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Margo Schlanger

University of Michigan Law School, mschlan@umich.edu

Margaret C. Love

Carl Reynolds

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ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS

By Margo Schlanger, Margaret Colgate Love, and Carl Reynolds



For more than 10 years, corrections professionals and others concerned about the treatment of prisoners have despaired over conditions in California's prisons. Crowding, violence, racial segregation, abysmal medical care, an obstructionist corrections union, and a state budget crisis have combined to bring the system to the point of constitutional meltdown. In 2008, a state appellate court found conditions of "extreme peril to the safety of persons and property," and a three-judge federal court confirmed the existence of a "substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them." (*See* *CCPOA v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 854 (Cal. App. Ct. 2008); *Coleman v. Schwarzenegger*, 2009 WL 330960 (Feb. 9, 2009).)

California's situation is extreme and atypical, but its lessons have not been lost on other jurisdictions struggling to cope with greatly expanded prison populations in a time of severe budget constraints. Nor have they been lost on the legal profession.

In a 2003 speech to the Annual Meeting of the American Bar Association, U.S. Supreme Court Justice Anthony Kennedy noted the "remarkable scale" of incarceration in the United States, and challenged the bar to address "the inadequacies—and the injustices—in our prison and correctional systems." (*See* <http://new.abanet.org/sections/criminaljustice/PublicDocuments/JusticeKennedySpeech.pdf>.) Responding to Justice Kennedy's challenge, the ABA moved quickly to renew its long-standing commitment to the fair, effective, and humane treatment of those who are imprisoned, initially through establishing the Justice Kennedy Commission. The following year, in 2004, it began the work of revising its standards governing the treatment of prisoners. The goal was to provide up-to-date guidance addressing current conditions and challenges in American jails and

MARGO SCHLANGER is the officer for civil rights and civil liberties for the U.S. Department of Homeland Security. Prior to her appointment to that position, she was reporter for the *Treatment of Prisoners Standards*; this article incorporates writing she did when she was reporter, before her current government tenure, and neither it nor the Standards themselves reflect the views of the Department of Homeland Security. **MARGARET COLGATE LOVE** chairs the Standards Drafting Task Force, and was reporter for the ABA Justice Kennedy Commission. In private practice she represents federal prisoners. **CARL REYNOLDS**, a member of the Standards Drafting Task Force, is currently the director of the Texas Office of Court Administration. From 1993 to 2005 he was general counsel for the Texas Department of Criminal Justice, the executive branch agency responsible for prisons, probation, and parole. This article and the Standards do not reflect the views of either the Office of Court Administration or the Texas Department of Criminal Justice.

prisons, with due respect for the extensive responsibilities of correctional officials and the considerable constraints under which they operate.

The ABA Standards for Criminal Justice on the Treatment of Prisoners, more than five years in the making, were approved by the ABA House of Delegates in February 2010. The new Standards are part of the ABA's multivolume Criminal Justice Standards project that has shaped the development of law and practice in the American criminal justice system since the 1960s. They replace the 1981 Standards on the Legal Status of Prisoners, which proved a useful source of insight and guidance for courts and correctional administrators during the 1980s, but had become sadly outdated and incomplete. Enormous changes have affected American corrections since 1981, and this revision is long overdue.

The Treatment of Prisoners Standards apply to all prisoners in adult correctional facilities, including jails, and cover a range of topics from classification and conditions of confinement to health care and access to courts. They address many topics of current concern not covered by the 1981 Standards, such as long-term and extreme isolation, privatization, reentry, and external oversight. Grounded in legal and constitutional principles, they aspire to promote the safe and efficient operation of correctional facilities while protecting prisoners' rights. (These Standards apply to all prisoners confined in adult correctional and criminal detention facilities, regardless of age or immigration status, but do not seek to cover facilities dedicated entirely to either juvenile or immigration detention.)

The Need for New Standards

The most consequential change since the ABA originally adopted prisoner standards in 1981 is the astronomical growth in incarceration in the United States. In 1981, 557,000 prisoners were held in American jails and prisons; that number has since skyrocketed to 2.4 million on any given day—two-thirds in prisons and one-third in jails. The population explosion has imposed severe pressure on correctional authorities as they attempt to cope with more people and longer terms of incarceration. New challenges have appeared and old ones have expanded, among them crowding, health care responsibilities, and the special needs of a variety of prisoners. At the same time, increased scale and generations of experience with modern correctional approaches have produced many examples of expertise and excellence. Social science research has developed significant insights in a large body of highly respected work.

The growing scale of modern American incarceration means, too, that an ever increasing number of our citizens have, at least at some point, been subject to criminal

justice supervision. The Pew Center on the States reported that, on any given day, more than one in every 100 adults is behind bars, (see http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912), and one in every 31 is under some sort of correctional control. Over the course of a year, about 13 million people spend time behind bars in our nation's jails and prisons. (See JOHN J. GIBBONS & NICHOLAS DE BELLEVILLE KATZENBACH (CHAIRS), *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 11* (VERA INSTITUTE, 2006).) While public safety is the paramount objective of the criminal justice system, it can and must be pursued with due regard to the dignity and humanity of the confined.

