Department indicates that no grievances have been filed against the physician assistant.

239 Even where inmates are put in segregation for medical or administrative purposes, as a functional matter, they share almost identical living conditions with inmates in punitive segregation. In segregation in many facilities, a prisoner is locked in a cell for 22 or 23 hours a day, with one or two hours each day to shower, clean his cell, and go to the law library. Segregation means no access to any of the prison programs, and limited access to family visits. Inmates in segregation lose whatever employment they participate in within the facility, and most or all of the privileges they have obtained. The only substantial distinction between conditions in administrative or medical segregation on one hand and punitive segregation on the other is that the prisoner in medical or administrative segregation is allowed to keep some of his property. Prisoners in punitive segregation are generally allowed only a few essential and constitutionally-protected items, such as religious items. Property aside, segregation is punishment to most prisoners. Even some prisoners who seriously fear assault by other inmates often take their chances in general population rather than turn themselves in for protective custody in the segregation unit.



Incarceration [© iStockphoto.com/Helene Vallee]

and efficient complaint procedure. The existing complaint practice in some facilities has a chilling effect on inmates who want to seek medical attention but fear placement in segregation.

This is not to say that medical segregation is never appropriate; international standards allow for medical segregation in certain circumstances. Medical segregation can be very useful in preventing the spread of infectious diseases, for example. However, few justifications exist for placing a prisoner with a non-communicable disease, or a prisoner with a mental condition the officers do not understand, in medical segregation. Where segregation is used as a punishment masquerading as medical treatment, the prison is in direct violation of several of the international standards outlined above, including, in some circumstances, the international prohibition of cruel, inhuman or degrading treatment or punishment.

Some prisoner complaints of inadequate or inappropriate treatment may be incorrect or unfair. The probability that all of the prisoner complaints are inaccurate is slender. While many providers may be diligent and competent, no one can expect all of them to be diligent and competent. Given the tens of thousands of prisoner admissions in a year and the hundreds of thousands of prisoner medical visits in a year, even a single health care worker who does not do his or her job properly could negatively affect the health of hundreds of prisoners.

#### *iv. Analysis and Suggestions for Reform*

An excellent way to improve the treatment of prisoners would be to establish an electronic medical record system to track the care given to prisoners and any negative medical outcomes for prisoners. Using a well-designed system could help flag individual institutions or providers when particular complaints arise with unusual frequency, when care or medical visits are unusually delayed, or when inappropriate care is ordered. The system could also help make particular systemic reforms easier to justify; by knowing exactly how many prisoners are being treated for an ailment and how much staff time and Department money goes to treating that ailment, the Department would be better able to target the most expensive and the most dangerous problems as most in need of a preventive solution.

A simple reform desperately needed in the prison system is the addition of diabetic meals to the menus in the facilities. Inmates housed in multiple facilities complained that the prison provided no diabetic meals, although prisoners at other facilities, including Spring Creek, could get a diabetic meal. Diabetes is a common ailment across the nation. In Alaska, 13% of the adult population either has diabetes or is in a pre-diabetic state, at serious risk of developing diabetes.<sup>240</sup> Diabetics require a low-sugar, low-starch diet to prevent sudden spikes in their blood sugar. Unmanaged high blood sugar can result in tissue and organ damage, sometimes requiring amputation of extremities or transplants for failing organs. Nevertheless, some prison meals are filled with high-starch dishes including bread and potatoes. At most facilities, no alternatives are provided for diabetic inmates, a policy in direct violation of the international standards that require prison food to be healthy and adequate. Many prisoners reported that they skipped meals that were inappropriate, supplemented their diets with food purchased with their own money, or simply ate what was given to them, regardless of the consequences. Indigent prisoners – who comprise a large proportion of the prison population – cannot afford to purchase food through the prison commissary; their health is unavoidably compromised when prisons fail to provide a medically appropriate diet. In denying prisoners a medically-appropriate diet, the prison contributes to deterioration of prisoners' health. Such a policy may lead to additional costs where prisoners need further medical care or even surgery. The costs of such a short-sighted policy will eventually be passed on to the taxpayer. The best treatment for diabetics, both in terms of economics and prisoner health, is prevention.

The two best ways to cut health care costs in the prisons are to reduce the prison populations and to prevent the need for medical intervention. In light of the apparent cost pressures that prevent the dedication of more substantial resources to prisoner medical care, one should note the “cost savings” in many of these cases is an illusion. The prisoners who go untreated in prison will ultimately need treatment and will simply receive the treatment later, likely at greater expense and likely at community expense at a local emergency room. The cost is not so much “saved” as “shifted” from one community-funded

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240 Alaska Diabetes Prevention and Control, Alaska Diabetes Strategic Plan *available at* <http://www.epi.alaska.gov/pubs/diabetes.pdf>.

The two best ways to cut health care costs in the prisons are to reduce the prison populations and to prevent the need for medical intervention.

organization (the Department of Corrections) to another (the local hospital). While legislators may feel that it is fiscally responsible to reject the provision of substantial resources to the Department's Inmate Health Service, limiting services in prison ultimately costs the general public more (either as taxpayers or as customers of health insurance companies), as postponed treatment is usually more complicated and expensive.

A better model for the Department to follow in trying to treat prisoners would be to put prisoner and community health first, to practice preventive medicine and, where possible, to integrate prisoner health care while in custody with the health care the prisoners will receive on release. A model program along these lines was adopted at the Hampden County Correctional Center in Ludlow, Massachusetts.<sup>241</sup> The emphasis at the program is on preventing illness. The facility also seeks to connect prisoners with health care providers in the community, rather than providing all care in the facility, in order to establish links between prisoners and health care providers. This model promotes continuity of care and encourages prisoners to keep up with mental and physical health treatment upon release. The cornerstone program, a comprehensive HIV and hepatitis screening and prevention program, was a net cost-saving program.<sup>242</sup> The overall costs associated with health care in Hampden County were reasonable, constituting about 9% of the budget of the institution.<sup>243</sup> By contrast, the budget for inmate health care in Alaska constitutes 15% of the whole corrections budget.<sup>244</sup> The legislature should consider funding a position for someone with a master's in public health to review the practices of the prison medical system and develop a plan for preventing illness and injury. Lots of valuable public health research has been conducted in prisons, aimed at prison-specific problems. Such an approach would improve the general health of prisoners while reducing overall costs.

Another area of modern concern, in light of present sentencing practices, is the increas-

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241 Conklin *et al.*, A Public Health Model to Connect Correctional Health Care with Communities, 88 Am. J. Pub. Health, 1249-50 (1998).

242 Massachusetts Public Health Board, Correctional Health: The Missing Key to Improving the Public's Health and Safety at 16 (2003), available at [http://www.mphaweb.org/resources/prison\\_health-5\\_05.pdf](http://www.mphaweb.org/resources/prison_health-5_05.pdf).

243 Conklin *et al.*, Abstract: A Public Health Model for Correctional Care, Proceedings of the National HIV Prevention Conference, available at <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102187764.html>. Although health costs have shifted in the interim, the costs of jail health care at Hampden ran just below the national average at the time. Massachusetts Public Health Board, Correctional Health: The Missing Key to Improving the Public's Health and Safety at 17 (2003), available at [http://www.mphaweb.org/resources/prison\\_health-5\\_05.pdf](http://www.mphaweb.org/resources/prison_health-5_05.pdf).

244 State of Alaska, FY2010 Governor's Operating Budget, Department of Corrections Summary available at [http://gov.state.ak.us/omb/10\\_omb/budget/DOC/dept20.pdf](http://gov.state.ak.us/omb/10_omb/budget/DOC/dept20.pdf) (showing a proposed Department of Corrections budget of \$248 million); State of Alaska, FY2010 Governor's Operating Budget, Department of Corrections Inmate Health Care (showing a prisoner health care budget of \$37 million), available at [http://gov.state.ak.us/omb/10\\_omb/budget/DOC/comp705.pdf](http://gov.state.ak.us/omb/10_omb/budget/DOC/comp705.pdf).

ing numbers of elderly prisoners.<sup>245</sup> Sentencing prisoners to decades in prison for serious crimes has become a nationwide phenomenon. From a crime prevention perspective, the new sentences can make little sense: a 60- or 70-year old is unlikely to leave prison and return to a life of armed robbery. Yet long sentences with little room for judicial or correctional judgment may keep him in prison, to little practical purpose and at great medical expense to the state.

An attempt at reform might be made by making all prisoners 60 or older eligible for parole after serving either 25% of their sentences or at least ten years in prison (to accommodate life prisoners and prisoners in on extremely long sentences).

#### *v. Recommendations by the ACLU of Alaska on Medical Care*

1. Develop a complaint procedure that allows for access to second opinions and an independent, objective official to hear medical complaints efficiently and frequently;
2. Ensure that inmates requesting medical care receive adequate treatment within 24 hours, by tracking the turn-around time from filing of a cop-out to meeting with a provider;
3. Create enforcement mechanisms like strict reprimands or a “three-strike rule” for correctional officers who fail to transfer a medical request to the proper medical staff within a certain time period, and for medical officers who fail to review these requests within a certain time period;
4. Provide facilities with proper exercise space and equipment;
5. Offer diets for inmates with health-related dietary restrictions like diabetes;
6. Write clear and precise policy instructions as to the use of medical treatment, care, and segregation, and enforce these instructions;
7. Provide periodic physical health examinations for prisoners, to flag issues that require the provision of medical care, especially preventive care;
8. Develop an electronic medical records system, using appropriate technology to ensure prisoner privacy, to allow improved analysis of medical records and supervision of care in other facilities;
9. Supervise prison health care through a systematic program of quality assurance, including assigning some providers to issue targeted in-person interviews, physicals, and second opinions on prisoner health care;
10. Improve health data collection from the many institutions in Alaska and look for trends in the data, such as excessive delays in response to prisoner requests and unusual frequency of particular prisoner complaints from one facility;
11. Set up a systemic review of negative outcomes, such as deaths, hospital admissions, or prolonged stays in medical segregation, to detect medical errors or lack

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<sup>245</sup> The number of offenders over the age of 50 who were sentenced to at least 10 years in custody rose by 20% in just the last two years. Alaska Department of Corrections, 2008 Offender Profile, at 62 (showing 63 long-term offenders – those in custody for 10 years or more – aged 50 or older); Alaska Department of Corrections, 2006 Offender Profile, at 62 (showing 52 long-term offenders aged 50 or older).

- of resources and to prevent recurrence of the outcome;
12. Draft policies that aim to directly and consistently address long-term medical conditions, such as heart disease, diabetes, and cancer, as well as infectious diseases such as HIV and Hepatitis, emulating nationally recognized correctional health care programs;
  13. Dedicate further resources to hiring at least one more physician-level provider and one public health worker with a masters degree in public health to improve patient care and the management of the correctional health system;
  14. Develop a multi-pronged plan for providing care at institutions outside the Southcentral area, including hiring more providers to work in the facilities, allowing providers to travel to the area periodically to provide care, and to improve telemedicine consultation; and
  15. Create a special parole proceeding to improve access to medical parole for aging or disabled prisoners who have served many years of long sentences.

## D. Mental Health Care in Alaskan Prisons

The problem of mental illness in prisons poses huge challenges to the administration of any prison system. The needs of many mentally ill prisoners are profound. Too often, the prison system must make up for a lack of community mental health resources. Administrators already charged with maintaining security and control over the prison population are also faced with the challenge of running mental health care facilities inside their prisons.

The first challenge in the treatment of mental illness is to identify those needing treatment. Prisoners with diagnosed mental illnesses may be prompted not to reveal their illness because they fear stigmatization, distrust prison authorities, or dislike the treatment they receive for it. Other prisoners may have undiagnosed mental illness, since they come from impoverished backgrounds with insufficient medical care or from rural areas where mental health resources are scarce. In Alaska, about 12% of all prisoners have been diagnosed with a mental illness by an outside source but have not been identified as mentally ill by the Department of Corrections, in part because of flaws in the intake and screening process.<sup>246</sup>

Prisons must also guard, especially at the initial screening stage, against the risk of suicide. Prisoners are far more likely to commit suicide than the general public.<sup>247</sup> Prisoners at risk of suicide need special care to prevent successful suicide. National organizations have developed standards for the treatment of a potentially suicidal prisoner; unfortunately, the current treatment of suicidal prisoners falls short of the standards set forth, particularly as suicidal prisoners are often housed in isolation which tends to promote

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246 Out of 39,899 prisoners admitted to ADOC custody from June 2002 to July 2006, 11,631 had been identified as having a mental illness either in Department records, in Medicaid records, or in the records of the Alaska Psychiatric Institute (API). A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 39. The Department records identified 6,993 of 39,899 (17.5%) prisoners as having a mental illness. *Id.* 4,638 prisoners (12% of the 39,899) were identified solely from the records of the Alaska Psychiatric Institute and the Medicaid program, but not in the ADOC records. *Id.* While the combined ADOC-Medicaid-API records indicate about 29% [11,631/39,899] of all prisoners admitted over the course of four years had a mental illness, the Department records on their own indicated only 17.5% of the 39,899 prisoners had a mental illness – meaning the Department files identified only about 58% of those who had been identified as mentally ill by some source.

247 The incidence of suicide among local jail inmates was 47 per 100,000 inmates in 2002; among state prisoners, the rate was 14 per 100,000 prisoners. Bureau of Justice Statistics, Dep't of Justice, Suicide and Homicide in State Prisons and Local Jails available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf>. Suicide is the fifth leading cause of death in state prisons, accounting for 6% of all deaths in state prisons, but accounts for one-third of all deaths in local jails. *Id.*; Bureau of Justice Statistics, Dep't of Justice, Medical Causes of Death in State Prisons, 2001-04 available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mcdsp04.pdf>. By contrast, the incidence of suicide among the general population was 10.9 per 100,000. National Institute of Mental Health, Suicide in the U.S.: Statistics and Prevention at <http://www.nimh.nih.gov/health/publications/suicide-in-the-us-statistics-and-prevention/index.shtml>.

In Alaska, about 12% of all prisoners have been diagnosed with a mental illness by an outside source but have not been identified as mentally ill by the Department of Corrections, in part because of flaws in the intake and screening process.

successful suicide.<sup>248</sup> A lack of treatment and follow-up for suicidal prisoners also tends to increase the risk of future suicide.

The lack of staff and resources for mental health treatment means that the problems of mental illness in prison are undertreated. While two acute psychiatric units and three sub acute units statewide are good resources for prisoners, the hundreds and hundreds of mentally ill prisoners outside those units can end up with limited in-custody treatment options. Creating new sub acute units in other facilities and allowing more access to treatment for prisoners in general population would improve in-custody mental health care substantially. A lack of access to psychiatric medication and counseling was a common complaint of prisoners.

Last, the overall experience of prisoners in segregation showed that a concerning number of those spending long periods of time in segregation tended to have serious mental illnesses. Given that segregation is widely believed to make existing mental illnesses worse, the placement of mentally ill prisoners in segregation should be avoided whenever possible.

The accounts of prisoners and the research conducted for this report show the need for improved identification of mentally ill prisoners, better suicide precautions, more access to treatment and medication, increased mental health staffing, and alternative responses to mentally ill prisoners who would otherwise end up in segregation. By addressing these challenges, the community will see reduced recidivism and improved participation by prisoners in society on release.

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<sup>248</sup> A representative of the Department stated that prisoners might be placed in segregation for a 24-hour period but would then be moved to an acute mental health care unit if the circumstances warranted. No Department procedures available to the ACLU of Alaska reflected this practice, but indicated that placement in segregation was the standard practice. Upon reviewing two prisoner files which were not disclosed to the Department for comment, one file revealed that the prisoner spent three days in segregation without being sent to a mental health unit; the other file revealed that the other prisoner was sent directly to the acute mental health unit, but was placed in a solitary cell and first received a visit from a mental health counselor four days after placement in the unit. Had the records been reviewed for comment by the Department, the Department might have been able to determine that proper procedures had been followed. The ACLU will conduct further research with more prisoner records.

## *i. Legal Standards on Mental Health Care*

### 1. International Standards

Most international standards applicable to the realm of physical health also apply to the arena of medical health. The fundamental demand of international human rights law in relation to general health care – that prisoners ought to receive the same health care they would receive outside the prison – is the hallmark of the requirements for mental health care as well.<sup>249</sup> International guidelines do define some specific requirements for prisoners based on their particular mental health conditions, including the right to provision of mental health care under the least restrictive conditions and the least invasive treatment possible.<sup>250</sup> Under international law, the medical officers should “see and examine every prisoner as soon as possible after his admission and thereafter as necessary” in order to discover any physical or mental health problems and take all the necessary treatment measures.<sup>251</sup> The officer should also provide for the segregation of individuals with contagious or infectious conditions.<sup>252</sup> In addition, any sick prisoners who require special attention must be transferred to a specialized institution or civil hospital.<sup>253</sup> While mentally insane inmates should be taken to mental institutions, other prisoners with mental disorders should be observed and treated in specialized institutions under medical management.<sup>254</sup> Also, institutions’ medical services should “provide for the psychiatric treatment of all other prisoners who are in need of such treatment.”<sup>255</sup>

### 2. Domestic Standards

The primary basis in the United States Constitution for asserting a right to treatment of mental illness, just as with physical ailments, arises under the Eighth Amendment’s prohibition of “cruel and unusual punishment” and, for unsentenced prisoners, a correlative right against punishment prior to adjudication under the Due Process Clause of

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249 International Covenant on Economic, Social, and Cultural Rights, Art. 12.1 (recognizing the right of everyone to the enjoyment of the highest attainable standard of physical and mental health); United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly in its Resolution 43/173, of 9 December 1988, Principle 9. See also European Prison Rules, Art. 40.3.

250 U.N. General Assembly, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, A/RES/46/119, 17 Dec. 1991, Principle 9 available at <http://www2.ohchr.org/english/law/principles.htm>. The rights of prisoners to mental health care are no different than those of non-prisoners in the outside world, except in the case of necessity. *Id.*, Principle 20.

251 Standard Minimum Rules for the Treatment of Prisoners, Art. 24.

252 *Id.*, Art. 24.

253 *Id.*, Art. 22.2.

254 Standard Minimum Rules, Art. 82.1-2. See also European Prison Rules, Art. 12.1-2.

255 Standard Minimum Rules, Art. 82.4.

the Fourteenth Amendment.<sup>256</sup> Providing “reasonably necessary” psychiatric care is a Constitutional requirement.<sup>257</sup> Six basic Constitutional requirements in the provision of mental health care are: 1) a basic screening process for mental illness; 2) psychiatric treatment beyond isolation and monitoring; 3) participation of mental health professionals in treatment; 4) accurate and complete mental health record-keeping; 5) avoiding prescription of medications in a dangerous manner, whether by overdosing or lack of follow-up; and 6) the identification, supervision, and treatment of suicidal prisoners.<sup>258</sup> In Alaska, the related standards arise under the “cruel and unusual punishment” standard as well as the “right to reformation.”<sup>259</sup>

## **ii. Mental Illness in Alaska Prisons**

### **1. The Scope of the Problem**

#### **a. The Population of the Mentally Ill in Prison**

Mental illness pervades the prison system. Many of the individuals interviewed for this report self-identified as suffering from mental illness, and many had previously received mental health care, including hospitalization, prior to incarceration. An earlier study estimated that 34% of the prison population suffers from some form of mental illness.<sup>260</sup> In the survey conducted for this report, 34% of prisoners self-identified as having a mental illness. Depending on how mental illness is defined and how studies are conducted, the estimated number of mentally ill prisoners nationwide in jails and prisons may range anywhere from 16%<sup>261</sup> to 64%<sup>262</sup>; meaning that anywhere between 700 and 3,000 prisoners in Alaska may have a mental illness.<sup>263</sup> The best Alaska specific study showed that 29% of all

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256 U.S. Const., Amdt. VIII & XIV; *see also* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

257 *See, e.g.*, Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989).

258 Ruiz v. Estelle, 503 F.Supp. 1265, 1339 (S.D. Tex. 1980) *overruled on other grounds* 679 F.2d 1115 (5th Cir. 1982) *amended* 688 F.2d 266 (5th Cir. 1982).

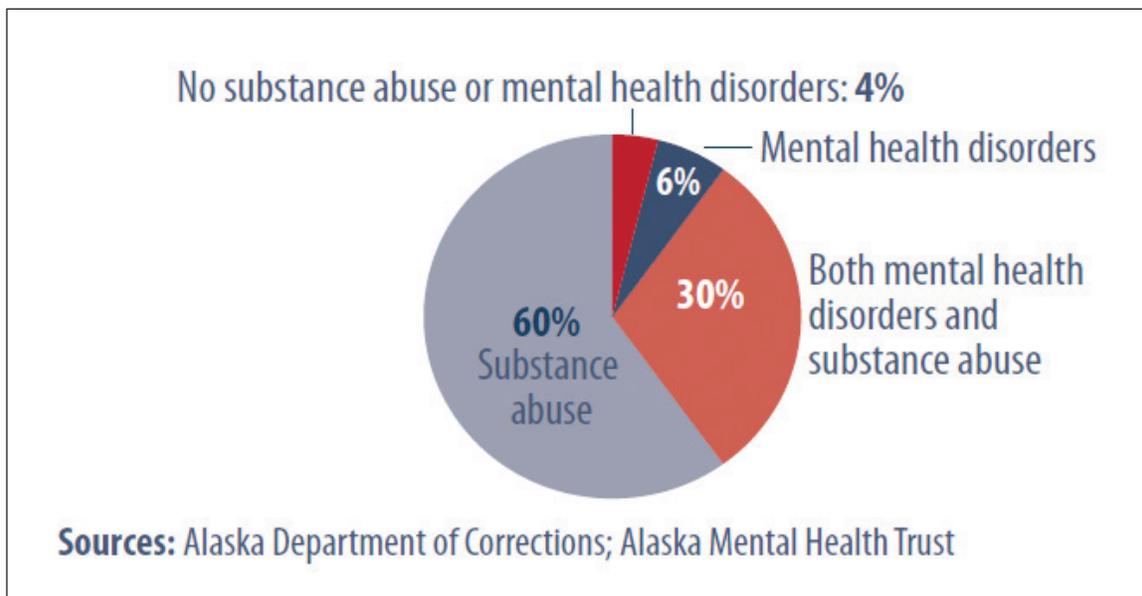
259 Alaska Const., Art. I, Sec. 12; Rust v. State, 582 P.2d 134, 142 (Alaska 1978).

260 Alaska Judicial Council, Alaska Felony Process: 1999, at 66; Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 8. According to the Mental Health Trust study, an average of 34% of individuals were Mental Health Trust beneficiaries, while 41% of admissions to DOC custody are Mental Health Trust beneficiaries. The distinction drawn between admissions and unique individuals' accounts for the fact that a single person may be admitted to the prison systems several times in a single year.

261 Ditton, Paula M., Dep't of Justice, Mental Health and Treatment of Inmates and Probationers (1999) (showing that 16% of state prison and local jail inmates reported having a major mental illness or spending at least one night in a psychiatric hospital) *available at* <http://ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf> .

262 James, Doris J. & Glaze, Lauren E., Dep't of Justice, Mental Health Problems of Prison and Jail Inmates (Sept. 2006) (showing that 64% of jail inmates had symptoms of mental illness and 56% of state prison inmates had symptoms of mental illness) *available at* <http://ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf> .

