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# Gender & Sexuality in the ABA Standards on the Treatment of Prisoners

Margaret Colgate Love

Giovanna Shay

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## GENDER & SEXUALITY IN THE ABA STANDARDS ON THE TREATMENT OF PRISONERS

Margaret Colgate Love<sup>†</sup> and Giovanna Shay<sup>††</sup>

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Over the past three decades, commentators, advocates, and corrections experts have focused increasingly on issues of gender and sexuality in prison. This is due in part to the growing number of women in a generally burgeoning American prison population.<sup>1</sup>

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<sup>†</sup> Margaret Colgate Love practices law in Washington, D.C. She chaired the Drafting Task Force for the ABA Standards on the Treatment of Prisoners, and is a former chair of the ABA Criminal Justice Section Corrections and Sentencing Committee.

<sup>††</sup> Giovanna Shay is an Associate Professor of Law at Western New England University School of Law and co-chairs the Corrections Committee of the ABA Criminal Justice Section.

The views expressed in this Article are not necessarily those of the ABA. We are grateful to Brett Dignam and Robyn Gallagher for their helpful comments.

1. Since 1981, women's incarceration rate has increased by 404%, nearly double the rate of increase for men, an increase fueled largely by the War on Drugs. See THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 1 (2007) (citing JODI M. BROWN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1994-8 tbl.1.8 (1996); PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF

It is also attributable to efforts to end custodial sexual abuse and prison sexual violence, which have focused attention on issues relating to women<sup>2</sup> and LGBT prisoners.<sup>3</sup> Also, in part, this heightened attention reflects the influence of growing free-world social movements emphasizing the “intersectionality” of multiple forms of subordination<sup>4</sup> and seeking to secure fair treatment of gay and transgender people.<sup>5</sup>

This Article describes provisions of the recently promulgated American Bar Association Criminal Justice Standards on the

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JUSTICE STATISTICS, PRISONERS IN 2005 4 (2006)), *available at* [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf). More recent government data indicates that the trend of increased involvement of women in the justice system is continuing, though women who are convicted are still less likely to be incarcerated than are men. *See* LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 3 (2010), *available at* <http://www.bjs.gov/content/pub/pdf/cpus09.pdf> (“A smaller portion of women (15% or 198,600) under correctional supervision were incarcerated in prison or jail at yearend 2009, compared to men (35%) . . .”). For documentation of the five-fold increase in the general rate of incarceration in the United States in the past forty years, see Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010).

2. *See, e.g.*, Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16 CRIM. JUST. 30 (2001) (discussing the emergence of sexual misconduct against female prisoners as an increasingly visible issue). *See generally* SILJA J.A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* (2007) (illustrating some of the important connections between the War on Drugs, racial disparity, and the high rate of substance abuse and physical and sexual abuse among incarcerated women).

3. *See, e.g.*, Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (describing how LGBT prisoners are subject to “heightened vulnerability to sexual victimization” in prison). The initialism “LGBT” refers collectively to lesbian, gay, bisexual, and transgender individuals. A popular variant adds a final “Q” to recognize those who are questioning their sexual identity.

4. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–51 (1991); *see also* Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 49 (2007) (describing custodial sexual abuse as a manifestation of racial and gender hierarchies); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571 (2006).

5. *See* Morgan Bassichis et al., *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 15, 15–19 (Eric A. Stanley & Nat Smith eds., 2011); JOEY L. MOGUL ET AL., *QUEER (IN) JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 156–57 (2011) (describing a critical, prison abolitionist queer and transgender movement).

Treatment of Prisoners (2010 Standards or Standards) that address issues of gender and sexuality in a correctional setting.<sup>6</sup> Part I describes the road to revision of the ABA standards on prisons and prisoners. Part II deals with the provisions of the 2010 Standards that are particularly relevant to women prisoners, including provisions on screening and classification, pregnant prisoners and new mothers, and co-corrections and equal protection. Part III discusses specific standards that are an outgrowth of the movement to address prison sexual violence, including those dealing with custodial sexual abuse and protection of vulnerable prisoners, as well as cross-gender supervision and privacy. Part III also describes standards affecting lesbian and gay prisoners, and transgender prisoners, reflecting heightened awareness of the special needs of these groups. The Article concludes with a comment on the role of the Bar in establishing correctional policy and practice.

#### I. DEVELOPMENT OF THE ABA STANDARDS ON THE TREATMENT OF PRISONERS

The ABA Criminal Justice Standards, of which the 2010 Standards on the Treatment of Prisoners are a part, are a multivolume set of policy documents covering every aspect of the criminal justice system, from policing to prisons.<sup>7</sup> The 2010

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6. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS intro. (3d ed. 2011) [hereinafter 2010 STANDARDS], available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/treatment\\_of\\_prisoners\\_commentary\\_website.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/treatment_of_prisoners_commentary_website.authcheckdam.pdf) (including commentary). These Standards were approved by the ABA House of Delegates in 2010 and published with commentary the following year. *Id.* The 2010 STANDARDS are also published without commentary at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_midyear2010\\_102i.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf). Issues relating to gender and sexuality are just a few of the human rights concerns addressed in the 2010 Standards, which include health care, crowding, segregation, reentry, and access to courts. See Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421 (2010) [hereinafter Schlanger, *Regulating Segregation*]; Margo Schlanger, Margaret Colgate Love, & Carl Reynolds, *ABA Criminal Justice Standards on the Treatment of Prisoners*, CRIM. JUST. MAG., Summer 2010, at 14 [hereinafter Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*], available at <http://www.pardonlaw.com/materials/CrimJustarticleon%20TOPS.pdf>.

7. The Criminal Justice Standards project began in the 1960s and is now in a third edition. *About Criminal Justice Standards*, AM. BAR ASS'N, [http://www.americanbar.org/groups/criminal\\_justice/policy/standards.html](http://www.americanbar.org/groups/criminal_justice/policy/standards.html) (last visited Mar. 23, 2012). The current Standards and a history of their

Standards substantially revise an earlier set of ABA standards dealing with prisons and prisoners, the 1981 Standards on the Legal Status of Prisoners (LSOP Standards).<sup>8</sup> As described in their introduction,<sup>9</sup> as well as in scholarly articles,<sup>10</sup> a multi-year drafting process produced the 2010 Standards. Here we briefly summarize that process to provide background for our discussion of particular provisions on gender and sexuality.

The introduction to the 2010 Standards points out that the LSOP Standards were developed in a very different world. Then, only 557,000 Americans were incarcerated, compared to an estimated 2.3 million today.<sup>11</sup> This historically unprecedented increase in incarceration rates has disproportionately affected women<sup>12</sup> and drawn attention to new issues specific to gay and transgender prisoners.<sup>13</sup> The LSOP Standards dealt in cursory fashion with the former and not at all with the latter.

