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Dying Twice: Conditions on New York's Death Row

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Dying Twice: Conditions on New York's Death Row

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David S. Hammer, Art C. Cody, Risa B. Gerson, Norman L. Greene, Michael B. Mushlin, and Richard T. Wolf

Dying Twice: Conditions on New York's Death Row¹

1. This article is a report of the Association of the Bar of the City of New York and a joint effort of two of the Association's committees, the Committee on Corrections and the Committee on Capital Punishment. The two committees formed a joint subcommittee (hereinafter "the Subcommittee") to undertake this project. This report, which was the result of the work of that Subcommittee, was originally published without footnotes in September 2001 in *The Record*, the official journal of the Association and has been updated. See The Committees on Corrections and Capital Punishment of the Association of the Bar of the City of New York, *Dying Twice: Conditions on New York's Death Row*, 56 THE RECORD 358 (2001).

The Association of the Bar, a 132-year-old organization currently composed of more than 22,000 members, has a long history of working for needed reforms of the legal system. The Subcommittee hopes that this report, which is submitted as part of that tradition, will bring about real change in the criminal justice system and perhaps a more humane death row.

The work of the Committee on Capital Punishment has included not only this report on death row, but also programs entitled *Sparing Cain: Executive Clemency in Capital Cases* (published as several articles in 28 CAP. U. L. REV. 513 (2000)); *Governor Ryan's Capital Punishment Moratorium and the Executioner's Confession: Views from the Governor's Mansion to Death Row*, 75 ST. JOHN'S L. REV. 401 (2002) (commenting on the moratorium on executions in Illinois); *The Condemned, the Tinkerers, and the Machinery of Death: Capital Punishment in New York Before 1965* (publication forthcoming in the CRIMINAL LAW BULLETIN); *The Art of Execution: Pictures and Punishment in Western Culture: The Aesthetic Image of Public Execution and Its Impact on Criminal Justice* (combining a study of art history and capital punishment) (publication forthcoming); programs in 2002 entitled *The Death Penalty in the Age of Terrorism*, *Rethinking the Death Penalty: Can We Define Who Deserves Death*, and *Dying Twice: Incarceration on Death Row*; and a report entitled *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 THE RECORD 129 (2000) (assessing proposed death penalty legislation). The Committee on Corrections, in addition to its work on death row, recently presented a symposium with several other committees on the Rockefeller Drug Laws, and another on the collateral consequences of conviction. Additionally, the Committee has sponsored a program on the parole system, prepared an amicus brief to the Second Circuit Court of Appeals for a case involving the Prison Reform Litigation Act, and has written a report on the use of stun shields on Rikers Island entitled *Conditions of Confinement on the Use of Stun Shields by the New York City Department of Correction*, 56 THE RECORD 535 (2001).

The authors are grateful to the many members of the Committees on Capital Punishment and Corrections who assisted in this work by reading and commenting on drafts of this report. The authors, in particular, express their appreciation to William J. Rold, who contributed to the ideas expressed in footnote 115, and psychiatrist Dr. Anthony Zitrin for his participation on the Subcommittee.

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7. Richard T. Wolf is a graduate of New York University School of Law (J.D. 1972), and he is Executive Director and co-Counsel of the New York City Board of Correction, which oversees New York City's jail system (including Rikers Island). The Board evaluates the Department of Correction's performance, and sets and

"[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted upon him, the first being worse than the second"

— Albert Camus⁸

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enforces minimum standards that regulate conditions of confinement and correctional health care and mental health care services. Richard Wolf has held his current positions since 1983. He also consults on correctional matters in other jurisdictions.

8. ALBERT CAMUS, *RESISTANCE, REBELLION AND DEATH* 205 (Justin O'Brien trans., Vintage Books 1974) (1961).

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I. Introduction

In 1995 New York State revived the death penalty as a punishment for certain categories of murder,⁹ and established a “death row” for condemned men at the Clinton Correctional Facility in Dannemora, New York (variously, “Clinton” or the “Prison”).¹⁰ Four years later, in October 1999, two committees of the Association of the Bar of the City of New York (the “Association”) joined together to study the conditions of confinement on this death row — or, as it is officially called, the Unit for Condemned Persons (the “UCP”).¹¹ These committees — the Committee on Corrections and the Committee on Capital Punishment — formed a joint subcommittee (the “Subcommittee”) to study, assess, and report on the conditions under which death row prisoners await their execution. This is the report of that Subcommittee.

The Subcommittee worked on this project for nearly two years. In the process, we interviewed a number of lawyers involved in death row litigation, including some with clients in New York’s UCP; we visited Clinton and interviewed the Prison’s Superintendent (“Superintendent”) about the UCP;¹² we reviewed the literature on the organization and management of other death rows around the nation, and obtained infor-

9. See N.Y. PENAL LAW § 125.27 (McKinney 1998); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2002).

10. State of New York, Dep’t of Correctional Services Directive No. 0054, at 1 (1998) (on file with authors) [hereinafter DOCS Dir. No. 0054 (1998)].

11. *Id.*

12. As noted below, one of the tasks performed in connection with the report was the Subcommittee’s August 2000 visit to Clinton Correctional Facility, the site of death row in New York State. Although the Subcommittee was barred by prison administration from inspecting death row itself, the Subcommittee had an opportunity to tour other parts of the prison and meet with high-ranking prison personnel. The members of the Subcommittee who visited the prison included, from the Corrections Committee, Messrs. David Hammer, who served as co-Chair of the Subcommittee, and Richard Wolf; and from the Committee on Capital Punishment, Norman L. Greene (Chair), Dr. Arthur Zitrin, Professor of Psychiatry at New York University School of Medicine, and Art Cody, co-Chair of the Subcommittee.

mation from the following states: Alabama,¹³ California,¹⁴ Delaware,¹⁵ Florida,¹⁶ Georgia,¹⁷ Illinois,¹⁸ Louisiana,¹⁹ Missouri,²⁰ Montana,²¹ North Carolina,²² Ohio,²³ Pennsylvania,²⁴ and Texas;²⁵ and with some difficulty, we obtained a limited amount of information about the operation of the UCP from New York's Department of Correctional Services (variously, the "Department," "Corrections," or "DOCS").

In this last regard — obtaining information from DOCS — our efforts were largely unsuccessful. Almost immediately after beginning our project, the Association's then president²⁶ wrote to the Commissioner of Corrections for New York State, asking him to permit members of the Subcommittee to visit the UCP. This request was refused because of undefined security con-

13. Telephone Interview by Daniel V. Shapiro with Sandra Butler, Research Monitoring and Evaluations Department, Alabama Department of Corrections (June 2000).

14. Interview with Russell Stetler, Director of Investigations and Mitigation, New York Capital Defender Office, New York, N.Y. (June 2000) (providing information about California's death row policies and procedures based upon previous work experience in California).

15. Telephone Interview with Beth Welch, Chief of Media Relations, Delaware Department of Corrections, (May 7, 2001).

16. See Florida Department of Corrections at <http://www.dc.state.fl.us/oth/deathrow/index.html> (last visited Mar. 16, 2002).

17. Telephone Interview with John Harper, Executive Assistant, Georgia Diagnostic & Classification Prison (Feb. 28, 2002).

18. Telephone Interview by Daniel V. Shapiro with Nick Howell, Public Information Department, Illinois Department of Corrections (June 2000).

19. Telephone Interview by Daniel V. Shapiro with Cathy Jett, Executive Staff Officer, Louisiana State Prison (Angola) (June 2000).

20. Telephone Interview with Tim Kniest, Public Information Officer, Missouri Department of Corrections (Apr. 5, 2001).

21. Telephone Interview with Ellen Bush, Public Information Officer, Montana Department of Corrections (May 7, 2001); Telephone Interview with Linda Moodry, Administrative Assistant, Montana Department of Corrections (May 7, 2001).

22. Telephone Interview by Daniel V. Shapiro with Warden's Office, Central Prison, Raleigh, North Carolina (June 2000).

23. Telephone Interview by Daniel V. Shapiro with Sally Glover, Assistant to the Warden, Mansfield Correctional Institution (June 2000).

24. Telephone Interview by Daniel V. Shapiro with Pennsylvania Department of Corrections (June 2000).

25. Telephone Interview by Daniel V. Shapiro with Public Information Line, Texas Department of Criminal Justice (June 2000).

26. The president of the Association from 1998-2000 was Michael A. Cooper. See City Bar Online, The Association of the Bar of the City of New York, at <http://www.abcnyc.org> (last visited Mar. 15, 2002).

cerns. The Subcommittee's inability to visit the UCP, to conduct a first-hand inspection of its facilities, and to interview the inmate population seriously restricted the factual record that we were able to compile.