263 The total in- and out-of-state prison population tends to stay around 4,400. Since Red Rock Correctional Center does not accept prisoners with serious mental illness nor offer any long-term treatment, prisoners with known mental illnesses will be kept in-state. The above numbers were estimates obtained by taking 16% and 64% of 4,400.



How Many Alaska Inmates Have Substance Abuse or Mental Health Disorders? [From: Martin, Stephanie and Colt, Steve, *Institute for Social and Economic Research, "The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?"*]

unique individuals admitted to the custody of the Department could be identified as Trust Beneficiaries.<sup>264</sup> The Department itself reports that 14,000 of 38,000 (about 36%) of prisoners admitted annually have a mental health diagnosis of some sort.<sup>265</sup>

Of the 155 prisoners interviewed, 53 (34%) inmates reported having been diagnosed with a mental disorder or disease. Of those reporting mental health problems, 11 (7% of all prisoners interviewed) had bi-polar disorder, 32 (21%) had some form of depression, 6 (4%) had post-traumatic stress disorder, 7 (5%) had some form of schizophrenia, a very serious mental condition involving the individual's mental break with reality.

<sup>264</sup> Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 43 (showing that 11,631 of 39,899 prisoners admitted to DOC custody were found to have been diagnosed with a mental illness by the Department or to appear in the records of either the Alaska Psychiatric Institute or Medicaid and qualified as Trust Beneficiaries). The classification is in some sense over inclusive, because Trust Beneficiaries include individuals with ailments that are not mental illnesses, such as developmental disorder, traumatic brain injury, cerebral palsy, epilepsy, dementia, or alcohol-related psychosis. The classification is under inclusive because the study does not seek to count prisoners who suffer from undiagnosed mental illness – not improbable given the poverty of the typical prisoner and the accompanying lack of access to mental health care, and the number of rural Alaskans geographically distant from mental health providers. The same difficulty is revealed in the sharply different 1999 and 2006 studies from the Department of Justice cited above: comparatively few prisoners with mental illness were detected in the 1999 study which looked solely at whether prisoners had a diagnosis of a mental illness or a history of admission to a mental hospital. One could safely say that most prisoners fitting those criteria were mentally ill; however, the study would likely not catch prisoners with undiagnosed mental illnesses. In the later study, one could argue the numbers were over inclusive, since the study relied exclusively on the number of symptoms reported, without a professional determination that the severity of an individual prisoner's symptoms justified a clinical diagnosis.

<sup>265</sup> Alaska Department of Corrections, FY2010 Governor's Operating Budget: Inmate Health Care, at 3 available at [http://gov.state.ak.us/omb/10\\_omb/budget/DOC/comp705.pdf](http://gov.state.ak.us/omb/10_omb/budget/DOC/comp705.pdf).

## ***b. Recidivism and the Cost of Untreated Mental Illness***

According to one measure, prisoners leaving prison and returning to the community tend, on the whole, to have made little progress in their condition and might, in some cases, have experienced a decline in mental health. The Alaska Mental Health Trust found that, on the whole, prisoners who had been receiving mental health treatment at the time of admission to the prison system were, after release from custody, one-third less likely to receive Medicaid-funded mental health treatment (suggesting that entry to the prison system disrupted existing care).<sup>266</sup> The study also found that those who resumed receiving mental health care imposed higher costs on the Medicaid system, indicating that “either the cost of mental health care has significantly increased over a relatively short period of time or the conditions of people with mental illness released from the ADOC worsened, thereby requiring more expensive mental health interventions, or likely some combination of the two.”<sup>267</sup> The Department reports that four clinicians and four specially trained probation officers work a caseload of 190 mentally ill probationers and parolees newly released into the community, as well as working with the Mental Health Court to support newly released prisoners. Nevertheless, based on Mental Health Trust research, the current level of mental health treatment seems to leave prisoners worse off after leaving prison,<sup>268</sup> rather than better off. A concerted effort to improve mental health treatment will save money and improve the outlook for the mentally ill throughout the state.

The largest cost of mental illness is the cost of reincarceration. Two different studies found substantially more recidivism among the mentally ill than among the general population. The Alaska Judicial Council found that individuals with mental illness reoffended at a rate eight percentage points higher than non-mentally ill individuals; a Mental Health Trust report found that released prisoners with mental illness reoffended at a rate eleven percentage points higher than those without mental illness.<sup>269</sup> As shown above, the current effect of incarceration on the long-term health of prisoners tends to be negative. By improving the mental health of a prisoner, his likelihood of return to prison may be reduced.

The failure to detect and to treat mental illness amongst the incarcerated now results in enormous costs later. A 2009 Institute of Social and Economic Research study indicated

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<sup>266</sup> Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 45.

<sup>267</sup> *Id.*

<sup>268</sup> A representative of the Department of Corrections expressed concern about the methodology of the Mental Health Trust report, including the inability of researchers to report whether the prisoners who had previously sought mental health care had actually gotten better or whether they remained ill but untreated. The representative also expressed concerns about whether the prisoner population polled involved prisoners who had been held briefly but released, for whom it would be impossible for the Department to provide effective care. The Mental Health Trust report does indicate a similar rate of discontinuation of mental health services for sentenced prisoners needing mental health care (34%), who would presumably be spending longer periods of time in custody, and unsentenced prisoners needing mental health care (32%). *Id.* at 45 (Table 18).

<sup>269</sup> Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 19; Alaska Judicial Council, Recidivism in Alaska, at 24.

that providing transitional services for prisoners with mental illnesses leaving custody saved twice as much as they cost by preventing reincarceration.<sup>270</sup> The Department of Corrections has a critical opportunity to provide supervised mental health treatment, thereby promoting community health and lowering recidivism rates. The legislature has responded to the Department's requests by increasing funding for substance abuse treatment; increased funding for mental health services will also improve the rehabilitation of prisoners and ease their transition into society. The legislature should continue the expansion of these rehabilitative programs into the mental health field.

A 2009 Institute of Social and Economic Research study indicated that providing transitional services for prisoners with mental illnesses leaving custody saved twice as much as they cost by preventing reincarceration.

## 2. Detection of Mental Illness and Intake Procedures

The records of the prison system show that mental illness frequently goes undetected in the prisons. The Department of Corrections commissioned the Alaska Mental Health Trust – an agency that administers lands and funds dedicated to the treatment of the mentally ill in Alaska – to study mental illness in the correctional system. In December 2007, the Mental Health Trust produced its report on the existing treatment of prisoners with mental illnesses. The primary recommendation of the report was: “To review and revise screening and assessment protocols for mental health to capture a higher, more accurate portion of the population.”<sup>271</sup> Despite the recommendations of the Mental Health Trust, the Remand Screening Form used by the Department of Corrections indicates it was last revised on January 10, 2001.<sup>272</sup> The Department reports the form is currently being revised, although no new form has yet been produced. The Mental Health Trust recommended revising the form, because, in comparing DOC records with those of the Mental Health Trust, about 40% of prisoners with a mental illness have never been identified as having a

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270 Martin, Stephanie and Colt, Stephen, *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, at 3 available at [http://www.iser.uaa.alaska.edu/Publications/researchsumm/RS\\_71.pdf](http://www.iser.uaa.alaska.edu/Publications/researchsumm/RS_71.pdf).

271 The Alaska Mental Health Trust Authority, “A Study of Trust Beneficiaries in the Alaska Department of Corrections,” December 2007, at iii.

272 Alaska Department of Corrections, Remand Screening Form 807.14A [footer].

disorder.<sup>273</sup> Since no one can treat a patient whose problems have not been identified, the gap in identifying prisoners with mental health problems suggests that many prisoners with mental health problems get no treatment at all.

In addition to improving treatment and conditions for mental illness, an improved screening system could substantially reduce recidivism. The Mental Health Trust study found that the prison system properly diagnosed prisoners with the most serious mental illnesses, such as schizophrenia or psychosis, while those prisoners most likely to go unidentified as mentally ill are those suffering from substance-related disorders and mood disorder (such as depression or bipolar disorder).<sup>274</sup> These same prisoners were found to be those most prone to recidivism; the prisoners least likely to be identified as in need of treatment are those most likely to commit new crimes.<sup>275</sup> By improving the screening tool to detect and treat those with hard-to-detect mental illnesses, the rates of recidivism for prisoners with mood disorders – those most likely to reoffend – might decrease.

The best first step in preventing suicide in custody is a good initial screening for suicide risk and mental health. At least three prisoners have killed themselves within a few days of admission to the prison system since 2004,<sup>276</sup> two more have died of overdoses or under suspicious or other unknown conditions soon after admission, although the Department

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273 The Alaska Mental Health Trust Authority, "A Study of Trust Beneficiaries in the Alaska Department of Corrections," December 2007, at 39. See discussion in footnote 265 *supra*. Some of the disparity arose from under detection of drug- or alcohol-related mental disorders, although mood disorders, such as depression, were also common among the prisoners not identified by DOC as trust beneficiaries. The study compared the Department's records of prisoners known to the Department as having a mental illness with the records of the Alaska Psychiatric Institute and Medicare records showing Mental Health Trust beneficiaries who had received some kind of mental health counseling paid by Medicare funds. Since the trust beneficiaries include those who suffer from traumatic brain injury, dementia, or other ailments that do not fall into the conventional category of mental illness, it may be that the results were somewhat overbroad. However, the total number of those prisoners suffering exclusively from ailments that are not classic mental illnesses but ones that would make them trust beneficiaries is very low. The Mental Health Trust Study identified only 431 trust beneficiaries with traumatic brain injury or features of fetal alcohol syndrome out of 11,000 prisoners qualifying as trust beneficiaries – less than 4% of those identified. *Id.* at 16. Most illnesses classified as Axis I disorders are what lay people consider mental illnesses (depression, anxiety, schizophrenia, etc.). Only 2.8% of the prisoners identified as having a diagnosis qualifying them for beneficiary status had an Axis II (a personality disorder) or Axis III (a medical diagnosis such as a traumatic brain injury or fetal alcohol syndrome) disorder but no Axis I disorder, although 4.7% of prisoners were identified as beneficiaries even though they were described as having "no diagnosis" for reasons that are unclear. Hornby Zeller Associates, Alaska Mental Health Trust Beneficiary Study, Part II: An Analysis of Alaska Department of Corrections Databases, at 23 *available at* [http://www.hornbyzeller.com/Projects\\_files/AK%20DOC%20Phase%20III%20Part%20I%20Report%20FINAL.pdf](http://www.hornbyzeller.com/Projects_files/AK%20DOC%20Phase%20III%20Part%20I%20Report%20FINAL.pdf).

274 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 41 ("Approximately 62 percent of Trust Beneficiaries in the Alaska Department of Corrections were identified from sources provided by the Department of Health and Social Services as opposed to databases maintained by the ADOC. Most of these had Axis I substance-related disorders and generalized mood disorders such as depression. Only a small proportion of Trust Beneficiaries with severe mental disorders such as schizophrenia or other psychotic disorders were identified as not having been known to both agencies."). 29% of those prisoners not shared between the two databases had a mood disorder, such as depression. 21% had an anxiety disorder. Only 2% had schizophrenia as a diagnosis, and only 3% had psychosis as a diagnosis. *Id.* at 41 [chart].

275 *Id.* at 32 ("On the whole, Trust Beneficiaries with severe mental illness were less likely to recidivate than Trust Beneficiaries with mild mental illness or substance-related disorders who had a far higher rate of recidivism.").

276 The Department reports that these suicides reported no mental health history and denied any suicidal intention. As stated below, the initial intake form did not include a mental health history query, however.

states that these deaths were not suicides.<sup>277</sup> Since the Department refuses to release the records relating to these deaths because of privacy concerns, the ACLU of Alaska cannot say whether these individuals were properly diagnosed with or treated for mental illnesses or not.

In Alaska, the suicide rate is hard to compare to national standards, because of Alaska's mixed jail and prison system. In local jails nationwide, the rate of suicide was 47 per 100,000 detainees in 2002, while in state prisons the rate of suicide was 14 per 100,000 prisoners.<sup>278</sup> Between 2001 and 2006, the average prisoner suicide rate was 23 per 100,000 prisoners in Alaska; lower than the average jail suicide rate and higher than the average state prisoner rate.<sup>279</sup> Compared to the state prison standard, one should expect less than one suicide per year in a state prison system of 4,400 prisoners.<sup>280</sup> Compared to the local jail statistics, one would expect two suicides per year in a local jail system of 4,400 prisoners. Recently, the state has had years with no suicides, some with only one suicide, and some with two suicides. In 2008, the prison system experienced four suicides – a number as high as any year in the last 25 years. At the time of preproduction of this report, only one prisoner suicide has been reported in 2009. While the four suicides in 2008 may have been an anomaly, the four suicides in 2008 were four suicides too many. The state of Alaska should not wait to see if future years compound the problem of prisoner suicides but re-examine its suicide prevention protocols today.

#### **a. The Intake Screening Process and Form**

The National Commission on Correctional Health Care – the organization that sets the national standard for corrections health care certification – has said that the procedures defined for initial screening of prisoners “might well be the most important of all [health care] standards.”<sup>281</sup> Failing to identify a prisoner with serious medical or mental health needs can cause serious health problems, suicides, untreated substance withdrawal, etc. Within 24 hours of admission to any prison in Alaska, a medical professional – usually a nurse – should conduct an evaluation of the prisoner's mental and physical health, using

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277 An ADOC report listing general causes of death for some prisoners was compared against admissions dates listed in court records and, where relevant, media accounts of the deaths. Alaska Department of Corrections, Deaths in Custody: 2000-07; “Inmate Dies Days After Suicide Attempt,” FAIRBANKS NEWS-MINER, March 13, 2007 (indicating that a prisoner attempted suicide about 10 days after admission to Fairbanks Correctional Center and died after a week in the hospital).

278 Bureau of Justice Statistics, Dep't of Justice, Suicide and Homicide in State Prisons and Local Jails *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf>.

279 Bureau of Justice Statistics, Dep't of Justice, Deaths in Custody Statistical Tables: State prison deaths 2001-2006, Table 13, *at* <http://www.ojp.usdoj.gov/bjs/dcrp/tables/dcst06spt13.htm>.

280 Multiplying the 14 per 100,000 times a prison population of 4,400 would give you a rate of 0.6 suicides per year – which would lead one to expect three suicides every five years.

281 National Commission on Corrections Health Care, *The Most Important Standard: Receiving Screening*, CORRECTCARE at 21 (Summer 2004), *available at* <http://www.ncchc.org/resources/spotlight/18-3.html>.

the Criminal Remand Screening Form with a prisoner.<sup>282</sup> The first page of the form used at the time of booking consists mostly of basic questions relating to rough impressions of the prisoner's conditions. The second page of the form presents a short health screen. The provider takes a set of vital signs, assesses the patient, and takes a medical history.

Subsequent to the release of the Mental Health Trust report and its recommendation to change the screening process, the Department of Corrections experienced four prisoner suicides in 2008, more than in any year this decade; a further prisoner suicide took place in January 2009.<sup>283</sup> The Department does report that the intake form is being revised; however, almost two years have passed since the Mental Health Trust report recommended the revisions and no new form has yet been released. The inadequacy of the screening process had also been discussed publicly years earlier.<sup>284</sup> Several intake forms shown to have good success already exist and could easily be adapted for use in the Department.<sup>285</sup>

The intake form in its current form omits several important questions.<sup>286</sup> Among the most important questions omitted from the three-page screening form are simple ones like: Do you have a mental illness?<sup>287</sup> Have you ever been diagnosed with any mental illnesses? Have you ever been hospitalized for mental illness? Do you now or have you ever taken

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282 Alaska Department of Corrections, Policy 807.14 & Criminal Remand Screening Form 807.14A. Non-criminal detainees – those held in preventive detention as a danger to themselves or others or for intoxication – are screened with a similar intake form. Alaska Department of Corrections, Title 47 Screening Form, 807.14B.

283 Alaska Department of Corrections, Deaths: 2000-2007; Demer, Lisa, "Kenai Prisoner Dead in Apparent Suicide," ANCHORAGE DAILY NEWS, Jan. 14, 2009 ("In 2008, there were four suicides in Alaska's prisons and jails."). The four suicides in 2008 were more than the Department had experienced in many years. Since January 2009, however, no further suicides had been reported as of the prepublication date.

284 Moras, Antonia, *Mentally Ill Inmates in Alaska Prisons*, 21 UAA JUSTICE FORUM 3 (Spring 2004) ("Moreover, screening at intake can be inadequate for identifying the mentally ill, leading to lags in providing treatment and medication.").

285 For instance, one recent study commissioned by the Department of Justice adapted existing jail screening instruments for the booking process and streamlined the process of evaluation to only two and a half minutes, while still properly flagging more than 70 percent of male inmates and 60 percent of female inmates needing treatment. The assessment relies on yes-or-no answers from the prisoners and not on the subjective impression of overworked, non-specialist medical staff. Osher *et al.* "Validating a Brief Jail Mental Health Screen, Final Technical Report," (2006) available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213805.pdf>. According to a Department representative, the proposed form includes the Brief Jail Mental Health Screen.

286 Comparing the criteria listed on the standard intake form with the criteria recommended in an appropriate medical text for consideration on admission to a jail on a standard interviewing form, the Criminal Remand Screening Form omits: recent or past surgery, kidney disease (including that requiring dialysis), use of any assistive devices (cane, wheelchair, CPAP, etc.), cancer, epilepsy, history of psychiatric medications, and history of psychiatric hospitalizations. Raba, John M., *Intake Screening and Periodic Health Examinations* in CLINICAL PRACTICE IN CORRECTIONAL MEDICINE (2006), at 45-46. The implications of omitting these basic health questions should be obvious; a prisoner at risk of experiencing seizures or missing needed dialysis could be exposed to serious health risks in the general population in a prison setting. Most, though not all, questions omitted would be covered in the later health screening; however, prisoners should not have to miss out on dialysis or other needed medical care for the two-week period they may wait for the follow-up screening. Alaska Department of Corrections, Policy 807.14 available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.14.pdf>; Alaska Department of Corrections, Health History Form 807.14D, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.14d.pdf>.

287 "Standards for screening and assessment developed by several national organizations suggest that, as with other acute medical conditions, mental health and substance abuse issues need to be identified immediately on entry into a correctional facility." National Institute of Corrections, United States Department of Justice, EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT, 2004, at 13.

any psychiatric medications?<sup>288</sup> The screening form does include a very basic Mental Status Examination, in which the health care worker is asked to evaluate the prisoner's appearance and mood and is asked whether the prisoner is experiencing hallucinations or homicidal or suicidal thoughts. The nursing instructions simply tell the providers to conduct "direct observation[s] of the prisoner" and to check the appropriate boxes.<sup>289</sup> Such instructions do not give sufficient guidance to a typical registered nurse or licensed practitioner nurse to determine whether someone needs mental health care.

Following the initial admission to the prison, prisoners are supposed to get a more thorough medical evaluation within fourteen days.<sup>290</sup> According to that evaluation form, the prisoner is at this point first asked whether he or she has a mental illness.<sup>291</sup> However, the failure to ask this question at initial intake may leave prisoners with a history of mental illness without treatment for fourteen days, which could present a greater risk for suicide among those with unidentified mental illness. 41% of all prisoners identified as having a mental illness have a history of at least one suicide attempt.<sup>292</sup> Since 2004, at least three prisoners have committed suicide within fourteen days of their admission to the Alaska prison system, and two more have died under indeterminate circumstances or of a drug overdose within a few days of admission to the Alaska prison system, although the Department indicates that the overdoses were

The National Commission on Correctional Health Care – the organization that sets the national standard for corrections health care certification – has said that the procedures defined for initial screening of prisoners “might well be the most important of all [health care] standards.”

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288 Asked these basic questions, 35% of prisoners interviewed for this report indicated that they had a mental illness or had received treatment for a mental illness – not far off the 34% of prisoners identified with a mental illness in the prison population. Alaska Judicial Council, *Alaska Felony Process: 1999*, at 66; Alaska Mental Health Trust, *A Study of Trust Beneficiaries in the Alaska Department of Corrections*, at 8. While the authors do not claim scientific significance, as the sample of prisoners polled was not random, these results are suggestive.

289 The nursing protocols for conducting the mental health evaluations indicate simply that the provider should conduct “the Mental Health Screening by direct observations of the prisoner. Check all criteria under the following categories that apply to the prisoner: Appearance, Attitude, Motor Behavior, Speech, Mood/Affect, Cognitive, Thought Processes, Thought Content, Hallucinations.” Alaska Department of Corrections, “Nursing Protocols 2.4: Criminal Remand Screen.” This protocol provides no further guidance as to how a nurse should assess a prisoner’s affect or mood or cognitive process, or which responses should be most concerning, or how many abnormal responses should cause a provider to seek follow-up with mental health staff. By contrast, the Department provides more specific instructions on far rarer conditions, such as care of eye prostheses. Alaska Department of Corrections, “Nursing Protocols 2.21: Care of Eye Prostheses.” Many excellent medical tracts are available that describe detailed methods for evaluating mental state. See, e.g., David C. Martin, *The Mental Status Examination* in *CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS* (Walker *et al.* eds.; 3d Ed. 1990).

290 Alaska Department of Corrections, “Health Examinations,” Policy 807.14(d).

291 Alaska Department of Corrections, “Health History Form,” 807.14D.

292 Hornby Zeller Associates, *Alaska Mental Health Trust Beneficiary Study, Part II: An Analysis of Alaska Department of Corrections Databases*, at 21 available at [http://www.hornbyzeller.com/Projects\\_files/AK%20DOC%20Phase%20III%20Part%20II%20Report%20FINAL.pdf](http://www.hornbyzeller.com/Projects_files/AK%20DOC%20Phase%20III%20Part%20II%20Report%20FINAL.pdf).

not suicides.<sup>293</sup> The secondary health screening received 14 days after admission solely relies upon self-reporting of the individual's history. The secondary health screening contains only the one mental health question, asking whether someone has ever been treated for mental illness. The form does not encourage any further analysis of the individual's mental state. Prisoners do not see a mental health professional as a matter of course for a mental health evaluation; the only required mental health evaluation is typically conducted by a nurse who may have little mental health training.

The Mental Health Trust has observed a substantial gap between the prisoners diagnosed by the prison system as actually being mentally ill and those who have previously received mental health services and recommended a review of the screening process. Concerns described here about the current screening form, the instructions provided for providers, and the low level of mental health expertise for the providers who conduct the screening may illustrate some of the problems with the screening process.

### 3. Suicide Precautions

Even for those prisoners targeted as in need of suicide precautions, some of the treatment provided is inappropriate or ineffective. Prisoners interviewed by the ACLU of Alaska who reported on their treatment after being identified as suicidal (or in some cases after unsuccessful suicide attempts) reported almost universally that they were placed in seclusion, either in a segregation unit or in an intake cell.<sup>294</sup> Some of these prisoners reported that their clothes and belongings were removed. Some wore only a "suicide smock" – a one-piece garment designed in such a way that a prisoner cannot form a noose with it. The prisoners generally reported spending five to ten days in seclusion, with little human contact, with no means to pass the time spent in seclusion, and without receiving any ongoing treatment – neither talk therapy nor medication. After five to ten days, a mental health worker would visit them and ask them if they still felt like hurting themselves.<sup>295</sup> The prisoners interviewed all reported being released from seclusion after simply denying any suicidal intentions. None – even those who actually attempted suicide – reported receiving follow-up counseling after release from seclusion.