Moreover, the legal regulation of corrections has changed since 1981,<sup>14</sup> including in ways that relate directly to issues of

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development are available on the ABA website. *Id.* There are currently twenty-three sets of ABA Criminal Justice Standards, covering topics from discovery and pretrial release to sentencing and collateral consequences. *Id.*

8. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS (2d ed. 1983) [hereinafter LSOP STANDARDS], available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crim\\_just\\_standards\\_prisoners\\_status.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crim_just_standards_prisoners_status.html). The LSOP Standards, jointly promulgated with the American Correctional Association and adopted by the ABA House of Delegates in 1981, were published in chapter 23 of the original Criminal Justice Standards, and that numbering has been preserved for the third edition's Treatment of Prisoners Standards. See Schlanger, *Regulating Segregation*, *supra* note 6, at 1423–24; Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, *supra* note 6, at 15–17.

9. See 2010 STANDARDS, *supra* note 6, at intro.

10. E.g., Schlanger, *Regulating Segregation*, *supra* note 6, at 1423–28; Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, *supra* note 6, at 15–17.

11. See 2010 STANDARDS, *supra* note 6, at intro; see also JODI M. BROWN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 tbl.1.1 (1996). The Bureau of Justice Statistics reports that the prison and jail population at the end of 2009 was slightly under 2.3 million. GLAZE, *supra* note 1, at tbl.1. If there can be good news in this picture, it is that, beginning in 2010, the number of individuals in U.S. prisons began to decline for the first time since the 1970s. PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 1 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf> (describing a 0.3% decrease in the American prison population in 2010).

12. See *supra* note 1 and accompanying text.

13. See, e.g., Bassichis et al., *supra* note 5; MOGULE ET AL., *supra* note 5.

14. Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*,

gender and sexuality. Most notably, in 2003, Congress passed the Prison Rape Elimination Act (PREA),<sup>15</sup> establishing a National Prison Rape Elimination Commission (NPREC) charged with developing federal regulations to combat prison sexual violence.<sup>16</sup> The process of enacting PREA regulations has included several public notice-and-comment periods and remains ongoing as this Article goes to press.<sup>17</sup> Another important legal development since 1981 was passage of the Prison Litigation Reform Act of 1996 (PLRA), which restricted prisoner lawsuits challenging conditions of confinement.<sup>18</sup> The PLRA has been criticized for its adverse effects on victims of custodial sexual abuse.<sup>19</sup> However, notwithstanding the PLRA's generally discouraging effect on prisoner litigation, several important post-PLRA cases have raised public awareness of issues affecting women and LGBT people in custody.<sup>20</sup>

Like other ABA Criminal Justice Standards, the 2010 Standards

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*supra* note 6, at 16.

15. 42 U.S.C. §§ 15601–09 (2006).

16. See NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009) [hereinafter NPREC REPORT], available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>. The PREA established NPREC as a nine-member commission charged with holding hearings, gathering evidence, and recommending to the Attorney General national standards to prevent and remedy prison rape. 42 U.S.C. § 15606 (2006).

17. See National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6248 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 11) [hereinafter DOJ PREA Regulations], available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf); see also *Better Protecting Prisoners*, N.Y. TIMES, (Apr. 6, 2011), [http://www.nytimes.com/2011/04/07/opinion/07thu2.html?\\_r=1](http://www.nytimes.com/2011/04/07/opinion/07thu2.html?_r=1) (describing proposed DOJ PREA regulations and criticizing the decision not to end cross-gender pat searches).

18. Act of Apr. 26, 1996, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66-10-77 (codified as amended in sections of 11, 18, 28, and 42 U.S.C.); see Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140 n.2 (2008).

19. Schlanger & Shay, *supra* note 18, at 144–46; see also Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004) (describing how the PLRA's physical-injury requirement should be amended to make clear that the statute does not bar damages for rape victims).

20. See, e.g., *Amador v. Andrews*, 655 F.3d 89, 92–93 (2d Cir. 2011) (involving a class action on behalf of women in the custody of the New York Department of Corrections alleging systemic custodial sexual abuse); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004) (involving allegations of deliberate indifference by Texas state prison officials to repeated sexual assaults on a gay prisoner over a period of eighteen months).

on the Treatment of Prisoners do not merely describe the current state of the law.<sup>21</sup> They are prescriptive, providing “practical guidelines to help those concerned about what happens behind bars.”<sup>22</sup> While the Standards are rooted in “litigation-developed constitutional minima for prisoners’ rights and their remediation,” they go “beyond these limited precedents” to address “what might be called the infrastructure of constitutional compliance,” such as correctional training and supervision.<sup>23</sup> The Standards “can appropriately be less deferential to prison administrators than are courts adjudicating constitutional claims, because . . . they have as their very purpose . . . ‘to shape the institutions of government in such fashion as to comply with the laws and the Constitution.’”<sup>24</sup> At the same time, the Standards are modest in recognizing the limited role of the Bar in determining the details of how prisons are administered on a day-to-day basis: “[The Standards] are directed at establishing the conditions that should exist in confinement facilities. How these conditions come into being is left to the skill and resourcefulness of correctional administrators.”<sup>25</sup>

The project of rewriting the LSOP Standards took place against the backdrop of a rich and growing literature on issues of gender and sexuality in corrections, including work by legal academics, corrections experts, social scientists, and advocates. This literature originates in numerous sources and schools of thought—including the transgender rights movement, the international human rights community, nonprofit organizations, and feminist civil rights attorneys and scholars. Topics of litigation and research include cross-gender privacy,<sup>26</sup> custodial sexual abuse,<sup>27</sup> medical treatment and housing for transgender

21. See 2010 STANDARDS, *supra* note 6, at intro.

22. *Id.*

23. *Id.*

24. *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)); see also Schlanger, *Regulating Segregation*, *supra* note 6, at 1426–27.

25. 2010 STANDARDS, *supra* note 6, at intro.

26. See Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2008) [hereinafter Buchanan, *Beyond Modesty*]; see also Robyn Gallagher, *Cross-Gender Pat Searches: The Battle Between Inmates and Corrections Officers Enters the Courtroom*, 33 W. NEW ENG. L. REV. 567 (2011).

27. See Buchanan, *supra* note 4, at 47 (writing in 2007 that “most prisons have failed to adopt institutional and employment policies that effectively prevent or reduce custodial sexual abuse”); see also M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 430 (2010) (explaining the growing trend of prison guards sexually abusing inmates and providing recommendations to combat the sexual assaults).

prisoners,<sup>28</sup> vulnerability of prisoners with non-heterosexual orientations,<sup>29</sup> reproductive issues and treatment of pregnant prisoners,<sup>30</sup> and how concepts of masculinity are constructed in prison culture.<sup>31</sup>

As discussed in greater detail in Parts II and III, many new topics reflected in this literature were added to the Standards in the 2010 revision. Existing provisions relating to prenatal care, childbirth, and child placement were expanded, and the needs of women were addressed in more general provisions on intake screening and classification.

The 2010 Standards reflect the effort to combat prison sexual violence, including provisions on custodial sexual abuse and cross-gender supervision. They also address the need to protect transgender prisoners and to forbid harassment on the basis of sexual orientation or gender identity.