As the landscape has been transformed by time and increased population over the past decades, relevant law has also changed considerably. Statutory and decisional law has in some ways expanded, in others contracted, the scope of legal protection for prisoners. International human rights standards have likewise evolved substantially, more uniformly in favor of prisoners' rights. New approaches in corrections have elicited new legal standards and rules; new approaches to a variety of legal questions have varied in their application to corrections; and the application of the Eighth Amendment, the "basic concept underlying [which] is nothing less than the dignity of man," has continued to safeguard "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, 356 U.S. 86, 100 (1958).)

In light of all these changes since 1981, this new version of the ABA Standards takes a new look at American prisons and jails, and sets out practical guidelines to help those concerned about what happens behind bars. In large part, the Standards state the law, with sources from the Constitution, federal statutes and regulations, and court decisions developing each. They also rely on other legal sources, such as settlements negotiated between the U.S. Department of Justice and state and local governments under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997 *et seq.*, as well as non-DOJ consent decrees, as models for implementation of legal norms.

In addition, there are occasions in which the litigation-developed constitutional minima for prisoners' rights and their remediation omit critical issues that are of concern to criminal justice policy makers and correctional administrators. Thus, many of the Standards are directed at what might be called the infrastructure of constitutional compliance. The Constitution does not, for example, guarantee prisoners trained correctional officers. But Standard 23-10.3 nonetheless addresses training because it is a necessary precondition for compliance with substantive constitutional requirements.

Two background points are relevant here. First, even

in litigation, some infrastructure is recognized in some circumstances as a constitutional obligation of an incarcerating authority. Supervisory failures—failure to screen, failure to train, failure to supervise, failure to discipline—can all *cause* the violation of prisoners' rights, though they do not *constitute* such a violation. Accordingly, while the Supreme Court has underscored that supervisory liability is the exception rather than the rule, such failures can be a predicate for damages liability and an object of a mandatory injunction. (See, e.g., *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 412-13 (1997) (failure to screen); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989) (failure to train).)

It is important to note, however, that the Standards go beyond these limited precedents for a second reason: The Standards can appropriately be less deferential to prison administrators than are courts adjudicating constitutional claims, because the Standards offer advice not only to courts—which grant correctional administrators a good deal of deference in order to respect the principle of separation of powers—but to the political branches. As the Supreme Court explained in *Lewis v. Casey*, 518 U.S. 343, 349 (1996):

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

The Standards' role is not to provide a restatement of the litigated constitutional law of corrections, guided as that law is by this principle of deference. Rather, the Standards have as their very purpose—most prominently in their provisions related to oversight and private prisons, but elsewhere as well—"to shape the institutions of government in such fashion as to comply with the laws and the Constitution."

The Role of the Bar

The organized bar has played and should continue to play a crucial role in American corrections. Prisons and jails are, to their core, legal institutions. Their population is determined by operation of criminal law, and prosecutor, defender, and judge are all members of the bar. Even more important, correctional administration is bounded by legal requirements. In fact, it is fair to say that the maturation of the field of corrections that has occurred over the past 30 years has been inextricably related to the increased influence of legal norms behind bars. It was litigation that ended the cutting off of prisoners from the

broader community, *Ex Parte Hull*, 312 U.S. 546 (1941); and litigation that first emphasized the relevance of the rule of law to prison administration, *Cooper v. Pate*, 378 U.S. 546 (1964). Litigation pushed corrections down the path of accreditation itself.

Moreover, members of the bar have substantial expertise in this area. As lawyers and judges, they are in daily contact with the criminal justice system. ABA members represent clients facing possible imprisonment or prisoners challenging the conditions of their confinement. They also represent prisons and jails in litigation, and counsel those institutions on legal compliance. Members of the organized bar spearheaded the nation's response to the deadly 1971 riot at New York's Attica prison and then went on to formulate the terms of a more general commitment to the rule of law within prisons. Robert McKay, dean of the NYU Law School, was the chair of the Attica Commission and the ABA Commission on Correctional Facilities and Services, the initiative formed in response to Chief Justice Warren Burger's 1969 call to the bar to focus its concern and abilities on the administration of the nation's correctional systems.

Yet the bar's role in corrections has often been contested, even opposed. After a tentative draft of Chapter 23 was completed in 1977, it was extensively debated in the ABA House of Delegates in August 1978 for precisely that reason, and was not approved until after a joint ABA/ACA task force, assisted by an arbitrator, submitted a revised version of Chapter 23 four years later. As passed, Chapter 23 dealt extensively with matters also the subject of the ACA standards, and it imposed more than a few limits on administrator discretion that were more stringent than the ACA's approach. This moment in the ABA's history marked its considered commitment to the paired propositions that 1) the bar cannot cede to corrections professionals the task of improving American conditions of confinement, and 2) the bar's contribution to corrections should take account of but not be bound by the views of corrections professionals.