Nevertheless, even our incomplete record reveals this basic conclusion: the UCP has been modeled on the punitive segregation units that normally house inmates who violate important prison rules, that is, inmates who prove themselves to be violent or highly disobedient *during* their incarceration.²⁷ The body of this report consists of an argument against this punitive segregation model, which punishes condemned inmates whether or not they have violated any prison rules.

We contend that — even for ardent supporters of the death penalty — death should be a sufficient punishment in itself. While awaiting execution, condemned prisoners who have obeyed prison rules should enjoy the same rights and privileges accorded inmates (including a number of convicted murderers) within Clinton's general prison population. To the extent that the punishments and restrictions imposed at the UCP serve no legitimate purpose, they should be lifted. This seems to us to be both simple justice and wise policy: justice — because it requires good reasons for the imposition of hardship, even on the condemned; wise policy — because it seeks to preserve the sanity of these men and, with it, their capacity to function in society should their current sentences of death be reversed or commuted. Indeed, in 2002, the death sentence of one death row inmate was vacated in New York.²⁸

We regret that we have been unable to engage DOCS in this argument. Had it been more willing to cooperate with our examination, DOCS might have been able to defend the punitive segregation model, pointing out virtues that we have been

27. While DOCS Dir. 0054 (1998) states, "The Unit for Condemned Persons is not considered to be a Special Housing Unit as defined in 7 N.Y.C.R.R. section 300.2" and N.Y.C.R.R. section 300(c) states, "For purposes of this rule, the Unit for Condemned Persons at Clinton Correctional Facility and at Bedford Hills Correctional Facility, and the Capitol Punishment Unit at Green Haven Correctional Facility are not considered to be SHU's," the similarities are inescapable. See DOCS Dir. No. 0054 (1998), *supra* note 10 (setting forth the rules and regulations of the UCP); N.Y. COMP. CODES R. & REGS. tit. 7, § 300 (2002) (setting forth the general provisions for Special Housing Units).

28. *People v. Harris*, 2002 WL 1461372 (N.Y. July 9, 2002).

unable to identify on our own. It is our hope that the circulation of this report will persuade DOCS that a fuller explanation of its policies serves its own interest, as well as that of the public it endeavors to serve.

II. A Description of Death Row

A. Location

The New York State Department of Correctional Services calls the State's death row the Unit for Condemned Persons. As of the date of this article, the UCP holds five condemned men, who are housed at Clinton Correctional Facility in Dannemora.²⁹ This location, fifteen miles south of the Canadian border in the northeastern part of the State, is 322 miles from New York City, which is approximately a six-hour drive.³⁰

B. Background

In 1995 when New York reinstated the death penalty,³¹ DOCS appointed a task force to develop rules for governing the State's new death row. Through a Freedom of Information Law ("FOIL") request, our Subcommittee has secured a small portion of the materials generated by that task force, although not its central memoranda and recommendations.³² The materials

29. Currently there are no women under sentence of death in New York State. Death Penalty Information Center, *Women and the Death Penalty*, at <http://www.deathpenaltyinfo.org/womenstates.html> (last visited Mar. 15, 2002). Nevertheless, a facility for such women has been established at the Bedford Hills Correctional Facility in Westchester County. Longtime death row inmate Darrel K. Harris had his death sentence vacated by the New York Court of Appeals in July 2002 and was sentenced to three concurrent life terms without parole. *In Brief: Harris: From Death Row to Solitary*, N.Y. L.J., July 11, 2002; see also *People v. Harris*, 2002 WL 1461372 (N.Y. July 9, 2002) and *Harris Sentenced to Three Life Terms*, N.Y. L.J., August 30, 2002, at 1.

30. See generally Mapquest, at <http://www.mapquest.com/directions> (last visited Apr. 5, 2002) (providing driving directions and calculating mileage between destinations).

31. See N.Y. PENAL LAW § 125.27 (McKinney 1998); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2002).

32. The Subcommittee was able to obtain: DOCS Dir. No. 0054 (1998), *supra* note 10; State of New York, Dep't of Correctional Services Directive No. 0402 (1995) (on file with authors) [hereinafter DOCS Dir. No. 0402 (1995)]; State of New York, Dep't of Correctional Services Directive No. 4403 (1993) (on file with authors) [hereinafter DOCS Dir. No. 4403 (1993)]; State of New York, Dep't of Correctional Services, *Clinton Correctional Facility Policy & Procedure: Unit for*

that were produced, when read in light of the rules actually adopted and when supplemented by remarks made to us by several DOCS officials, make clear that DOCS modeled the UCP upon the State's punitive segregation model or "Special Housing Units" ("SHUs") — the units structured to deal with the system's most violent and intractable prisoners. The hallmarks of punitive segregation — constant surveillance, nearly complete isolation of inmates from each other and from outsiders, and severe limitations on the privileges normally accorded inmates within the prison system — are all present in the UCP.

Significantly, no law requires DOCS to confine all condemned men to the UCP. To the contrary, Corrections Law section 652(2)³³ provides that a condemned prisoner:

*[M]ay, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.*³⁴

This paragraph, although oddly worded, provides that when a defendant sentenced to death is remanded to the custody of DOCS, the Commissioner may determine that he can safely be confined within the general prison population. This, in turn, implies that an investigation should be made into each prisoner's personal characteristics, since those characteristics will determine if confinement within the general population is likely to jeopardize "the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate."³⁵

This, however, is not the procedure that DOCS has adopted. Department of Correctional Services Directive num-

Condemned Prisoners (2000) (on file with authors) [hereinafter *Clinton Policy & Procedure*]. DOCS has declined to identify the task force members, citing what seem to us chimerical concerns for their safety. Our FOIL submission requested such names, and when this request was denied, we lodged an administrative appeal within DOCS. The appeal essentially upheld DOCS's refusal to disclose the names in question, and no Article 78 proceeding was brought to challenge the matter further.

33. N.Y. CORRECT. LAW § 652(2) (McKinney Supp. 2002).

34. *Id.* (emphasis added).

35. *Id.*

ber 0054³⁶ states that all death-sentenced inmates shall, in the first instance, be assigned to the UCP, but that following this initial assignment, “at the Commissioner’s discretion, the inmate can be released to the general population.”³⁷ The directive thus preserves the possibility that a condemned prisoner may be released into the general prison population, but defers decision of such release until after the prisoner has been remanded to the UCP for an indefinite period. At some point after this remand, however, a rule-abiding, stable prisoner should, under the Department’s own directive, be considered eligible for transfer from the UCP.

In fact, it appears that the Commissioner has simply ignored both section 652(2) of the Corrections Law and Directive number 0054, and has adopted a policy of consigning condemned prisoners to the UCP until they are either transferred to another facility for execution or released by the Governor or the courts from their sentence of death. In fact, we know of no instance in which the Commissioner, or his staff, has ever conducted an investigation into whether a condemned prisoner should be released into the general prison population; certainly, none of the six prisoners sentenced to death and remanded to the State system since 1995 has ever been so released. The automatic and apparently irreversible assignment of all condemned prisoners to the UCP seems to be a clear violation of the purposes of the Corrections Law and the Department’s own directive.

C. *The UCP Within Clinton State Prison*

The close connection between the UCP and Clinton’s SHU is immediately apparent on a visit to the Prison. The UCP is located within a building in the eastern portion of the Clinton Prison ground that also houses the Prison’s SHU. In 1995 when New York reinstated the death penalty, the Clinton SHU had three twelve-cell tiers, for a total of thirty-six cells. In order to house the new death row inmates, the State took one twelve-cell tier from the SHU and dedicated it to the UCP.

36. DOCS Dir. No. 0054 (1998), *supra* note 10.

37. *Id.* at 1.

New York currently has five male prisoners under sentence of death,³⁸ each of whom has been assigned to a cell within the twelve-cell tier that constitutes the UCP.³⁹ Although the Subcommittee was not allowed to visit the UCP, its layout has been described to us by the Superintendent of Clinton and by several defense lawyers who have visited the UCP. The occupied cells are contiguous, with the entrance to each cell located upon a single hallway that spans the length of the UCP. The hallway wall opposite the cell doors contains a series of opaque windows that, when closed, prevent any outside view. The walls between each of the cells are solid and although the inmates can hold conversations among themselves, they are unable to see each other.

UCP cells consist of two compartments - namely, a living area and a visiting/showering area. The primary living area is approximately seventy-eight square feet and contains a toilet, sink, bed, mattress and pillow. The cells are not air-conditioned and fans are not allowed in the cells. The visiting/showering area is accessible from the cells through an electronically controlled sliding door which, when activated by a corrections officer, allows the inmate to move to a small cubicle containing both the inmate's visiting and showering area. During visitation, the inmate is always separated from visitors by a Plexiglas® window. The men of the UCP are allowed three showers per week, in open stainless steel stalls without curtains.

D. *Illumination / Surveillance*

Lights are kept on at the UCP twenty-four hours per day. The Department of Correctional Services states that it has reduced the wattage of the lights in response to inmate complaints, but these lights remain sufficiently bright to permit constant surveillance by the staff. Several inmates have complained that the lights disturb their sleep.