## II. UPDATED PROVISIONS AFFECTING WOMEN PRISONERS

The fact that there was only one provision of the LSOP Standards that addressed the needs of women—“Services for Women Prisoners”<sup>32</sup>—reflects the different realities of a time when there were far fewer women prisoners and when issues specific to women were thought to be limited to pregnancy and childbirth. Yet, the provisions of this standard seem surprisingly progressive: “[C]orrectional authorities should assure . . . that accommodations for all necessary prenatal and postnatal care and treatment are available for women prisoners,” and “whenever practicable . . . children . . . [should] . . . be born in a hospital outside an institution.”<sup>33</sup> If a child was born in the institution, this “should not be mentioned in the birth certificate . . . .”<sup>34</sup> The 1981 standard

28. See CAPTIVE GENDERS: TRANS EMBODIMENT AND PRISON INDUSTRIAL COMPLEX (Eric A. Stanley & Nat Smith eds., 2011); Sydney Tarzwell, *The Gender Lines are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 186 (2006).

29. See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender & the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 61–62 (2010); Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 125 (2010).

30. See Mark Egerman, *Rules for Radical Lawyers: Advancing the Abortion Rights of Inmates*, 21 COLUM. J. GENDER & L. 46, 90 (2011).

31. See PRISON MASCULINITIES (Don Sabo et al. eds., 2001).

32. LSOP STANDARDS, *supra* note 8, at 23-5.7.

33. *Id.* at 23-5.7(a).

34. *Id.*; see also 2010 STANDARDS, *supra* note 6, at 23-6.9 (“Governmental authorities should ensure that no birth certificate states that a child was born in a



does not stop there: correctional authorities should ensure “that it is possible for women prisoners to keep their young children with them for a reasonable time, preferably on extended furlough or in an appropriate community facility . . . .”<sup>35</sup> If that is “not feasible . . . alternative care [should] be promptly arranged.”<sup>36</sup> This standard also called for prison nurseries.<sup>37</sup>

As will be discussed, the 2010 Standards retain most of the provisions of the LSOP Standards regarding pregnancy and maternity. But reflecting a new world of women’s incarceration, as well as years of litigation and advocacy about conditions in prisons designated for women,<sup>38</sup> the 2010 Standards address numerous other issues relating to the treatment of women prisoners, which we discuss in the following sections.

#### A. *Screening and Classification*

Gender-related changes in the 2010 Standards begin with the provision regarding “intake screening”—the process of gathering information about a prisoner at admission to ensure appropriate custody arrangements and treatment. The new screening provision, Standard 23-2.1(b)(i), states that “correctional authorities should . . . use a properly validated screening protocol, including, if appropriate, special protocols for female prisoners . . . .”<sup>39</sup> The standard on classification, Standard 23-2.2(c), requires that classification and housing standards take account of several factors, including the prisoner’s gender.<sup>40</sup>

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correctional facility.”).

35. LSOP STANDARDS, *supra* note 8, at 23-5.7(b).

36. *Id.*

37. *See id.* (“Where the young children remain with the mother in an institution, a nursery staffed by qualified persons should be provided.”).

38. *See, e.g.,* Amador v. Andrews, 655 F.3d 89, 93 (2d Cir. 2011) (challenging systemic custodial sexual abuse); Roubideaux v. N.D. Dep’t of Corr. & Rehab, 570 F.3d 966, 969–70 (8th Cir. 2009) (involving a Title IX challenge on behalf of women prisoners); Klinger v. Dep’t of Corr., 31 F.3d 727, 729 (8th Cir. 1994) (challenging vocational and educational opportunities available to women prisoners on equal protection grounds); Jordan v. Gardner, 986 F.2d 1521, 1524 (9th Cir. 1993) (challenging cross-gender clothed pat searches of women prisoners); Women Prisoners of the D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 639 (D.D.C. 1994) (challenging conditions of confinement, programming, and medical care for women prisoners, as well as systemic custodial sexual abuse), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part*, 93 F.3d 910 (D.C. Cir. 1996).

39. 2010 STANDARDS, *supra* note 6, at 23-2.1(b)(i).

40. *Id.* at 23-2.2(c).

These provisions of the 2010 Standards, as elaborated on in a resolution approved by the ABA House of Delegates in 2011,<sup>41</sup> reflect a policy determination that screening and classification instruments designed for a female population can promote more appropriate (and frequently less restrictive) housing placements and, in some circumstances, a shift from incarceration to community corrections. The 2011 resolution urged correctional authorities to adopt “gender-responsive” classification instruments to avoid classifying women in overly restrictive settings.<sup>42</sup> The report accompanying the resolution cites research showing how traditional classification instruments, designed primarily for men, tend to result in “over-classification” of women.<sup>43</sup> At the same time, “gender-responsive” classification and programming have been criticized as promoting “essentialist” stereotypes that depict women as primarily caregivers and men as fundamentally violent and dangerous.<sup>44</sup> One of the proponents of the 2011 resolution has acknowledged that gender-responsive classification can be a “double-edged sword.”<sup>45</sup>

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41. CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, RESOLUTION 105C REPORT TO THE HOUSE OF DELEGATES (2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/2011a\\_resolution\\_105c.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105c.auth_checkdam.pdf).

42. *Id.*

43. *See id.* (“[G]iven that the overwhelming majority of women are released from prison within twelve months, the researchers recommended alternatives to incarceration, including a transition from a prison-focused to a community correctional residential paradigm, in which women are supervised and receive programming within their communities.”). *See generally* Giovanna Shay, *Double-Edged Paring Knives: Human Rights Dilemmas for Special Populations*, HUM. RTS., Summer 2011, at 17 (describing dilemmas in regulations addressing issues of special populations of prisoners); COMM’N ON GIRLS & WOMEN IN THE CRIMINAL JUSTICE SYS., ONE SIZE DOES NOT FIT ALL: A STATUS REPORT ON RECOMMENDATIONS FOR GENDER-RESPONSIVENESS IN ALABAMA’S CRIMINAL JUSTICE SYSTEM (2010), *available at* <http://parca.samford.edu/commission/report2010.pdf> (recommending gender-responsive reforms as a means of decarceration of nonviolent women offenders).

44. *See, e.g.*, Cassandra Shaylor, *Neither Kind Nor Gentle: The Perils of ‘Gender Responsive’ Justice*, in THE VIOLENCE OF INCARCERATION 145, 152–54 (Phil Scraton & Jude McCulloch eds., 2009) (arguing that “gender responsive justice relies on outmoded, essentialist notions of femininity,” and that “the current punishment regime assumes a harmful and violent masculinity”).