A third principle emerges from even these brief descriptions: 3) the bar's prescriptions for corrections exceed constitutional minima. The ABA has taken a consistent stance that it is the bar's proper province not

merely to restate the operational floor established by courts and legislatures but rather to promote the fair and humane operation of the criminal justice institutions that are prisons and jails. Because the Standards are intended to provide guidance to judges, policy makers, lawyers, and correctional administrators, and to shape the just and lawful operation of the criminal justice system, some Standards are aspirational, yet within the bounds of lawful and feasible correctional practice. Each and every one of these Standards reflects the best current thinking on the correctional practices necessary to protect prisoner's rights and operate safe, humane, and effective prisons.

That said, the Standards leave a large place for the operational expertise of corrections professionals, a number of whom were intimately involved in the drafting of the revised Standards. The Standards are aimed at establishing the conditions that should exist in confinement facilities. How these conditions are made operational has been left to the skill and resourcefulness of correctional administrators. For example, adequate light in housing areas is necessary for humane operation of a prison, as stated in both the 1981 Standards (23-6.13(c)(ii)) and the 2010 Standards (23-3.1(a)(v)). But translation of this general command into a specific measure of "foot-candles" in different settings is beyond the comparative advantage and appropriate role of the bar.

The Law of Prisons

Prisoners' rights and interests are protected under the Eighth Amendment, whose cruel and unusual punishments clause enforces "contemporary standards of decency" for convicted prisoners, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). But of course, rights of prisoners are subject to restrictions and limitations "justified by the considerations underlying our penal system." (*Bell v. Wolfish*, 441 U.S. 520, 546 (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948))); a prisoner "simply does not possess the full range of freedoms of an unincarcerated individual an important tension must be navigated. In tension with this reality of restricted liberty is the relatively modern recognition that "There is no iron curtain drawn between the Constitution and the prisons of this country."

(*Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).)

In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Under the Eighth Amendment some rights—rights related to protection from harm, in particular—are *broad-er* in prison than outside. But *Turner* makes it clear that the scope of many other rights shrinks behind the prison walls. Chief among these highly limited rights are privacy, free speech, and association. Even under *Turner*, however, prison regulations are unconstitutional if they reflect an “exaggerated response” even to real security concerns. *Turner* itself overturned a prison rule against prisoner marriages on this basis. The approach of these Standards is to offer a referent useful for those administrators seeking to avoid such an exaggerated response, and for courts seeking to assess correctional practices in application of this test.

needed, and a written statement of reasons for the decision have frequently been required.

The Supreme Court has always been careful *not* to require due process protections around every important decision affecting prisoners’ lives. Decisions relating to classification and interprison transfers, for example, have been held not to deprive prisoners of a protected liberty interest, and therefore the due process clause does not reach them. (*See* *Moody v. Daggett*, 429 U.S. 78 (1976) (classification, *in dicta*); *Meachum v. Fano*, 427 U.S. 215 (1976) (interprison transfers); *Olim v. Wakinekona*, 461 U.S. 238 (1983) (interstate prison transfers).) The same is true for decisions relating to various privileges. (*See* *Sandin v. Conner*, 515 U.S. 472 (1995) (noting this result for shock incarceration, tray lunches rather than box lunches, and in-cell television).) Moreover, in *Sandin*, the Supreme Court introduced a significant restriction on prisoners’ rights in this area when it ruled that a liberty interest, and thus the need for due process, is not implicated in a

The Supreme Court has not required due process protection around every decision affecting prisoners’ lives.

An additional key strand of the constitutional law of corrections involves prisoners’ procedural rights—in particular, the process due for further deprivations of liberty within the prison or jail setting. The Supreme Court has insisted on various procedural protections to ensure accurate and fair decision making in such contexts as prison discipline involving deprivation of good-time credits, *Wolff v. McDonnell*, 418 U.S. 539 (1974); transfer to a psychiatric institution, *Vitek v. Jones*, 445 U.S. 480 (1980); and forced administration of psychotropic medication, *Washington v. Harper*, 494 U.S. 210 (1990). Those precedents remain good law: Contemporary case law is clear that substantial process continues to be due in proceedings to further deprive prisoners of their liberty. Where a liberty interest is found, the question these cases answer is what process is due. Under the established general analysis, *see Mathews v. Eldridge*, 424 U.S. 319 (1976), the answer has varied based on the gravity of the liberty interest, the value of the process sought and the risk of erroneous deprivations if it is omitted, and the burden the process would impose. In the prison setting, this has meant that the law does not require the full panoply of due process protections familiar from criminal trials. But notice, an opportunity to be heard before a decision maker who had no involvement in the relevant events, a limited right to assistance where it is

prison disciplinary case unless the disciplinary penalty imposes an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” (*Id.* at 484.) Thus discipline that does not impact the length of a prisoner’s incarceration but only its conditions is often not regulated by the due process clause; if similar conditions are sometimes imposed not as a matter of discipline but for administrative reasons, they are not deemed “atypical.” Especially in states and settings in which prison life is particularly stark, this test, from *Sandin*, shrinks the liberty interests protected.

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which drastically transformed the rules governing litigation by prisoners. The statute had two goals: to stem what Congress saw as a tide of frequently frivolous lawsuits by prisoners, and to rein in what Congress saw as unduly intrusive court orders in prison and jail class actions. (*See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).) With respect to the first goal, it is clearly the case that pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities. The PLRA’s supporters focused on these

problems, but emphasized over and over: “[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.” (141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).)