Numerous mental health authorities strenuously emphasize that suicidal prisoners

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293 An ADOC report listing general causes of death for some prisoners was compared against admissions dates listed in court records and, where relevant, media accounts of the deaths. Alaska Department of Corrections, Deaths in Custody: 2000-07; "Inmate Dies Days After Suicide Attempt," FAIRBANKS NEWS-MINER, March 13, 2007 (indicating that a prisoner attempted suicide about 10 days after admission to Fairbanks Correctional Center and died after a week in the hospital).

294 The Department does not track statistics on how many prisoners are identified as suicide risks or what precautions are provided for them.

295 The official policy of the Department of Corrections is that prisoners should be visited daily by a mental health professional. Alaska Department of Corrections, Suicide Prevention and Awareness: Policy 807.20, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.20.pdf>. Prisoners' anecdotal reports did not indicate such frequent interaction with mental health staff while in segregation.

should not be placed in seclusion unless subject to continual monitoring. Continual monitoring includes, for instance, being viewed through a full-length glass window; however, periodic checks, such as those performed every 15 minutes, do not meet a “continual monitoring” standard.<sup>296</sup> The NCCHC states that potentially suicidal prisoners should generally be “housed in general population, mental health unit, or medical infirmary, and located in close proximity to staff.”<sup>297</sup> The National Institute of Corrections – a research unit for the U.S. Department of Justice – stated the case against isolation of suicidal prisoners even more strongly: “One of the most important and consistent findings in suicide prevention research is the strong correlation between segregation and successful suicide. Overwhelmingly consistent research shows that isolation should be avoided whenever possible.”<sup>298</sup> The APA argues that suicidal depression should be a contraindication for segregation.<sup>299</sup> The relationship of seclusion to suicide is twofold: first, seclusion can give a prisoner the privacy needed to commit suicide successfully without interruption from a guard or another prisoner; second, the experience of seclusion “may cause extreme stress for a mentally ill person and can promote decompensation and exacerbate the illness.”<sup>300</sup>

In contrast to the national consensus against seclusion of suicidal prisoners without continual monitoring, the suicide prevention policy allows two housing options for a suicidal prisoner: “in general population with other prisoners, observed and closely supervised by staff” or placement in a “single cell/segregation” with close supervision which “may include” periodic checks every five to fifteen minutes, the use of restraints, or the use of a camera to observe the prisoner.<sup>301</sup> While the practice of 5 to 15 minute periodic checks fails to meet the national guidelines, review of prisoner medical records raised concerns that even the Department’s standards were not being met. In two cases not submitted for comment to the Department of Corrections, periodic checks were ordered by mental health providers and performed in either 30 minute or one hour intervals. In contrast to Alaska policy, the NCCHC states that observation by camera is not a substitute for in-

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296 A study of suicides in mental hospitals found that frequent but intermittent checks, e.g., five times an hour, were ineffective in preventing suicides. Paton, Jo & Jenkins, Rachel, *Suicide and Suicide Attempts in PRISON*, IN PREVENTION AND TREATMENT OF SUICIDAL BEHAVIOR, at 321 (2005, Oxford Press; Hawton ed.).

297 National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 102 (2008).

298 National Institute of Corrections, United States Dep’t of Justice, *EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT*, at 48 (2004).

299 *Id.* at 42 (“Inmates in current, severe psychiatric crisis, including but not limited to acute psychosis and suicidal depression, should be removed from segregation until they are able to psychologically tolerate segregation.”).

300 *Id.* at 41. See also Hayes, Lindsay M., *Technical Assistance Report on Suicide Prevention Practices Within the Massachusetts Department of Corrections* (“In determining the most appropriate location to house a suicidal inmate, there is often the tendency for correctional officials in general to physically isolate and restrain the individual. These responses may be more convenient for staff, but they are detrimental to the inmate. The use of isolation not only escalates the inmate’s sense of alienation, but also further serves to remove the individual from proper staff supervision.”) available at [http://www.mass.gov/Eeops/docs/doc/hayes\\_ma\\_doc\\_report.pdf](http://www.mass.gov/Eeops/docs/doc/hayes_ma_doc_report.pdf).

301 Alaska Department of Corrections, *Suicide Prevention and Awareness: Policy 807.20*, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.20.pdf>.

person observation.<sup>302</sup> The policy conflicts with the national standard and leaves suicidal prisoners an unacceptable window of time in which to commit suicide outside the observation of officers. Neither does the policy indicate that seclusion is the “last resort” that research and standards-makers describe. While the Department does not track the use of suicide precautions, the anecdotal reports of prisoners on suicide watch suggest that seclusion is frequently used as a response to potential suicide.

The procedures designated for supervision of the suicidal prisoner also raise concerns. Perhaps one reason why each suicidal prisoner reported placement in segregation – rather than in general population, closely monitored by staff – is that the only form provided for mental health providers presupposes placement in segregation.<sup>303</sup> While the suicide prevention policy theoretically permits the housing of suicidal prisoners in general population “observed and closely supervised by staff,” the policy does not describe the meaning of how suicidal prisoners should be “observed and closely supervised by staff”: should staff check on prisoners every 15 minutes? Every hour? During the day or just at night? Do staff members need to record their observations? The policy gives no guidance for what constitutes minimal observation. While each case is different, failing to set some minimum threshold of care leaves open the possibility that suicidal prisoners in general population will get no special observation at all.

The suicide precautions form also allows the provider to order “hard” restraints such as metal shackles and hard plastic cuffs,<sup>304</sup> even though such restraints are not appropriate for use as a therapeutic restraint.<sup>305</sup> A Department spokesperson indicated that hard restraints are used only for prisoners for whom soft restraints are not appropriate, giving the example of a prisoner who attempted to chew through his soft restraints. While the ACLU of Alaska recommends the Department should wholly prohibit the use of hard restraints in keeping with NCCHC guidelines, the protocols for use ought, at minimum, to be revised to limit the use of hard restraints to a last resort for prisoners who have escaped from soft

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302 “Other supervision aids (e.g., closed circuit television, inmate companions or watchers) can be used as a supplement to, but never a substitute for, staff monitoring.” National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 102 (2008). The Director of Psychiatric Services for the Missouri Department of Corrections observed, based on his experience, that: “[t]hrough video monitoring is an excellent tool for ensuring uninterrupted observation, it may not be as effective as the direct personal observation by staff.” Daniel, Annaseril E., *Preventing Suicide in Prison: A Collaborative Responsibility of Administrative, Custodial, and Clinical Staff*, 34 J. AM. ACAD. PSYCHIATRY LAW 164 (2006).

303 The appropriate form begins “This prisoner is hereby recommended for *placement in segregation* by a mental health or medical professional.” (emphasis added) Alaska Department of Corrections, Suicide Precautions: Policy 807.20a, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.20a.pdf>.

304 The precautions form provides a check box for “hard” under the heading of “restraints.” Alaska Department of Corrections, Suicide Precautions: Policy 807.20a, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.20a.pdf>. The Department’s official restraint policy, referred to in the suicide prevention policy, Policy 807.20 (“use of therapeutic restraints per policy 807.03”), does not indicate that hard restraints are prohibited, and even cites “plastic leg and wrist cuffs” as appropriate restraints. Alaska Department of Corrections, Use of Restraints and Seclusion for Therapeutic Purposes: Policy 807.03, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.03.pdf>.

305 “Metal or hard plastic devices (such as handcuffs and leg shackles) are not used for clinically ordered restraint.” National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 124 (2008).

restraints.

A better option for managing prisoners at risk for suicide would be to house them in a single open unit of the prison, specially designed or adapted to limit physical opportunities for successful suicide (such as protruding objects upon which a prisoner could hang himself or stairs and balconies a prisoner could throw himself from), specially staffed with more correctional officers trained to manage suicidal prisoners.<sup>306</sup> One of the difficulties presented by the crowding situation, of course, is that remedies of this sort become harder and harder to accomplish when facilities must hold more than their designed capacities since no extra space can be found.<sup>307</sup> Three facilities have sub acute mental health units which could be adapted to this purpose: Palmer, Hiland, and Spring Creek. However, prisoner reports indicate that, even in those institutions, segregation is still used to house suicidal prisoners, at least in some cases, instead of the sub acute units. The suicide prevention policy of the Department does not offer a sub acute unit or other special housing unit as an option for housing a suicidal prisoner.

Another difficulty with the existing suicide prevention policy is that, using isolation as the primary means to prevent suicide, the prison system has limited options in responding to a prisoner who is not so acutely suicidal that he needs continual supervision, but who may not be entirely well. Two recent cases – a prisoner who killed himself several months after admission by leaping off the second tier of his housing unit and a prisoner who hanged himself on a towel rack in his cell – both highlighted this concern. Both prisoners had caught the attention of the prison mental health services as presenting a suicide risk. Yet both were living in general population and both took advantage of the freedom provided there – in one case, the open second tier; in another, the privacy of his cell and a towel rack – to kill themselves. One could readily understand that prison mental health authorities would be unwilling to house these men indefinitely in segregation until they could be “sure” that the risk of suicide was reduced: for one, that period of time could be very lengthy; for another, the experience of isolation could have worsened the symptoms and deprived the prisoners of constructive opportunities in general population, such as employment, that would help them recover. Providing prison administrators and mental health staff with a third option – housing not as restrictive as segregation but allowing improved monitoring and physical safety for at-risk prisoners – may prevent future suicides by prisoners in the same position. Not only is segregation contraindicated by prison research as a housing option for suicidal prisoners, it is a clumsy tool for response to a

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306 The NCCHC states that suicidal prisoners should not be placed in seclusion, except where continually monitored, and instead recommend such prisoners be housed “in general population, mental health unit, or medical infirmary, in close proximity to staff” where cells have been made “as suicide-resistant as possible (e.g., without protrusions of any kind that would allow hanging).” National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 102 (2008).

307 “An overcrowded and short-staffed prison is likely to increase suicide risk due to lack of access to medical care, increase in assaults, lower staff-offender ratio, lack of opportunity for activity, lack of food and clothing, unwanted interactions, and rapidly changing social structures within the prison.” Daniel, Annaseril E., *Preventing Suicide in Prison: A Collaborative Responsibility of Administrative, Custodial, and Clinical Staff*, 34 *J. AM. ACAD. PSYCHIATRY LAW* 164 (2006).

whole spectrum of prisoners at risk of suicide.<sup>308</sup>

Prisoners described the hardships associated with suicide precautions: the deprivation of property and clothing, the provision of only a “suicide smock” – designed not for warmth or comfort, but to prevent use in a hanging – in a cold cell, laying on a mattress on the floor, a lack of human contact, and (in some cases) no visitation, as a punitive environment to be escaped, rather than a therapeutic one encouraging recovery.<sup>309</sup> Prisoners on administrative segregation as a protective measure (as in protective custody or on suicide watch) have been observed at some facilities escorted in manacles and handcuffed to the wall during attorney interviews, just like prisoners held in segregation as a danger to the facility or prisoners held for punitive reasons – even though these prisoners are not accused of assaults or believed to be more dangerous than the average prisoner. Numerous prisoners indicated that, after staying for days in segregation, they told mental health workers that they no longer wished to harm themselves primarily so that they could escape isolation, rather than indicating actual improvement in their condition. Creating an environment that feels punitive to prisoners may encourage them to state falsely that the risk of suicide has passed.

At least as important for managing suicidal prisoners as the physical housing of the prisoners is the treatment regimen for suicidal prisoners, including treatment both during the suicidal period and follow-up afterwards.<sup>310</sup> All of the prisoners reporting placement in segregation for suicide risk denied receiving any treatment – either pharmaceutical or talk therapy – while in segregation; all reported receiving no follow-up counseling after release from segregation, even those who had actually attempted suicide. A Department representative indicated correctly that the Department protocols require that a mental health provider should visit a prisoner at least every 24 hours.<sup>311</sup> However, this practice was contradicted by prisoner accounts. Review of two prisoner medical files – not shared with the Department for comment in the absence of releases – revealed that only one of the prisoners received daily visits, while the other went four days before the first visit from

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308 In a comprehensive review of suicide procedures in the Massachusetts prison system after a rash of prisoner suicides, an expert retained by the department recommended that the department create “transitional” housing to ease prisoners’ return from suicide watch cells. Hayes, Lindsay M., *Technical Assistance Report on Suicide Prevention Practices within the Massachusetts Department of Corrections*, available at [http://www.mass.gov/Eeops/docs/doc/hayes\\_ma\\_doc\\_report.pdf](http://www.mass.gov/Eeops/docs/doc/hayes_ma_doc_report.pdf).

309 One of the conclusions of the review of the Massachusetts prison system was that housing on suicide watch tended to carry punitive connotations, particularly in the denial of telephone contact and visits. Hayes, Lindsay M., *Technical Assistance Report on Suicide Prevention Practices within the Massachusetts Department of Corrections*, available at [http://www.mass.gov/Eeops/docs/doc/hayes\\_ma\\_doc\\_report.pdf](http://www.mass.gov/Eeops/docs/doc/hayes_ma_doc_report.pdf).

310 The NCCHC suggests that mental health providers should seek to address the “underlying reasons . . . for the suicidal ideation” including “treatment needs when the patient is at heightened risk of suicide as well as follow-up treatment interventions and monitoring strategies to prevent relapse.” National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 102 (2008).

311 Alaska Department of Corrections, *Suicide Prevention and Awareness: Policy 807.20(a)(6)*, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/807.20.pdf>

a mental health practitioner.<sup>312</sup> A lack of treatment for the prisoners most vulnerable to suicide runs a strong risk of successful future suicide attempts.

The overall portrait of suicide precautions depicted by prisoners who had experienced them told a consistent story of the use of segregation as the first and primary recourse of the prison system is corroborated by the suicide policy and accompanying form drafted by the Department which leave little option for other response. The use of segregation to treat suicidal prisoners is roundly criticized by experts in the field as counterproductive. Prisoner accounts of lack of treatment in segregation and after release suggest gaps in treatment for prisoners at risk of suicide. A new procedure to protect prisoners at risk of suicide needs development.

#### 4. Care of the Mentally Ill Prisoner

##### *a. The Scope of Mental Illness in Alaska and Resources for Treatment in the Department of Corrections*

The Department of Corrections has become the primary provider of care to the mentally ill in Alaska.<sup>313</sup>

Despite the enormous population of the mentally ill in custody, relatively few positions are provided for dedicated mental health professionals inside the Department.<sup>314</sup> As a consequence, not a single prisoner reported getting regular group or individual counseling. In combination with the failure to catch many mentally ill prisoners at the time of admission, the level of treatment provided raises constitutional concerns. In a District of Columbia case, a large jail employing only two psychologists who could not even properly screen incoming inmates and could not provide more than basic emergency psychiatric care was found to be so understaffed as to violate the Constitution.<sup>315</sup>

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312 The circumstances and substance of the prisoner interviews raise concerns about their efficacy. When interviews between a prisoner and the mental health staff occur, they tend to be brief and the scope of the interviews limited. The interviews are also typically conducted through an opening in the cell door, typically the meal slot, which denies patient privacy and calls into question the utility of the visits. It is possible that some prisoners actually received these visits from mental health counselors and, not recognizing these interviews as treatment, reported that they received no treatment.

313 The number of beds available for mental health treatment in Alaska outside the prison system has declined from 220 beds to 76 in 2006. Alaska Mental Health Trust, *A Study of Trust Beneficiaries in the Alaska Department of Corrections*, at 2.

314 The proposed 2010 budget for the Department of Corrections requests funding for 41 mental health professionals – including 2 forensic psychologists, 30 mental health clinicians, 7 mental health nurses, 6 psychological counselors, and one social worker. Six of those providers work in the community, not at a prison.

315 *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 863 [D.D.C. 1989] (“Any initial screening that occurs is at the D.C. Jail and this is not done by mental health professionals. [A jail psychologist] believes that there is a high probability that there are people in need of mental health services at Occoquan that no one knows about due to the lack of screening.”) [citations omitted]; *id.* (indicating that one of the two psychologists was “struggling to give merely emergency service”).

Prisoners suffering in acute psychiatric crisis are housed primarily at the Mental Health Unit at Hiland Mountain Correctional Center and “Mike Mod” at the Anchorage Correctional Complex, which hold a maximum of 46 prisoners. Three sub acute units house prisoners with special mental health needs at Spring Creek, Palmer, and Hiland Mountain, for a total of 105 sub acute beds. These facilities have on-duty mental health staff and provide an environment where mentally ill prisoners can feel safe and not worry about being attacked by other prisoners. About 1,400 to 1,500<sup>316</sup> prisoners in Alaska have been diagnosed with a mental illness.

A recent report from the Department of Corrections to the Alaska Mental Health Board described the acute care units as “almost always at capacity and too often over capacity,” a crowded condition which turned the treatment units “into stabilization units.”

The mental health staff in Alaska is primarily employed to staff the two acute modules at Hiland Mountain and the Anchorage Complex – 11 mental health nurses, a dual-diagnosis counselor, two psychiatrists, and an advanced nurse practitioner provide care at the two facilities. In addition, four clinicians provide care exclusively at “Mike Mod” in Anchorage, while three clinicians at Hiland Mountain serve both the acute unit and the rest of the facility. At Palmer<sup>317</sup> and Spring Creek, two and four clinicians, respectively, provide care to the prisoners in the sub acute unit as well as the rest of the population. The remaining facilities without an acute or sub acute unit have small staffs of clinicians to manage the prisoners with mental health problems at the local facility: three clinicians at Anchorage Jail, two at

Wildwood, one each at Lemon Creek, Cook Inlet Pretrial (for the prisoners not in “Mike Mod”), Fairbanks, and Yukon-Kuskokwim (part-time only). Anvil Mountain and Ketchikan have no regular mental health staff, although, as at other facilities, prisoners can have 24-hour a day telemedicine consults with a psychiatrist in Anchorage or can get services from contract providers in local hospitals as needed.

Given the scope of the mental health problems in the Alaska prison system where approximately one in three prisoners have been diagnosed with a mental illness and the limitations of acute and sub acute care to 150 beds, only eight clinicians are tasked with the care of the population outside acute and sub acute beds at six institutions; a further 11 clinicians are jointly assigned to care for the prisoners on sub acute units and the general

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316 While true measures of the degree of mental illness in the prison system are challenging to reconstruct, common estimated figures for the mentally ill in Alaska prisons have run around 34%, meaning that one in every three prisoners suffers from a mental illness. Alaska Judicial Council, *Alaska Felony Process: 1999*, at 66; Alaska Mental Health Trust, *A Study of Trust Beneficiaries in the Alaska Department of Corrections*, at 8. One-third of the prison population in Alaska at any one time would be about 1,400, counting out-of-state prisoners, since the total prison population counting prisoners in and out of state rarely drops below 4,200. Since Red Rock Correctional Center in Arizona does not accept seriously mentally ill individuals, most mentally ill prisoners will be incarcerated in Alaska.

317 The clinicians at Palmer also serve the Mat-Su Pretrial Facility.

population at four institutions. Two psychiatrists and an advanced nurse practitioner are responsible for supervision of the acute care modules, but provide some care for prisoners in general population.

No matter how competent and committed the mental health staff of the Department may be, the limited resources for provision of mental health care cannot meet the needs of 1,400 or more prisoners diagnosed with mental illnesses.<sup>318</sup> The responsibilities of these providers include evaluations of prisoners with signs of mental illness, crisis intervention, group and individual therapy, and release and treatment planning, for the 1,200 or more mentally ill prisoners not in the acute or sub acute units. What is hard to measure is how hard it is to keep up with the burdens of the position.<sup>319</sup> Professionals familiar with the mental health system in the facilities indicate that resources are inadequate for meeting the needs of mentally ill prisoners.<sup>320</sup> Particularly, the lack of counseling and sub acute care has been targeted as areas of concern.<sup>321</sup> A recent report from the Department of Corrections to the Alaska Mental Health Board described the acute care units as “almost always at capacity and too often over capacity,” a crowded condition which turned the treatment units “into stabilization units.”<sup>322</sup> The sub acute units were described as constantly full.<sup>323</sup> The reports of prisoners interviewed for this report corroborate these reported gaps in treatment. Prisoners who requested talk therapy sessions reported being unambiguously told, “We don’t do that here.” Other prisoners who reported serious mental health problems described being unable to obtain care or being refused further treatment after a brief consultation. Since basic statistics about how many prisoners in general population are receiving care and of what kind are either not tracked or, if tracked, were not relayed to the ACLU of Alaska after request, it is difficult to assess the adequacy of the staffing at these facilities in any other way.

The resource and treatment gap within the prison does not compare to the resource and treatment gap on the other side of the prison gates. Between 1990 and 2000, the number

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318 In a one day census, the Mental Health Trust found 1,524 prisoners diagnosed with a mental illness in custody on June 30, 2006. Alaska Mental Health Trust, *A Study of Trust Beneficiaries in the Alaska Department of Corrections*, at 10.

319 The American Psychiatric Association suggests a ratio of one psychiatrist to 150 patients receiving psychiatric medication. Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, at 95 (2003) available at <http://www.hrw.org/en/reports/2003/10/21/ill-equipped>. Experts in a Washington case recommended a ratio of one psychiatrist for every 200 prisoners with outpatient-level needs, one supervisor psychologist for each institution, one mental health professional for every 75 seriously mentally ill prisoners, and one mental health nurse for every 100 patients. *Id.* The Alaska prison system has a single psychiatrist for all prisoners in the system.

320 “The consensus among professionals working with the mentally ill inmate population is that in Alaska, as elsewhere, staffing and resources are inadequate to meet the needs of this population.” Moras, Antonia, *Mentally Ill Inmates in Alaska Prisons*, 21 UAA JUSTICE FORUM 3 (Spring 2004).

321 “There are not enough sub-acute-care units, and there is little counseling available.” *Id.*

322 Alaska Department of Corrections, Report to the Alaska Mental Health Board & Advisory Board on Alcohol and Drug Abuse, October 19, 2009.

323 *Id.*

of inpatient beds for mental health treatment in Alaska declined from 220 to 79.<sup>324</sup> In many cases, newly-released prisoners struggle on release because they lack options for continuing mental health care outside the prison. For instance, the prisoners released from Anchorage Correctional Complex had the greatest unmet psychiatric needs of prisoners released from any facility in the state, because the volume of those in need of care so far outstripped the resources for care in Anchorage.<sup>325</sup> The Department of Corrections does have six dedicated mental health counselors managing 75-80 mentally ill probationers and parolees in the community, a successful program which reduces recidivism for the participants.<sup>326</sup> The DOC also works in conjunction with the court system and the Department of Health and Social Services to administer the highly successful mental health courts in Anchorage and Palmer, with a total caseload of 120 individuals under supervision.<sup>327</sup> State resources dedicated to programs emulating these successful options are sorely needed for improved access to psychiatric treatment throughout the state to treat parolees and probationers outside the prison system.