45. Shay, *supra* note 43, at 19 (quoting former ABA Corrections Committee Co-Chair Brett Dignam).

*B. Pregnancy and Childbirth*

Standard 23-6.9 (“Pregnant prisoners and new mothers”) reaffirms and elaborates on the provisions of the LSOP Standards relating to provision of prenatal and postpartum services, birth certificates of children born in a prison facility, new mothers’ ability to keep their children with them for “a reasonable time” after birth, and suitably staffed nurseries.<sup>46</sup> It also states that prisons should “strive to meet the legitimate needs of prisoner mothers and their infants, including a prisoner’s desire to breastfeed her child.”<sup>47</sup>

It is a shame that the clear thrust of these provisions—to maintain mother-child relationships through a prison term—has been frustrated by the dramatic increase in women’s incarceration. The commentary to Standard 23-6.9 notes that “[t]housands of prisoners come to prison pregnant; thousands give birth behind bars every year. But conditions and practices at many jails and prisons are not adjusted to meet the unique needs of pregnant prisoners.”<sup>48</sup> Very few jurisdictions offer prisoners an opportunity to bond with newborns, much less a prison nursery.<sup>49</sup> A growing literature describes the adverse effects of parental incarceration on children.<sup>50</sup> In contrast to the bonding of mothers and children contemplated by the LSOP Standards, and reaffirmed in the 2010 Standards, the federal Adoption and Safe Families Act of 1997 (ASFA) now calls for accelerated termination of prisoners’ parental rights.<sup>51</sup> Bowing to the inevitable, Standard 23-6.9(f) provides that

46. See 2010 STANDARDS, *supra* note 6, at 23-6.9 cmt; see also *supra* text accompanying notes 32–37 for a discussion of LSOP STANDARDS, *supra* note 8, at 23-5.7.

47. 2010 STANDARDS, *supra* note 6, at 23-6.9.

48. *Id.* at 23-6.9 cmt.

49. REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., MOTHERS BEHIND BARS 20 (2010), available at <http://nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf> (reporting that only twelve states offer prison nursery programs).

50. See Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1672–78 (2003); Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353 (2010); see also Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

51. See 42 U.S.C. § 675(5) (2006). See generally Genty, *supra* note 50, at 1677–79 (discussing how the ASFA accelerates termination of prisoners’ parental rights).

if a prisoner will be incarcerated for the long-term, the prisoner shall be “helped to develop necessary plans for alternative care” and should be informed of any consequences for her parental rights.<sup>52</sup> The commentary to this Standard acknowledges that, in light of the ASFA, “a prisoner’s placement of a child into foster care can trigger a life-changing consequence the mother should understand as she chooses childcare arrangements.”<sup>53</sup>

The 2010 Standards address two issues that were not dealt with at all in the LSOP Standards: (1) the shackling of women prisoners in labor; and (2) access to abortion services. Respecting the first of these, Standard 23-6.9(b) states that “a prisoner should not be restrained while she is in labor, including transport, except in extraordinary circumstances after an individualized finding that security requires restraint . . . .”<sup>54</sup> The commentary to Standard 23-6.9(b) states that restraints can “seriously injure the mother” and “obstruct labor progress.”<sup>55</sup> This provision reflects the ongoing debate over the shackling of pregnant and laboring prisoners in human rights reports,<sup>56</sup> court decisions,<sup>57</sup> and law review articles,<sup>58</sup> and the changes in policy in some states<sup>59</sup> and in the federal prison system.<sup>60</sup>

52. 2010 STANDARDS, *supra* note 6, at 23-6.9(f).

53. *Id.* at 23-6.9(f) cmt.

54. *Id.* at 23-6.9(b).

55. *Id.* at 23-6.9(b) cmt.

56. See, e.g., AMNESTY INT’L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001); AMNESTY INT’L, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), available at <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11d1-808b-bfd8d459a3de/amr510191999en.pdf>.

57. See, e.g., *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009) (en banc).

58. See, e.g., Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363 (2008).

59. See, e.g., Zachary R. Dowdy, *Guv Signs Anti-Shackling Bill for Pregnant Prisoners*, NEWSDAY (Aug. 26, 2009, 6:08 PM), <http://www.newsday.com/long-island/nassau/guv-signs-anti-shackling-bill-for-pregnant-prisoners-1.1397013>; *Va. Prisons to Ban the Shackling of Pregnant Inmates*, ARLNOW (Aug. 18, 2011, 10:35 AM), <http://www.arlnow.com/2011/08/18/va-prisons-to-ban-the-shackling-of-pregnant-inmates> (reporting that eleven states have banned the practice, including Virginia, California, Colorado, Illinois, Pennsylvania, New Mexico, New York, Texas, Vermont, Washington, and West Virginia).

60. See, e.g., FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT NO. 5538.05, ESCORTED TRIPS (2008), available at [http://www.bop.gov/policy/progstat/5538\\_005.pdf](http://www.bop.gov/policy/progstat/5538_005.pdf) (stating that a laboring inmate “should not be placed in restraints unless there are reasonable grounds to believe the inmate

On access to abortion services, Standard 23-6.9(c) provides that corrections officials should “facilitate access to abortion services for a prisoner who decides to exercise her right to an abortion . . . .”<sup>61</sup> This should include “prompt scheduling of the procedure” and transportation to the provider.<sup>62</sup> This standard reflects court decisions striking down state procedures that infringed on incarcerated women’s right to choose.<sup>63</sup>

### C. Co-Corrections and Equal Protection

Like the analogous provision of the LSOP Standards, 2010 Standard 23-3.2(c) provides that a correctional agency may confine men and women in the same facility.<sup>64</sup> Standard 23-3.2(c) adds that if men and women are housed in one facility, they should be housed separately, reflecting widespread norms of binary sex segregation in American corrections.<sup>65</sup> In any case, under the 2010 Standards, “[l]iving conditions for a correctional agency’s female prisoners should be essentially equal to those of the agency’s male prisoners, as should security and programming.”<sup>66</sup> The commentary to 2010 Standard 23-3.2(c) notes that because women are the minority gender in correctional systems—7% of prisoners and 13% of those confined in jails—they have faced “scarcity in both housing options and appropriate programming.”<sup>67</sup>

Standard 23-3.2(c) requires more than most courts have mandated under the Equal Protection clause. The commentary notes that some courts have concluded that men and women prisoners are not “similarly situated” because of the “special characteristics” of women prisoners (generally relating to the likelihood of their being custodial parents or abuse victims),

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presents an immediate, serious threat of hurting herself, staff or others, or there are reasonable grounds to believe the inmate presents an immediate or credible risk of escape that cannot be reasonably contained through other methods”).

61. 2010 STANDARDS, *supra* note 6, at 23-6.9(c).

62. *Id.*

63. *See, e.g.,* *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008); *see also* 2010 STANDARDS, *supra* note 6, at 23-6.9 cmt.

64. *Compare* LSOP STANDARDS, *supra* note 8, at 23-6.14, *with* 2010 STANDARDS, *supra* note 6, at 23-3.2(c).

65. 2010 STANDARDS, *supra* note 6, at 23-3.2(c); *see* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 79–81 (2011) (describing a widespread legal requirement of sex segregation in U.S. corrections).

66. 2010 STANDARDS, *supra* note 6, at 23-3.2(c).

67. *Id.* at 23-3.2 cmt.

thereby excusing jurisdictions from giving women equal access to programming and other benefits.<sup>68</sup> “The constitutional footing of this approach is doubtful, but regardless of its ultimate resolution, agencies . . . should not countenance gross inequalities by gender any more than they should tolerate racial disparities.”<sup>69</sup>

### III. NEW PROVISIONS ADDRESSING SEXUAL ABUSE, PRIVACY, AND LGBT PRISONERS

Since 1981, forces have converged to create a movement to end prison sexual violence and custodial sexual abuse,<sup>70</sup> issues that were scarcely hinted at in the LSOP Standards. The most significant additions to the 2010 Standards in the area of gender and sexuality grow out of this movement. Other new provisions reflect a heightened awareness of the vulnerability of LGBT prisoners.