UCP inmates live under uninterrupted surveillance, including both twenty-four-hour camera surveillance of their cells

38. Death Penalty Information Center, *Death Row Inmates by State*, at <http://www.deathpenaltyinfo.org/DRowInfo.html#state> (last visited Mar. 16, 2002).

39. See DOCS Dir. No. 0054 (1998), *supra* note 10, at 1. This arrangement is designed to allow for minimal contact with the institutional staff and absolutely no contact with non-UCP inmates. *Id.*

and audio monitoring by installed microphones. On the infrequent occasions when the inmates are permitted to leave their living compartments, they are kept under surveillance wherever they go. Curtains were removed from shower stalls to permit the inmates to be monitored even while they bathe.

E. Visitation

The visitation rights of UCP inmates are limited to: (i) counsel; (ii) immediate family; (iii) media; (iv) those possessing a court order; and (v) spiritual advisors.⁴⁰ These restrictions are more severe than those imposed on the general prison population,⁴¹ and are more severe than those New York imposed on the UCP twenty years ago.⁴² In fact, the regulations in force in 1983, when the UCP was maintained at Green Haven Correctional Facility, permitted all visitors authorized by the current regulations as well as visits by: (i) relatives who acted in the "parental role," and (ii) aunts, uncles, nieces, nephews, and cousins by blood.⁴³

1. Non-Legal Visits

Each UCP inmate is permitted one non-legal visit per week.⁴⁴ Since UCP inmates, unlike those in the Prison's general population, are not permitted to receive visits from non-family members, and since visits from the media and from spiritual advisors are rare, visitors to the UCP essentially consist of the immediate family of the condemned men.⁴⁵ For those in-

40. *Id.* at 11; see Epilogue and *infra* note 117 for subsequent modifications in visitation procedures.

41. See DOCS Dir. No. 4403 (1993), *supra* note 32.

42. The modern history of the death penalty in New York has been concisely described by Joseph L. Hoffmann, et. al., in *Plea Bargaining in the Shadow of Death*, 69 *FORDHAM L. REV.* 2313 (2001). As the authors note, the New York Court of Appeals invalidated New York's death penalty statute in 1984 and "[f]rom that time until the enactment of the current statute in 1995, the death penalty was not authorized in New York." *Id.* at 2334. The more liberal UCP regulations referred to were promulgated in 1983. See State of New York, Dep't of Correctional Services Directive No. 0054 (1983) (on file with authors) [hereinafter DOCS Dir. No. 0054 (1983)].

43. DOCS Dir. No. 0054 (1983), *supra* note 42, at 5.

44. DOCS Dir. No. 0054 (1998), *supra* note 10, at 11.

45. A single media visit may, at the request of the inmate and with the approval of the Superintendent, be substituted for the non-legal family visit. DOCS Dir. No. 0402 (1995), *supra* note 32, at 1. At least one media visit so far has oc-

mates who are estranged from their immediate families, or whose families live in distant parts of the State, the immediate-family-only visitation policy effectively means no visitors at all.⁴⁶

All visits to UCP inmates take place in the visiting area adjacent to the inmates' cells, under both video and audio surveillance by the correctional staff. The Plexiglas® barrier prevents physical contact between the inmate and his visitor. The general population, on the other hand, may receive multiple visitors in multiple visitation periods with some direct physical contact.⁴⁷ UCP inmates are limited to one ten-minute telephone call per week.⁴⁸

2. *Legal Visits*

Defense lawyers who have visited the UCP inform us that each cell has its own visiting area, with a Plexiglas® shield that separates the inmate from the visitor; it is here that attorney visits take place. Although audio surveillance is shut down during attorney visits, the confidentiality of attorney-client communications is highly compromised. A video camera on the visitor side of the Plexiglas® is trained upon the inmate.

A telephone system recently has been installed to permit inmates to speak, without having to raise his voice, to visitors sitting on the other side of the Plexiglas® partition. Defense counsel have informed us, however, that these phones do not function properly and that inmates must speak very loudly, or even yell, to be heard through the Plexiglas® shield. This makes their "privileged" communication clearly audible to any

curred. See William Glaberson, *On a Reinvented Death Row, The Prisoners Can Only Wait*, N.Y. TIMES, June 4, 2002, at A1 (describing interview with death row inmate Stephen LaValle).

46. Family members include legal spouse, children, parents or step-parents, brothers and sisters, grandparents, foster parents or legal guardians, and grandchildren. DOCS Dir. No. 0054 (1998), *supra* note 10, at 11. The family-only restriction is lifted during the period just prior to execution while the inmate is held at the Capital Punishment Unit at Green Haven State Prison. See *Procedures for the Operation of the Capital Punishment Unit, Green Haven Correctional Facility* (on file with authors) (stating that "[d]uring the period 24 hours prior to the scheduled execution, visits with an inmate's attorney, spiritual advisor or person(s) possessing a court order . . . will be permitted").

47. DOCS Dir. No. 4403 (1993), *supra* note 32, at 7.

48. DOCS Dir. No. 0054 (1998), *supra* note 10, at 12.

nearby guard or inmate. If several inmates are receiving visitors at the same time, all inmates and visitors, legal and non-legal, can hear each other.⁴⁹ The Plexiglas® also interferes with the transfer of documents, including legal papers, which must be transmitted through a padlocked slot that an officer must unlock.

There is no limit to the number or duration of inmate telephone calls to counsel of record.⁵⁰ However, defense counsel inform us that audio monitoring of the cells is not turned off during these telephone conversations. Consequently, corrections personnel presumably overhear inmates' remarks to their lawyers. This seems to the Subcommittee an obvious violation of the inmates' right to confidential communication with their attorneys.

F. *Exercise*

During the initial thirty-day adjustment period after arrival at the UCP, each UCP inmate is permitted an hour per day of outdoor exercise in a single person "cage." After this adjustment period, UCP prisoners are then allowed to exercise daily for one hour, by themselves, in a rectangular "dog-run" of approximately 2,000 square feet. All exercise is solitary and outdoors. When weather conditions are extreme, UCP inmates are provided with a coat and galoshes but are never provided with gloves.⁵¹

G. *Oversight*

Prison regulations require twice-weekly tours by the Superintendent and weekly tours by both the First Deputy Superintendent and the Deputy Superintendent for Security.⁵² DOCS regulations do not, however, provide for oversight of the conditions on the UCP by any entity outside of the Department it-

49. Compounding these problems is the cramped space on the visitors' side of the Plexiglas®. It is difficult for three people to occupy this space, thus making visits by the interdisciplinary legal teams, often present in capital appeals, quite arduous.

50. DOCS Dir. No. 0054 (1998), *supra* note 10, at 12.

51. *Id.* at 8.

52. *Id.* at 1.

self.⁵³ We have been informed that the American Correction Association reviewed the plans for the UCP but has never visited the site in operation.

In the summer of 2001, DOCS permitted the Correctional Association of New York to make its first visit to the UCP. We have been informed that the visit took place on June 22, 2001.⁵⁴

H. *Guidelines and Standards of Conduct for UCP*

DOCS has promulgated a number of other rules to control the UCP inmates, including:

1. No talking from one section to another.
2. No passing of anything from one cell to another.
3. No talking from the exercise yard into the housing unit (UCP or SHU).
4. When being escorted from the unit, the inmate's hands will be placed behind the inmate's back.
5. No talking after the quiet bell rings at 10:30 p.m.⁵⁵

I. *Use of Restraints*

All inmates assigned to the UCP are "mechanically restrained" whenever they are escorted off the unit (e.g., during their one-hour exercise period) by (i) handcuffs, either in front with a waist chain or in back with or without a waist chain, and (ii) leg irons.⁵⁶

J. *Commissary Privileges*

The commissary rights of UCP inmates are more limited than those of the general inmate population. A general population prisoner can spend \$110 per month on commissary items

53. *See id.*

54. *See* The Correctional Ass'n of New York, at <http://www.corrassoc.org> (last visited Mar. 16, 2002). The Correctional Association of New York is a privately funded organization that is authorized by state law to visit New York State's prisons. Its members and staff comprise a visiting committee, which inspects prisons and issues reports. *Id.*; *see also* Report by the Prison Visiting Committee of The Correctional Ass'n of New York, *State of the Prisons: Conditions of Confinement in 25 New York Correctional Facilities* 56-57 (June 2002), available at <http://www.correctionalassociation.org>.

55. These rules have been extracted from *Clinton Policy & Procedure*, *supra* note 31, at 9.

56. DOCS Dir. No. 0054 (1998), *supra* note 10, at 13.

and may purchase any item available (snacks, personal hygiene items, etc.).⁵⁷ A UCP inmate may only spend \$55 a month, and only \$15 of the \$55 may be spent on food.⁵⁸ This limitation on discretionary food purchases imposes a real hardship on UCP inmates, since their normal meals are all served within a single eight-hour work-shift.⁵⁹ Thus, sixteen hours can pass between an inmate's dinner and his next meal.