Unfortunately, the results have not fulfilled this sanguine prediction. The PLRA has been extremely effective in shrinking the number of federal lawsuits by prisoners, even as incarcerated populations rise; since its passage, prisoners’ federal filing rates have declined 60 percent, from 26 federal cases per thousand prisoners in 1995 to fewer than 11 cases per thousand prisoners in 2006. And the burden posed by litigation for prison and jail officials has diminished even more, because of the statute’s screening provisions, which require courts to dispose of legally insufficient prisoner civil rights cases (as well as some cases brought by nonprisoners), often without even notifying the sued officials of the suit against them and without receiving any response from those officials. Under the PLRA, prison or jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law.

But the dramatic reduction in the volume of prisoner litigation has by no means been limited to the frivolous or even nonmeritorious cases. If the PLRA were successfully “reduc[ing] the quantity and improv[ing] the quality of prisoner suits,” *Porter v. Nussle*, 534 U.S. 516, 524 (2002), as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs’ success rates in the cases that remain. The evidence is quite the contrary. The shrunken prisoner docket is less successful than before the PLRA’s enactment; more cases are dismissed, and fewer settle. (See Schlanger, *Inmate Litigation*, *supra*, at 1644-64.)

That result is not surprising: Many aspects of the PLRA undermine court access even for prisoners with meritorious cases, or are unfair for other reasons. Congress is currently considering amending the statute, and the ABA-endorsed reform several years ago. (See ABA resolution 102B, 2007 Midyear Meeting (Prison Litigation Reform Act).) Several provisions of two Standards restate the ABA’s positions on these issues:

- The PLRA imposes special and disadvantageous filing fee and cost-assessment rules for prisoners. 28 U.S.C. § 1915. Standard 23-9.2(b) requires that restrictions on court access accomplished by fees be imposed upon prisoners only if like restrictions are imposed upon non-prisoners.
- The PLRA requires prisoners to exhaust administrative grievance systems or forfeit their right to

bring a lawsuit. 42 U.S.C. § 1997e. Standard 23-9.2(d) requires, instead, that lawsuits be stayed for several months if that time is needed for a complaint to be processed through a grievance system, and then be allowed to proceed in court.

- The PLRA bars damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e); 28 U.S.C. § 1346(b)(2). Standard 23-9.3(c) recommends that there should be no such bar.
- The PLRA limits the equitable authority of courts in prisoner litigation in a variety of ways. 18 U.S.C. § 3626. Standard 23-9.3(d) insists that courts should have the same equitable authority in conditions of confinement cases as in other civil rights cases.
- The PLRA drastically limits the availability of attorneys fees in successful prisoner civil rights cases, 42 U.S.C. § 1997e(d); altering the ordinary fee-shifting rules, 42 U.S.C. § 1988. Standard 23-9.4(f) requires that prisoner’s litigation not be singled out in this way.

In short, the PLRA places formidable, indeed often insurmountable, obstacles in the path of prisoners when they seek redress from the courts for violations of their federally secured rights, leaving a wide range of constitutional violations beyond judicial remedy. Standards 23-9.2 and 23-9.3 affirm the ABA’s core principles of due process and equality, by requiring that effective and fair procedures for redress be available to prisoners as they are for others who seek the protections of the legal system.

The same year the PLRA was passed, the Supreme Court decided *Lewis v. Casey*, 518 U.S. 343 (1996), which is also pertinent to a number of the Standards. Two decades prior to *Lewis*, in *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that prison officials must not merely refrain from posing obstacles to prisoners’ access to the courts, such as the refusal to forward a court petition held unconstitutional in *Ex Parte Hull*, 312 U.S. 546 (1941), but actually offer affirmative assistance, usually by providing a law library. *Lewis* overruled *Bounds* in part, holding that prisoners’ court access rights are limited to criminal and constitutional cases. Moreover, *Lewis* emphasized that prisoners asserting a violation of their right of access to courts were not entitled to judicial relief unless they could demonstrate “actual injury”—“for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known,” or “that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by

inadequacies of the law library that he was unable even to file a complaint.” (*Id.* at 351.)

Lewis sets the constitutional minima, but if officials provide only that much, they restrict prisoners’ access to courts far more than is appropriate. After all, prisoners have many legal needs unrelated to either unconstitutional conditions or the fact of their confinement—they face legal proceedings relating to their families, immigration issues, statutory rights, etc. It is both unduly harsh and not conducive to accurate outcomes in those consequential cases to exempt them from court access rights. Accordingly, these Standards are not limited to criminal, habeas, and constitutional litigation.

The Standards likewise do not condition the various components of court access rights on a showing that a prisoner has suffered a concrete injury brought about by the failure to provide access or other assistance. But while this exceeds *Lewis*’s holding that litigated remediation of a violation of court access rights requires a showing of “actual injury,” it does not reject *Lewis*’s analysis.