#### ***b. Refusal of Psychiatric Medications***

In any individual case, a provider may have a good reason to terminate an ongoing course of medication. Concerns about the efficacy of the treatment, potential for abuse or addiction to the substance, side-effects, and developed tolerance might prompt a provider to end the course of medication. While isolated occurrences of such suspension might be fully consistent with good practice, consistent prisoner reports of the suspension of psychiatric medications upon admission raise concerns. Of the 53 prisoners interviewed who reported having a mental illness, 30 (56% of those reporting a mental illness) stated that they were no longer receiving their medications in prison. Some of the prisoner reports may also be misleading: some prisoners may be recalling the nature of the prescription incorrectly, or may have stopped taking medications some time before admission to the prison, or may otherwise be distorting their history of psychiatric treatment. The Department states that it makes appropriate independent clinical judgments in each case. While the ACLU of Alaska respects the independent judgment of corrections employees, reports that more than half of all prisoners had their medication terminated raise concern and bear future investigation.

Raw pharmacy data provided by the Department of Corrections indicated that Alaska prisoners received the equivalent of 467 year-long antidepressant prescriptions from

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324 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 2.

325 *Id.* at 48.

326 Alaska Department of Corrections, Report to the Alaska Mental Health Board & Advisory Board on Alcohol and Drug Abuse, October 19, 2009

327 *Id.*

November of 2008 through October 2009.<sup>328</sup> The equivalent of 610 year-long mood stabilizer prescriptions – including drugs like lithium used to stabilize prisoners with bipolar disorder – were provided during the same period.<sup>329</sup> The equivalent of 386 year-long psychotropic prescriptions – typically including antipsychotic medications – were provided to prisoners during that same period.<sup>330</sup> It is unclear how many prisoners receive medications from more than one group of psychiatric medications, so the ACLU of Alaska cannot report how many individual prisoners are receiving medications at any one time. Neither is there a clear baseline of how many prisoners *should* be taking psychiatric medications. In order to examine the question more carefully, a thorough review of medical and psychiatric records would have to be conducted.

Several prisoners reported the immediate termination of psychiatric medications on admission to the prison system. Patients taking the most common antidepressants should be weaned off the medication, rather than quitting the medication suddenly.<sup>331</sup> The Department contends that medications requiring “weaning” are titrated appropriately. If prisoners are serving time in custody without proper medication and other forms of treatment, this could put prisoners at risk of self-harm, of harming others, of panic attacks, and of anxiety- and stress-related reactions, and would violate international standards concerning the treatment of the mentally ill and the responsibilities of medical officers to improve the mental health of prisoners.

Moreover, in part due to the improper or delayed health examinations at admission, denial of psychiatric medications often occurs during the prisoner’s arrival at the prison – a time of exceptionally high stress, usually in the face of some lengthy and unknown period of incarceration. The prisoner’s main defense against anxiety and depression is taken away at a time when the prisoner’s susceptibility to anxiety and depression is the highest. Sudden denial of medication at the chaotic time of admission to a jail may destabilize suicidal or other mentally ill prisoners.

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328 Alaska Department of Corrections, Prescription Database [printed 11/4/09] (showing 170,754.5 pills prescribed to prisoners from the pharmacy in the November 2008 to October 2009). 170,754.5 divided by 365 yields the equivalent of roughly 467 year-long prescriptions – assuming that each prisoner received a single tablet as a daily dose.

329 Alaska Department of Corrections, Prescription Database [printed 11/4/09] (showing 222,954.5 mood stabilizer pills prescribed to prisoners from the pharmacy in the November 2008 to October 2009). 222,954.5 divided by 365 yields the equivalent of roughly 610 year-long prescriptions – assuming that each prisoner received a single tablet as a daily dose.

330 Alaska Department of Corrections, Prescription Database [printed 11/4/09] (showing 140,999 psychotropic pills prescribed to prisoners from the pharmacy in the November 2008 to October 2009). 140,999 divided by 365 yields the equivalent of roughly 386 year-long prescriptions – assuming that each prisoner received a single tablet as a daily dose.

331 Rosenbaum *et al.*, Selective Serotonin Reuptake Inhibitor Discontinuation Syndrome: A Randomized Clinical Trial, 15 *BIOLOGICAL PSYCHOLOGY* 77 (1998) (showing sudden interruption of SSRI treatment caused negative psychological effects in patients).

### *c. Inadequate Mental Health Resources and the Cycle of Mental Illness*

The failure to provide adequate or appropriate care for prisoners with mental illness or even to identify those prisoners with serious mental illness puts the functioning of the prison system and the community at risk. Prisoners with serious mental illness will struggle to adapt to prison life under the best of circumstances. In the absence of treatment, they may disrupt prison life by arguing with other prisoners, shouting, making excessive noise, confronting guards, or committing other disruptive acts. The outcome of this behavior is frequently ostracism or abuse from other prisoners and discipline or violence from guards and staff. Prisoners with mental illnesses who suffer abuse from other prisoners will feel more agitated and become more disruptive.<sup>332</sup> Prisoners with mental illnesses who confront guards will often be disciplined by placement in segregation, where the closed environment and lack of human contact will further exacerbate symptoms of mental illness, engendering more and more anxiety and more and more disruptive behavior.<sup>333</sup> Some prisoners will then spiral into absolutely antisocial behavior, throwing feces or taking off their clothing, which will extend their time spent in segregation. Some prisoners will spend years in this downward spiral and ultimately leave prison in far worse condition than how they entered it.<sup>334</sup> They will suck up prison resources, agitate other prisoners with their behavior, and have a strong tendency to reoffend on release. Far too many prisoners in Alaska languish in segregation units with mental illnesses that grow worse and worse with each passing day.

The NCCHC requires that prisoners in extreme isolation get daily observation by medical staff and at least weekly observation by mental health staff, regardless of whether the prisoner has a diagnosed mental illness.<sup>335</sup> The Department reports the implementation of a pilot project to conduct weekly rounds at Anchorage Correctional Complex; expanding this project to detect the development of mental illness in segregation would be a laudable step to comply with national norms.

No one's interests are served by fostering this cycle of destruction: not the prison's, not society's, not the other prisoners', and certainly not those of the prisoner with mental

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332 Bureau of Justice Statistics, Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006) (showing that 58% of mentally ill state prisoners violated facility rules, while only 43% of non-mentally ill prisoners violated facility rules; 20% of mentally ill state prisoners had been injured in a fight, while only 10% of non-mentally ill prisoners were injured in a fight).

333 National Institute of Corrections, United States Department of Justice, *EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT*, at 41 (2004) ("Solitary confinement or extended segregation may cause extreme stress for a mentally ill person and can promote decompensation and exacerbate the illness.")

334 See, e.g., *Inmates of Occoquan*, 717 F.Supp. at 863 (quoting a jail psychologist who indicated that confining the mentally ill to segregation units left prisoners "abandoned to their hallucinations and their delusions ... it makes the illness more difficult to treat, in some cases may make it untreatable"); *id.* (quoting a jail psychologist who indicated that it was "inappropriate and unacceptable from a professional viewpoint to house people with serious mental illnesses" on the segregation unit where prisoners "are locked in their cells for 23 hours a day with no social contact and they receive no treatment except for medication and an occasional visit from the psychologist").

335 National Commission on Correctional Health Care, *STANDARDS FOR HEALTH SERVICES IN JAILS*, at 75 (2008).

illness. The best way to treat prisoners with mental illness while in custody is not to put them in custody at all. This is why diversionary programs like mental health courts are the best practice for accused individuals with mental illnesses. Therapeutic courts have had great success in preventing recidivism at a cost-savings to the justice system.<sup>336</sup> When prisoners with mental illnesses are put in custody, they should be housed in an open housing unit dedicated to prisoners with mental illnesses, with psychiatric staff in the unit who understand the course of a mental illness, in which prisoners live in a community, not in segregation cells.

### ***iii. Recommendations by the ACLU of Alaska on Detection and Treatment of Mental Illness***

In order to provide the care to which mentally ill prisoners are entitled under international, federal, and Alaska law, the ACLU of Alaska recommends that the Department of Corrections ought to:

1. Fully assess inmates upon admission, using a clinically-tested form, taking into consideration each inmate's current health status, medical, mental health and substance abuse history, and medications the inmate is currently taking, in order to make proper decisions regarding the inmate's care and housing;
2. Write clear and precise policy instructions on the use of mental health treatment, care, and segregation, and enforce these instructions, in keeping with the guidelines set forth by the APA and the NCCHC and other standard setting bodies;
3. Provide unique yet non-stigmatizing treatment, facilities, and areas within facilities staffed by trained psychiatrists and designated for inmates facing mental health issues, sufficient to manage the large population of mentally ill prisoners in Alaska;
4. Work with community mental health care providers so that mental health care, especially prescribed medications, for new prisoners can be coordinated with their earlier providers, and so that prisoners awaiting release can transition easily to mental health providers in their own community;
5. Review the status of prisoners who have spent three months or more in segregation units to determine if they suffer from serious mental illness and, if so, to develop a treatment plan to prevent return to segregation; and

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336 In an early evaluation of the efficacy of the Anchorage Mental Health Court, only one of 49 participants had been arrested for a new felony charge, and only 17 had been arrested for a misdemeanor, for an overall 39% recidivism rate. Goldkamp, John S. & Irons-Guynn, Cheryl, Bureau of Justice Assistance, *The Anchorage Mental Health Court in EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE* available at <http://www.ncjrs.org/html/bja/mentalhealth/chap4.html>. This recidivism rate is dramatically less than the 65% indicated in the Alaska Judicial Council's recidivism study. Alaska Judicial Council, *Recidivism in Alaska*, at 24. A more comprehensive review of the mental health court in Anchorage found that participation in mental health court reduced the period of time spent in custody, the number of arrests, and the number of admissions to the Alaska Psychiatric Institute. Alaska Judicial Council, *Court Coordinated Resources Project Evaluation Report* available at <http://www.ajc.state.ak.us/reports/CRPReport.pdf>.

6. Work with mental health facilities like the Alaska Psychiatric Institute to provide care for the prisoners most in need of mental health care and least suited for life inside a correctional institution.

The ACLU of Alaska recommends that the legislature ought to:

1. Promote diversionary programs and treatment courts that foster healthy living in the community for offenders with mental illness, rather than expensive incarceration; and
2. Fund community mental health care programs to serve released prisoners and offenders in the community, as well as to prevent criminality in other individuals with mental illnesses.

## E. Rehabilitation in the Alaska Department of Corrections

### i. Introduction

The prisoners' day will begin at six in the morning in winter and at five in summer. They will work for nine hours a day throughout the year. Two hours a day will be devoted to instruction. Work and the day will end at nine o'clock in the winter and eight in the summer. . . . At twenty minutes to eleven... the prisoners form into ranks and proceed in divisions into the school. The class lasts two hours and consists alternately of reading, writing, drawing, and arithmetic. . . . At half-past seven in the summer and half-past eight in the winter, the prisoners must be back in their cells. . . . The cell doors are closed and the supervisors go the rounds in the corridors, to ensure order and silence.

Léon Faucher, *De la réforme des prisons*, 1838.<sup>337</sup>

Alaska's correctional system has a long history of underfunding rehabilitative programming. Sadly, the underfunding frequently took place in the face of strong expert opinions that funding needed to be increased. In 2000, the University of Alaska Justice Center pointed out that the just under one million dollar budget for rehabilitative programming had not increased in eight years, to the detriment of the rehabilitative programs.<sup>338</sup> In 2001, the Department of Corrections sponsored its own study to gauge the scope of substance abuse problems; the study revealed enormous problems with substance abuse among the prison population, showing that 79% of all prisoners surveyed reported active addiction to alcohol or a drug within 12 months of their date of incarceration.<sup>339</sup> Despite the obvious problem of substance abuse in Alaska and the expert opinion that the rehabilitation budget should be expanded, the Department of Corrections instead requested that the

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337 Faucher, Léon, *DE LA RÉFORME DES PRISONS*, 1838, *quoted in* Foucault, Michel, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON*, 1991.

338 University of Alaska at Anchorage Justice Center, *The Alaska Department of Corrections: The Drug Treatment Picture*, 17 *JUSTICE FORUM* 1, Spring 2000.

339 North Charles Research and Planning Group, *Substance Abuse Treatment Needs of Alaska's Newly Incarcerated Prisoner Population Prior to Incarceration: Final Report*, at 60, *available at* <http://www.hss.state.ak.us/press/pdfs/ak-prisonerfinalreport.pdf>.



Uncuffed [© iStockphoto.com/Paige Foster]

legislature *cut* the rehabilitation budget to almost nothing in 2003.<sup>340</sup>

However, under the new administration, the Department of Corrections has taken heed of the expert opinions and studies – including a recent ISER study showing that the state could save \$300 million over the next 20 years by funding rehabilitative programs and other social services shown to prevent crime<sup>341</sup> – and renewed its efforts to rehabilitate prisoners. The Department has sought over \$2 million in funding over the last two years to initiate rehabilitative programs at numerous facilities throughout the state. Some of these programs have already begun; others are planned. This new direction deserves commendation. However, given prior correctional policies, chronicling the negative effects of the past policy serves as an important reminder of the costs and effects of not providing these services. This report will seek to recognize ongoing efforts to improve rehabilitation, as well as to document the effects of prior policies.

340 FY2004 Governor's Proposed Budget, Department of Corrections, at 6 ("\$1,163,200.00 million of substance abuse programs currently offered by the department will be curtailed with the emphasis placed on facilitating the use of program offerings from community based health organizations, Native Health providers, and 12 step programs.") available at [http://www.gov.state.ak.us/omb/04\\_OMB/budget/DOC/comp1972.pdf](http://www.gov.state.ak.us/omb/04_OMB/budget/DOC/comp1972.pdf). This constituted almost the whole state-funded budget for substance abuse treatment in Alaska correctional facilities, as the RSAT programs were heavily subsidized by the federal government. Bureau of Justice Assistance, Department of Justice, Program Update: Residential Substance Abuse Treatment for State Prisoners (RSAT) Program available at <http://www.ncjrs.gov/pdffiles1/bja/206269.pdf>. The Department has requested partial restoration of \$500,000 of the original substance abuse funding. FY2010 Governor's Proposed Budget, Department of Corrections, Inmate Health Care available at [http://gov.state.ak.us/omb/10\\_omb/budget/DOC/comp705.pdf](http://gov.state.ak.us/omb/10_omb/budget/DOC/comp705.pdf).

341 Martin, Stephanie and Colt, Stephen, The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs? available at [http://www.iser.uaa.alaska.edu/Publications/research-summ/RS\\_71.pdf](http://www.iser.uaa.alaska.edu/Publications/research-summ/RS_71.pdf) (projecting that modest spending on rehabilitative programs could decrease the future prison population and save more than \$300 million over the next 20 years).

In meeting with prisoners who had previously been incarcerated prior to the institution of the new programs, prisoners regularly reported being released right to the streets from a prior stint in custody with no job, no place to live, no way to get medical care, no access to substance abuse treatment. Some prisoners were released to below-zero weather in the middle of winter in Alaska wearing only a sweatshirt and sweatpants. Numerous prisoners told stories of going directly from the prison doors to a homeless shelter. Others reported living on the streets or in abandoned cars immediately after their release. Many prisoners reported returning to substance abuse the same day or the same week as they were released from custody. Most prisoners have a substance abuse problem of some sort, thus substance abuse programs should be available at all facilities.

Numerous prisoners told stories of going directly from the prison doors to a homeless shelter. Others reported living on the streets or in abandoned cars immediately after their release.

Not only is the reinstatement of the rehabilitative programs for prisoners in custody the best way to prevent future victimization, an excellent way to save money on corrections costs, and the right thing to do for the prisoners, the provision of this programming fulfills an important legal obligation of the state. Under the Alaska Constitution, the criminal justice system is based in part on the principle of reformation, which has been interpreted as granting incarcerated inmates the fundamental right to access rehabilitative programs.<sup>342</sup> Through rehabilitation, prisoners have the means to become productive members of society upon their release. The Alaska Constitution places this right to rehabilitation alongside the expressed goals of retributive punishment and public safety. Rehabilitation programs not only benefit prisoners themselves, but also serve to protect the public by treating conditions that cause crime. Leaving unaddressed the underlying societal and individual sources of crime, such as substance abuse and addiction, mental illness, and joblessness, is both counter to Alaska's Constitution and to international law standards.

## *ii. Legal Standards on Rehabilitative Programs*

### **1. International Standards**

Like the Alaska Constitution, international law standards recognize rehabilitation as a fundamental goal of incarceration and an important state responsibility. The International Covenant on Civil and Political Rights (ICCPR) provides that the primary objective of pris-

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<sup>342</sup> Smith v. State, 790 P.2d 1352, 1354 (Alaska 1990); Abraham v. Alaska, 585 P.2d 526, 531 (Alaska 1978).

oner treatment is reformation and social rehabilitation.<sup>343</sup> The Standard Minimum Rules recognize that while imprisonment serves to protect society against crime, this goal can only be achieved if the period of imprisonment is used to ensure that the offender is willing and able to lead a law-abiding and self-supporting life upon return to society.<sup>344</sup> Similarly, the American Convention states that punishments consisting of deprivation of liberty have as the essential aim the reform and social readaptation of the prisoners.<sup>345</sup>

The international standards cited above recognize the need for discipline and order in prisons<sup>346</sup> but limit disciplinary restrictions to those “necessary for safe custody and well-ordered community life.”<sup>347</sup> Creating the space and security for community life is particularly important in facilitating rehabilitation and preparing prisoners for reentry to the community. In recognition of this objective, the Standard Minimum Rules state that the prison should seek to minimize any differences between prison life and life at liberty which may diminish the responsibility or dignity of prisoners as human beings.<sup>348</sup> The Standard Minimum Rules further provide that institutions, in order to achieve rehabilitation and reintegration, should use “all the remedial, educational, moral, and spiritual forces and forms of assistance which are available and appropriate, and should seek to apply them according to the individual treatment needs of the prisoners.”<sup>349</sup> In recognition of the wide-ranging responsibilities implied by the right to rehabilitation, the Standard Minimum Rules recommend that the prison personnel include “a sufficient number of specialists

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343 ICCPR, Art. 10.3 (“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”). See also European Prison Rules, Art. 6 (“All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.”).

344 Standard Minimum Rules, Art. 58.

345 American Convention on Human Rights, Art. 5(6). See also *Garcia-Asto and Ramirez-Rojas v. Peru*, Inter-American Court of Human Rights, (Nov. 2005), at para. 223 (finding that detention conditions were contrary to the essential aim of imprisonment sanctions, which is the reform and social adaptation of prisoners). As previously noted, the United States has signed, but not ratified, the American Convention and is not legally bound by its provisions. The Convention, however, reflects international standards upheld by the majority of member states in the Organization of American States (OAS), to which the United States also belongs. In addition, as a signatory to the American Convention, the United States has an obligation not to defeat the object and purpose of the Convention. Vienna Convention on the Law of Treaties, Article 18(a). As such, an examination of U.S. standards under the Convention is appropriate.

346 Standard Minimum Rules, Art. 27. See also Basic Principles for the Treatment of Prisoners, Principle 4 (“The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State’s other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.”); European Prison Rules, Art. 49 (“Good order in prison shall be maintained by taking into account the requirements of security, safety and discipline, while also providing prisoners with living conditions which respect human dignity and offering them a full program of activities in accordance with Rule 25.”).

347 Standard Minimum Rules, Art. 27.

348 *Id.*, Art. 60.1. See also European Prison Rules, Art. 5 (“Life in prison shall approximate as closely as possible the positive aspects of life in the community.”). As such, the Inter-American Court of Human Rights found that prohibiting prisoners from working, reading, going outside, and receiving visitors amounted to “psychological torture.” *Miguel Castro-Castro Prison v. Peru*, Inter-American Court of Human Rights, para. 328 (Nov. 2006) (finding that the totality of conditions constituted physical and psychological torture in violation of Article 5(2) of the American Convention).

349 Standard Minimum Rules, Art. 59.1.

such as psychiatrists, psychologists, social workers,<sup>350</sup> teachers and trade instructors” to apply the above forms of assistance.<sup>351</sup> As international human rights standards emphasize, the central aim of incarceration is rehabilitation, and prisons should follow this mandate accordingly.

## 2. Domestic Standards

The primary legal authority for treatment programs comes from the Alaska Constitution.<sup>352</sup> The federal constitution does not guarantee the right to rehabilitative programs to adult offenders,<sup>353</sup> except as they are a natural consequent of a medical need (for instance, in response to a medical crisis resulting from drug or alcohol withdrawal).<sup>354</sup> The Alaska Constitution by contrast guarantees that prisoners in custody have access to all sorts of rehabilitative programs, including basic substance abuse programming, visitation, and vocational training.<sup>355</sup>

### iii. Rehabilitation in the Alaska Prison System

#### 1. Substance Abuse Treatment

Prisoners in Alaska suffer from a variety of treatable social problems. Substance abuse is the most prevalent. The Alaska Judicial Council found that about two-thirds of all individuals convicted of a felony in Alaska had an alcohol problem and approximately half had a drug problem.<sup>356</sup> The study further found that more than a third of the persons convicted of a felony were actively under the influence of alcohol at the time of the offense.<sup>357</sup> According to a 2001 study by the Department of Corrections, over 90% of all prisoners surveyed reported having a substance abuse problem at some point in their lives.<sup>358</sup> 79% of those prisoners reported an active substance abuse problem within 12 months of their

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350 According to the Rules, States should provide social workers at each institution; the role of social workers is to assist prisoners in “maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies,” emphasizing the prisoner’s continuing role with the greater community. *Id.*, Art. 61.

351 Standard Minimum Rules, Art. 49.1.

352 Alaska Const., Art I, sec. 12

353 *Marshall v. U.S.*, 414 U.S. 417, 421 [1974]; *Battle v. Anderson*, 564 F.2d 388, 403 (10<sup>th</sup> Cir. 1977).

354 *Dawson v. Kendrick*, 527 F.Supp. 1252, 1272-73 [D. W. Va. 1981]

355 *Abraham v. Alaska*, 585 P.2d 526, 531 [alcohol treatment]; *Ferguson v. Dep’t of Corr.*, 816 P.2d 134, 140 [Alaska 1991] [vocational program]; *Brandon v. Dep’t of Corr.*, 938 P.2d 1029, 1032 [family visitation].

356 Alaska Judicial Council, *Alaska Felony Process: 1999*, at 10.

357 Alaska Judicial Council, *Alaska Felony Process: 1999*, at 65.

358 North Charles Research and Planning Group, *Substance Abuse Treatment Needs of Alaska’s Newly Incarcerated Prisoner Population Prior to Incarceration: Final Report*, at viii.

most recent arrests.<sup>359</sup>

The nexus of substance abuse with incarceration is enormous. Over 600 prisoners in the Alaska prison system are in custody simply for drug or alcohol offenses like drug possession or driving while intoxicated.<sup>360</sup> More than 700 prisoners are in custody for violations of probation or parole.<sup>361</sup> In the course of interviewing prisoners, almost every single prisoner who had been returned to prison simply for violating the terms of probation or parole had violated the probation or parole by relapsing into a drug or alcohol addiction. These prisoners were either charged with directly violating the prohibition on alcohol or drug use, or charged with failure to report to the assigned probation or parole officer, which is a common result of substance abuse.