III. Inmate Concerns

The Subcommittee has tried to determine how UCP inmates feel about the conditions of their confinement. Initially, we asked the Department of Correctional Services for permission to visit the UCP and speak to the inmates directly. This was refused. We then asked DOCS for a summary of the grievances filed by the UCP inmates. This was provided, but proved of limited utility; the summaries were so brief that we often found it difficult to determine precisely what the complaints were about.⁶⁰

Recently, however, the Subcommittee has received more substantial information about inmate concerns from two new sources. The first is the law firm of Sullivan & Cromwell ("S&C"), which represents four of the six UCP prisoners in connection with potential litigation concerning aspects of their confinement. At our request, the firm asked its clients (the "S&C Clients") to respond to a number of questions about death row, advising them first that their answers might be included in our report. All four of the S&C Clients responded, articulating vari-

57. See Letter from UCP inmate, to Daniel A. Senkowski, Superintendent, Clinton Correctional Facility 1 (Mar. 3, 2000) (on file with authors).

58. DOCS Dir. No. 0054 (1998), *supra* note 10, at 6; see Epilogue for modifications in commissary privileges.

59. See Interview with Russell Stetler, *supra* note 13.

60. Quite apart from the difficulty in deciphering the grievance breakdown, we cannot assume that inmates are only concerned with those rules and practices about which they file formal complaints. Because the grievance procedure requires the inmates to complain about prison conditions to prison personnel, the degree of inmate candor is open to serious question; it seems entirely plausible that they submit grievances about issues that do not seem to them sensitive - that is, issues about which they do not fear reprisal.

ous concerns about the operation of the UCP, which we summarize below.⁶¹

The second new source of information came in response to the FOIL request. DOCS's response to this request contained letters, among other items, from two UCP inmates, each of whom is represented by Sullivan & Cromwell. The first of these letters was sent by one of the inmates to the Superintendent of Clinton and was forwarded by the Superintendent to a Deputy Commissioner of DOCS.⁶² The second letter, written on behalf of all of the UCP inmates, was in the form of a petition and was submitted directly to DOCS.⁶³

A. *Summary of the S&C Letters and FOIL Request Materials*

As indicated, the Subcommittee has had access to the views of four UCP inmates, all of whom are clients of Sullivan & Cromwell. These inmates, in their comments to Sullivan & Cromwell and in the two letters sent to DOCS, have complained that certain conditions of their confinement are unnecessarily — indeed, senselessly — harsh and restrictive. These conditions include: (i) their nearly complete isolation from other prisoners; (ii) restrictions on their exercise rights; (iii) restrictions on their commissary privileges; (iv) the lack of confidentiality in their communications with attorneys; (v) the twenty-four-hour

61. See Letter from Laurent A. Sacharoff, Attorney, Sullivan & Cromwell, to David S. Hammer, Chair of the Committee on Corrections, Association of the Bar of the City of New York (Apr. 4, 2001) (on file with authors).

62. See Letter from UCP inmate to Daniel A. Senkowski, *supra* note 57; Letter from Daniel A. Senkowski, Superintendent, Clinton Correctional Facility, to Lucien J. Leclaire, Deputy Commissioner, Department of Correctional Services (Mar. 6, 2000) (on file with authors).

63. See Letter from "The Men of U.C.P." to Stewart Kidder, Director of Support Operations, Department of Correctional Services (Dec. 16, 2000) (on file with authors). Both letters contained complaints about specific conditions at the UCP. The first letter appears to have been the impetus behind DOCS's decision, in March 2000, to increase the monthly spending allowance of UCP inmates for candy and snack items from \$5 to \$15. See Letter from UCP inmate to Daniel A. Senkowski, *supra* note 57; Letter from Daniel A. Senkowski to Lucien J. Leclaire, *supra* note 62, Memorandum from Lucien J. Leclaire, Deputy Commissioner, Department of Correctional Services, to Daniel A. Senkowski, Superintendent, Clinton Correctional Facility (Mar. 24, 2000) (on file with authors). DOCS rejected all the requests contained in the second letter. See Letter from the men of UCP to Stewart Kidder, *supra*; Letter from Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, to the men of UCP (Feb. 7, 2001) (on file with authors).

per day illumination of their cells; (vi) the uninterrupted video surveillance of their cells; (vii) limitations on their visiting rights; (viii) deficiencies in their access to medical care; and (ix) deficiencies in current grievance procedures.⁶⁴

1. *Lockdown*

Many of the inmates' complaints concern their lockdown in individual cells for twenty-three hours per day.⁶⁵ This practice isolates them more or less completely from other inmates and confines their movements to the close quarters of their immediate unit. Both aspects of the lockdown — isolation and physical confinement — are demoralizing. Thus, while only one of the UCP inmates expressed a desire to be placed in the general population, almost all expressed a need to congregate with others, as well as a simple need for more freedom of movement.⁶⁶ One of the S&C Clients complained of “[n]ot being allowed to go to church or see a doctor without first having it cleared by someone in Albany,” while another wrote, “A person needs to be able to walk around Why can't we walk in the hallway for one hour every day?”⁶⁷

2. *Surveillance*

Many of the S&C Clients have complained about the uninterrupted surveillance and the twenty-four-hour illumination of their cells which makes such surveillance possible. The illumination rule is particularly distressing. One inmate stated “the lights in the cells remain[ing] on makes no sense. If a person wanted to cause physical harm to himself or others the act would be done regardless Also, it is very, very hard to sleep.”⁶⁸ A second wrote: “I've not had a decent night sleep

64. See Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61 (quoting UCP inmates); Letter from UCP inmate to Daniel A. Senkowski, *supra* note 57; Letter from “The Men of U.C.P.” to Stewart Kidder, *supra* note 63.

65. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61.

66. *Id.*

67. *Id.* (quoting UCP inmates). We note that even in the notoriously harsh Angola Prison in Louisiana condemned inmates are allowed one hour of “tier time,” during which they may walk up and down the cell block and associate with the other prisoners. See Telephone Interview with Cathy Jett, *supra* note 19.

68. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61 (quoting UCP inmate).

since the new lights were installed. It's uncomfortable sleeping with a towel over my head or sleeping with the light shining in my eyes."⁶⁹ A third stated that he tries to sleep by putting his head under his blanket but noted that the strategy is often ineffective since the officers wake him up and require that he uncover his head.⁷⁰

The UCP inmates thus object to twenty-four-hour surveillance because the lighting it requires interferes with their sleep. However, they also have a more basic objection: the constant surveillance is a deep intrusion into their privacy. As one man wrote in questioning the need for constant surveillance:

"For six years the U.C.P. has been open and not once has there been a problem of violence or threat to the safety and security of the facility and it has nothing to do with the structure of how U.C.P. is run. The men of U.C.P. are just that, men who want the chance to show that we are not animals."⁷¹

In the words of another: "Video surveillance denies me privacy when using the toilet, drying off after showers and privacy to pray."⁷² A third wrote: "[W]e have no privacy. It's inhumane."⁷³

3. *Commissary Privileges*

The UCP inmates attach great importance to the privilege of buying food and other items at the prison commissary⁷⁴ — one of the very few activities in which they can exercise even a small degree of discretion. Virtually all of the UCP inmates expressed unhappiness with the restrictions imposed on their purchases, especially those restrictions that were not imposed on the general inmate population.⁷⁵ Thus, the UCP inmates complained that: (i) their food purchases were confined to "junk food," while inmates in the general population were permitted to buy nutritious items such as cold cuts and peanut butter; (ii) their purchases of toiletries, writing supplies, cassette tapes,

69. *Id.* (quoting UCP inmate).

70. *Id.*

71. *Id.* (quoting UCP inmate).

72. *Id.* (quoting UCP inmate).

73. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61 (quoting UCP inmate).

74. *Id.*

75. *Id.*

etc., were restricted for no apparent reason; and (iii) their visits to the commissary were limited to one per month.⁷⁶ In the words of one of these inmates,

“the men on U.C.P. go to commissary once a month, where if we were in [the general] population we would go twice a month or every two weeks. The men on U.C.P. should be allowed to go every two weeks and be allowed to purchase beverages, cereals, peanut butter, jelly, condiments, writing supplies, household items and special buy items like AM/FM cassette[s]. We should have access to hot [pots] for tea and coffee and spending should be \$25 and not \$15.”⁷⁷

4. *Visiting Rights*

a. *Family Visits*

The UCP inmates are very unhappy with the present arrangements for family visits. They are unanimous in asking for a room in which visits can be conducted in private, and with a degree of physical contact — in which the inmates can touch, hold hands with, and even hug their loved ones; such contact is now impossible, precluded by the thick sheet of Plexiglas® that separates inmates from visitors.⁷⁸ The inmates note that the rule against “contact” visits for UCP inmates is not imposed on other inmates in the system, including those serving disciplinary sentences in Clinton’s Special Housing Unit.⁷⁹

The inmates are also unanimous in wanting to expand the list of permitted visitors to “include cousins, aunts and uncles, in-laws, and close friends.”⁸⁰ One of the S&C Clients, for example, complained that the current policy prevented him from seeing his “godmother, who raised him, and his cousin, with whom he grew up.”⁸¹ We note that both these excluded visitors would have been permitted under the rules that governed UCP visitation in the early 1980s.⁸² Two of the S&C Clients noted that

76. *Id.*

77. *Id.* (quoting UCP inmate).

78. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61.

79. *Id.*

80. *Id.*

81. *Id.*

82. DOCS Dir. No. 0054 (1983), *supra* note 42, at 5. Under the 1983 visitation rules, members of the family included: legal spouses, children, parents, step-parents, relatives who acted in a parental role, brothers, sisters, grandparents, foster

Clinton's remote location makes it difficult for their family members to visit at all.⁸³

i. *Telephone Calls To Family*

In addition to restrictions on face-to-face visits, several of the S&C Clients objected to the rule that UCP inmates may place only one ten-minute telephone call per week to family members.⁸⁴ One inmate, writing to the Director of Support Operations on behalf of the inmates of the UCP, stated that ten minutes "is by no means adequate enough time for a reasonable conversation with loved ones," and asked that the time limitation either be abolished, or at least raised to twenty minutes.⁸⁵ Another UCP inmate, writing to the Superintendent of Clinton, concurred, stating that "[c]onsidering their [sic] are typically 3 or more people awaiting our weekly call that 10 minutes becomes little more than a brief hello and goodbye."⁸⁶

b. *Legal Visits*

Each of the S&C Clients complained about the lack of confidentiality in their meetings with defense counsel, stating that it was easy for them to hear each other's conversations.⁸⁷ Several men also reported that they had "overheard guards talking about what various other inmates had said to their lawyers"⁸⁸ during visitation adding that "they were reluctant to tell their lawyers certain things because they knew their conversations were not private."⁸⁹ The S&C Clients also complained that telephone conversations with their attorneys are not confidential. Calls to attorneys must be placed from the inmates' cells, and the S&C Clients believe that the resulting conversations can be overheard by other inmates as well as by the microphones installed in each cell.⁹⁰

parents, guardians, aunts, uncles, nieces, nephews, and cousins (blood relatives).
Id.

83. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61.

84. *Id.*

85. Letter from "The Men of U.C.P." to Stewart Kidder, *supra* note 63.

86. Letter from UCP inmate to Daniel A. Senkowski, *supra* note 57.

87. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61.

88. *Id.*

89. *Id.*

90. *Id.*

5. *Grievance Procedures*

The S&C Clients uniformly view the grievance procedure as ineffective;⁹¹ one stated that the procedure was “no help at all,” and another that “the grievance procedure does not exist in UCP.”⁹² They were divided, however, on whether prison staff retaliated against inmates who filed grievances. While one inmate stated that “[t]he only retaliation for grievances are that they are either lost or ignored,”⁹³ another wrote that “I definitely believe that there is retaliation for putting in a grievance.”⁹⁴

6. *Medical Treatment*

UCP inmates are divided over whether they receive adequate health care. One states that the care provided for non-emergency problems is “fair,”⁹⁵ while another writes that “I have been waiting two months to see a doctor for my lower back problems. I have filed a grievance and was told last month that a doctor will schedule me an appointment[;] that was in January and it is now March and I have seen no one.”⁹⁶ A third states that “to see a doctor we have to call our lawyers, otherwise it could take months.”⁹⁷

When the UCP inmates do receive medical care, it is often provided in their cells, rather than at the Prison’s medical facilities.⁹⁸ The S&C Clients are thus concerned that their conversations with health care providers are no more private and confidential than their conversations with counsel and family.⁹⁹

7. *Other Concerns*

The S&C Clients have expressed dissatisfaction with several additional aspects of the conditions of confinement. Many

91. *Id.*

92. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61 (quoting UCP inmate).

93. *Id.*

94. *Id.*

95. *Id.* (quoting UCP inmate).

96. *Id.* (quoting UCP inmate).

97. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61 (quoting UCP inmate).

98. *Id.*

99. *Id.*

of their complaints seem reasonable, and could be remedied at very little cost. For example, they ask for: the right to subscribe to newspapers, to use a typewriter, to have a desk or locker within their cells, to hold legal materials for longer than twenty-four hours, to keep personal underclothing and shower equipment, and to use fans during the summer.¹⁰⁰

IV. Analysis and Recommendations

The punitive segregation model, upon which New York has organized its death row, is very difficult to justify. As the Clinton Superintendent himself admits, the middle-aged prisoners on death row have turned out to be among the most obedient inmates within the prison system.¹⁰¹ Since the UCP has been established, there has not been a single reported incident of violence, a single attempted escape, or serious security violation.¹⁰² In spite of this, the UCP continues to be operated as if its five condemned men are serious threats to prison security and can be controlled only by round-the-clock surveillance and the most stringent restraints.

The punitive segregation model may have seemed a plausible way to organize the UCP in 1995, before the State had any actual experience with the type of prisoners its new death row would be receiving.¹⁰³ Six years later, the harsh restrictions imposed at the UCP appear to be gratuitous, a form of punishment that has not been judicially imposed and is unrelated to any actual misdeeds the inmates may have committed while in

100. *Id.*

101. Interview with Daniel A. Senkowski, Superintendent, Clinton Correctional Facility (Aug. 2000); *see also* Correctional Association Report, *supra* note 54, at 56 (superintendent said inmates "file few grievances and do not cause any trouble.").

102. *Id.*

103. Indeed, the last man sentenced to death and housed in the UCP was Lemuel Smith, who had committed a brutal murder and mutilation of a corrections officer at Green Haven Correctional Facility. Under the prior statute, death was mandated when an inmate serving a life sentence committed a murder while incarcerated on that sentence. *See Smith v. Coughlin*, 577 F. Supp. 1055 (S.D.N.Y. 1983). It seems likely that the UCP was designed with the idea that the occupants would have criminal histories similar to Smith. As noted in this report, this has not turned out to be the case.

prison.¹⁰⁴ This model, in other words, does not fit the reality of today's UCP, which is a housing area populated by obedient, indeed often passive inmates, obsessed with working on their appeals and posing little threat to prison security.

We therefore urge the Department of Correctional Services to abandon its current policy of holding all UCP inmates in close confinement, under harsh SHU conditions, and in complete isolation until immediately before their execution. Instead, we propose that DOCS adopt the same case-by-case analysis that it employs in determining how and where to house all other inmates entering the corrections system.

Currently, each inmate entering a New York State prison is classified according to security classification guidelines, which require an assessment of the security risks the inmate poses.¹⁰⁵ These guidelines identify two types of security risks: (1) public risk — a combination of the likelihood that an inmate will escape and the likelihood that he will be dangerous to the public were he to escape; and (2) institutional risk — the likelihood that he will be dangerous to staff, other inmates, or himself.¹⁰⁶ Each inmate is evaluated by point scores that take into account such factors as: criminal history; history of violence; history of escape and abscondence; date of earliest possible release; family, employment, school, and military history; and institutional disciplinary history.¹⁰⁷

Based upon this analysis, inmates are given a security classification and placed in an appropriate facility. We can see no reason why a similar analysis cannot be performed with inmates under sentence of death, and we note that a number of other states currently undertake just such an analysis in determining where death-sentenced prisoners should be assigned.

104. While the Department did not have any experience with the type of prisoners its new death row would receive, it had considerable experience with death row before 1984, when the Court of Appeals struck down New York's then-governing death penalty statute. *See People v. Smith*, 479 N.Y.S.2d 706 (1984). The regulations in place in 1984 were significantly less harsh than the regulations DOCS adopted in 1995 when the death penalty was reinstated.

105. *See* N.Y. CORRECT. LAW § 137(1) (McKinney 2001) (requiring the Commissioner to establish classification procedures); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, § 1000.3(a) (2001) (recommending various aggravating circumstances to be taken into account by "the classification analyst or correction counselor").

