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Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners

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ARTICLES

REGULATING SEGREGATION: THE CONTRIBUTION OF THE ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS

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Over recent decades, solitary confinement for prisoners has increased in prevalence and in salience. Whether given the label "disciplinary segregation," "administrative segregation," "special housing," "seg," "the hole," "supermax," or any of a dozen or more names, the conditions of solitary confinement share basic features: twenty-three hours per day or more spent alone in a cell, with little to do and no one to talk to, and one hour per day or less in a different, but no less isolated, setting—an exercise cage or a space with a shower.

Long-term segregation units operated along these lines 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. Prisoners in long-term segregation units often experience extreme suffering, 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."[1] Some prisoners who enter long-term segregation in a relatively psychologically healthy state experience mental-health damage as well. Such conditions are inconsistent with the human dignity of prisoners and are frequently counterproductive.

It is for this reason that the American Bar Association's (ABA) Criminal Justice

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* I served as the Reporter for the ABA Standards that are the subject of this Article from July 2007 to January 2009, when I left the project to assume my current role as U.S. Department of Homeland Security Officer for Civil Rights and Civil Liberties. My work on the Standards and their commentary was completed prior to my government service. This Article is adapted from the commentary I drafted as the Reporter, which is currently being edited, augmented, and finalized by the ABA Criminal Justice Standards Committee. The views expressed in this Article and in that commentary are not those of the Department of Homeland Security.

1. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995), *mandamus denied*, 103 F.3d 828 (9th Cir. 1996); *see also* Jones'El v. Berge, 164 F. Supp. 2d 1096, 1116 (W.D. Wis. 2001) (noting that "[t]he conditions at Supermax are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit."); Settlement Agreement at 2, Disability Advocates, Inc. v. N.Y. State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. Apr. 25, 2007) (stipulating that a heightened level of care will be provided to seriously mentally ill patients), *available at* http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf.

Standards on the Treatment of Prisoners propose several important reforms in this area of criminal justice policy. From 2007 to 2009, I had the privilege of serving as the Reporter for the Task Force that produced these Standards, which the ABA has now adopted and which are reprinted in this issue of the *American Criminal Law Review*. Like all of the ABA's Criminal Justice Standards, these are offered by the ABA as a source of insight and authority for judges, legislators, and government officials who are aiming to rationalize and improve the criminal justice system.[2]

In this Article, I discuss both how and why the ABA Standards deal with the crucial issue of the use of segregation. To summarize, in order to comply with the Standards, jails and prisons must:

- Provide sufficient process prior to placing or retaining a prisoner in segregation to be sure that segregation is warranted. (ABA Treatment of Prisoners Standard 23-2.9 [hereinafter cited by number only][3])
- Limit the permissible reasons for segregation. Disciplinary segregation should generally be brief and should rarely exceed one year. Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible. (23-2.6, 23-5.5)
- Decrease isolation within segregated settings. Even prisoners who cannot mix with other prisoners should be allowed in-cell programming, supervised (and physically isolated) out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material. (23-3.7, 23-3.8)
- Decrease sensory deprivation within segregated settings. Jails and prisons must limit the use of auditory isolation, deprivation of light and reasonable darkness, punitive diets, etc. (23-3.7, 23-3.8)
- Allow prisoners to gradually gain more privileges and be subjected to fewer restrictions, even if they continue to require physical separation. (23-2.9)
- Refrain from placing prisoners with serious mental illness in what is an anti-therapeutic environment. Jails and prisons must instead maintain appropriate secure mental-health housing for such prisoners. (23-2.8, 23-6.11)
- Carefully monitor prisoners in segregation for mental-health deterioration and deal with deterioration appropriately if it occurs. (23-6.11)

The ABA is far from the first organization to offer proposals to reform solitary

2. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009), *available at* http://www.abanet.org/crimjust/standards/marcus.pdf.

3. The Standards constitute volume 23 of the ABA's Criminal Justice Standards project; for more information on the entire project, see Marcus, *supra* note 2.

confinement.[4] The Standards' unique contribution, however, is to address all the aspects of long-term segregation by presenting solutions that embody a consensus view of representatives of all segments of the criminal justice system who worked on them together in the exhaustive and collaborative ABA Standards process.[5]

Part I of this Article provides information on the Standards more generally. Part II discusses the history of segregated housing and general observations about its effects. Part III discusses the approach taken by the ABA Standards with respect to permitted rationales for the use of segregated housing. Part IV describes the Standards' procedural requirements for placing prisoners in long-term segregation. Finally, Part V focuses on those Standards that are intended to mitigate the effects of isolating conditions.