#### A. *Custodial Sexual Abuse and Prison Sexual Violence*

The LSOP Standards contained a brief mention of sexual assault under a Standard entitled “physical security,” as part of a list of conditions potentially affecting prisoners’ safety.<sup>71</sup> The 2010

68. *Id.*; see, e.g., *Klinger v. Dep’t. of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994); *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 913 (D.C. Cir. 1996), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part*, 93 F.3d 910 (D.C. Cir. 1996); see also Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of “Similarly Situated,”* 51 N.Y.L. SCH. L. REV. 595 (2006–2007); Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 592–93 (2011) (analyzing court decisions that conclude that male and female prisoners are not “similarly situated”).

69. 2010 STANDARDS, *supra* note 6, at 23-3.2 cmt.

70. Valerie Jenness and Michael Smyth have described how interest groups coalesced to produce passage of the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–09 (2006). See Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL’Y REV. 489, 489–90 (2011). The PREA mandated formation of a National Prison Rape Elimination Commission (NPREC) to propose regulations to end prison sexual abuse to the Department of Justice (DOJ). NPREC REPORT, *supra* note 16, at 1–3. The DOJ then initiated a notice-and-comment period and issued its own proposed regulations, which are still pending. See DOJ PREA Regulations, *supra* note 17.

71. LSOP STANDARDS, *supra* note 8, at 23-6.9 (“Prisoners should be entitled to a healthful place in which to live and to protection from personal injury, disease, property damage, and personal abuse or harassment, including sexual assault or manipulation.”).

Standards address in detail the prevention of and response to custodial sexual abuse and prison sexual violence,<sup>72</sup> reflecting the outcome of litigation,<sup>73</sup> human rights advocacy,<sup>74</sup> and scholarship.<sup>75</sup>

Standard 23-5.3 (“Sexual abuse”) contains a detailed scheme for preventing, investigating, and addressing prison sexual abuse. It mandates that “[c]orrectional officials should strive to create an institutional culture in which sexual assault or sexual pressure is not tolerated.”<sup>76</sup> They should implement a means of reporting and investigating allegations of sexual abuse, and provide for prompt medical and mental health treatment, and confidentiality.<sup>77</sup> The PREA regulations soon to be issued by the Department of Justice (DOJ) are likely to be both more detailed and more enforceable than the 2010 Standards. However, where the PREA regulations may be less protective of prisoners’ rights (as in their proposed provisions on cross-gender pat searches and supervision), the 2010 Standards will continue to set a higher aspirational bar.<sup>78</sup>

72. 2010 STANDARDS, *supra* note 6, at 23-5.3.

73. *See, e.g.*, *Amador v. Andrews*, 655 F.3d 89, 92–93 (2d Cir. 2011) (permitting a class action lawsuit brought by women prisoners alleging sexual abuse and harassment against employees at seven state prisons); *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634, 679–80 (D.D.C. 1994) (holding that sexual assault and harassment against women prisoners violated the inmates’ constitutional and civil rights), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part*, 93 F.3d 910 (D.C. Cir. 1996).

74. *See, e.g.*, HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* (1996) (recommending reforms to prevent, investigate, and punish custodial sexual abuse in U.S. prisons); HUMAN RIGHTS WATCH, *NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS* (1998) (providing recommendations to end retaliation against women inmates in Michigan state prisons for reporting instances of sexual abuse).

75. *See, e.g.*, Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 WOMEN’S RTS. L. REP. 1 (2007) (evaluating the body of scholarship related to women and prisons since the 1970s); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression & Safety*, 15 COLUM. J. GENDER & L. 185 (2006) (discussing sex in prisons in the context of the Prison Rape Elimination Act of 2003).

76. 2010 STANDARDS, *supra* note 6, at 23-5.3(a).

77. *Id.*

78. The commentary to Standard 23-5.3 states that “[t]he provisions of this Standard represent the ABA’s own views, but are consonant with the regulations recommended by the National Prison Rape Elimination Commission, currently under review by the Attorney General.” *Id.* at 23-5.3 cmt.

B. *Searches and Cross-Gender Supervision*

Cross-gender supervision and searches have been a flash point in litigation and advocacy concerning women prisoners,<sup>79</sup> given the population's high reported rates of prior sexual abuse.<sup>80</sup> Concern about opening employment in men's facilities to women corrections officers has sometimes conflicted with the goal of protecting women prisoners from abuse by male officers.<sup>81</sup> Some fear that any restriction on the ability of one sex to supervise or search another could limit opportunities for employment of women in corrections and run afoul of employment discrimination laws.<sup>82</sup> Other commentators have criticized advocates for focusing too much on women's privacy vis-à-vis male officers, without recognizing men's privacy interests or the possibility of same-sex abuse.<sup>83</sup> Still others counter that the realities of custodial sexual abuse demand that corrections officials pay particular attention to the vulnerabilities of women guarded by men.<sup>84</sup>

79. See Gallagher, *supra* note 26; see also Buchanan, *Beyond Modesty*, *supra* note 26, at 756 (describing the debate about cross-gender supervision and critiquing theorists described as "modesty critics," who argue that advocacy to eliminate cross-gender supervision relies on stereotypes); Deborah LaBelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 110–11 (2008) (describing international human rights standards prohibiting cross-gender supervision).

80. THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM (2007) (citing LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS 8 (1999)), available at [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf) (noting that 57% of women prisoners in state custody report having been the victim of physical or sexual abuse before incarceration); Cathy McDaniels-Wilson & Judson L. Jeffries, *Women Behind Bars: An Illuminating Portrait*, 2011 J. INST. JUST. & INT'L STUD. 129, 134 (2011) (finding, in a study of women prisoners in Ohio, that "nearly all of the women . . . admitted being sexually abused at some point in their lives," while 70% described at least one incident that would be deemed rape in most states).

81. See generally Gallagher, *supra* note 26, at 601 (describing a "history of discrimination" against women working in corrections and proposing that a "gender-based BFOQ" could have "very real effects" on women officers in men's facilities).

82. *Id.* at 588–95 (describing female officers' concern that they will be barred from opportunities in corrections if cross-gender searches are restricted).

83. See Buchanan, *Beyond Modesty*, *supra* note 26 (describing and critiquing the claim that advocates have promoted stereotypes by emphasizing women prisoners' privacy concerns vis-à-vis male guards).

84. Ashlie Case, Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309, 324 (2005) ("The place to wage theoretical battles about the truth of gender and sexuality is not the penitentiary."); see also 2010 STANDARD, *supra* note 6, at 23-7.9 cmt. n.256 (citing Bureau of Justice



In developing regulations to implement the PREA, NPREC<sup>85</sup> and the DOJ<sup>86</sup> have approached this set of controversial issues from different perspectives, mirroring the tension between the privacy interests of prisoners, on the one hand, and the needs of correctional administrators and staff on the other. The primary source of this tension lies in the potential for limiting employment opportunities for women officers in correctional facilities, which of course are overwhelmingly populated by men.<sup>87</sup> In our view, the ABA's 2010 Standards navigate this difficult terrain in a thoughtful way.