Overview of the Standards

Organization. Part I, “General Principles,” provides overarching purposes and principles. Part II covers the initial decisions about each prisoner admitted to a correctional facility—intake and classification (the process by which correctional agencies decide on appropriate housing, custody, and programming for prisoners), and reclassification decisions including segregation and extreme isolation. Part III addresses “Conditions of Confinement,” describing both what must be provided (e.g., food, light, clothing) and what may not be taken away (e.g., opportunity for out-of-cell exercise, sleep). Part IV covers “Rules of Conduct and Discipline.” Part V, on “Personal Security,” treats protection from harm issues (including sexual assault and other prisoner-on-prisoner violence, and protection of particularly vulnerable prisoners), as well as use of force. Part VI deals with another area of affirmative obligation, “Health Care” (a term defined to cover medical, mental health, and dental care).

Part VII, on “Personal Dignity,” is probably the part most directly reliant on the 1981 Standards, adding only an additional standard relating to “cross-gender supervision,” an issue less salient in 1981 than now. Because of the new emphasis in criminal justice policy on issues of “reentry”—facilitating the reintegration of those leaving prison into their communities—Part VIII groups together Standards relating to “Rehabilitation and Reintegration,” and includes provisions relating to the location of facilities, prisoner work programs, visiting, access to telephones, and preparation for release.

Part IX combines “Prisoner Grievances and Access to Courts” in recognition of the new importance of

grievance systems under the Prison Litigation Reform Act; the content if not the organization is very similar to the 1981 predecessors. Part X, on “Administration and Staffing,” deals with issues relating to staff training and accountability (a prerequisite for enforcement of legal rights) and with private prisons. Finally, Part XI, “Accountability and Oversight,” addresses both internal and external oversight mechanisms, including the media.

Scope. The Standards apply to all adult correctional and criminal detention facilities, including jails. They also apply to all those confined in such institutions, including immigration detainees, juveniles, and pretrial detainees, for whom the legal protections due are if anything greater. *Separate* juvenile facilities or separate immigration detention facilities are not covered because of substantial differences in law and policy considerations. (The ABA was a partner in developing the Immigration and Customs Enforcement Detention Standards, and even plays a role in monitoring compliance with them. See http://www.abanet.org/publicserv/immigration/detention_standards.shtml; Report No. 111B, Aug. 2008.)

Note that the definition of a correctional facility includes even very small facilities, of which there are many. At last count, about half the nation’s 3,000 jails (excluding lockups) housed fewer than 50 prisoners on an average day. Those Standards that require particular bureaucratic structures in order to facilitate humane and constitutional treatment of prisoners—for example, several layers of review of agency operations—may need adaptation for such small facilities. But most of the Standards that present compliance challenges for small facilities—for example, the requirements of mental health monitoring for prisoners in segregated housing—are required for prisoner safety no less in a small than a large facility. If a small facility finds itself unable to comply with such mandates, it should seek out some cooperative arrangement with a larger facility that has developed the required operational expertise and capacity.

Similarly, the definition of the term “jail” covers temporary holding or lockup facilities, from which prisoners are usually transferred within 72 hours and not held beyond arraignment. As with small jails, complete compliance with these Standards by such facilities cannot be expected. Simply because of prisoners’ short length of stay, some of the Standards are entirely inapplicable (for example, Standards on reentry planning), others apply only in part (for example, Standards on medical care and provision of necessities), and still others are inconsistent with the ordinary functioning of these kinds of congregate holding areas and not necessary given the very short lengths of stay of all the prisoners (for example, Standards requiring prisoners to have a writing area and seating, and storage for personal items). Other Standards, however,

should apply in full force (for example, Standards on use of force and use of restraints). Rather than entirely excluding lockup facilities from coverage, or devoting substantial space in the Standards to the issues involved, it is our intent to recommend to those who operate lockups that they use these Standards as guidance for their operations and comply with as many of the Standards as practicable and sensible in light of the unique needs and challenges lockups present.

The definition of the word “staff” is important in light of the many types of employees working in prisons and jails. Within a secure facility, private contractors (e.g., employees of a private health care contractor) or noncorrectional government employees (e.g., teachers or public health officials) are just as much state actors as the security and nonsecurity staff who work more directly for correctional agencies, and it is important to make it clear that they are equally bound by operative norms.

Highlights. One important substantive commitment that runs through the Standards is an insistence that prisons be safe, but that, simultaneously, restrictions upon prisoners should be justified rather than reflexive. A second commitment of the Standards, detailed in the Part IX, is that independent monitoring of correctional facilities is preservative of prisoners’ substantive rights and is equally necessary for both private and public facilities. Transparency and accountability are difficult challenges in closed institutions such as prisons, but without them rights cannot be assured. In addition to these themes, the Standards take on three key issues of modern American correctional experience: crowding, long-term segregation, and reentry.

Crowding

As discussed above, the most important trend in American corrections for the past 30 years has been population growth. The result of growth is not inevitably crowding; space and resources may—and sometimes have—kept pace with increasing populations. But particular jurisdictions have indisputably housed more prisoners than

they were prepared for, and this crowding affects not just sleeping arrangements (although requiring prisoners to sleep on mattresses on the floor is a common and very problematic response to crowding, and has been held unconstitutional). As the courts have found recently in systemic California prison litigation, crowding can undermine medical care, security, and virtually all aspects of conditions of confinement.