From 2003 to 2007, the lack of sustained, quality treatment programs for prisoners had wide-ranging implications for the community as a whole. Failure to provide programming in the prisons and jails means that a large population returns to their communities untreated and are likely to return to prison at some point. In Alaska, two-thirds of all prisoners released from custody return to prison within three years, either for violation of the terms of probation or parole, or on new charges.<sup>362</sup> In the survey for this report, 53% of re-offenders had substance abuse problems. Absent public substance abuse programs in the community, the prison is one of the most important sites for identifying and treating substance abuse problems to control recidivism and promote individual and community health.

Placing all of the liability at the foot of the corrections system would be unfair. Throughout the state of Alaska, the availability of substance abuse treatment programs has declined outside the prison walls as well. The number of substance abuse treatment facilities in Alaska declined from 87 in 2002 to 70 in 2006.<sup>363</sup> As with many other social problems described in this report, the legislature should make serious efforts, not only to rehabilitate prisoners, but to establish services available in the community – ones which can handle newly released prisoners as well as ordinary members of the community.

The survey conducted for this report illustrates the high number of persons in Alaska jails and prisons with substance abuse problems. A significant number of prisoners in Alaska had problems with substance abuse prior to incarceration. 122 of 151 prisoners (or approximately 75%) stated that they had substance abuse problems; 43 of the 122 reporting

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359 North Charles Research and Planning Group, Substance Abuse Treatment Needs of Alaska's Newly Incarcerated Prisoner Population Prior to Incarceration: Final Report, at viii.

360 Alaska Department of Corrections, Offender Profile 2008, available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2008final.pdf>.

361 *Id.*

362 Alaska Judicial Council, Recidivism in Alaska, at 11.

363 Office of Applied Studies, Substance Abuse and Mental Health, "States in Brief: Alaska" (2009) at 2, available at [http://www.samhsa.gov/StatesInBrief/2009/ALASKA\\_508.pdf](http://www.samhsa.gov/StatesInBrief/2009/ALASKA_508.pdf).

a history of substance abuse said they had received treatment during their current or prior periods of incarceration. 59 of those interviewed further noted that they had been arrested for an alcohol or drug-related crime (for example, possession of a narcotic, DWI, selling drugs) at some point in their lives.

The prisons, which house a large population with long-term substance abuse issues, also failed to provide adequate rehabilitative treatment and care. Until this year, most institutions in Alaska held only non-therapeutic programs, such as Alcoholics Anonymous groups, if they offer any programs at all. Fewer than half of all prisoners surveyed for this report who reported a substance abuse problem indicated that they had ever received substance abuse treatment while incarcerated. In addition, only 5 of the prisoners who said they had past or on-going substance abuse problems reported that they were released into an inpatient substance abuse treatment program after prison. 20 of the prisoners reported that they were released into a halfway house, and everyone else reported receiving no assistance whatsoever after release. One inmate reported that he was unable to receive court-ordered treatment during his sentence because no services were available.

For years,<sup>364</sup> the Department of Corrections let untreated individuals out on the streets with serious untreated substance abuse problems. The failure to treat these individuals played a major role in the increase in prison population since 2002, particularly in the population of those in custody for probation and parole violations. To combat this problem, the Department has sought funding for several new programs. Some of these programs have begun to take shape; others remain in the planning and implementation stage. One important program, the Life Skills Substance Abuse Treatment program, has recently begun implementation at four facilities, and the Department is taking bids to open a fifth program.<sup>364</sup> Several other programs to address alcohol and drug addiction are planned at other facilities and for released inmates, including another substance abuse treatment program planned for late 2009 at Palmer Correctional Center, a substance abuse assessment program for the Anchorage Complex, and several outpatient programs in Anchorage and Fairbanks for released prisoners and probationers. The Department of Corrections supplied a full description of the planned and existing programs, attached here as a sidebar.

Within the prison system, the only therapeutic-level treatment available between 2003 and 2008 consisted of two residential substance abuse treatment programs (RSAT): one for women at Hiland Mountain Correctional Center in Eagle River and the other for men at Wildwood Correctional Center in Kenai. The total bed space for the two programs was just above 100. Smaller-scale substance abuse programs were available for certain prisoners

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364 State of Alaska, Request for Proposals: 2010-2000-8757, LSSAT-AMCC (Nome) at 22 [seeking bids for contractors to provide services at Anvil Mountain Correctional Center in Nome and indicating the program has begun in Juneau, Bethel, Seward, and Fairbanks] available at [http://notes5.state.ak.us/pn/pubnotic.nsf/0/1322a586d6b28d7c892575d100760275/\\$FILE/RFP+2010-2000-8757+Substance+Abuse+Treatment+Program+Services,+Nome,+Alaska.pdf](http://notes5.state.ak.us/pn/pubnotic.nsf/0/1322a586d6b28d7c892575d100760275/$FILE/RFP+2010-2000-8757+Substance+Abuse+Treatment+Program+Services,+Nome,+Alaska.pdf).

*(Continues on page 97)*

## Developing Rehabilitative Programs in Alaska

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DOC is currently in the process of developing a needs assessment (LSI-R and other assessment screening instruments) that will cover the areas of:

1. **Substance Abuse**
2. **Anger Management**
3. **Criminal Thinking**
4. **Education**
5. **Vocational Interests**
6. **Sexual Deviancy issues, and**
7. **Re-Entry**

This assessment is the foundation for developing an Offender Management Plan which will be used, in part, to guide intervention and program referrals to the following programs:

**Substance Abuse:** All programs adhere to the ASAM, American Society of Addiction Medicine criteria. 79% of offenders arrested had an active substance abuse problem during the 12 months preceding their arrest.<sup>1</sup>

- 3- Level 3: 6 month inpatient programs  
-HMCC, WWC, and Hudson Correctional Facility.
- 5- Level 2: 3-4 month institutional intensive out-patient programs  
-YKCC, AMCC, FCC, LCC and SCC.
- 2- Level 2: 3-4 month Community Residential Center intensive out-patient programs  
-North Star in Fairbanks and Akeela for the Anchorage-area CRCs.

All of these programs have aftercare components.

- Level 1: 1 month educational program with assessment and referral to additional treatment if needed.  
-PCC
- 2-assessment and referral programs  
-ACC and MSPT

**Anger Management:** This is a 12 week program that covers the areas of hostility, aggressiveness, temperament, violence, and cognitions favorable to violent behavior. This program is part of our substance abuse curriculum, as a very high percentage of people with substance abuse issues also have anger issues. It will also be offered as a standalone program that meets court-ordered requirements

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<sup>1</sup> North Charles Research and Planning Group, Substance Abuse Treatment Needs of Alaska's Newly Incarcerated Prisoner Population Prior to Incarceration: Final Report, at viii., 2007

(individualized treatment plans and discharge summaries) in all DOC facilities.

48 week Offender Treatment program:

4 phases:

1. Anger Management
2. Criminal Thinking Errors
3. Moral Reasoning, and
4. Rational Problem Solving and Relapse Prevention

This program covers the areas of criminal thinking, socialization, poor problem solving, interpersonal relationship issues, risk, talking behavior and Anger Management. It is currently available in seven facilities, ACC, SCC, WWC, FCC, LCC, PCC and HMCC, with plans to implement in 4 additional facilities by the end of the year. (AMCC, YKCC, KCC and the Hudson Community Correctional Center).

**Criminal Attitudes Program or CAP:** A comprehensive cognitive-behavioral program that focuses specifically on the attitudes, values, beliefs and rationalizations conducive to criminality. It is a 22 session program that will be available in all 13 institutions through the Education department by year end.

**Parenting: Inside/Out Dads:** A program for incarcerated fathers. This is a 12 session program that provides practical and innovative ways to help overcome the physical and psychological challenges that incarcerated fathers face both inside and out of prison. This program is offered in 12 of Alaska's facilities through the Education department. HMCC currently offers the Active Parenting Today program for the female offenders. Both programs are designed to diminish intergenerational criminality.

**Sex Offender Treatment:** Opening in early 2010, this is an 18 month intensive inpatient treatment program located at LCC. The LCC program is long term and treats multi-custody offenders.

The Bethel Tundra Center program is a shorter term community based sexual offender program for released offenders that operates in a Community Residential Center.

There are several out-patient sex offender management programs for released offenders that include assessment, treatment, supervision and polygraph testing at six locations around the state.

**Education:**

GED/ABE Vocational Certification/Training and Re-Entry Programming in all 13 facilities.

**Vocational Rehabilitation:**

DOC currently provides vocational training programs that provide inmates certifications upon completion. The Department intends to expand the number and availability of these programs.

**Re-Entry Program:** This program is designed to be available for all offenders who are within 18 months of release. The program will focus on employment skills, developing housing options, family reunification, and sober support. Specific program components will consist of the Federal Bureau of Prisons Re-Entry Survival Program, the Department of Labor Job Preparedness Program, C.A.P., and Parenting. It is currently available at SCC and under development for the remainder of our facilities.

*(Continues from page 94)*

at Palmer, Spring Creek, Yukon-Kuskokwim, and the Hudson Correctional Facility in Colorado. Given these limited options for treatment, less than 10% of the Alaska prison population had access to substance abuse treatment in a prison population, through the RSAT program,<sup>365</sup> while close to 80% of the prisoners has substance abuse problems. Several prisoners at Hiland (where 22 out of 28 prisoners interviewed said they had substance abuse problems) highlighted that RSAT was the only substance abuse program available. Programming added in the last year has added space for treatment of 100 prisoners in various institutions at any one time; plans for increasing treatment programming would allow the Department to treat more than 400 prisoners in all in-state programs at any one time. Continuing the existing treatment plans, expanding the capacity of the system to provide substance abuse treatment, and following prisoners after release to ensure continued sobriety and participation in substance abuse treatment is vital to keeping the prison population low.

Failure to provide treatment in prison has enormous future costs. Holding a single prisoner in custody costs roughly \$44,000 per year.<sup>366</sup> The one million dollars cut from the budget in 2003 that was dedicated to substance abuse treatment programs in prisons is equal to the cost of incarcerating just 25 individuals for one year or incarcerating one prisoner for 25 years, equivalent to a sentence for a serious felony. State-wide substance abuse treatment programs would certainly impact more than 25 individuals, proving to be a more cost-effective investment. This calculation does not factor in the greater societal benefits of treating alcohol and drug addictions and of preventing the costs (financial and otherwise) of future crimes. The sudden cut in funding for substance abuse programs in the early part of this decade coincided with a tripling of the number of prisoners returned to custody for violating the terms of probation and parole, violations that typically come about through substance abuse. In 2008 alone, the increase of prisoners in custody for violations of probation and parole over the number incarcerated in 2002<sup>367</sup> cost the state \$23 million.<sup>368</sup> Focused spending on in-prison substance abuse treatment programs will lead to reductions in drug use and subsequent criminal behavior, resulting in decreased spending on the incarceration of returning prisoners.<sup>369</sup> The substance abuse treatment programs that the Department has reintroduced are vital and important parts of the

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365 The RSAT program is designed to “[assist] states and units of local government in developing and implementing residential substance abuse treatment programs in state and local correctional and detention facilities.”

366 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 23 (indicating that DOC officials had reported the daily cost of incarceration at \$121.60; multiplying by 365 days, the annual cost would be \$44,384).

367 Alaska Department of Corrections, 2008 Offender Profile at 15 (showing 734 offenders in custody for probation and parole violations); Alaska Department of Corrections, 2002 Offender Profile at 15 (showing 216 offenders in custody for probation and parole violations).

368 Using the annual per prisoner housing costs listed above [ $\$44,384 \times 518 = \$22.99$  million].

369 National Research Council Report at 49 (“It is widely believed that in-prison drug treatment for offenders leads to reductions in drug use and subsequent criminal behavior and to better outcomes in other areas, such as employment.”).

system. Even modest success in preventing recidivism and reincarceration will more than make up for the expense of the programs themselves.

## 2. Sex Offender Treatment

Alaska has the highest rate of sexual assault of any state in the nation,<sup>370</sup> yet the Department of Corrections terminated in-custody sex offender treatment in 2003. Sex offenders received treatment only after their release to the streets. While sex offenders already have a relatively low rate of re-offending,<sup>371</sup> beginning targeted treatment while prisoners are still in custody will help the rehabilitative prospects of sex offenders and, in turn, prevent re-offending. Fortunately, a sex offender treatment program has been newly instituted at the Yukon-Kuskokwim Correctional Center in Bethel, and another sex offender treatment program began in December 2009 at Lemon Creek in Juneau. There are also outpatient sex offender treatment programs at six different locations around the state, managing the post-release protocol of monitoring, treatment, and polygraph testing.

## 3. Pre-Release Services

International human rights standards recognize that prisoners have individual treatment needs that require accompanying services.<sup>372</sup> In order to fulfill these needs, the Standard Minimum Rules require a flexible system of classifying prisoners in groups, and recommend that such groups be distributed in separate institutions suitable for the treatment of each group.<sup>373</sup> Prisons should provide appropriate services, such as religious programming (if desired), education, vocational guidance and training, social casework, employment counseling, physical development, and strengthening of moral character—all in accordance with the individual's social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence, and his prospects after release.<sup>374</sup> The Rules provide that an individualized program of treatment should be prepared for each prisoner as soon as possible after admission.<sup>375</sup> In addition to substance abuse, mental health, and sex offender treatment as discussed above,

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370 Rosay, Andre, "Forcible Rapes and Sexual Assaults in Anchorage," 20 ALASKA JUSTICE FORUM (Winter 2004).

371 Alaska Judicial Council, Criminal Recidivism in Alaska, at 8-9 (showing sex offenders in Alaska had a lower incidence of reoffending than violent offenders, property offenders, or drug offenders).

372 *Id.*, Art. 63.1.

373 *Id.* The Standard Minimum Rules recommend an optimal size for individualization of treatment, noting that in some countries a population exceeding 500 is considered too large. *Id.*, Art. 63.3.

374 *Id.*, Art. 66. The European Prison Rules note that special attention should be paid to the needs of prisoners who have experienced physical, mental, or sexual abuse. European Prison Rules, Art. 25.4.

375 *Id.*, Art. 69. See also European Prison Rules, Art. 103-104 (stating that individual sentence plans, incorporating work, education, other activities, and preparation for release, be drawn up upon admission). Studies have shown that best practice rehabilitative programs are carefully tailored to the individual prisoner. National Research Council Report at 42, 61.

individualized programs in Alaska should include education, job planning, and family support services.

### *a. Education*

Many individuals arrive in prison with limited education, which, compounded by their convictions, may impair their ability to find steady work when released. Consistent with the goal of rehabilitation and reintegration, prisoners should be provided with educational resources while incarcerated as part of the reintegration process. Under international law, prisoners maintain an uninterrupted right to education.<sup>376</sup> The Standard Minimum Rules state that provision should be made for further education of all prisoners who would benefit and that education should be compulsory for the illiterate and young.<sup>377</sup> The Rules also provide that so far as practicable, prisoners' education should be integrated with the educational system of the state, so that after release, the prisoners may continue their education without difficulty.<sup>378</sup>

GED and Adult Basic Education courses are available at almost every facility, and a few institutions have excellent vocational opportunities beyond the GED level. But education is largely limited at most institutions to the GED level; while 12 out of 115 inmates who had re-offended said that they had received their GED during a prior sentence, only a total of 38 prisoners total said they had received any vocational or educational classes during their prior prison term. Prisoners at Red Rock even complained that, while GED classes were available, no one would administer the GED test. Computer coursework, when available, extends only to basic familiarity with Windows and has no recognized certification level. While correspondence courses are available, most prisoners cannot afford them, and few institutions assist those prisoners who can afford that coursework in applying for such programs.

Studies show that recidivism rates are significantly lower for released prisoners with more education.<sup>379</sup> If Alaska continued the education of its incarcerated population, consistent with international human rights standards, its formerly incarcerated citizens would be better equipped to reintegrate into their communities. For correctional education

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376 International Covenant on Economic, Social and Cultural Rights, Art. 13, entered into force Jan. 3, 1976 ("Everyone has the right to education.").

377 Standard Minimum Rules, Art. 77.2. See also European Prison Rules, Art. 28.2-28.3 ("Priority shall be given to prisoners with literacy and numeracy needs and those who lack basic or vocational education," and "Particular attention shall be paid to the education of young prisoners and those with special needs.").

378 *Id.*, Art. 77.2. See also European Prison Rules, Art. 28.7 (same).

379 National Research Council report at 41; Martin, Stephanie and Colt, Stephen, The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs? at 3 (indicating that increased educational and job training programs were the most effective and cost-saving measures in preventing re-incarceration, saving four times the cost of the programs) available at [http://www.iser.uaa.alaska.edu/Publications/researchsumm/RS\\_71.pdf](http://www.iser.uaa.alaska.edu/Publications/researchsumm/RS_71.pdf).

programming to be successful, it should both be carefully tailored to individual prisoners and be tied to vocational and job skills training.<sup>380</sup>

### *b. Job Training*

Prison offers an opportunity for prisoners to be equipped with vocational and life skills that will enable them to be productive citizens upon release. The Basic Principles for the Treatment of Prisoners mandates enabling prisoners to undertake meaningful remunerated employment, designed to facilitate their reintegration into the job market and to permit them to contribute to their own financial support and to that of their families.<sup>381</sup> While work must not be forced, compulsory,<sup>382</sup> afflictive in any way,<sup>383</sup> or used primarily to make a financial profit,<sup>384</sup> the Standard Minimum Rules state that the prison should provide vocational training in useful trades.<sup>385</sup> Furthermore, the organization and methods of work in the institution should resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.<sup>386</sup>

In Alaska, the prisoners gave glowing reviews regarding the vocational coursework available at Palmer Correctional Center. Unfortunately, at many other institutions, prisoners reported vocational training was limited. Only 26 prisoners out of 115 who had re-offended stated that they had received vocational training during their prior sentence. Such training included training and certification in handling hazardous materials, life skills, and construction classes. The Department has laid out a plan to develop more vocational training for prisoners at all institutions, in a variety of fields.

Another remarkable vocational and rehabilitative project is the Point Mackenzie Correctional Farm. Point Mackenzie is a special minimum security facility that is a working farm. Prisoners are sent to the farm to work in the fields and care for livestock. The farm is a thoughtfully designed facility where prisoners can perform useful labor, rather than wasting their days inside an institution. By concentrating the minimum security prisoners in one facility, the Department is able to reduce the per prisoner costs of running the farm far below the operating costs of other facilities. Altogether, the institution is one

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380 *Id.* at 42.

381 Basic Principles for the Treatment of Prisoners, Principle 8.

382 ICCPR, Art. 8.3(a) (“No one shall be required to perform forced or compulsory labor.”).

383 Standard Minimum Rules, Art. 71.1.

384 *Id.*, Art. 72.2. See also European Prison Rules, Art. 26.8 (“Although the pursuit of financial profit from industries in the institutions can be valuable in raising standards and improving the quality and relevance of training, the interests of the prisoners should not be subordinated to that purpose.”).

385 *Id.*, Art. 71.5. See also European Prison Rules, Art. 26.2 (“Prison authorities shall strive to provide sufficient work of a useful nature.”).

386 *Id.*, Art. 72.1. See also European Prison Rules, Art. 26.3 (“As far as possible, the work provided shall be such as will maintain or increase prisoners’ ability to earn a living after release.”)

to be emulated.

The environment at Point Mackenzie is a special one, where prisoners have freedom to move around the grounds of the farm and have many tasks to perform. Instead of living in institutional housing, the prisoners live in prefabricated housing on the grounds. Because the facility is far out in the country and because the individual housing units hold only a few prisoners, the conditions are rustic.<sup>387</sup> Prisoners mostly use outhouses, since plumbing is limited to a few main buildings. Produce from the farm goes to other institutions to supplement the food provided. The facility on the whole is a uniquely Alaskan one, conveying real skills to prisoners in close contact with the natural environment. The facility prepares prisoners for the responsibility and hard work associated with life in the civilian world.

Through vocational programs, the community stands to gain productive members; without them, the state of Alaska will continue to lose members of their communities to prisons and pay heavy costs in the process.

Providing good job-training is particularly important for prisoners, as many barriers, including some set up by the State, await them when they reach the streets. 28 prisoners observed that they were unable to find work when released.

Parole or probation restrictions can inhibit finding a job. One interviewee noted that the terms of his release required him to submit to urine analyses three times a week; he reported that the tests cost him \$60 each time and required him to miss work, leading to his inability to keep a job and support his family. Another noted that upon release, he did not have enough money to pay for transportation to work. Many of the interviewees who had reoffended also observed that their prior convictions rendered them ineligible for public assistance. As a result,

they found themselves homeless, unable to provide for themselves or their families, and more likely to return to prison for either parole/probation violations or new charges. While a variety of factors may have contributed to any individual's inability to find work, 41 out of 94 prisoners reported that their prior conviction was an obstacle in finding work upon release. Without job skills or vocational training, prisoners who have completed their sentences face great difficulties in locating work.

Work is a primary component of successful reintegration and reduced recidivism, because

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<sup>387</sup> Because of both the requirement to work in the fields and the rustic living conditions, the ACLU of Alaska expresses concern that there is no explicit protection for prisoners who do not want to work in the fields or live in housing without running water. The Department reports that prisoners are not disciplined for refusing to work or requesting a return to a conventional facility; however, absent an explicit policy protecting prisoners from discipline and the loss of good time for refusing placement at Point Mackenzie, some prisoners may feel compulsion to live and work under the unique conditions there. If prisoners are put at risk for losing good time, they could end up spending more time in custody for refusing work, violating international law. ICCPR, Art. 8.3(a) ["No one shall be required to perform forced or compulsory labor."].

it both provides informal social controls and reduces the economic incentives for criminal behavior.<sup>388</sup> Vocational and job skills training and opportunities, both in prison and continuing in the community setting, offer formerly incarcerated prisoners the means and status to reject criminal behavior and establish themselves in their communities. Through vocational programs, the community stands to gain productive members; without them, the state of Alaska will continue to lose members of their communities to prisons and pay heavy costs in the process. The legislature should watch the development of vocational programs for prisoners and ensure that these prisoners are able to find work on release, as well as reduce legal barriers to re-employment of released prisoners. Maintaining employment is a key to preventing recidivism.

### *c. Family Contact & Communication*

Family support is an important component of rehabilitation.<sup>389</sup> It enables individuals to maintain their links with the outside world, which will in turn prepare them for release and successful reintegration as citizens, parents, and spouses. International legal standards emphasize continuing relationships and contact between prisoners and their families. The ICCPR recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>390</sup> For those individuals who are lawfully incarcerated, international standards uphold the primacy of family relationships during the period of incarceration.<sup>391</sup> Under the Standard Minimum Rules, prisoners should be able to “communicate with their family and reputable friends at regular intervals,”<sup>392</sup> through both correspondence and visits.<sup>393</sup> The Rules note that special attention should be paid to the maintenance and improvement of relations between a prisoner and his family,

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388 National Research Council report at 42.

389 See, e.g., *Brandon v. State Dep’t of Corr.*, 938 P.2d 1029, 1032 n.2 (Alaska 1997) (noting that “virtually every statement on visitation by prison officials . . . and every major textbook on corrections stresses the critical nature of visitation both in terms of reduction of tension inside the prison and the facilitation of the ultimate rehabilitation of the prisoner strengthening his ties with the “free world”) (citation omitted).