On the issue of cross-gender searches, the 2010 Standards come down squarely in favor of prisoners' privacy interests, by adopting essentially the NPREC position that cross-gender pat searches should be restricted to extraordinary or unforeseen circumstances.<sup>88</sup> Thus, Standard 23-7.9 provides that, "except in exigent situations," pat searches and visual searches of a prisoner's private bodily areas "should be conducted by correctional staff of the same gender as the prisoner."<sup>89</sup> Beyond a mere concern for privacy, limitations on cross-gender searches are grounded in their established linkage to sexual abuse.<sup>90</sup> Conceding that there is "some reason to think that this rule is less urgent for male prisoners" in light of the lesser degree of reported sexual trauma in the background of male prisoners and their lower rate of victimization by correctional staff, the commentary to Standard 23-7.9 points out that an across-the-board rule was thought to have important benefits for both men and women prisoners, "reducing occasions for sexual abuse and respecting their human dignity."<sup>91</sup> At the same time, the commentary to Standard 23-7.9 recognizes that "[t]he presence of female officers in large numbers in

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Statistics studies purporting to demonstrate that women prisoners in state facilities are six or seven times "as likely as male prisoners to be victims of staff sexual contact").

85. See NPREC REPORT, *supra* note 16, at 215.

86. See DOJ PREA Regulations, *supra* note 17, at 6253-54.

87. 2010 STANDARDS, *supra* note 6, at 23-7.9 cmt.

88. *Id.* (citing NPREC REPORT, *supra* note 16, at app. B (containing NPREC [Proposed] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails PP-4 (limiting cross-gender viewing and searches))).

89. *Id.* at 23-7.9(b).

90. *Id.* at 23-7.9 cmt. (citing *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc); *Colman v. Vasquez*, 142 F. Supp. 2d 226 (D. Conn. 2001)).

91. *Id.*

correctional facilities of all types is helpful in promoting normalcy and appropriate rehabilitation in men's as well as women's prisons."<sup>92</sup> Corrections administrators can avoid restricting women's job opportunities in men's facilities by "careful shift assignments that take account of the gender-specific roles allowed in searching."<sup>93</sup>

The proposed DOJ PREA Regulations<sup>94</sup> take a far more permissive approach to cross-gender pat searches than the NPREC recommendations or the 2010 Standards, eliminating such searches only in juvenile facilities and otherwise restricting them only for prisoners with a documented history of prior custodial cross-gender sexual abuse.<sup>95</sup> In commenting on the proposed regulations, the ABA pointed out that this proposal fails to recognize the vulnerability of a large percentage of incarcerated individuals or the high incidence of sexual assault stemming from cross-gender pat searches.<sup>96</sup> To underscore both the necessity and feasibility of the limitations proposed by NPREC and its own Standards, the ABA noted that most states "do not allow routine cross-gender pat-downs in female facilities."<sup>97</sup>

92. *Id.*; see also NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, WOMEN AS CORRECTIONAL OFFICERS IN MEN'S MAXIMUM SECURITY FACILITIES: A SURVEY OF THE FIFTY STATES 4 (1991), available at <http://static.nicic.gov/Library/009504.pdf> (describing how hiring of women officers created a more "normalized environment").

93. 2010 STANDARDS, *supra* note 6, at 23-7.9 cmt.

94. See DOJ PREA Regulations, *supra* note 17.

95. *Id.* at 6253. The DOJ accepted the NPREC recommendation to limit cross-gender strip searches to emergency situations. See *id.* at 6285.

96. See Letter from Thomas M. Susman, Director, Gov't Affairs Office, Am. Bar Ass'n, to Robert Hinchman, Senior Counsel, Office of Legal Policy, Dep't of Justice (Apr. 4, 2011) [hereinafter Letter from Thomas Susman], available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr04\\_dojcomments\\_o.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr04_dojcomments_o.authcheckdam.pdf); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE'S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES 26 (2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf> (recognizing that a large number of allegations of sexual misconduct arose from incidents relating to pat searches).

97. Letter from Thomas Susman, *supra* note 96 (citing NAT'L INST. OF CORR. PRISONS DIV. AND INFO. CTR., U.S. DEP'T OF JUSTICE, CROSS-SEX PAT SEARCH PRACTICES: FINDINGS FROM NIC TELEPHONE RESEARCH (1999)).

Relying on this evidence, a federal court in Connecticut recently found that the Bureau of Prisons had "failed to present any evidence as to why many state penal institutions forbid non-emergency cross-gender pat searches, but [it] is incapable of doing the same," and "gender-based assignment of shifts, even where it prevents correctional officers from selecting preferred assignments, is a 'minimal restriction' that can be

In contrast to the position reflected in Standard 23-7.9 on cross-gender searches, the position on cross-gender supervision in Standard 23-7.10 is closer to the position advanced in the DOJ PREA Regulations. In particular, Standard 23-7.10 does not subscribe to the categorical prohibition in the NPREC Report on cross-gender surveillance of prisoners who are naked or using the toilet.<sup>98</sup> Nor does it endorse the asymmetrical position endorsed in international standards and some U.S. case law, which limits supervision of women by men but not vice versa.<sup>99</sup> Instead, Standard 23-7.10 urges that “[c]orrectional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner’s private bodily areas.”<sup>100</sup> The commentary identifies some of these “strategies and devices”:

Many jails and prisons have implemented a variety of strategies to curtail visual exposure of naked female prisoners to male officers. Approaches include use of warnings (a shouted “Male officer on the tier!”); privacy panels allowed for several minutes at a time when a prisoner is changing; partially opaque shower curtains; small partial stalls in bathrooms; and provision of sleepwear. Some, though fewer, facilities use similar strategies to limit intimate visual supervision in male housing areas.<sup>101</sup>

At the same time, Standard 23-7.10 provides that any visual surveillance of a prisoner undergoing an intimate medical procedure should be conducted by staff of the same gender.<sup>102</sup> Also, “[a]t all times within a correctional facility or during transport, at least one staff member of the same gender as supervised prisoners should share control of the prisoners.”<sup>103</sup>

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tolerated.”

*Id.* (citing *Forde v. Baird*, 720 F. Supp. 2d 170, 180–81 (D. Conn. 2010) (quoting *Tipler v. Douglas Cnty.*, 482 F.3d 1023, 1027 (8th Cir. 2007)) (alteration in original).

98. Compare 2010 STANDARDS, *supra* note 6, at 23-7.10, with NPREC REPORT, *supra* note 16, at 62. See also Letter from Thomas Susman, *supra* note 96.

99. See 2010 STANDARDS, *supra* note 6, at 23-7.10 cmt. (citing *Standard Minimum Rules for the Treatment of Prisoners*, OFF. OF UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS., ¶53, <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>) (last visited Mar. 23, 2012).

100. *Id.* at 23-7.10.

101. *Id.* at 23-7.10 cmt.

102. *Id.* at 23-7.10.