A three-judge district court in California found that crowding in the California prison system was the primary cause of that system’s currently unconstitutionally deficient medical and mental health care. (*Coleman v. Schwarzenegger*, 2009 WL 2430820 (E.D. Cal., 2009).) The district court set out a case study of the problematic impact of egregious crowding, describing the “everyday threat to [prisoner] health and safety” caused by “the unprecedented overcrowding of California’s prisons.” (*Id.* at *1.) The court elaborated:

Since reaching an all-time population record of more than 160,000 in October 2006, the state’s adult prison institutions have operated at almost double their intended capacity. As Governor Schwarzenegger observed in declaring a prison state of emergency that continues to this day, this creates “conditions of extreme peril” that threaten “the health and safety of the men and women who work inside [severely overcrowded] prisons and the inmates housed in them” Ex. Pl at 1, 8. Thousands of prisoners are assigned to “bad beds,” such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California’s prisons are bursting at the seams and are impossible to manage.

CRIMINAL JUSTICE EDITORIAL POLICY STATEMENT

Criminal Justice is a magazine for everyone who cares about the quality of our justice system. Its focus is on practice and policy. Our readers are private and public defense attorneys, prosecutors, judges, law professors, and others who recognize that society is itself ultimately judged by its system for judging others. The magazine is published by the Section of Criminal Justice of the American Bar Association with the assistance of ABA Publishing.

The membership of the Section is diverse. Some members preside over or practice in state courts, others primarily in federal courts. Some specialize in white collar crimes, others prosecute or defend street crimes, and still others specialize in juvenile cases. Articles in *Criminal Justice* thus cover a wide variety of subjects, addressing areas of importance to all segments of the Section.

Those who prosecute and defend, regardless of their level of experience, constantly seek information on how to enhance their practice skills. *Criminal Justice* is also a forum for airing significant issues of interest to everyone concerned with the administration of justice. Accordingly, critical policy questions and recent trends are routinely covered. In doing so, *Criminal Justice* does not avoid controversy or unpopular viewpoints. Although a serious journal, *Criminal Justice* aims to be lively, provocative, and always highly readable.

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Crowding can be partially addressed by correctional officials; they can improve efficiency and develop various coping strategies. But they do not control most of the policy levers that might relieve crowding (chiefly their budgets and the mechanisms that control the entry and exit of prisoners) and accordingly the Standard (23-3.1) is addressed not just to correctional agencies, but more broadly to federal, state, and local authorities of all types who can cause or solve a crowding problem.

The definition of crowding in corrections policy is somewhat controversial; disputes occur about whether a facility is crowded when its population exceeds “design capacity,” “operational capacity,” or “rated capacity.” Standard 23-3.1 provides two definitions. One is entirely functional (and very minimalist), looking to adverse impact. Like the Supreme Court’s test for evaluating the constitutionality of “double-celling” in *Rhodes v. Chapman*, the Standard’s reference to “crowding that . . . adversely affects the facility’s delivery of core services at an adequate level, maintenance of its physical plant, or protection of prisoners from harm, including the spread

have grown much more rare, both because of the Supreme Court’s insistence in *Rhodes* that crowding is not itself a constitutional violation and because of the provisions of the 1996 Prison Litigation Reform Act, in which Congress made it extremely difficult for civil rights plaintiffs to obtain population caps. (See 18 U.S.C. § 3626(a)(3).) The Standards do not suggest any use of population caps to relieve crowding, rather urging authorities to avoid the problem using whatever method they choose. It seems advisable that where crowding exists, it should trigger a review of options for housing prisoners in other correctional settings or in the community, as well as an examination of the policies and processes that resulted in crowding.

Part X of the Standards does frown upon one common response to population pressure: privatization. The 1980s and 1990s saw enormous growth in use of private prison companies, which now operate a very significant proportion of correctional facilities in the United States. According to its Web site, the largest private prison corporation, CCA, operates 60 facilities with over 80,000 beds—which makes it, alone, responsible for more

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of disease” takes as its touchstone the existence of an adverse impact on core services—those relating to prisoner health and safety. (See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (upholding double-celling where it “did not lead to deprivations of essential food, medical care, or sanitation” and did not “increase violence among inmates or create other conditions intolerable for prison confinement”); *Coleman v. Schwarzenegger*, at *32 (“A prison system’s capacity is not defined by square footage alone; it is also determined by the system’s resources and its ability to provide inmates with essential services such as food, air, and temperature and noise control.”).) In addition, following the American Correctional Association, crowding is also defined to mean population “that exceeds a correctional facility’s rated capacity.” (Rated capacity is defined by the ACA to mean “the original design capacity, plus or minus capacity changes resulting from building additions, reductions, or revisions.” ACA, PRISON STANDARDS 4-4129.) This definition has the benefit of easy administration and the potential to change to reflect changed circumstances.

During the 1980s, many court orders relieved crowding in individual jails and prison by imposing numerical caps on the prison population permitted. Such orders

prisoners than any state but California, Texas, and Florida. (See Heather C. West & William J. Sabol, *Prison Inmates at Midyear 2008—Statistical Tables*, tbls. 2 and 11 (Bureau of Justice Statistics, June 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>.)