390 ICCPR, Art. 23.1. Each person has the fundamental right to be free from arbitrary or unlawful interference with his privacy, family, home, or correspondence and the right to the protection of the law against such interference. ICCPR, Art. 17.1-2; see also European Convention, Art. 8(1) (“Everyone has the right to respect for his private and family life, his home and his correspondence.”) and Art. 8(2) (“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”)

391 Standard Minimum Rules, Art. 79.

392 The European Prison Rules state that prisoners should be allowed to communicate “as often as possible” by letter, telephone or other forms of communication “with their families, other persons and representatives of outside organizations and to receive visits from these persons.” European Prison Rules, Art. 24.1.

393 Standard Minimum Rules, Art. 37.

according to the best interests of both.<sup>394</sup> According to the Rules, the state itself has a duty to encourage and to assist in maintaining or establishing such relations.<sup>395</sup>

The Inter-American Court of Human Rights has found that prisoner placement in a region that was distant and difficult to access restricted the visits of his relatives, and that this inaccessibility, in combination with other detention conditions, amounted to cruel, inhuman, and degrading treatment.<sup>396</sup> The Court also found a violation of his relatives' right to humane treatment, citing the great pain, suffering, and constant worry caused by the inhuman detention conditions, the prisoner's isolation, and the "distance and inaccessibility of the different penitentiaries to which he was transferred."<sup>397</sup> This decision is of particular relevance to the situation in Alaska, where the few post-trial facilities are scattered across a large state in which transportation is difficult and expensive. As previously noted, Alaska Native prisoners are disproportionately impacted because their communities are generally located at great distances from the facilities.

Prisoners rely on family visits, phone communication, and mail correspondence to maintain their family relationships during incarceration. Due to the long distances and dangerous driving conditions, family visits may not be a feasible option for many prisoners. Intrusive or unduly restrictive rules on visits left inmates frustrated about an inability to get family and friends to visit: non-marital partners not admitted to visits because they were not "family"; inmates' children who could not be admitted because the only supervising adults were non-marital partners; requirements of lengthy periods of advanced notice of visits; and arbitrary exclusion of visitors from institutions.

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394 *Id.*, Art. 79. The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment similarly recognizes the prisoner's right to be visited by and to correspond with members of his family. In addition, it states that the prisoner should be given adequate opportunity to communicate with the outside world, subject to reasonable restrictions as specified by law or lawful regulations. Body of Principles for the Protection of All Persons, Principle 19.

395 Standard Minimum Rules, Art. 80. See also European Prison Rules, Art. 24.4-24.5 ("The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible," and "prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so."); *Brandon v. State Dep't of Corr.*, 938 P.2d 1029, 1032 n.2 (Alaska 1997) (recognizing that visitation privileges are a component of the constitutional right to rehabilitation). Thus, the European Court of Human Rights found that the State has an obligation to assist prisoners in maintaining contact with their families. See, e.g., *McCotter v. United Kingdom*, European Court of Human Rights (1993); *X. v. United Kingdom*, European Court of Human Rights (1982). Likewise, the International Criminal Tribunal of Rwanda (ICTR) found that detainees should be allowed visitations by family and friends at regular intervals, subject to the restrictions and supervision of the Commanding Officer, in consultation with the Registrar. President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64, International Criminal Tribunal of Rwanda, para. 61. The Rules of Detention of the International Criminal Tribunal for the Former Yugoslavia (ICTY) specify that persons awaiting trial or sentence are also "entitled to receive visits from family, friends and others"; restrictions on such visits "must be necessary in the interests of the administration of justice or the security and good order of the host prison and the Detention Unit." Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention"), Adopted 5 May 1994, Amended 21 July 2005, (IT/38/REV.9), available at [http://www.icty.org/x/file/Legal%20Library/Detention/IT38UNDU\\_rules\\_rev9\\_2005\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Detention/IT38UNDU_rules_rev9_2005_en.pdf).

396 *Garcia-Asto and Ramirez-Rojas v. Peru*, Inter-American Court of Human Rights, para. 221, 225, 229 (Nov. 2005).

397 *Id.*, para 230.

Given the long distances families must travel to visit incarcerated relatives, maintaining phone accessibility is of vital importance. A near-universal complaint raised by prisoners at all facilities was the difficulty in maintaining contact with family members through the existing telephone system, provided by the private operating system Securus (formerly Evercom). Securus is expensive and burdensome for the prisoners and the family members they need to contact. A phone call costs a \$2 fee to make the initial connection and then costs a further per-minute rate to call an in-state number. Rates are even more exorbitant for calls to the lower 48 states. Inmates are often unable to afford such fees and are reluctant to pass them on to their loved ones. In addition, Evercom only connects to numbers with an Evercom account and does not allow callers to leave voicemails, making it difficult for prisoners to connect to family members whose numbers are restricted or who are away from their phones. Furthermore, the prison does not allow more convenient, alternative means of payment, including phone cards and call-forwarding systems. In total, more than a third of the inmates interviewed<sup>398</sup> said that they had difficulty calling their family members due to the Securus system.

Prisoners also experience difficulty connecting with family members upon release. Several prisoners interviewed for this report said that they were left where they had been arrested,<sup>399</sup> without the means to return to their homes. It is critical that the Department of Corrections recognize that prisoners require assistance in returning to their families and communities to begin the process of reintegration. Preventing prisoners from maintaining these relationships creates an additional and unnecessary obstacle to reentry.

#### *iv. Re-entry and Reintegration*

Successful reintegration efforts begin in the prisons and continue in the community setting on release.<sup>400</sup> International standards recognize the role of the State in rehabilitation efforts upon the prisoner's release. The Standard Minimum Rules call for governmental or private agencies who can assist the released prisoner re-establish himself in society by ensuring he has the appropriate documents and identification papers, has a suitable home and work to go to, is suitably clothed, and has sufficient means to reach his destination

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398 Fifty-five out of the 146 prisoners who responded to this question reported difficulty communicating with family or loved ones because of the cost or design of the phone system.

399 The Department reports that state statutes require them to return prisoners to the place of their arrest, though they will return a prisoner to a requested location, provided the transportation costs are no greater than returning the prisoner to the place of arrest.

400 National Research Council report at 41.

and maintain himself for the period immediately following release.<sup>401</sup> Discontinuation of mental health and substance abuse care due to incarceration has in the past meant that many prisoners were actually worse off upon release than when they were first incarcerated, in terms of their access to mental health and substance abuse treatment.<sup>402</sup> Such pre-release needs should be taken into consideration from the beginning of the prisoner's sentence.<sup>403</sup>

In Alaska, one of the most common concerns amongst prisoners who had previous experiences of incarceration concerned the total lack of assistance in reintegration to society. Prisoners are given transport out of the facility upon release but often without any money, means to reach home, official identification, employment, and housing to start anew. In order to enable prisoners to transition back to society upon release with adequate success, they must be equipped with the most basic needs, including photo identification<sup>404</sup> (essential for getting access to food, housing, and other services), appropriate clothes, housing, access to transportation, and, if they are eligible, help in signing up for public assistance. Accounts of prisoners released right to the streets from a prior stint in custody with no job, no place to live, no way to get medical care, and no access to substance abuse treatment are all too common. Numerous prisoners told stories of going directly from the prison doors to a homeless shelter. Others reported living on the streets or in abandoned cars immediately after their release. Many prisoners reported returning to substance abuse the same day or the same week as they were released from custody.

For example, one prisoner interviewed recalled that he was released to an Anchorage street corner during the winter with only a sweat suit on. He had no idea where he was, no form of identification, and no pocket money, not even enough for a phone call. He slept at a local bus station until he was able to transport himself to a family member's house. He began a job search, but received no responses to his applications. In the meantime, he tried to stay away from alcohol and support himself through freelance work. One year

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401 Standard Minimum Rules, Art. 81.1. See also European Prison Rules, Art. 33.7-33.8 ("Steps must be taken to ensure that on release prisoners are provided, as necessary, with appropriate documents and identification papers, and assisted in finding suitable accommodation and work," and "released prisoners shall also be provided with immediate means of subsistence, be suitably and adequately clothed with regard to the climate and season, and have sufficient means to reach their destination.").

402 Alaska Mental Health Trust, A Study of Trust Beneficiaries in the Alaska Department of Corrections, at 45 (showing that about 30% of both individuals receiving mental health treatment prior to incarceration and individuals receiving substance abuse treatment prior to incarceration did not receive treatment within a year after their release).

403 *Id.*, Art. 64, 81. See also European Prison Rules, Art. 7 ("Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged."), Art. 107.4-107.5 ("Prison authorities shall work closely with services and agencies that supervise and assist released prisoners to enable all sentenced prisoners to re-establish themselves in the community, in particular with regard to family life and employment," and "representatives of such social services or agencies shall be afforded all necessary access to the prison and to prisoners to allow them to assist with preparations for release and the planning of after-care programs."). Studies show that best practice programs incorporate joint community case management between the criminal justice system and community providers. National Research Council Report at 51-52.

404 The Department of Corrections has developed an agreement with the Department of Motor Vehicles to allow ex-prisoners to present their prison ID's as proof for obtaining identification.

later, with no job in sight, he violated his parole by consuming alcohol and ended up back in prison.

Despite the predictable and basic needs of the large indigent population, the Department of Corrections for a long time did not provide adequate services or programs to prepare prisoners to be functioning, responsible members of their community. The beginnings of a program for prisoner re-entry services can be seen at Spring Creek Correctional Center, where one housing unit is dedicated to prisoners facing imminent release. Expansion of such programs to other institutions, so that prisoners can leave prison with a job and a place to stay, is a high priority for the Department. The program at Spring Creek will be a model for the development of similar programs at other institutions.

A crucial link in the re-entry process is the probation or parole officer. While some probation officers care primarily about the success of prisoners in the outside world, too many see themselves as enforcers, waiting for a paroled prisoner or probationer to slip up, so they can be returned to jail. When probation and parole officers are trained, more emphasis needs to be placed on their role in rehabilitating prisoners. Officers should be taught that their primary aim should be to see a probationer or parolee succeed in the community, not to catch them in a violation. More emphasis should be placed on teaching parole and probation officers about the availability of rehabilitative, housing, and employment programs in the community. More continuity of supervision should take place, with probation and parole officers meeting their charges in the prisons prior to release, so that they can work with prisoners to make sure they get the help they need to succeed. No prisoner should be released from an Alaska prison without a place to go, with no way to get to shelter, with no useful employment, with no access to needed medical and psychiatric care, and without adequate clothing. Making these connections is not just the smart thing for Alaska to do; this type of re-entry preparation is required by international law.<sup>405</sup> Probation and parole officers can be the needed link in this chain.

In addition to meeting Alaskan and international law standards for rehabilitation, rehabilitative programs are also beneficial because they have been proven to be cost-effective. The cost of maintaining a growing number of prisoners in prisons is exacerbated by high recidivism rates. Targeted rehabilitation programs both in prison and during post-release have been shown to reduce recidivism rates.<sup>406</sup> By providing rehabilitative programs, prisons would be instrumental in setting up newly released prisoners for reintegration into

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405 U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 60(2) ["Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid."]; *id.*, Rule 64 ["The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation."].

406 See, e.g., Committee on Community Supervision and Desistance from Crime, National Research Council, Parole, Desistance from Crime, and Community Integration (2007), available at <http://www.nap.edu/catalog/11988.html>. [hereinafter National Research Council Report]

the community while reducing state corrections costs and improving community safety. The State of Alaska should be encouraged to develop a comprehensive community based re-entry program where all state- and community-based stakeholders work collaboratively to effectively use state resources to support successful prisoner reintegration. This program would support the appropriate oversight and care from probation and parole officers.

#### ***v. Recommendations from the ACLU of Alaska***

1. The Governor should create an Alaska Re-Entry Coalition composed of the stakeholder state and community agencies that would work to utilize state and local resources to tackle the challenges of housing, employment, and vocational training/education for newly released prisoners;
2. Continue funding proposed substance abuse treatment for prisoners during their incarceration;
3. Enable the Department of Corrections to assist prisoners in finding continuous substance abuse and mental health treatment upon release;
4. Fund the creation of more community-based substance abuse and mental health treatment centers, located in areas of greatest need;
5. Ensure that more beds, staff, and resources are available for mental health treatment for prisoners with mental illness during their incarceration and assist them in finding treatment at release and reentry;
6. Continue to fund and improve educational and vocational skills training to prisoners at the correctional institutions so that they are able to find work upon release;
7. Offer services, in conjunction with other state and federal agencies, to prisoners in the weeks or months leading up to their release with information on finding work and housing, securing public assistance, and applying to substance abuse or mental health treatment programs; and
8. Assist prisoners in maintaining contact with their families during their prison sentence by providing easy and affordable phone access and flexible visitation policies, as well as setting a firm date to end the policy of sending prisoners to out-of-state contract facilities like Red Rock in Arizona.

## **F. Internal Governance Practices**

### ***i. Introduction***

The grievance procedure is a vital component of the prison institution because it is the only mechanism facilitating communication between the prison staff and the prisoners. A well-functioning grievance system helps to ensure that the prisoners' basic needs are met and that the prison system upholds its own standards of professionalism and humane treatment.

An internal grievance system, however, has its limitations. Some facilities in Alaska are based in small towns where personal relationships are impossible to avoid. Even in facilities in larger towns and cities, the correctional facility itself forms a tight-knit community. The close social connections and professional bonds among officers may make true impartiality hard to find. Even where real partiality does not occur, the appearance of favoritism diminishes trust in the validity of grievance review. Concerns among inmates about the ultimate fairness in the process and the possibility of retribution may make some prisoners unwilling to file grievances in the first place.

### ***ii. Legal Standards on Internal Prison Supervision***

#### **1. International Standards**

In order to guarantee the safety and security of all, people who are incarcerated must respect the policies and procedures of the prison. In turn, the prison staff who supervises their incarceration must be held accountable to the same policies and procedures. International human rights norms call on prisoners and prison staff alike to respect prison rules and standards, and any violations should be promptly addressed. When prisoners violate these rules and standards, there are disciplinary consequences for them. When prison staff violates these rules and standards, there should also be a fair and adequate form of redress made available to those who have been wronged. The prison grievance system then is important as the avenue through which people can draw attention to and rectify the problems they experience while incarcerated.

Prisoners have rights under international human rights law to make complaints or file grievances related to conditions of confinement. The Standard Minimum Rules outline the recommended procedure for grievance and complaint mechanisms in prison.

First, every prisoner should be provided with information about the regulations governing the treatment of prisoners in his category, the disciplinary requirements of the institution, and the authorized methods of seeking information and making complaints in order to enable him to "understand both his rights and his obligations and to adopt himself to the

life of the institution.”<sup>407</sup>

Second, every prisoner should have the opportunity each weekday of making requests or filing complaints to the director of the institution and also shall be able to make requests or complaints to any inspecting officer without the director or other members of the staff being present. Every prisoner should also be able to make an uncensored request or complaint to the central prison administration, the judicial authority, or any other proper authorities through approved channels.<sup>408</sup> Finally, every request or complaint should be dealt with promptly and replied to without “undue delay.”<sup>409</sup>

The recommended procedure stated above promotes the recognition of prisoner’s rights and obligations within the prison walls. It ensures that channels for communication between the prisoner and those who imprison them remain open and that any abuses are brought to light.

In particular, where the prisoner has a grievance related to staff violence against prisoners, several international human rights instruments emphasize the individual’s right to complain and to have his case promptly and impartially examined by competent authorities.<sup>410</sup> The Convention Against Torture underlines the complainant’s and witnesses’ need for protection against retaliation.<sup>411</sup> Even where no grievance has been filed, if there are reasonable grounds to believe that prison staff have used violence against prisoners that constitutes torture or ill-treatment, states have an affirmative responsibility to undertake an immediate and impartial investigation.<sup>412</sup>

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407 Standard Minimum Rules, Rule 35.

408 *Id.*, Rule 36.

409 *Id.*, Rule 36(4).

410 Under the Convention Against Torture, anyone who alleges he has been subject to torture or to other forms of cruel, inhuman or degrading treatment or punishment has “the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” *Id.*, Articles 13 and 16(1) (“In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”). See also Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8 (“Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the State concerned.”).

411 Convention Against Torture, Article 13 (“Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”).

412 See Convention Against Torture, Article 12 (“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”); Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 9 (“Wherever there is reasonable ground to believe that an act of torture as defined in Article 1 has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.”); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2 (“Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred.”).

While the internal grievance and complaint mechanisms are essential to the functioning of a prison system, the importance of independent review cannot be overstated. Prisoners are out of sight and out of mind; most prisons are physically isolated, and the people within them do not readily provoke public sympathy. As a result, what happens within the prison walls is often shielded from public inquiry. Furthermore, prison officials and staff may find themselves unable or unwilling to hold each other accountable for violations against prisoners. When external, independent review is unavailable and internal accountability mechanisms are inadequate, the prisoner ceases to have any recourse against violations and finds his or herself extremely vulnerable. It is only when a death or serious incident occurs that public scrutiny is brought to bear on the prison system, if then.

Human rights standards emphasize the importance of an impartial and independent investigation. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment mandates that any person alleging torture or other cruel, inhuman, degrading treatment or punishment by or at the instigation of a public official should have the right to have his case impartially examined by the competent authorities of the state.<sup>413</sup>

International human rights documents underline that an “independent” process must go beyond internal governance and incorporate external actors or agencies for purposes of review. The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment emphasizes that the investigators, who should be independent of the suspected perpetrators and the agency they serve, must be competent and impartial.<sup>414</sup> If the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, investigations should instead be conducted through an independent commission for inquiry or similar procedure. Members of such a commission should be chosen for their recognized impartiality, competence and independence as individuals, and in particular, they should be independent of any suspected perpetrators and the institutions or agencies they may serve.<sup>415</sup> The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials indicates that this independent process includes a judicial process.<sup>416</sup>

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413 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8. *See also* Convention Against Torture, Article 13 and 16 (“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” “In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”).

414 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.

415 *Id.*, Article 5(a).

416 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, General Provision 23 (“Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process.”).

In general, according to the American Convention on Human Rights, a prisoner has a right to easy and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights as recognized by the Convention or the constitution or laws of the state concerned, even though such violation may have been committed by persons acting in the course of their official duties.<sup>417</sup>

## 2. Domestic Standards

While international standards guarantee access to some kind of grievance or complaint process, prior court cases have found no constitutional right of access to the grievance process.<sup>418</sup> The rights of prisoners in Alaska to file grievances are instead defined by the Alaska Administrative Code and the policies and procedures of the Alaska Department of Corrections.<sup>419</sup>

### iii. Internal Governance in Alaska Prisons

#### 1. Grievance and Appeal Process in Alaska

##### a. Department of Corrections Grievance Policy

The State of Alaska Department of Corrections outlines the prisoner grievance and appeal system in Policy 808.03. The current grievance procedure in Alaska seeks to resolve issues “at the lowest possible level”<sup>420</sup> and encourages “informal face-to-face communication as the first step towards resolution.”<sup>421</sup> If verbal communication attempts fail to resolve the issue, the prisoner must then complete a Request for Interview Form, commonly known as a “cop-out.”<sup>422</sup> A prisoner can file a formal grievance only after filing this form and only

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417 American Convention on Human Rights, Article 25(1). In addition, Article 25(2) commits State Parties to “undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b) to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted.” The United States has signed, but not ratified, the American Convention and is not legally bound by its provisions. The Convention, however, reflects international standards upheld by the majority of member states in the Organization of American States (OAS), to which the United States also belongs. In addition, as a signatory to the American Convention, the United States has an obligation not to defeat the object and purpose of the Convention. Vienna Convention on the Law of Treaties, Article 18(a). An examination of U.S. standards under the Convention is therefore worth consideration.

418 See, e.g., *Mann v. Adams*, 855 F.2d 639 (9<sup>th</sup> Cir. 1988).

419 22 Alaska Admin. Code 05.185; Alaska Department of Corrections, Prisoner Grievances, Policy 808.03.

420 Alaska Department of Corrections, Policies and Procedures 808.03 III, “Purpose.”

421 *Id.* VI.D., “Policy: Communication Continuum.”

422 *Id.*

when the response to the form does not resolve the issue.<sup>423</sup>

The first level of the formal grievance system requires the prisoner to fill out a Prisoner Grievance Form, attaching up to two additional pages of narrative and proof of the prisoner's attempts to resolve the issue informally.<sup>424</sup> The Facility Standards Officer, appointed by the Facility Manager, must "promptly review all grievances to see if they should be screened,<sup>425</sup> easily resolved, or processed further."<sup>426</sup> If the issue is not screened or easily resolved, the grievances must be investigated by either the Facility Standards Officer of the institution where the incident occurred or by an "objective staff member that is not involved in the subject of the grievance."<sup>427</sup> Within 10 working days, the investigator must send a clear and concise written statement of findings and recommendations to the Facility Manager, upon which he or she will issue a determination and send a written response to the prisoner.<sup>428</sup>

If an issue is screened, the prisoner may file an appeal to have the grievance reconsidered. This grievance is forwarded to the Facility Manager, unless the screened grievance concerns an action taken by the Facility Manager, at which time it is forwarded to the Director of Institutions. If the prisoner does not receive a response within 10 working days, his appeal is considered denied.<sup>429</sup> Grievances can be screened for several reasons, including when the issue is not first addressed informally; the grievance is not filed within 30 calendar days of the action; the specific relief sought is unclear; or the grievance raises unrelated issues that should be presented in separate grievances.<sup>430</sup>

The second level of the grievance system allows for appeal of the grievance decision by the Facility Manager within two days of receiving the decision.<sup>431</sup> If the prisoner does not receive a response from the Director within 15 working days, the appeal is considered denied.<sup>432</sup>

The third level allows the prisoner to seek review by the Standards Administrator within

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423 *Id.* VII.A.1.b.4., "Procedures: Prisoner Responsibilities: Informal Resolution"

424 *Id.* VII.A.1.c., "Procedures: Prisoner Responsibilities: Formal Grievance Packet Completion."

425 A screened grievance is a grievance that is rejected or returned for correction due to content or completion deficiencies. *Id.* VI.K. "Definitions: Screened Grievance."

426 *Id.* VII.A.2.d., "Procedures: Staff Responsibilities: Initial Grievance Review."

427 *Id.* VII.A.2.d., "Procedures: Staff Responsibilities: Initial Grievance Review."; *Id.* VII.A.2.f., "Procedures: Staff Responsibilities: Grievance Investigation."

428 *Id.* VII.A.2.f-g., "Procedures: Staff Responsibilities: Grievance Investigation-Formal Grievance Decision."

429 *Id.* VII.A.2.e., "Procedures: Staff Responsibilities: Screened Grievance Appeals."

430 *Id.* VII.A.2.d., "Procedures: Staff Responsibilities: Initial Grievance Review."

431 *Id.* VII.A.1.f., "Procedures: Prisoner Responsibilities: Grievance Appeal."

432 *Id.* VII.A.2.i., "Procedures: Staff Responsibilities: Grievance Appeal."