103. *Id.*

By contrast, the proposed DOJ PREA Regulations allow nonemergency viewing of the nude bodies of prisoners of the opposite gender in connection with “routine cell checks.”<sup>104</sup> This open-ended compromise is intended to facilitate women officers’ continued employment in men’s housing units by tolerating “incidental” viewing and “retrofitting” facilities with “privacy panels.”<sup>105</sup> The ABA’s comment on this provision of the proposed regulations warned against “the sort of routine viewing evidently contemplated by the [proposed DOJ PREA Regulations]” and urged the DOJ to “require facilities to use strategies and devices to protect prisoner privacy even during routine cell checks.”<sup>106</sup>

In summary, we believe that the 2010 Standards do a creditable job of balancing the privacy interests of prisoners against the advantages of increased employment opportunities for women in men’s correctional facilities in this most sensitive area of correctional practice.

### C. *Lesbian, Gay, and Bisexual Prisoners*

The move to combat prison sexual violence has brought increased attention to issues affecting lesbian, gay, bisexual, and transgender prisoners. The NPREC Report noted research documenting the heightened vulnerability of prisoners with non-heterosexual orientations,<sup>107</sup> and there have been court decisions allowing suits by gay prisoners subjected to prison abuse,<sup>108</sup> and academic scholarship proposing ways to protect LGBT prisoners.<sup>109</sup>

The 2010 Standards reflect some of this attention. Standard 23-5.3 (“Sexual abuse”) urges “[c]orrectional authorities [to] evaluate reports of sexual assault or threats of sexual assault without regard to a prisoner’s sexual orientation, gender, or gender

104. DOJ PREA Regulations, *supra* note 17, at 6278.

105. *Id.* at 6254.

106. Letter from Thomas Susman, *supra* note 96.

107. NPREC REPORT, *supra* note 16, at 7 (“Research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations and transgender individuals.”).

108. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 532–33 (5th Cir. 2004) (involving a “failure to protect” section 1983 claim brought by a gay African-American prisoner, Roderick Johnson, who was subjected to repeated abuse in a Texas state prison).

109. *E.g.*, Dolovich, *supra* note 3; Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107 (2010); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CAL. L. REV. 1309 (2011).

identity.”<sup>110</sup> The commentary states that “[s]taff attitudes that it is up to a prisoner to fight or submit, or that gay or transgender prisoners must have consented to sex, are unacceptable.”<sup>111</sup>

The 2010 Standards also contain a provision that forbids “harassment, bullying, or disparaging language,” in addition to discrimination, on the bases of many identity categories, including gender, sexual orientation, and gender identity.<sup>112</sup> The addition of these identity categories in Standard 23-7.1 is important, as reports of homophobic taunts and stigmatizing procedures by prison officials have gained national prominence in recent years.<sup>113</sup> At the same time, while noting “disagreement among practitioners about whether it is appropriate to have an option for separate housing” for LGBT prisoners, the Standards take no position on the issue “apart from [an] explicit requirement of individualized housing and serious consideration of the prisoner’s own views.”<sup>114</sup>

The 2010 Standards recognize that LGBT prisoners may be subject to greater risk of sexual abuse, and thus may need to be placed in segregated housing for their own protection.<sup>115</sup> However, they also seek to limit such placements, particularly on a long-term basis. Standard 23-5.5 provides that a prisoner should not be housed involuntarily in protective custody for more than thirty days without a “serious and credible threat” to the prisoner’s safety that

110. 2010 STANDARDS, *supra* note 6, at 23-5.3(a).

111. *Id.* at 23-5.3 cmt.

112. *Id.* at 23-7.1(a). By contrast, the LSOP Standards provision on “nondiscriminatory treatment” barred only discrimination based “on race, sex, religion, or national origin.” See LSOP STANDARDS, *supra* note 8, at 23-6.14.

113. Dena Potter, *Virginia Women’s Prison Segregated Lesbians, Others*, HUFFINGTON POST (June 10, 2009, 8:05 PM), [http://www.huffingtonpost.com/2009/06/10/virginia-womens-prison-se\\_n\\_213967.html](http://www.huffingtonpost.com/2009/06/10/virginia-womens-prison-se_n_213967.html) (reporting on the existence of a “butch wing” in a Virginia state prison).

114. 2010 STANDARDS, *supra* note 6, at 23-2.4 cmt. For differing views on the experimental separate housing unit in the Los Angeles County jail, compare Dolovich, *supra* note 3 (advocating for separate units for LGBT prisoners, such as the K6G unit in Los Angeles County jail), with Robinson, *supra* note 108 (criticizing K6G unit for relying on stereotypes regarding gay identity and for forcing prisoners to “out” themselves to seek safety). See also Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012) (describing how the segregated K6G unit provides a relatively “safe space” at the Los Angeles County jail by reducing gang issues and the pressure to comply with norms of “hypermasculinity”); Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111, 114 (2010) (arguing that the K6G unit “redistribute[s] prison rape—from sexual minorities to some set of heterosexual men”).

115. See 2010 STANDARDS, *supra* note 6, at 23-5.5 cmt; see also *id.* at 23-2.6(a) (recognizing “protection from harm” as one reason for placement in segregation).

cannot be addressed adequately in the general population.<sup>116</sup> In cases where correctional officials believe there is such a “serious and credible threat,” prisoners are entitled to a variety of procedural protections, including “timely, written and effective notice,” decision-making by a specialized classification committee, and a due process hearing at which the prisoner may be heard in person and allowed to “present available witnesses and information.”<sup>117</sup> Protective custody placements should be reviewed every three months.<sup>118</sup>

As to conditions in protective custody, correctional authorities should “minimize the extent to which vulnerable prisoners needing protection are subjected to rules and conditions a reasonable person would experience as punitive.”<sup>119</sup> In other words, protective custody, unlike disciplinary segregation, should not be tantamount to additional punishment. Prisoners in segregation for their own protection should be “housed in the least restrictive environment practicable” and “provided opportunities to participate in programming and work.”<sup>120</sup>

#### *D. Provisions Affecting Transgender Prisoners*

Some of the most groundbreaking provisions of the 2010 Standards recognize the special needs of transgender prisoners, notably in their general provisions on housing and medical treatment. This reflects decades of litigation on behalf of transgender prisoners, including the leading case on deliberate indifference, *Farmer v. Brennan*,<sup>121</sup> the extension of medical care for

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116. *Id.* at 23-5.5(d); *see also id.* at 23-2.7(a) (noting that long-term segregation should be used “sparingly” and protective custody should not be used except where there is a “credible continuing and serious threat . . . to the prisoner’s own safety”).

117. *Id.* at 23-2.9(a)(i)–(iii).

118. *Id.* at 23-5.5(e).

119. *Id.* at 23-5.5(c); *see also id.* at 23-3.8(a) (stating that no prisoner in segregation for whatever reason should be deprived of “those items or services necessary for the maintenance of psychological and physical wellbeing”).

120. *Id.* at 23-5.5(g)(i)–(iii); *see also id.* at 23-3.8(d) (“Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.”).

121. 511 U.S. 825 (1994) (articulating the Eighth Amendment deliberate indifference standard for “failure to protect” claims in a case involving the rape of a transgender woman housed in a men’s prison).

gender identity disorder,<sup>122</sup> as well as other advocacy efforts.<sup>123</sup> As a tiny minority of prisoners,<sup>124</sup> transgender inmates are subject to unique risks and hardships.