106. N.Y. COMP. CODES R. & REGS. tit. 7, app. 1-E (2002).

107. *Id.*

For example, Montana, which has approximately the same number of death-sentenced inmates as New York, employs a classification system in which inmates on death row can earn privileges as a result of good behavior.¹⁰⁸ California, which has the largest death row in the Western Hemisphere, classifies its death-sentenced inmates as “Grade A” or “Grade B,” the former comprising the majority of inmates, the latter a minority of violent or gang-affiliated inmates.¹⁰⁹ The two groups enjoy different privileges and are housed in separate areas, with Grade B inmates consigned to a three-story building called the “Adjustment Center.”¹¹⁰

We further note that many other states do not operate their death rows on a punitive segregation model,¹¹¹ and that one state, Missouri, at one of its maximum-security facilities, actually integrates capital prisoners with the general population.¹¹²

108. See sources cited *supra* note 21.

109. Interview with Russell Stetler, *supra* note 14.

110. See Evelyn Nieves, *Rash of Violence Disrupts San Quentin's Death Row*, N.Y. TIMES, May 22, 2001, at A12.

111. As of the date of this report, thirty-eight states and the federal government have death penalty statutes. See Death Penalty Information Center, *States with the Death Penalty*, at <http://www.deathpenaltyinfo.org/firstpage.html#with> (last visited Mar. 13, 2002). We did not study each state with a death row, but rather concentrated on the states with the largest populations on death row: Alabama, California, Florida, Georgia, Illinois, North Carolina, Ohio, Pennsylvania, and Texas. See sources cited *supra* notes 13-14, 16-18, and 22-25. Additionally, we looked in-depth at two other states: Montana, a state with approximately the same number of men on death row as New York, and Missouri, which has a substantial death row population of approximately seventy-five inmates. In 1992, Missouri abandoned the segregation model of death row (i.e., separating death-sentenced prisoners from the general prison population) and integrated its death row prisoners with its general population at a maximum security facility. See Telephone Interview with Tim Kneist, *supra* note 20; see also sources cited *supra* note 21.

112. See Telephone Interview with Tim Kneist, *supra* note 20 (speaking of the Potosi Correctional Center). In spite of the Subcommittee's strong conviction that the UCP inmates are overly isolated, we take no position on whether the UCP should be integrated into Clinton's general population. We hesitate to do so for two reasons: first, the inmates themselves are not unanimous in wanting such a change; and second, while we are confident that the present UCP inmates would pose no serious threat to prisoners in the general population, we are less confident that the reverse is true.

Nevertheless, the Missouri experience is very instructive. Missouri houses approximately seventy-five death-sentenced prisoners at its Potosi Correctional Center, and all of them have been integrated with the general population of this maximum security facility since 1992. It is Missouri's position that all maximum security prisoners pose essentially the same risks to the public safety. Thus, each

Another state, Montana, as we already have noted, allows its death row prisoners to earn important privileges, including the rights to congregate with other death-sentenced prisoners in a day room, to obtain more items from the commissary, and to have greater freedom to use the telephone.¹¹³

In light of these considerations, the Subcommittee urges the Department of Correctional Services to conform its regulatory model to the present reality of the UCP. Specifically, we make the following six recommendations that are discussed below.

1. Protect the privacy of prisoner meetings with counsel, counsel representatives, psychologists, and spiritual advisors.

At present, inmates cannot meet privately or communicate confidentially with their families, attorneys, health care professionals (including psychologists), or spiritual advisors. The inmates and their visitors are separated by a Plexiglas® partition, because of which all parties must shout in order to be heard. The consequence, of course, is that entire conversations are audible throughout the cellblock and may be overheard by other inmates and correction officers. In addition, the partition prevents inmates and visitors from simultaneously reviewing documents; indeed, documents cannot even be transferred unless an officer unlocks a padlocked slot.

The Subcommittee believes that, at a minimum, the Plexiglas® partitions should be removed, although a better solution would be to provide a separate room where privileged visits can be conducted face to face. California, Florida, Georgia, Illinois, and Missouri allow such “contact visits” for both legal and non-legal visitors.¹¹⁴

is assessed based upon his institutional behavior, with isolation reserved for those prisoners who demonstrate that they cannot be housed safely with general population maximum security prisoners. In the nine years since Missouri has implemented this model, there has not been an increase in conduct violations in either group: the death-sentenced inmates or the general population. *Id.*

113. See sources cited *supra* note 21.

114. See sources cited *supra* notes 14, 16-18, and 20.

The Subcommittee also believes that audio monitoring of the inmates' cells should be suspended during their telephone conversations with counsel.¹¹⁵

2. Allow inmates to control their own lights.

The UCP's practice of illuminating cells twenty-four hours per day interferes with the inmates' sleep and seems to them a form of harassment. Inmates try to block out the light by placing towels or blankets over their heads — anything to keep the light from “shining in my eyes”¹¹⁶ — but the guards, for some reason, object to their doing so. The result, which one might expect, is that it is “very, very hard to sleep.”¹¹⁷ The apparent justification for this twenty-four-hour illumination rule is that the lights permit nighttime video surveillance of the cells; such surveillance in turn is justified by the fear of inmate suicide. The irony in this, however, is that the rule is so demoralizing to inmates, who are unable to see its purpose and complain bitterly that it interferes with their sleep, that the rule may increase the likelihood of the very act it is designed to prevent.

The UCP is very small and seems likely to remain so for the foreseeable future. Surely the prison can address its legitimate security and inmate safety concerns simply by having its nighttime staff make more frequent rounds of the cells.

115. The Subcommittee notes that each of the five inmates currently held in the UCP is engaged in the initial phase of challenging his conviction and sentence, that is, in his direct appeal. In this phase, the relevant facts are those already adduced in the hearings and trials that led up to the sentence of death. At some point in the future, however, some or all of these inmates will move from direct to collateral attacks on their convictions and sentences, most commonly through petitions for writs of habeas corpus. Collateral attacks may re-open the record, and entail factual investigation and analysis. At this second stage, confidential communication with counsel and forensic teams is essential. If an inmate believes, for example, that trial counsel was ineffective in the post-conviction stage because he failed to present to the jury in mitigation at sentencing that the defendant as a child endured years of sexual abuse from a parent, it cannot be expected that the inmate will shout this history over a Plexiglas® barrier for all to hear. Similarly, the rapport necessary to conduct a forensic psychiatric evaluation fully is impaired by the denial of contact visitation and the sense of being overheard, when, at this stage, evaluation of the defendant's competency for execution may be critical in obtaining a stay.

116. Letter from Laurent A. Sacharoff to David S. Hammer, *supra* note 61.

117. *Id.*

3. Expand the list of permitted visitors.

The severe restrictions that New York imposes on the list of permissible visitors to death row are unique, unnecessary, and cruel. Prisoners cannot be visited by a life-partner if there has been no formal marriage; they cannot be visited by relatives (such as cousins, step-siblings, uncles, and aunts) who fall outside the narrow definition of family that DOCS employs for visiting purposes; and they cannot be visited by friends, no matter how close or long-established the friendship may be.¹¹⁸

These restrictions on the visitation rights of condemned men, who are permitted no other form of society while awaiting execution, are more severe than those imposed on the general prison population, more severe than those imposed on condemned prisoners in other states,¹¹⁹ and more severe than those previously imposed in the UCP itself.¹²⁰ The Subcommittee can see no justification for these unique and unprecedented restrictions and, therefore, urges DOCS to immediately grant UCP inmates the same visitation rights afforded the general prison population at Clinton.

4. Give death row inmates the same commissary privileges that the general prison population enjoys.

UCP inmates are permitted to spend \$55 per month at the prison commissary, \$15 of which can be spent on candy and snacks.¹²¹ Inmates in the general population are given \$110 per month, which they can spend as they choose on a wide array of food products, toiletries, cards and other sundries.¹²² If an inmate from the general population violates a prison rule and is sentenced to disciplinary confinement, his monthly food

118. See DOCS Dir. No. 0054 (1998), *supra* note 10, at 11. In March 2002, the Superintendent sent a memorandum noting a revision to this portion of the directive. Inmates can now be visited by non-immediate family if it can be demonstrated that the inmate has lived with and shared a long-term relationship with the individual, and if the inmate has no other immediate family nor any other members of the inmate's immediate family has visited within the preceding six months. Memorandum from Daniel A. Senkowski, Superintendent, Clinton Correctional Facility, to "All Concerned Personnel" (Mar. 12, 2002) (on file with authors).

119. See sources cited *supra* notes 13-25.

120. See DOCS Dir. No. 0054 (1983), *supra* note 42.

121. See *supra* note 58 and accompanying text.

122. See *supra* note 57 and accompanying text.

purchases are limited to \$15 — the maximum allowed to death row prisoners even when they have not violated any rules.¹²³

DOCS should eliminate these severe and inexplicable restraints on the right of UCP inmates to buy food, especially because UCP inmates often wait sixteen hours between their final meal of the day and breakfast. A number of states, including Alabama, California, Florida, Illinois, Louisiana, North Carolina, Ohio, and Texas allow death row inmates the same commissary privileges as those inmates in the general population.¹²⁴

5. Allow inmates to congregate within the UCP and to engage in recreational activities in small groups in the exercise cages; afford them exercise equipment and gloves.