20 working days after receiving the Director's decision. Such review by the Standards Administrator serves as the final administrative action of the Department on the grievance.<sup>433</sup>

Separate procedures apply to the processing of emergency and health care grievances and grievances against staff.<sup>434</sup> For health care grievances, the Institutional Health Care Officer handles the initial investigation and an "impartial investigator" assigned by the Health Care Administrator handles the investigation upon appeal.<sup>435</sup> For grievances against staff, the prisoner is not required to resolve the grievance informally with the staff member who is the subject of the grievance, and the Facility Manager is in charge of investigating the grievance and issuing a written decision to the prisoner within 15 working days, or returning the grievance to the Facility Standards Officer for informal resolution or for assignment to an objective staff member to investigate and issue a recommendation, upon which the Facility Manager will issue a determination.<sup>436</sup>

If a prisoner files more than five grievances in a week or more than 20 grievances in any 180 consecutive days, he may be found to have abused the grievance system and may then be subject to both a restriction on filing grievances and disciplinary action.<sup>437</sup> In addition, the Facility Manager has discretion to determine whether the prisoner has abused the grievance system under the additional criteria of finding that the prisoner has a "pattern of abuse of the system by filing frivolous or repetitious grievances, or by filing false statements."<sup>438</sup> Frivolous grievances address "information or circumstances that are trivial, lacking in seriousness, irresponsible, self-indulgent, or that have already been addressed."<sup>439</sup>

The Standards Administrator and the Director of Institutions are responsible for the development, implementation and monitoring of the Department's grievance and appeal system throughout the state. The Facility Manager, either the Warden or Superintendent of the prison, is entrusted with monitoring the grievance process at the prison itself.<sup>440</sup> For purposes of accountability, the Standards Administrator must periodically audit grievance records to ensure that all grievances are properly logged and handled pursuant to Policy 808.03. The Standards Administrator must report annually to the Commissioner about the

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433 *Id.* VII.A.1.g., "Procedures: Prisoner Responsibilities: Standards Administrator Review."

434 *Id.* VI.B., "Policy: Standard Grievance Procedures."

435 *Id.* VII.B., "Procedures: Health Care Grievances."

436 *Id.* VII.C.1., "Procedures: Grievance Against Staff: Allegations of Staff Misconduct."

437 *Id.* VI.F.1., "Policy: Grievance System Abuse." Note: the policy does not specify the scope of the restriction or the nature of the disciplinary action.

438 *Id.* VI.F.1 and 3, "Policy: Grievance System Abuse."

439 *Id.* V.D., "Definitions."

440 *Id.* VI.A., "Policy: Grievance and Appeal System."

disposition and handling of grievances by the Department.<sup>441</sup>

Retaliatory action against any prisoner for pursuing a grievance is prohibited, and the policy guidelines note that, “claims about retaliation will be reviewed and processed as grievances alleging staff misconduct.”<sup>442</sup> Retaliatory action includes “any form of discipline, placement in administrative segregation, transfer, other adverse classification action, or harassment that is imposed upon a prisoner for a prisoner’s filing or pursuit of a grievance.”<sup>443</sup>

### *b. A Fair and Adequate Procedure?*

The grievance system is the only internal mechanism by which prisoners can formally file complaints regarding prison conditions, abuses and violations. This system is thus central to ensuring that the facility’s standards are upheld and that the prisoners’ rights are adequately protected.

Alaska’s Department of Correction Policy 808.03 establishes policies and procedures for the formal grievance system. The policy was drafted to establish fair and adequate procedures for the grievance system; however, these procedures do not, in fact, comport with international human rights standards. For instance, international human rights law calls for an investigation by an impartial and competent investigator “independent of . . . the agency . . . .”<sup>444</sup> According to § 808.03, the Facility Standards Officer and the Facility Manager are the officials in charge of the first level of review and second level of review respectively, but the policy does not mandate that these officials be impartial and in every case are representatives of the Department of Corrections, not independent of the agency concerned.

While the first level of review does allow for the investigation to be conducted by an “objective staff member that is not involved in the subject of the grievance,” this is not a requirement. In fact, some prisoners reported that when they filed complaints against the Facility Standards Officer, this officer reviewed them. A number of prisoners similarly reported that grievances were reviewed by the officers against whom the grievances were filed.

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441 *Id.* VII.F., “Procedures: Records and Accountability”

442 *Id.* VI.H.8., “Policy: Staff Responsibilities.”

443 *Id.* V.I., “Definitions.”

444 “The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts.” Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; “Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the State concerned.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8.

Others reported that grievances were reviewed by relatives, spouses, or close friends of the officer against whom the grievance was filed.

The existing policies do not require an investigator to seek out commentary or clarification from the prisoner or interview witnesses in cases where there is a fundamental factual dispute, but may examine the statement filed by the officer in question and reject the grievance out of hand.

The Department contends that investigation and response to a grievance by the officer involved can be appropriate where the grievance challenges a policy of the Department, rather than alleging misconduct on the part of the officer. As an example, a prisoner who grieves the fact that he was not taken to the law library after making a request may not be alleging misconduct on the part of the officer; the denial of access to the law library may have been because the law library was already full or the computers were down or any number of legitimate reasons for denying the prisoner access to the law library. Nonetheless, review of the complaint by the officer involved in denying the request may lead to a defensive response in which the officer seeks to explain the legitimacy of his actions. Review by a truly uninvolved party, on the other hand, may lead to a finding that the denial was legitimate, but also identify alternative procedures to avoid the problem in the future. If the prisoner couldn't use the law library because it was already full, a third party might be more likely to look at why

it was full and suggest a change in the process for or scheduling of law library visits to avoid congestion.

When a Facility Standards Officer or "objective staff member" uninvolved in the substance of the grievance reviews a prisoner's grievance, this procedure still poses significant risks to maintaining an independent and impartial investigation. The importance of an impartial investigation in the prison context cannot be overstated; given the enormous discretion provided to prison officials, the lack of transparency and the absence of external review, prisons need open and user-friendly procedures for independent review of grievances. Instead, the popular perception among prisoners was that grievances are often investigated in a superficial fashion. The existing policies do not require an investigator to seek out commentary or clarification from the prisoner or interview witnesses in cases where there is a fundamental factual dispute, but may examine the statement filed by the officer in question and reject the grievance out of hand.

Prisoners from many facilities perceived collusion among some corrections officers regarding grievances. Prisoners complained that the corrections officers could make cop-outs or grievances "disappear"; some prisoners alleged that officers would cover for each other. Prisoners told far too many stories of cop-outs and grievances that were filed and later could not be found for the phenomenon to be a fabrication. One prisoner reported

that after he filed a grievance against a corrections officer, the officer confronted him and told him that, as a prisoner, he couldn't do anything to the officer. Another prisoner recalled that one corrections officer who had helped inmates with writing "cop-outs" (i.e. complaints or requests to prison administrators) was punished by colleagues and assigned to the segregation unit as punishment. Several prisoners reported that, at disciplinary or classification hearings, the disciplinary officers would state that he "would not go against" another officer, or that the officer would do what the superintendent wanted him to do, or that the officer was part of "a team" with other officers and rule against the prisoner.<sup>445</sup>

The concerns raised by the prisoners regarding the grievance system tended to take three forms: concerns that the grievance system was mostly ineffective at addressing prisoner complaints, concerns about retribution from the officers complained about, and, resulting from those two concerns, a chilling effect on the use of the grievance system.

### *i. Ineffective Grievances*

The vast majority of prisoners expressed low confidence in the effectiveness of the grievance system. Out of 133 prisoners responding to the grievance questions, 78 reported filing grievances in the Alaska prison system. Almost 80% of all prisoners filed no grievances in 2008, while 41% of all prisoners interviewed by the ACLU of Alaska reported not having filed a grievance at some point during their stay in custody.<sup>446</sup> Only five of those prisoners interviewed (4% of those responding to the grievance questions) reported that all their grievances had been resolved, meaning either that the issue was moot or the facility had taken corrective measures to redress the issue. 12 prisoners reported that 50% or more of their grievances had been resolved. 11 reported that less than 50% of their grievances had been resolved, and 45 reported that the prison system provided no resolution.<sup>447</sup> As a result of the reported low success rate of internal grievance procedures, grievances were largely viewed as "a waste of time." As indicated earlier, the prisoners who spoke with ACLU of Alaska representatives reported filing grievances at a higher rate than most prisoners. The ACLU of Alaska did not specifically address filing a grievance within the last calendar year in the questions asked on the survey.

A number of these prisoners resort to outside measures, such as notifying an ombudsman or obtaining a court order, to resolve the issue. Notifying an ombudsman is not common,

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<sup>445</sup> Audio recordings are made of disciplinary hearings and preserved for 60 days, unless the prisoner appeals the result of his hearing. Alaska Department of Corrections, Disciplinary Hearing/Officer and Basic Operation, Policy 809.04 (K) available at <http://www.correct.state.ak.us/corrections/pnp/pdf/809.04.pdf>. Since records of uncontested disciplinary hearings are not preserved more than 60 days, the ACLU of Alaska did not attempt to locate the records of these hearings, nor was it clear whether these comments were made on the record.

<sup>446</sup> Alaska Department of Corrections, 2008 Grievance Report, at 8.

<sup>447</sup> Five prisoners did not report whether or not their grievances were resolved.



The warder [© iStockphoto.com/Lukasz Laska]

however, since prisoners may not even know how to contact one. The ombudsman has limited power to resolve incidents, usually making recommendations to any department or agency in the event of a negative finding. The ombudsman has no power to investigate out-of-state incidents at contract facilities. The Ombudsman's office is not in the chain of response to prisoner grievances; only those prisoners who know about the Ombudsman's office and seek the Ombudsman's assistance on their own get help. Last, the ombudsman serves the whole of state government, not merely the prison system, leaving a crowded docket of complaints of all sorts; it has not opened an investigation into the Department of Corrections since 2007.<sup>448</sup> The ombudsman's office, currently with a staff of 11, has completed 21 full investigations into the Department of Corrections since 1990, slightly more than one a year.<sup>449</sup>

The Department believes that the influence of outside observers, including the ACLU of Alaska and other non-profit organizations, the media, and concerned citizens, can play an important role in monitoring conditions in the prisons and mitigate the need for more elaborate internal processes. While each organization and individual has an important role to play in monitoring prison conditions, the capacity of these organizations and individuals just to conduct an investigation into fact-intensive situations would be overwhelmed by the volume of complaints and the challenges of conducting an investigation inside a closed prison facility. In many cases, even where the investigation could be completed, the ability

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448 Alaska Office of the Ombudsman, Fully Investigated Complaints, available at <http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/table.htm> (listing all full investigations by the Ombudsman's office, and showing the most recent Department of Corrections investigation in 2007).

449 *Id.*; Alaska Office of the Ombudsman, Meet the Staff at <http://ombud.alaska.gov/staff.php>.

of these organizations to enforce a resolution to the dispute would be very limited.

Prisoners also viewed filing grievances as ineffective because of the frequency with which they are screened out – meaning that the grievance was summarily denied without investigation. Out of 63 people who reported on whether or not their grievance had been screened, 39 people reported that at least some of their grievances had been screened. Six reported that all of their grievances had been screened.

While § 808.03 clearly enumerates the grounds for screening certain issues, prison facilities, according to prisoner reports, routinely screen grievances on other issues. One prisoner was told that a grievance was screened so that the matter could be dealt with internally. Another was told that the allegations in his complaint against a corrections officer were too “incredible” to be believed, without any investigation conducted. Another prisoner noted that grievances were sometimes screened when corrections officers were protecting other officers they were related to.

Still other prisoners reported that prison officials sought to prevent them from filing grievances. Another prisoner reported that the officer crumpled up his grievance form when he handed it to her. Other prisoners were simply told to stop filing grievances by the Superintendent and Assistant Superintendent.

## *ii. Retaliation*

The ACLU of Alaska has no explicit, verifiable evidence of retaliation taken against a prisoner for filing a grievance. However, whether an adverse decision against a prisoner – a decision to seek reclassification or punitive charges – amounts to retaliation necessarily depends on the mental state of the officers involved, a condition difficult to assess as an outside observer. We do note that some prisoners expressed fear of retaliation for filing a complaint against a corrections officer, regardless of whether or not an investigation proceeds.

Of prisoners with whom the ACLU of Alaska met, about half of the prisoners who filed a grievance reported some form of retaliation.<sup>450</sup> Retaliatory action can take many forms besides physical or verbal harassment. As stated in § 808.03, retaliatory action includes “any form of discipline, placement in administrative segregation, transfer, other adverse classification action, or harassment that is imposed upon a prisoner for a prisoner’s filing or pursuit of a grievance.”<sup>451</sup> The prisoners reporting retaliation described a variety of retaliatory actions. Some reported verbal harassment and provocation as well as general intimidation; destruction of property; denial of recreation and use of a phone, as well as

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<sup>450</sup> 36 reported retaliation, 1 reported that there had been no retaliation but he expected it any day, and 41 reported that there was no retaliation.

<sup>451</sup> *Id.* V.I., “Definitions.”

other privileges; physical attacks; increased subjection to strip searches, shakedowns, and write-ups; loss or denial of work; denial of medical treatment; placement in administrative segregation; transfer to another facility; denial of credit for time served; and raised classification status.

The fear that reporting staff misconduct could place a prisoner in harm's way was a common reply to questions about grievances.

One prisoner reported filing a grievance and then being written up for doing so. He was put into administrative segregation for 30 days. As a result, he is afraid of filing grievances, recognizing that people who file grievances "can be singled out." Another prisoner confirmed, "If you speak up, they make it hard for you." The fear that reporting staff misconduct could place a prisoner in harm's way was a common reply to questions about grievances.

As stated above, adverse actions become retaliation only when an officer takes that action maliciously. Prisoners may not be in the best position to distinguish between malicious action and ordinary conduct of prison administration. Particularly, as noted in earlier sections, mental illness is common in the prison system, including paranoid tendencies. At least some prisoners complaining of retaliation were likely experiencing a form of paranoia, seeing malice where there was none. Still, the scope of the complaints raise concerns; further, the function of the grievance system can only be understood in light of the perceptions – correct or incorrect – of prisoners. The ACLU of Alaska believes this represents an area for further investigation.

### *iii. Chilling Effect*

The prisoners interviewed described both a belief in the futility of filing a grievance and a fear of retaliatory action. Five prisoners interviewed specifically stated that even though they had desired to file grievances about prison conditions, they had never filed a grievance for fear of retaliation. Another prisoner reported that, if someone filed a grievance against a staff member, the grievance would be deemed a "false grievance," and the complainant would be disciplined for lying to a staff member. As a result, prisoners who view grievances as a waste of time or as an invitation to be singled out by their peers and the prison staff have little reason to file grievances in the first instance.

Several prisoners we interviewed noted that the problems with the grievance process had worsened since the end of the *Cleary* supervision. Prisoners who have been incarcerated in Alaska for a long time recalled that the *Cleary* Compliance Monitor had been effective in keeping prison staff accountable. Based on the success of the monitor in the earlier supervision, the utility of having an independent observer – the same model the Department follows in observing conditions at its own contract facilities – has been demonstrated.

*iv. Recommendations by the ACLU of Alaska on Internal Governance Procedures:*

1. Ensure that an investigation is not conducted by those involved in the subject matter of the grievance or their close relatives, especially for claims against staff;
2. Require staff to give detailed reasons for delaying investigation or screening grievances;
3. Ensure that grievance procedures are adequately explained to prisoners upon arrival and provide necessary forms;
4. Time-stamp any “cop-out” or grievance form a prisoner submits and allow him or her to keep a duplicate or carbon copy, or alternately provide a receipt with a tracking number, as proof that the “cop-out” or grievance was filed;
5. Improve the monitoring of staff-inmate interactions after the filing of a grievance to prevent retaliation or fear of retaliation;
6. Provide regular institutional review of procedures;
7. Monitor the prisoner perceptions of the grievance system by polling prisoners anonymously about their views of the grievance system; and
8. Provide for external review of grievances by a dedicated correctional ombudsman or external monitor.

## G. Discriminatory Treatment

### i. Introduction

The promise of equality for all people has long been a vital part of international, federal, and Alaska law. Yet prisons in Alaska hold twice as many Alaska Natives as found in the general population of Alaska. Alaska Natives in prison often find themselves unable to keep in touch with families from rural villages, unable to practice their traditional religion, and unable to access rehabilitative programs. Women in Alaska prisons find themselves insufficiently protected from sexual assault and harassment by male prisoners and guards.

### ii. Legal Non-Discrimination Standards

#### 1. International Standards

International law protects the rights of specific groups of individuals identified by their gender, race, or indigenous origin, and prohibits discrimination against them on the basis of their minority status.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) expressly prohibits racial discrimination. Under this international treaty, state parties “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”<sup>452</sup> Thus, they must “take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>453</sup> Not only must states refrain from discrimination,<sup>454</sup> they must also take positive action to end it. They should prohibit racial discrimination and “bring [it] to an end, by all appropriate means,” including through the enactment of legislation,<sup>455</sup> and they should, where warranted, “take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them” in order to guarantee them their equal enjoyment of human rights.<sup>456</sup> Furthermore, under international law, individuals have the “right to liberty and security of person” without distinction on the basis of color or race<sup>457</sup> and to “protection by the State

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<sup>452</sup> CERD, art. 2(1).

<sup>453</sup> *Id.* Art. 2(1)(c).

<sup>454</sup> *Id.* Art. 2(1)(a).

<sup>455</sup> *Id.* Art. 2(1)(d).

<sup>456</sup> *Id.* Art. 2(2).

<sup>457</sup> ICCPR, Arts. 2(1) and 9(1). See also United Nations Declaration on the Elimination of All Forms of Racial Discrimination Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, Article 7.

against violence or bodily harm,” including violent acts committed by a government official or through an institution.<sup>458</sup>

International laws and standards also expressly protect cultural communities. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of peoples to “freely pursue their economic, social and cultural development.”<sup>459</sup> State parties have an obligation to ensure that men and women have equal “enjoyment of all economic, social and cultural rights” recognized by the Covenant.<sup>460</sup> This obligation requires, first, that a State revise policies that disparately impact indigenous minorities and their cultures, and second, that it affirmatively takes measures to support and protect cultural life, such as promoting and maintaining family bonds among indigenous minorities.

As recently as September 2007, the international community reaffirmed the rights of indigenous peoples with the United Nations Declaration on the Rights of Indigenous Peoples. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. Like the ICESCR and the ICCPR, this declaration provides for the right of indigenous peoples to self-determination, that is, the ability to determine their political status, and to pursue their economic and cultural development.<sup>461</sup> These international instruments emphasize indigenous peoples’ right to freedom from State oppression, highlighting their right to life and security of person, as well as their collective right to “live in freedom, peace and security as distinct peoples.”<sup>462</sup> Moreover, signatory States have a further obligation to affirmatively act to protect indigenous minorities, and provide remedies for actions that have the effect of depriving indigenous peoples of their integrity as distinct peoples, or of their cultural values or ethnic identities.<sup>463</sup> States must provide remedies for any form of forced population transfer that has the effect of violating or undermining the rights of indigenous peoples.<sup>464</sup> Certain other measures help ameliorate state discrimination against indigenous individuals – for example the ICESCR hints at the role of the family in helping maintain indigenous cultures, by providing conduits of information and cultural learning, and demands that the States maintain the “widest pos-

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458 United Nations Declaration on the Elimination of All Forms of Racial Discrimination Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, Article 7.

459 International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI), 16 December 1966, Article 1.

460 ICCPR, Article 3.

461 International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI), 16 December 1966, Article 1.

462 United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, Article 7(1-2).

463 United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, Article 8(1), 8(2)(a).

464 United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, Article 8(2)(c).

sible protection and assistance . . . to the family.”<sup>465</sup>

International standards concerning the rights and treatment of prisoners include specific protections for indigenous peoples and the practice of their culture and religions during incarceration, especially where there are many members of the same indigenous group in a single facility. For example, in the treatment of prisoners, there shall be no discrimination on the grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>466</sup> International standards establish that it is “necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.”<sup>467</sup> If there is a sizeable community of prisoners of the same religion in a single institution, international standards demand that a qualified representative of that group be allowed to visit the prisoners.<sup>468</sup> Even in sentence facilities, an institution should use all “remedial, educational, moral, spiritual and other forces and forms of assistance” to meet the individual treatment needs of the prisoners.<sup>469</sup>

In addition, international standards provide that prisoners should be allowed to communicate with their family and reputable friends at regular intervals, both through correspondence and in person.<sup>470</sup> In facilities for sentenced prisoners, states are required pay special attention to a prisoner’s family relationships and facilitate their development where it is in the prisoner’s and the family’s best interest. Under international standards, states must also consider the prisoner’s future release and help the prisoner maintain relationships with people or agencies that will be in the best interest of his family and his

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465 International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI), 16 December 1966, Article 10.

466 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Basic Principle, Article 6(1).

467 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Basic Principle, Article 6(2).

468 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Religion, Article 41(1).

469 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part II, Rules Applicable to Special Categories, Prisoners Under Sentence, Guiding Principles, Article 59.

470 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Contact with the outside world, Article 37.

own social rehabilitation.<sup>471</sup>

International law is particularly concerned with the status of and treatment of women. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to protect the equality of women before the law, ensuring, “through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”<sup>472</sup> States must also avoid “any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”<sup>473</sup> The UN Declaration on the Elimination of Violence Against Women provides further analysis.<sup>474</sup> Specifically, it requires states to develop legal and administrative sanctions to address violence against women. Women who are victims of violence should be able to seek justice and remedies for the harm they suffered.<sup>475</sup> The Declaration also requires States to make sure law enforcement officers and public officials responsible for addressing violence against women “receive training to sensitize them to the needs of women.”<sup>476</sup>

International standards suggest various methods to actualize these protections in the prison context. Incarcerated women receive particular attention and protection from international instruments. For example, international standards require male and female prisoners be detained in separate institutions wherever possible, and where they are housed together in the same institution, the area where women are housed must be entirely separate.<sup>477</sup> Perhaps most importantly, women officers shall be responsible for women inmates, and no male staff member should enter the part of the institution set

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471 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Social relations and after-care, Article 79-80.

472 Convention on the Elimination of All Forms of Discrimination Against Women, Article 2(c). The United States has signed but not ratified this Convention. However, although it is not at present a state party, as a signatory to the Convention, the United States is obligated to refrain from doing acts that would defeat the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, Art. 18(a). See also *supra* note XX and accompanying text.

473 Convention on the Elimination of All Forms of Discrimination Against Women, Article 2(d).

474 Declaration on the Elimination of Discrimination against Women, Proclaimed by General Assembly resolution 2263(XXII) of 7 November 1967; Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993.

475 Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, Article 4(d).

476 Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, Article 4(i).