The 2010 Standards' provisions on housing of transgender prisoners are notable for their emphasis on the prisoner's own gender identity and concerns about safety. Standard 23-2.4(d) ("Special classification issues") provides that corrections staff should make "individualized" housing and custody decisions for prisoners who have had treatment for gender identity disorder or who "present themselves and identify as having a gender different from their physical sex at birth."<sup>125</sup> The Standard states that officials should determine on a "case by case basis" whether a prisoner should be assigned to a facility designated for male or female prisoners, based on "whether a placement would ensure the prisoner's health and safety, and whether the placement would present management or security problems."<sup>126</sup> Such placement decisions are to be reevaluated at least twice a year, and officials are advised to give "serious consideration" to "[t]he prisoner's own views with respect to his or her own safety."<sup>127</sup> The proposed DOJ PREA Regulations have adopted a similar standard, emphasizing case-by-case housing determinations for transgender prisoners.<sup>128</sup>

The 2010 Standards also recognize the special medical issues that transgender prisoners may face. Standard 23-6.13 ("Prisoners with gender identity disorder") provides that "[a] prisoner diagnosed with gender identity disorder should be offered

122. See, e.g., *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (concluding that a statute that precluded hormone therapy for prisoners with gender identity disorder demonstrated deliberate indifference to prisoners' serious medical needs, in violation of the Eighth Amendment).

123. See, e.g., *Cruel and Unusual*, OUTCAST FILMS, <http://www.outcast-films.com/films/cu/index.html> (last visited Mar. 23, 2012) (describing a documentary film entitled *CRUEL & UNUSUAL* (Janet Baus, Dan Hunt, & Reid Williams 2006)); see also Bassichis et al., *supra* note 5.

124. In the most thorough demographic assessment of transgender prisoners completed to date, a group of California sociologists identified 332 transgender prisoners housed in men's prisons in California, out of a total population of 146,360 prisoners in facilities designated for men. See Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons* 27 JUST. Q. 825, 842 (2010).

125. 2010 STANDARDS, *supra* note 6, at 23-2.4 (d).

126. *Id.*

127. *Id.*

128. DOJ PREA Regulations, *supra* note 17, at 6281.

appropriate treatment.”<sup>129</sup> The black letter goes on with a specific directive as to what may be “appropriate”:

At a minimum, a prisoner who has begun or completed the medical process of gender reassignment prior to admission to a correctional facility should be offered treatment necessary to maintain the prisoner at the stage of transition reached at the time of admission, unless a qualified health care professional determines that such treatment is medically inadvisable for the prisoner.<sup>130</sup>

The commentary explains that “[t]he Standard’s use of the phrase ‘at a minimum’ should not be read to connote that mere maintenance is always, or even usually, constitutionally acceptable.”<sup>131</sup> Instead, the phrase “is intended to emphasize that while more may often be required, for prisoners already diagnosed and receiving treatment, continuation of at least that treatment is presumptively appropriate.”<sup>132</sup> Thus, the Standard specifically rejects the so-called “freeze-frame” policy,<sup>133</sup> which “artificially limits care, both for prisoners whose disorder was untreated or inappropriately treated prior to incarceration, or those whose disorder manifested only after incarceration.”<sup>134</sup>

Standard 23–7.9(e) provides that examination of transgender prisoners “to determine that prisoner’s genital status should be performed in private by a qualified medical professional,” and only if the correctional agency does not know the prisoner’s genital

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129. 2010 STANDARDS, *supra* note 6, at 23-6.13.

130. *Id.*

131. *Id.* at 23-6.13 cmt.

132. *Id.*; see also Tarzwell, *supra* note 28, at 187 (describing severe medical and psychological consequences of abrupt discontinuation of hormone treatment).

133. The Bureau of Prisons recently abandoned the “freeze-frame” approach as part of a settlement in a case involving a transgender prisoner seeking medical treatment for gender identity disorder. See *Federal Bureau of Prisons Makes Major Change in Transgender Medical Policy*, GLAD (Sept. 30, 2011), <http://www.glad.org/current/news-detail/federal-bureau-of-prisons-makes-major-change-in-transgender-medical-policy>; see also Memorandum from Newton E. Kendig, Assistant Director, Health Servs. Div. & Charles E. Samuels Jr., Assistant Director, Corr. Programs Div., U.S. Dep’t of Justice, Federal Bureau of Prisons (May 31, 2011), available at <http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy.pdf>; Memorandum from Newton E. Kendig, Assistant Director/Medical Director & D. Scott Dodrill, Assistant Director, Corr. Programs Div., U.S. Dep’t of Justice, Federal Bureau of Prisons (June 15, 2010), available at <http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy.pdf>.

134. 2010 STANDARDS, *supra* note 6, at 23-6.13 cmt.



status.<sup>135</sup> This Standard is similar to one suggested by NPREC and proposed by the DOJ.<sup>136</sup> Some commentators have criticized such standards as promoting unnecessary searches of transgender prisoners,<sup>137</sup> but they at least make clear that these procedures are to be done only when necessary and only in a respectful manner. The commentary to Standard 23–7.9 provides that the determination of which officers may perform nonemergency same-sex strip and pat searches on transgender prisoners will be guided by “[w]hatever has been chosen as a prisoner’s designated gender for other purposes, such as housing.”<sup>138</sup>

#### IV. CONCLUSION

The 2010 ABA Standards on the Treatment of Prisoners address issues of gender and sexuality in a reasonably comprehensive and thoughtful manner. At least in this regard, they are light-years ahead of the 1981 LSOP Standards. The attention the 2010 Standards pay to gender and sexuality reflects an understanding that these issues are central to many of the problems facing all prisoners, including sexual abuse, inadequate health care, and assaults on human dignity.

The efforts of the legal community to develop “best practices” for the treatment of prisoners have not always been understood or welcomed by the corrections professionals who must put them into practice. The parts of the 2010 Standards that address gender and sexuality contain their share of provisions that are controversial. As the introduction to the Standards emphasizes, however, the Bar must remain a full partner in our national conversation about prison conditions, not only because of the oversight of courts, but because of the Bar’s institutional commitment to the rule of law, to equality, and to human dignity. This is nowhere more the case than where issues of gender and sexuality are concerned. The drafters of the Standards made a substantial effort to deal thoughtfully with these cutting edge issues of correctional policy, while avoiding the sort of detail more appropriately left to corrections professionals. In our view, the provisions of the 2010

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135. *Id.* at 23-7.9(e).

136. DOJ PREA Regulations, *supra* note 17, at 6278; NPREC REPORT, *supra* note 16, at app. B.

137. *See id.* at 6254 (“Some commenters would impose further restrictions and ban all examinations to determine gender status.”).

138. 2010 STANDARDS, *supra* note 6, at 23-7.9 cmt.

Standards that deal with gender and sexuality appropriately balance the institutional interests at stake and represent a substantial step forward in recognizing the special needs of groups within the prison population that have too frequently been misunderstood or ignored.