Privatization promised cost savings and improved performance, but there is now a question whether it has delivered on those promises. (See U.S. GEN. ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE (1996).) And private facilities have been shown to have disproportionately high rates of serious incidents involving prisoner safety. (See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 440, 504-07 (2005).) At the same time, privatization does allow government greater flexibility as prison populations expand and contract.

Some close observers of private prisons believe strongly that imprisonment is a core governmental function that should not be delegated to the private sector and should not be a profit-making enterprise. Without recommending a categorical ban on private prisons, Standard 23-10.5 is founded on a high degree of discomfort with the idea of profitable prisons, where—as in

every type of human enterprise—money may gain priority over law, morality, and rights. Prison privatization can create a financial incentive system in which stockholders become richer when prisoners are fed less, housed in smaller cells, or provided substandard health care, less education, or fewer programs.

With these observations as motive, the standard spells out precautions that protect both the prisoners and the contracting jurisdiction. In 1990, the ABA House of Delegates urged caution in the use of private correctional facilities. (ABA resolution 115B, 1990 Midyear Meeting, available at <http://www.abanet.org/crimjust/policy/cjpol.html#my90115b>.) Standard 23-10.5 goes a bit farther, suggesting that jurisdictions “should make every effort” to avoid privatization in secure facilities, and that they should enter into a privatization contract for operation of any correctional facility only if “it can be demonstrated that the contract will result either in improved performance or in substantial cost savings, considering both routine and emergency costs, with no diminution in performance.” (Cf. Texas Government Code sec. 495.003(c)(4) (authorizing private prison contracting only if the private entity can “offer a level and quality of programs at least equal to those provided by state-operated facilities that house similar types of inmates and at a cost that provides the state with a savings of not less than 10 percent of the cost of housing inmates in similar facilities and providing similar programs to those types of inmates in state-operated facilities”).)

In addition, like the 1990 ABA policy, which endorses contract-related “Guidelines Concerning Privatization of Prisons and Jails” this Standard spells out contractual precautions that protect both the prisoners and the contracting jurisdiction. Even privatization’s advocates urge extremely careful and comprehensive contracting with explicit terms governing substance, monitoring, penalties, and termination.

Long-Term Segregation

The most secure classification status in prison is long-term solitary confinement, sometimes in a facility or unit labeled “supermax.” Living conditions in this kind of isolated setting are generally the same, whether it is conferred after a classification or other nondisciplinary process (in which event it is usually labeled “administrative segregation”) or as discipline for a serious rule infraction (in which event it is usually labeled “disciplinary segregation”). Sometimes, that is, segregation is used to control or even (as “protective custody”) to protect, other times to punish. The forerunner of today’s “supermax” facilities was the federal maximum security prison at Alcatraz, which closed in 1963. A high-security control unit at the U.S. Penitentiary in Marion, Illinois, opened in 1978, but

the modern supermax prison was not born until USP Marion was locked down permanently in 1983, after the murder of two correctional officers by prisoners on the same day. The federal Bureau of Prisons opened another such facility in Florence, Colorado, in 1994; by 1999, more than 30 states operated supermax prisons. (Chase Riveland, *Supermax Prisons: Overview and General Considerations* 5, 1 (NIC 1999), available at <http://www.nicic.org/pubs/1999/014937.pdf>.) These freestanding facilities hold thousands of prisoners, and have also made more salient the issues raised by similar custody arrangements in units within general population facilities.

To understand life in long-term segregation, consider, for example, the Supreme Court’s description of life in the Ohio State Penitentiary, the supermax facility that was the subject of *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005):

In the OSP almost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate’s cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Some prisoners are sufficiently mentally resilient (or their stays in segregation sufficiently short) that isolating confinement does them no lasting harm; for others, the human cost can be devastating. Abundant research demonstrates that prisoners in segregation often experience physical and mental deterioration. Indeed, even in 1890, the Supreme Court discussed some of the evidence relating to the penitentiary system of solitary confinement:

[E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became vio-

lently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

(*In re Medley*, 134 U.S. 160, 168 (1890). *See also* *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940) (referring to “solitary confinement” as one of the techniques of “physical and mental torture” governments have used to coerce confessions).)

The modern evidence is abundant. As a leading expert summarizes:

Solitary confinement—that is the confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction—can cause severe psychiatric harm. It has indeed long been known that severe restriction of environmental and social stimulation has a profoundly deleterious effect on mental functioning.

(Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006).)

Some dangerous prisoners pose a threat to others unless they are physically separated. But such separation does not necessitate the social and sensory isolation that has become routine. Extreme isolation is not about physical protection of prisoners from each other. It is a method of deterrence and control—and as currently practiced it is a failure. The segregation units of American prisons are full not of Hannibal Lecters but of “the young, the pathetic, the mentally ill.” (Rob Zaleski, *Supermax Doesn't Reflect the Wisconsin That Walter Dickey Knows*, CAPITAL TIMES (Madison, Wis.), Aug. 27, 2001 (quoting Walter Dickey, former secretary of the Wisconsin Department of Corrections).)