477 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part I, Rules of General Application, Register, Article 8(a).

aside for women unless he is with a woman officer.<sup>478</sup>

## 2. Domestic Standards

The federal constitution guarantees “equal protection” to every person within its jurisdiction.<sup>479</sup> The Alaska Constitution provides that “all persons are equal and entitled to equal rights, opportunities, and protection under the law”<sup>480</sup> and prohibits discrimination on the basis of “race, color, creed, sex, or national origin” in relation to any civil or political right.<sup>481</sup> Some federal civil rights statutes mandate equal treatment for prisoners: for instance, male and female prisoners must receive similar vocational opportunities and similar pay.<sup>482</sup>

### iii. Inequality in Alaska Prisons

#### 1. Alaska Natives in Alaska Prisons

Alaska Natives make up more than a representative proportion of the population of the average Alaska facility. While Alaska Natives make up about 18% of the state’s population, Alaska Natives constitute about 36% of all prisoners in custody. This overrepresentation is hard to ascribe to just one source. A complex mix of factors likely affects the disparity. Alaska Natives are more likely to be convicted of alcohol possession and importation offenses simply because “dry” and “damp” towns are concentrated in majority-Alaska Native areas. A lack of community resources – especially substance abuse and mental health treatment – in majority-Alaska Native areas may leave some Alaska Natives with substance abuse or mental health problems that go untreated, resulting in more individuals ending up in the correctional system than in community-based treatment.<sup>483</sup> Simple income disparity – as almost 40% of prisoners in Alaska jails are awaiting trial – may preclude the release of many Alaska Natives on bail. A cultural inclination to conflict

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478 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C [XXIV] of 31 July 1957 and 2076 [LXII] of 13 May 1977, Part I, Rules of General Application, Register, Article 53(1-3).

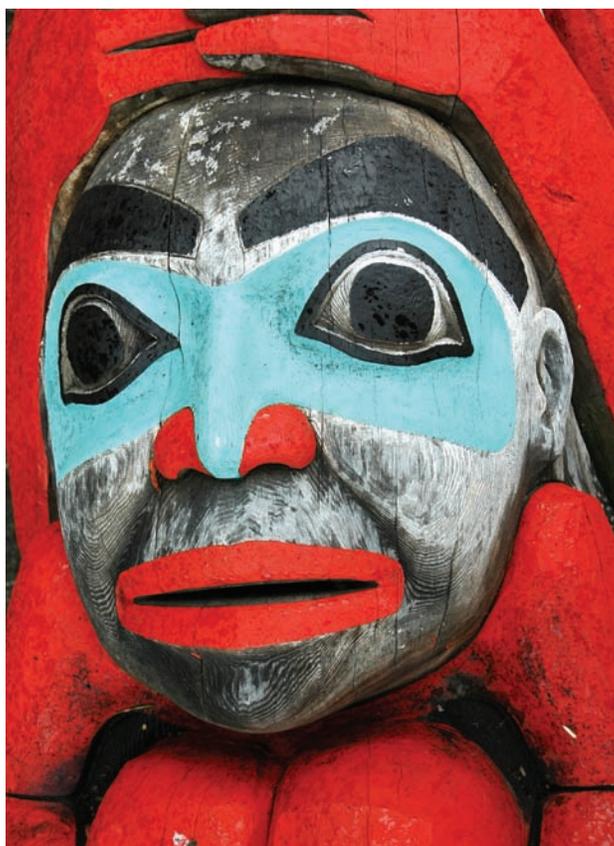
479 U.S. Const., Amdt. XIV.

480 Alaska Const., Sec. I, Art. 1.

481 Alaska Const., Sec. I, Art. 3.

482 *Jeldness v. Pearce*, 30 F.3d 1220 (9<sup>th</sup> Cir. 1994) (ruling that Title IX of the federal Civil Rights Act prohibit unequal treatment of male and female prisoners).

483 Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access, at 68 (1997) available at <http://www.ajc.state.ak.us/reports/fairness.pdf> (describing a lack of treatment alternatives to incarceration in rural areas).



Totem Face [© iStockphoto.com]

avoidance may promote guilty pleas.<sup>484</sup> Real disparities in treatment based on conscious or unconscious racial motives from judges, probation officers, attorneys, police officers, jurors, or other parties to the criminal justice process may also impact the proportion of Alaska Natives convicted of crimes and sentenced to incarceration in Alaska.<sup>485</sup>

#### **a. Family Contact**

In addition to the cultural isolation of prison, many Alaska Natives report difficulty in maintaining contact with their family members while incarcerated. Because Alaska Natives often live outside of Alaska's urban centers, many Alaska Native prisoners are transported

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484 Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access, at 68 (1997) available at <http://www.ajc.state.ak.us/reports/fairness.pdf>; see also Morrow, Phyllis, *A Sociolinguistic Mismatch: Central Alaskan Yup'iks and the Legal System*, 10 JUSTICE FORUM (Summer 1993) available at [http://justice.uaa.alaska.edu/forum/10/2summer1993/a\\_socio.html](http://justice.uaa.alaska.edu/forum/10/2summer1993/a_socio.html).

485 Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access, at 69 (1997) available at <http://www.ajc.state.ak.us/reports/fairness.pdf> (discussing the disproportionate placement bail conditions on Alaska Natives prohibiting the use of alcohol and prohibiting travel to certain locations).

to prisons far from their families. Because of the difficulty of traveling across hundreds or even thousands of miles from rural villages to urban centers, families may be unable to visit them. The current policy of sending Alaskan prisoners out of state exacerbates these difficulties in maintaining family contact. Given these logistical and expensive barriers to in-person visits, telephone calls are the most expedient form of communication, but even those calls can be expensive. Of the 49 Alaska Natives interviewed, 13 claimed the phone calls to their family were prohibitively expensive. Because they are the prisoners who usually live furthest from their families and because of disproportionate poverty making long-distance travel and communication difficult or impossible, Alaska Natives are affected more than other prisoners by the lack of visitation and communication with families.

### ***b. Access to Appropriate Rehabilitative Programming***

A frequent complaint of Alaska Native prisoners was that the treatment programs they needed were unavailable in their communities. After a prior term in prison, as a condition of probation or parole, the prisoners had been forced to live in Anchorage or another city to have access to those programs. The scarcity of rehabilitative programming left these newly-released prisoners in an unfamiliar city, far from their supportive families, far from

Success after release is often tied closely to family relationships. A family member who can offer a place to stay and a guiding hand as a prisoner returns to the larger world is a lifeline for a newly released prisoner.

a familiar environment. Frequently, these newly released prisoners were forced to live in homeless shelters while they completed their probation or parole. One Alaska Native commented that, for him and others from Alaska Native areas, parole and probation rules required them to remain in the Anchorage area, far from their home communities, rendering family reconciliation and return impossible. Such barriers to family reintegration are also obstacles towards building healthy families and communities and enabling those released to desist from criminal behavior.<sup>486</sup> Some new efforts are being made by the Department of Corrections, however, including an important sex offender program which was developed in Bethel in 2007.

An Alaska Native prisoner interviewed by the ACLU of Alaska spoke of being released from custody but was required to remain in a large town while on probation rather than returning to his village, where he had a home and a job. Lacking a place to stay in this large town, he slept in his vehicle. Within a few days of this sad existence, he began to drink again. Homeless and inebriated, he was arrested shortly

<sup>486</sup> Greater contact with family during incarceration has been associated with lower recidivism rates, and prisoners with close family ties have lower recidivism rates than those without such attachments. Strong family support may keep ex-offenders away from criminal networks and contribute to a pro-social identity. It is also correlated with better employment and avoidance of illegal substance abuse. National Research Council Report at 44-45.

thereafter for a serious felony.

Success after release is often tied closely to family relationships. A family member who can offer a place to stay and a guiding hand as a prisoner returns to the larger world is a lifeline for a newly released prisoner. Along with the difficulties of maintaining relationships with family members while in custody, the probation and parole process tends to foster recidivism in some cases by keeping rural Alaskans from returning home.

Another serious concern in the area of rehabilitative programming is the provision of culturally appropriate rehabilitative programs. Many traditional rehabilitative programs are developed in a “confessional” style, focused on group therapy, with individuals talking with numerous other patients about their failings. However, this model of treatment does not resonate with some Alaska Natives. For many Alaska Natives, a program emphasizing self-disclosure and confrontation would conflict with traditional values of stoicism and conflict avoidance in communication. Requiring an older man to reveal his deepest faults to a younger person, rather than a respected elder, might offend a sense of social order. Creating programs to meet these needs presents particular difficulties. Finding a program that has been thoroughly tested and its efficacy shown in studies will be nearly impossible, since the populations involved are very small and unique. Corrections administrators will have to trust collaborators and basically invent appropriate programming, tracking it for evidence of efficacy as the program progresses.

As an example of the hazards of a one-size-fits-all treatment program, a 1996 study of the sex offender treatment program formerly conducted at Hiland Mountain showed that Alaska Natives dropped out in higher numbers than participants of other ethnicities.<sup>487</sup> However, those conducting the study were surprised to find large numbers of older, educated Alaska Natives leaving the treatment program.<sup>488</sup> The researchers anticipated that the older, educated Alaska Natives would presumably be the most mature and motivated participants, and thus would be more likely to succeed. However, the older Alaska Natives were also likely those who deeply valued their traditions and had less exposure to Anglo-American culture, making the program less effective in addressing their problems.

By contrast, one program that shows promise as culturally appropriate treatment has begun in Bethel. A sex offender treatment program aimed particularly at the Alaska Native population in the area has been developed, with a special aim at restorative practices that heal the community disrupted by the offenses. As part of the program, the offenders heard women from a nearby shelter describe the effects abuse had on their lives; the offenders also constructed a fish camp and fished for salmon to feed the women in the shelter. By connecting treatment with the community and with the traditional lifestyle of Alaska Natives, the Department and the ACLU of Alaska hope that treatment will be more

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<sup>487</sup> Mander *et al.*, *Sex Offender Treatment Program: Initial Recidivism Study*, Justice Forum (1996) available at [http://www.correct.state.ak.us/corrections/media/documents/Sex\\_Offender\\_Treatment\\_Prog.pdf](http://www.correct.state.ak.us/corrections/media/documents/Sex_Offender_Treatment_Prog.pdf).

<sup>488</sup> *Id.*

effective for Alaska Natives, diminishing the risk of recidivism and uniting the community once more. Similar sex offender treatment programs for First Nations prisoners in Canada have emphasized traditional spirituality and community healing.<sup>489</sup> The Canadian programs have also allowed important roles for elders in the rehabilitative process.<sup>490</sup> More efforts along these same lines, as well as the simple dedication of more resources to rehabilitation in rural areas, could improve the results of rehabilitation efforts for Alaska Native prisoners.

## 2. Women in Alaska Prisons: Separation and Supervision

Between 1977 and 2004, the population of sentenced female prisoners in Alaska increased by 729%, growing at an average rate of 15% per year.<sup>491</sup> As the number of female prisoners has grown, overcrowding has presented challenges for the state in creating equality in opportunity for female prisoners. The Department has developed a central facility exclusively for women at Hiland Mountain. Today, Hiland Mountain has an excellent array of programs and therapeutic options for women. However, women who are held as pre-trial prisoners in other outlying facilities find themselves largely locked down to one housing unit in order to maintain separation from male prisoners. Their access to religious services, rehabilitative programs, the law library, or exercise in the yard sometimes ends up compromised.

Successfully separating male and female prisoners has proven difficult. In the Mat-Su Pretrial facility, one inmate reported that the male cell windows looked over the prison yard. Because men and women were housed at the facility, time in the yard was divided between the sexes. One day, male inmates looking down on the women in the yard exposed themselves to the women through the window. In response, the prison staff covered the cell windows overlooking the yard with thick, opaque plastic, blocking the lighting in these cells, even for the men who had not exposed themselves. As discussed above, international standards require complete separation between male and female inmates – a shared yard clearly violates that standard.

Several of the women interviewed described situations in which they found themselves alone, supervised by male correctional officers. Female prisoners have complained of verbal harassment from male correctional officers. Permitting male officers to supervise female inmates without a female officer places the Department of Corrections in direct conflict with international legal standards for the care and custody of female offenders.

Many of these difficulties stem from the limitations of building correctional facilities in

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489 Williams, Sharon, *Aboriginal Sex Offenders: Melding Spiritual Healing with Cognitive-Behavioural Treatment*, available at <http://www.csc-scc.gc.ca/text/pblct/so/aboriginal/toce-eng.shtml>.

490 *Id.*

491 Institute on Women and Justice, *Hard Hit: the Growth in the Imprisonment of Women, Alaska Fact Sheet*, at <http://www.wpaonline.org/institute/hardhit/states/ak/ak.htm>.

small towns around Alaska. A woman awaiting trial in Ketchikan or Bethel cannot be economically flown back and forth from Hiland Mountain near Anchorage to the site of her trial. On the other hand, providing fully accessible facilities for the small number of women in already existing prisons presents enormous challenges. As the prison population expands over the next decade, prisons in towns and cities far from the Anchorage area – in Juneau, in Bethel, in Nome, in Fairbanks – will need to expand just to accommodate prisoners awaiting trial. As these expansions occur, the ACLU of Alaska hopes that the state will keep in mind the special needs of these small groups of female prisoners in constructing their facilities and consider designing housing units that would provide more privacy and separation from male prisoners.

#### *iv. Recommendations by the ACLU of Alaska for Equal Treatment:*

1. Improve enforcement of requirements that male correctional officers are always accompanied by female officers in enclosed or private areas housing female inmates, such as cells, bathrooms, etc. ;
2. Develop a long-term facility management plan for the expansion of pre-trial facilities to ensure that female and male prisoners and facilities are completely separated;
3. Improve enforcement of existing standards on conducting physical searches of inmates in a professional manner;
4. Ensure that female prisoners in pretrial facilities have equal and adequate mental health resources and other rehabilitative programming available to them during their pretrial incarceration;
5. Develop a long-term facility planning program that includes more development of facilities, probation offices, and community correctional programs in rural areas;
6. Implement policies that treat each prisoner as an individual and address the needs of that individual as the member of a cultural or religious group;
7. Provide more therapeutic and rehabilitative programs geared towards the cultural needs of Alaska Natives and in the geographic regions where Alaska Natives reside;
8. Provide sufficient resources to enable the successful completion of probation and parole requirements for Alaska Natives and permit them, wherever feasible, to return to their home communities; and
9. Consider technological solutions, such as videoconferencing, for the difficulties of maintaining prisoner –family relationships over long distances.

# APPENDIX A

## ACLU OF ALASKA PRISON PROJECT INMATE INTERVIEW FORM

Interview Date:	Location:	Interviewer:
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### **Biographical Information**

Inmate Name:	Age:	Race:	Inmate#:
Birthplace:	DOB:	Tribe (if any):	Language:
Home Address:	City:	State/ZIP:	Phone:
Time in Alaska:	Education:		Work:

### **Current Prison Status**

Are you currently represented by an attorney in a criminal case or prison conditions case?  
 \_\_\_\_\_ Attorney name(s)? \_\_\_\_\_

Have you previously sought to contact an attorney or non-profit group regarding prison conditions?  
 \_\_\_\_\_

Are you serving a sentence? \_\_\_\_\_ If so, start date? \_\_\_\_\_ End date? \_\_\_\_\_

Held at what other facilities: \_\_\_\_\_

Nature of conviction (lead charge): \_\_\_\_\_ Classification: \_\_\_\_\_

Are you held on a pretrial basis? \_\_\_\_\_ If so, what is your bail? \_\_\_\_\_

Has a Third-party Custodian Requirement been imposed? \_\_\_\_\_

### **Prior Custodial History**

Institution	Pre-Trial/Sentenced	Est. Date Entered	Est. Date Left

**Physical Conditions of Detention**

What size is the cell in which you are currently being held? \_\_\_\_\_

How many other prisoners are currently held there? \_\_\_\_\_

Maximum # of people you have shared your current cell or a comparable cell with? \_\_\_\_\_

For how long? \_\_\_\_\_

What toilet/sanitary facilities are available to you in your cell? \_\_\_\_\_

Are the toilet/sanitary facilities operable? \_\_\_\_\_

Which toilet facilities must you leave your cell to obtain? \_\_\_\_\_

How often may you use those facilities? \_\_\_\_\_

Are you provided with means to clean your cell? \_\_\_\_\_

Is it light enough to read in your cell? \_\_\_\_\_

Is the temperature in the facility sufficiently cool in summer? \_\_\_\_\_

Warm in winter? \_\_\_\_\_

Are there any health threats or unsanitary conditions in your cell (leaking water, sewage, etc.)? \_\_\_\_\_

How many hours a day are you permitted to move outside your cell? \_\_\_\_\_

Are you ever restricted to your cell on a disciplinary basis? \_\_\_\_\_

Are you ever restricted to your cell for lack of staff? \_\_\_\_\_

How many meals per day do you eat in your cell? \_\_\_\_\_

How many hours of exercise are you permitted per day? \_\_\_\_\_

How many hours of educational/vocational opportunities are you given in a day? \_\_\_\_\_

Are you able to work? Has the prison offered you work opportunities? \_\_\_\_\_

How and under what circumstances have you been subject to a strip search? \_\_\_\_\_

How and under what circumstances have you been subject to a cavity search? \_\_\_\_\_

Have you ever been subject to a strip or cavity search specifically to humiliate you or as retribution? \_\_\_\_\_

Narrative: \_\_\_\_\_

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## Health, Mental Health, and Substance Abuse

Please describe any outstanding medical conditions: \_\_\_\_\_

Please list any medications you are currently taking: \_\_\_\_\_

Prior to entering the prison system, with which medical conditions had you previously been diagnosed? \_\_\_\_\_

Prior to entering the prison system, were you prescribed any medications? \_\_\_\_\_

Are you still getting those medications? \_\_\_\_\_

Since being incarcerated, have you sought treatment for any preexisting medical conditions? \_\_\_\_\_

Did the prison system provide medical care and treatment consistent with your prior treatment? \_\_\_\_\_

Have you ever been denied sick call or medical services? \_\_\_\_\_

Have you ever suffered injury or increase illness because of delayed medical services in prison? \_\_\_\_\_

Have you ever been refused the opportunity to go to the hospital or see a doctor not from the prison? \_\_\_\_\_

Out of all your medical visits in the prison system, how many times have you seen a doctor, rather than a nurse or physician's assistant? \_\_\_\_\_

Have you ever been diagnosed with a mental illness? Which illness(es)? \_\_\_\_\_

Were you diagnosed before or after entering the prison system? \_\_\_\_\_

Have you ever been prescribed psychiatric medications? \_\_\_\_\_

Are you receiving your medications in the prisons? If not, why not? \_\_\_\_\_

Has the dosage been altered since you entered prison? Why? \_\_\_\_\_

Have you ever been forcibly medicated? \_\_\_\_\_

Have you ever been physically restrained? How many times? \_\_\_\_\_

What was the longest time you were forcibly restrained? \_\_\_\_\_

During your time in prison, have you ever had any treatment other than medication? \_\_\_\_\_

Have you ever been placed on a mental health unit in the prison? \_\_\_\_\_

Have you ever been treated at a hospital for mental illness? \_\_\_\_\_

Have you ever felt suicidal in prison? How did the prison respond? \_\_\_\_\_

Have you ever attempted suicide? How did the prison respond? \_\_\_\_\_

Have you ever been placed in segregation because of your mental illness? \_\_\_\_\_

Narrative: \_\_\_\_\_

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## Prisoner Safety

Have you ever been assaulted by another inmate? \_\_\_\_\_

How many times? \_\_\_\_\_

Was a weapon used? What kind? \_\_\_\_\_

Where did the assault take place (what facility & where within the facility)?  
\_\_\_\_\_

Were you ever injured by an assault by a fellow prisoner? Describe your injuries:  
\_\_\_\_\_

Were you ever assaulted by your cellmate? \_\_\_\_\_

Have you ever been assaulted by corrections officer? \_\_\_\_\_

How many times? \_\_\_\_\_

Where did the assault take place (what facility & where within the facility)?  
\_\_\_\_\_

Were you ever injured by an assault by a CO? Describe your injuries:  
\_\_\_\_\_

Has a CO ever used pepper spray/Taser/etc. on you? How many times?  
\_\_\_\_\_

Describe what happened: \_\_\_\_\_  
\_\_\_\_\_

If pepper spray or other spray was used, how did you clean out your eyes?  
\_\_\_\_\_

How did the institution respond to the incident? Did it discipline the guard, discipline you, or do nothing? \_\_\_\_\_

Have you ever been sexually assaulted in prison? \_\_\_\_\_

How many times? \_\_\_\_\_

By a CO or by a prisoner? \_\_\_\_\_

Where did the assault take place (what facility & where within the facility)?  
\_\_\_\_\_

Did you ever report the sexual assault? \_\_\_\_\_

Narrative: \_\_\_\_\_  
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**Prisoner Accommodation**

What religion do you practice, if any? \_\_\_\_\_

Are you able to practice your religion freely here? \_\_\_\_\_

Are you able to participate in religious services regularly, if you want to? \_\_\_\_\_

Have you had any difficulty in obtaining important religious items (books, icons, rugs, etc.)? \_\_\_\_\_

Has the prison provided you a proper religious diet? \_\_\_\_\_

Has any prison staff member sought to convert you to another religion? \_\_\_\_\_

Are you barred from participating in any prison-based programs based on your religion? \_\_\_\_\_

Are you able to get into the law library? \_\_\_\_\_

If not, does the prison supply an alternate means to get legal materials? \_\_\_\_\_

How often are you able to go to the law library each week? \_\_\_\_\_

Are the materials in the law library electronic, paper, or mixed? \_\_\_\_\_

If the law library includes electronic access, how many computers are there? \_\_\_\_\_

On a typical day, how many of those computers are operable? \_\_\_\_\_

On a typical day, is there anyone present to assist you with legal research? \_\_\_\_\_

Are you able to correspond with your attorney by mail? By phone? \_\_\_\_\_

Are you able to correspond with your family by mail? By phone? \_\_\_\_\_

Have you experienced any difficulty in getting permission for family or attorney visits? \_\_\_\_\_

Have you ever found that legal mail has been opened outside your presence? \_\_\_\_\_

Has the prison ever refused to deliver mail or books/newspapers/magazines to you because of their contents? \_\_\_\_\_

Narrative: \_\_\_\_\_

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## Rehabilitation & Release

When you were last released from prison, how, if at all did the prison prepare you for release?

Did the prison help you find housing? \_\_\_\_\_

If you have medical problems or take medication, did the prison make sure that you could get medical care/medical assistance/your prescriptions on the outside? \_\_\_\_\_

Did the prison help you to find work or apply for public assistance? \_\_\_\_\_

Did the prison assist you during your prior prison term with any kind of mental health treatment?

Did the prison assist you during your prior prison term with any kind of substance abuse treatment? \_\_\_\_\_

Did the prison assist you during your prior prison term with any kind of education?

Did the prison assist you during your prior prison term with any kind of vocational or life skills training? \_\_\_\_\_

At the time you were last released from prison, did you enter any kind of treatment program outside the prison? Inpatient or outpatient? Please describe it.

Did you transition into the outside world via a halfway house or were you released directly to the street? \_\_\_\_\_

Describe any other resources provided to you by the Department of Corrections after your last release. \_\_\_\_\_

How many days after your last release did you first use a recreational drug or alcohol (if at all)?

How many days after your last release did you first get arrested?

Were you arrested for new charges or for parole/probation violations?

What type of parole/probation violations? \_\_\_\_\_

Were you able to find work after your release? \_\_\_\_\_

Were you able to find a place to live? \_\_\_\_\_

How did you support yourself after your release? \_\_\_\_\_

Did your prior conviction prevent you from getting a job? From getting public assistance?

From getting housing? How so? \_\_\_\_\_



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