UCP prisoners are not allowed to congregate either with each other or with the general prison population. They are, in other words, kept in virtual isolation, alone in their cells for twenty-three hours per day, and then alone in the exercise yard for the twenty-fourth hour. To our knowledge, DOCS has never publicly explained its policy of keeping these men so isolated, but we have assumed that it reflects a general expectation that condemned men will be violent and intractable — the worst of the worst in terms of prison discipline.

As Clinton's own Superintendent freely admits, this assumption has not proved to be the case. Indeed, the Superintendent has stated that the six inmates formerly on death row are, in fact, older, more passive, and more obedient than most of Clinton's population. Moreover, this is commonly the case with death row prisoners,¹²⁵ although it is entirely possible that the next inmate assigned to the UCP may be as dangerous as DOCS

123. See *supra* note 58 and accompanying text.

124. See sources cited *supra* notes 13-14, 16, 18-19, 22-23 and 25. California death-row inmates may also receive packages from friends and relatives, and the packages may include food items. Interview with Russell Stetler, *supra* note 14.

125. Robert Johnson in *Death Work: A Study of the Modern Execution Process* notes that:

Except for their sentences, condemned prisoners are not very different from typical prisoners. The vast majority of the condemned have criminal records that are no worse than those of other chronic felons, and a sizeable minority, in fact, have no prior record of felony convictions or imprisonments. . . . Thus, condemned prisoners are, at least for those years when their execu-

originally expected all condemned men to be. This merely illustrates that presumptions about death row prisoners — either favorable or unfavorable — are very dubious, arising from intuition and errant common sense, rather than from broad and consistent experience.

Our concern with the present state of the fairly extreme isolation imposed on UCP inmates arises, in part, from the extensive body of literature concerning the destructive psychological effects of solitary confinement and the sensory deprivation it usually entails. This literature has become well known in the corrections community, largely through the work of Dr. Stuart Grassian who has identified what he calls solitary confinement psychosis.¹²⁶ Those who suffer from this syndrome, according to Dr. Grassian, display symptoms including “massive” anxiety; “perceptual distortions and hallucinations”; “difficulty with concentration and memory”; “acute” confusion, primitive and aggressive fantasies; “persecutory ideation, at times reaching the level of delusion”; “motor excitement, often associated with violent, destructive or self-mutilating outbursts”; as well as other symptoms of anxiety.¹²⁷

tions are not imminent, no more dangerous or desperate than other prisoners and, accordingly, could be managed in regular prisons.

ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 216-17 (2d ed. 1998) (footnote omitted).

126. See Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49 (1986).

127. *Id.* at 54; see also Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265 (1977). The most relevant comparison to New York's death row comes from an article by Craig Haney, which is based on interviews with prisoners in the SHU at California's Pelican Bay State Prison. Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, in CORRECTIONAL CONTEXTS, CONTEMPORARY AND CLASSICAL READINGS 464 (Edward J. Latessa et al. eds., 2d ed. 2001). With its high-tech security, starkly austere conditions, and high degree of isolation, the SHU at Pelican Bay closely resembles New York's UCP. Haney observes that:

Prisoners who are housed inside these units are completely isolated from the natural environment and from most of the natural rhythms of life. . . .
 . . . Their movements are monitored by video camera, watched by control officers on overhead television screens. In the control booth, the televised images of several inmates, each in separate exercise cages, show them walking around and around the perimeter of their concrete yards, like laboratory animals engaged in mindless and repetitive activity.

These considerations persuade the Subcommittee that death row prisoners should be allowed some rights to congregation unless and until their own behavior proves that isolation is necessary. We do not now specify the precise form these rights should take — whether congregation should be with other UCP inmates alone, or with members of the general population in supervised settings such as prison jobs or educational programs. We merely contend that DOCS should abandon the present regime of complete and perpetual isolation, sporadically lifted for family, attorney, and medical visits.

The Subcommittee also urges DOCS to relax the extreme and strange restrictions it presently imposes on recreational activities. Today, recreation at the UCP means standing alone in an empty outdoor cage, a condition few people outside death row would find particularly stimulating. Inmates should be allowed to engage in recreational activities in groups and should receive some type of athletic equipment, such as a basketball,

Id. at 465. Haney empathizes with the prisoners in his analysis of the effects of such conditions:

The psychological consequences of living in these units for long periods of time are predictably destructive, and the potential for these psychic stressors to precipitate various forms of psychopathology is clear-cut. When prisoners who are deprived of meaningful social contact begin to shun all forms of interaction, withdraw more deeply into themselves and cease initiating social interaction, they are in pain and require psychiatric attention. They get little or none. Prisoners who have become uncomfortable in the presence of others will be unable to adjust to housing in a mainline prison population, not to mention free society. They are also at risk of developing disabling, clinical psychiatric symptoms. Thus, numerous studies have underscored the role of social isolation as a correlate of mental illness. Similarly, when prisoners become profoundly lethargic in the face of their monotonous, empty existence, the potential exists for this lethargy to shade into despondency and, finally, to clinical depression. For others who feel the frustration of the totality of control more acutely, their frustration may become increasingly difficult to control and manage. Long-term problems of impulse control may develop that are psychiatric in nature.

Id. at 469 (footnote omitted).

These considerations are especially salient with death row inmates, who often spend decades under the utmost stress — awaiting execution. The inmates at New York's UCP are, at present, in the early stages of this death watch. The Subcommittee anticipates that the full impact of the extreme isolation in which they are held may not be seen for years. However, we fear that at some point the devastation of awaiting execution in nearly complete isolation will prove overwhelming.

jump rope, or weights.¹²⁸ These proposals — to relax the isolation under which death row prisoners are held — are hardly radical. Indeed, many other states already allow death row inmates to congregate.¹²⁹ For example:

- North Carolina allows death-sentenced inmates to congregate in a day room from 7:00 a.m. to 11:00 p.m., where there is a television. Death-sentenced prisoners may also participate in weekly religious services and may attend a ninety-minute bible study class taught by the prison chaplain. The death-sentenced prisoners eat in dining halls in groups, not alone in cells.¹³⁰
- California, which has the largest death row population in the country, allows death row inmates to congregate both inside the prison and outside in the prison yard, and to engage in activities such as chess, cards, and board games.¹³¹
- Florida, Illinois, Louisiana, Ohio, and Pennsylvania allow inmates under sentence of death to exercise together during their recreational period.¹³²
- Georgia allows condemned inmates to socialize within their cell blocks for several hours each day, during which time they can play cards, chess, and checkers. Death row inmates also are allowed to exercise with each other twice weekly.¹³³

6. Independent Monitor of the UCP

In addition to these recommendations for changing specific conditions of confinement at the UCP, the Subcommittee strongly recommends that the State create a mechanism for

128. The Subcommittee believes that UCP inmates should have the option of participating in job programs at Clinton, even though we have been unable to determine if many of them would exercise that option. Unfortunately, here, as elsewhere, our limited contact with the UCP's population has impeded our efforts at a comprehensive assessment of the UCP's operation. Nevertheless, we note that seventeen states allow death-sentenced prisoners to participate in jobs programs, although generally only limited jobs are open to death-sentenced prisoners. These states are: Arkansas, Colorado, Connecticut, Indiana, Kentucky, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Tennessee, and Washington. MAJOR DANIEL HUDSON, *MANAGING DEATH-SENTENCED INMATES: A SURVEY OF PRACTICES* 47 (American Correctional Ass'n ed., 2000).

129. See sources cited *supra* notes 13-25.

130. Telephone interview by Daniel Shapiro with Warden's Office, Central Prison, Raleigh, North Carolina (June 2000).

131. Interview with Russell Stetler, *supra* note 14.

132. See sources cited *supra* notes 16, 18-19 & 23-24.

133. Telephone Interview with John Harper, *supra* note 17.

regular independent oversight of conditions in the UCP. The UCP is unique among housing areas in New York prisons since it is the only location that contains prisoners who have been sentenced to death, and it is the only housing area to which professional corrections monitors have not had regular access.¹³⁴

The importance of visits, scheduled and unscheduled, by an outside monitor seems obvious. In the first instance, the role of a monitor is to conduct inspections to determine if regulations are being followed. This, however, is not the only service a monitor may provide. A monitor also can serve as a source of unfiltered information about conditions within the UCP - information both about how inmates are treated and how public funds are being spent. Finally, a monitor represents an extra-institutional vehicle for lodging complaints. Today, UCP prisoners present their complaints primarily to the correctional staff with whom they come in contact. This is unfair to the inmates because the correctional staff is hardly impartial and because DOCS seems to have adopted a presumption that inmate requests are unreasonable.¹³⁵

This presumption is evidenced by the response of DOCS's General Counsel to the letter from a UCP prisoner on behalf of all inmates of the UCP. That inmate submitted several modest requests for changes in the UCP, among which were: (i) an increase in the variety of toiletries that UCP inmates are permitted to purchase at the commissary; (ii) the right to use typewriters; and (iii) a relaxation of the rule that UCP inmates can make only one ten-minute telephone call per week to family members. DOCS rejected each of these proposals in a perfunctory letter that advanced arguments we find difficult to take seriously. DOCS asserted that (i) "[a]dditional toiletries would present administratively [sic] and security implications"; (ii) "[t]ypewriters present unique security concerns," they "can be used as a weapon" and "[c]ontraband can be secreted in a type-

134. It is true that, in the summer of 2001, DOCS allowed the Correctional Association to visit the UCP, a decision for which the Department should be commended. However, the Correctional Association may lack the staff and resources to monitor regularly the UCP.