Long-term segregation units are extraordinarily expensive to build and operate. Too many prisoners are housed in them for too long, in conditions whose harshness stems more from criminal justice politics than from correctional necessity or even usefulness. Those prisoners experience extreme suffering within the units, and those who have serious mental illness frequently decompensate and become floridly psychotic. As one judge has explained, “[f]or these inmates, placing them in the SHU [Security Housing Unit] is the mental equivalent of putting an asthmatic in a place with little air to breathe.” (*Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995), mandamus denied, 103 F.3d 828 (9th Cir. 1996).) Some prisoners who start off relatively psychologically healthy experience mental health damage, as well. Such

conditions are inconsistent with the human dignity of prisoners, as well as frequently being counterproductive. It is for this reason that the Standards require several important reforms in this area of criminal justice policy—and the ABA is far from the first organization to offer proposals along these lines. (*See, e.g.*, REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* at 52-60.)

Most of the Standards deal generally with all assignments to segregated housing, regardless of the justification. Eight Standards, including four in Part II (23-2.6 to 2.9) regulate administrative and disciplinary segregation, long- and short-term. Standard 23-2.6 sets out very broad substantive prerequisites for placing a prisoner in segregation even for a short time; Standard 23-2.7 provides far narrower rationales acceptable for segregation for a longer period. Standard 23-2.8 deals with the extremely important topic of mental health monitoring of prisoners in segregation, and forbids housing of prisoners with serious mental illness in segregation. Standard 23-2.9 governs the process by which a decision is made to house a prisoner in long-term segregation. In Part III, Standard 23-3.7 and 23-3.8 limit the degree of sensory deprivation and isolation even in such a setting, and Standard 23-3.9 deals with facility “lockdowns,” which can sometimes operate, de facto, as wholesale segregating reclassification. Finally, Standard 23-6.11(c) and (d) repeat 2.8(a)'s rule against housing prisoners with serious mental illness in anti-therapeutic environments—which long-term segregation cannot help but be—and require development, instead, of high-security mental health housing appropriate for those whose mental illness interferes with their appropriate functioning in general population.

Reentry

America's prisons release over 700,000 people annually; jails release millions more. The new Standards are imbued with the imperative that correctional administrators develop appropriate rehabilitative and vocational programming for prisoners, help them maintain and reestablish connections to their families, ensure that they have continuity of medical and mental health care, and access to housing, work, and treatment options upon their release. Prisoners who successfully reenter the community, and establish functional ties with their communities, are less likely to return to prison.

In light of the massive numbers of prisoners and the correspondingly increased numbers of former prisoners, the Standards urge that prison itself be oriented towards reentry and reintegration of those leaving prison into nonprison communities. This has been a theme in prior ABA policy, and the subject of numerous recent resolutions and reports. (*See, e.g.*, *Second Chances in the*

Criminal Justice System, Report of the ABA Commission on Effective Criminal Sanctions (2009), available at <http://www.abanet.org/cecs/secondchances.pdf> (last visited Feb. 28, 2010).) For a summary of many recent governmental initiatives in this area, see Re-Entry Policy Council, <http://www.reentrypolicy.org>.

Part VIII of the Standards also covers the location of facilities, prisoner work programs, visiting, access to telephones, and fees and financial obligations. Standard 23-8.5, Visiting, is particularly noteworthy, and takes the position that there are important public policy interests served by encouraging prisoners to stay in touch with the outside world, without regard to constitutional decisions permitting limits on visiting. In support of this position is a growing body of social science research showing that retaining ties with family and community plays an important part in reducing recidivism and facilitating reentry. Visiting rights are also substantially protected under international law.

Overall, the intent of these several provisions is to focus the attention of those who operate and oversee jails and prisons on the fact that nearly all of their prisoners will be released, and to encourage policies and procedures that maximize the ability of all prisoners to remain engaged with their families and to lead productive and healthy lives upon their return to the community.

Conclusion

The American Bar Association has a proud history of involvement in the development of the law governing prisons and prisoners. In the years since the Attica

riots, it has insisted that correctional administration be bounded by legal requirements. And, it is fair to say that the maturation of the field of corrections that has occurred since that time has been inextricably related to the increased influence of legal norms behind bars. The ABA is uniquely well positioned to take into account the sometimes competing interests of prisoners, administrators, correctional officers, and the public. It should, accordingly, remain a full partner in our polity's conversation about prison conditions.

In the 1980s, the now-replaced *Legal Status of Prisoners* Standards proved a useful source of insight and guidance for courts and correctional administrators, and were sometimes cited and used. This revision, long overdue, recognizes the enormous changes that have affected American corrections since 1981, and deals with many pressing current conditions and challenges facing American corrections that have to date not been fully addressed by the courts. To that extent, the goal of these Standards is precisely "to shape the institutions of government in such fashion as to comply with the laws and the Constitution."

Justice Kennedy reminded us seven years ago of "the inadequacies—and the injustices—in our prison and correctional systems," and called the ABA back to the task it first took up in the 1970s, of which these Standards are only the most recent installment. As he recognized, the bar has played and must continue to play a central role in American corrections. Prisons and jails are, to their core, legal institutions, and there is no place where it is more important to defend liberty and pursue justice. ■