135. The present system also is unfair to the corrections staff, who lack a mechanism for presenting their perspectives to independent, impartial parties. A monitoring system could blunt the force of unsubstantiated complaints against prison guards.

writer”; and (iii) since there is only one telephone on the UCP, “[i]ncreasing the maximum time that inmates may speak on the telephone with family members would necessarily impact the time that inmates have to communicate with their attorneys.”¹³⁶

Latent in DOCS’s response to the second inmate letter is a hostility, or at least a resistance, to inmate complaints. Given this resistance, we believe that some other method must be found to identify problems at the UCP. This is a role that can be filled by an independent, outside monitor.¹³⁷

We do not now suggest the particular form that a monitoring agency should take. What is important is that it be independent of the executive branch, to which DOCS belongs;¹³⁸ that it have a professional staff, however small; and that it have

136. Letter from Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, to UCP inmate, Clinton Correctional Facility 1-2 (Feb. 7, 2001) (on file with authors). DOCS’s response did not make clear why a second telephone line could not be installed at the UCP, or why the security dangers posed by manual typewriters could not be met by bolting them to a desk.

137. Outside oversight of correctional facilities long has been accepted in New York State and New York City. Three very different models exist today:

1. Private citizens: Since 1844, the privately funded Correctional Association (the “CA”) has been authorized by state law to visit New York State’s prisons. Its members and staff comprise a visiting committee, which inspects prisons and issues reports. See The Correctional Association of New York, *Prison Visiting Project*, at http://www.corrassoc.org/visiting_proj.html (last visited Mar. 15, 2002).

2. Executive branch appointees: The New York State Commission of Corrections (the “SCOC”) is comprised of three salaried commissioners, each of whom is appointed by the Governor. The SCOC sets minimum standards for state prisons and local correctional facilities. Unlike the CA, to our knowledge the SCOC never has inspected the UCP. See The New York State Commission of Correction, *Mission Statement*, at <http://www.scoc.state.ny.us/nysscoc/mission.htm> (last visited Mar. 15, 2002).

3. Appointees from executive, legislature and judiciary: The New York City Department of Correction consists of nine unsalaried members who are supported by a small, full-time paid staff. The Mayor and the City Council each appoint three members, and another three are nominated jointly by the Presiding Justices of the First and Second Departments, thereby creating a perception of independence. See generally New York City Department of Correction, at <http://www.ci.nyc.ny.us/html/doc> (last visited Mar. 15, 2002) (providing general information about the New York City Department of Correction).

138. See New York State Government Information Locator Service, *New York State’s Executive Branch Agencies*, at <http://unix2.nysed.gov/ils/executive/executive.html> (last visited Mar. 15, 2002).

clear statutory authority to make unannounced visits to the UCP.

V. Conclusion

It is a terrible thing to be condemned to death and to be confined for years in a small cell with little to do except to prepare for execution. It seems self-evident that the conditions under which the condemned spend their last years should not involve additional punishment. Yet, at present, the five condemned prisoners on New York's death row endure a host of indignities and restrictions that normally are employed only as punishment for the violation of important prison rules. To impose these conditions on the UCP's inmates as a matter of course, even if they have obeyed every rule that the system enacts, constitutes harshness without purpose, which is a fair definition of cruelty.

We have argued in this report that no restriction should be imposed on UCP inmates that is not imposed on the general prison population without a specific and persuasive justification for distinguishing between the two groups. Since we can see no important distinction between convicted murderers who have been sentenced to death and are therefore lodged in the UCP, and convicted murderers who have been sentenced to life without parole and are therefore lodged in the general population, we strongly recommend abandoning the special restrictions imposed on the UCP.

The Subcommittee recognizes that, even if adopted, the changes we propose may not substantially improve the life of the condemned, each of whom will still suffer under the knowledge that he faces execution. Indeed, we admit that we know little about the experience of living with a death sentence. Nevertheless, we believe that it is better to await death in a humane environment than in one that is harsh and restrictive, and it is toward the end of humanizing the UCP that we submit our proposals.

We urge DOCS to consider our arguments seriously and in goodwill, for this is the spirit in which they are advanced. And we ask them to consider a fact of great importance: it is by no means certain that any of the men on death row will be executed. Some may be returned to the general prison population,

where they will be expected to function as members of the prison community. Others may even be found innocent of any offense and released into society. In no case is it in society's interest to impose conditions that may lead to the mental or spiritual breakdown of the prisoner and make it impossible for him to become a functioning member of prison or civilian society. In no case is it in our interest to inflict pain needlessly, and yet needless, purposeless pain is precisely what is being endured at the UCP today.

VI. Epilogue

In early September 2001, the Association sent an advance copy of this report to the office of the General Counsel at DOCS, both as a courtesy and to allow DOCS to respond to anything it thought either inaccurate or unfair. DOCS did not respond then, and it has not directly responded to the Association or the Subcommittee in the period since.

In February 2002, the Subcommittee asked the General Counsel if there had been any changes to the UCP in the period since publication of the original publication of this report. In response, the General Counsel sent the Subcommittee a copy of a letter, dated January 22, 2002, that DOCS originally sent to the law firm of Sullivan & Cromwell.¹³⁹ The letter outlined several actual and anticipated changes to the UCP.

Among other things, DOCS asserted that it had: (1) established a new visiting room at the UCP for attorney-client visits, so that such visits would no longer take place at the rear of each inmate's cell, and (2) installed infrared lighting for use at night in order not to interfere with inmates' sleep.¹⁴⁰ DOCS also stated that it planned in the near future to: (1) permit inmates to make two telephone calls, rather than one, to family members each week; (2) slightly expand the list of persons authorized to visit an inmate; and (3) expand commissary privileges so that inmates could spend \$40 rather than \$15 per month on food items.¹⁴¹ In fact, on March 12, 2002, the Superintendent of

139. Letter from Anthony Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, to Sullivan & Cromwell (Jan. 22, 2002) (on file with authors).

140. *Id.*

141. *Id.*

Clinton Correctional Facility did issue a memorandum formally announcing changes to the list of persons allowed to visit inmates and expanding the number of personal telephone calls that inmates could make each week.¹⁴²

In order to assess the significance of these changes, the Subcommittee has spoken with several attorneys who represent death row inmates, including the attorney at Sullivan & Cromwell to whom the DOCS letter had been addressed. These attorneys confirmed that DOCS has established a new visiting room for attorney-client visits and agreed that this represents an improvement to the previous regime in which attorney-client visits took place at the back of an inmate's cell, where they could be easily overheard by guards and other inmates. The attorneys stressed — and the DOCS letter itself concedes — that attorney-client visits remain “non-contact,” i.e., separated by a Plexiglas® divider. The attorneys added that the visiting room contains two video cameras each with an audio monitor that records both the inmate and his attorney throughout the visit, a point DOCS concedes, although DOCS insists that the attorney can disengage the audio monitor at the outset of the visit.¹⁴³ The attorneys further corroborate that an infrared lamp is now used for night lighting at the UCP and that there has been a relaxation of the commissary restrictions on food purchases by UCP inmates.

These steps — the opening of a new visiting room, the slight expansion of the kinds of visitors permitted, the use of infrared night lights, and the expansion of commissary privileges — represent small, but real improvement in the conditions of confinement at the UCP. Nevertheless, for the most serious criticism raised in the report — the inhumanity of iso-

142. Memorandum from Daniel A. Senkowski, to “All Concerned Personnel” (Mar. 12, 2002) (on file with authors). This new revision now allows spouses of children, brothers, sisters, grandparents, foster parents, legal guardians, or grandchildren of the inmate to visit. A person who has lived with the inmate and shared a long-term relationship is now permitted to visit the death row inmate as well, but only if the inmate has had no family visits for six months and the Superintendent approves the visit. In addition, two ten-minute telephone calls per week to immediate family, rather than one ten-minute telephone call per week, are also permitted. *Id.*

143. E-mail from Russell Neufeld, Attorney, to Michael Mushlin, past Chair of the Committee on Corrections, Association of the Bar of the City of New York (April 3, 2002) (on file with authors).

lating inmates in the close quarters of their cells for years and perhaps decades — there has been no change at all. Indeed, the DOCS letter explicitly states that there will be no change to this point and that death row inmates will continue to be segregated from each other and from the general prison population until they are either executed or released from the sentence of death.