This Article is part of a paper Symposium on the Standards; it is joined by an essay by ACLU National Prison Project Director David Fathi focusing on prisoners' access to courts and other oversight bodies, and another on immigration detention by New York City Department of Corrections Commissioner Dora Schriro.

I. STANDARDS ON THE TREATMENT OF PRISONERS

A. Background

The *Standards on the Treatment of Prisoners* were, after a five-year drafting process, approved by the American Bar Association House of Delegates in February 2010. Based on constitutional and statutory law, a variety of relevant correctional policies and professional standards, the deep expertise of the many people who assisted with the drafting, and extensive contributions and comments of dozens of additional experts and groups (among them heads and former heads of correctional agencies, prisoners' advocacy organizations, and many professional associations), the Standards set out principles and functional parameters to guide the operation of American jails and prisons, in order to help the nation's criminal justice policy-makers, correctional administrators, legislators, judges, and advocates protect prisoners' rights, while promoting the safety, humaneness, and effectiveness of our correctional facilities.

The Standards are part of the ABA's multi-set Criminal Justice Standards project.[6] They replace the ABA's 1981 *Criminal Justice Standards on the Legal Status of Prisoners*, which were supplemented by two additions in 1985 but not

4. *See, e.g.*, JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 52–60 (Vera Institute of Justice 2006) (making similar recommendations and discussing other comparable proposals).

5. Marcus, *supra* note 2.

6. There are currently twenty-three sets of the ABA Criminal Justice Standards, many in their third edition, covering topics from *Discovery* and *Pretrial Release* to *Sentencing* and *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*. *See* Am. Bar Ass'n, *Standards*, *available at* http://www.abanet.org/crimjust/standards/. The *Legal Status of Prisoners Standards* were in chapter 23 when they were released in 1981, and that

subsequently amended.[7] 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 frequently cited and used.

Nevertheless, the 2010 revision was long overdue: enormous changes have affected American corrections since 1981, and even in the 1990s, the 1981 standards had grown sadly out of date. The Criminal Justice Standards project's goal is to provide up-to-date guidelines that address the current conditions and challenges of America's jails and prisons, helping to shape the fair and humane development of the law and operation of the criminal justice system. There are eighty-three Standards in the volume that cover a wide range of issues affecting the 2.4 million people housed on any given day in America's jails and prisons.

The most consequential change since 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 its current level of over 2.3 million, with two-thirds in prisons and one-third in jails.[8] Justice Anthony Kennedy's address to the ABA in 2003 highlighted the "remarkable scale" of incarceration in the United States and the consequent need to "improve our corrections system" by addressing "the inadequacies—and the injustices—in our prison and correctional systems."[9] The population explosion in prisons and jails has imposed severe pressure on incarcerating authorities as they attempt to cope with more prisoners and longer terms of incarceration. New challenges have appeared, and old ones have expanded (among them private prisons, long-term and

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numbering has been preserved in this new (and re-titled) edition. *See* Am. Bar Ass'n, *Standards on Treatment of Prisoners*, *available at* http://www.abanet.org/crimjust/standards/treatmentprisoners.html.

7. *See* Am. Bar Ass'n, *Mental Health Standards*, Part X: Mentally Ill and Mentally Retarded Prisoners 375–87 (ABA 1984). In August 2003, Part VIII of the 1981 Standards, on Civil Disabilities of Convicted Persons, was superseded by the new *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, *available at* http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf.

8. TODD D. MINTON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2008–STATISTICAL TABLES (Mar. 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf; WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (Dec. 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf. The term "prison" usually is used to indicate a state or federally operated facility that houses convicted felons; "jail" means a county or city (or very occasionally federal) operated facility that houses some combination of pretrial detainees, felony convicts awaiting sentencing or transfer to prison, and misdemeanant and felony convicts serving relatively short terms. For a fuller discussion of the operational and litigation differences between these types of facilities, *see* Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEG. STUD. 79 (2004); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 n.76 & 1686–89 (2003).

9. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (revised Aug. 14, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf. For the policy document adopted by the ABA in direct response to Justice Kennedy's challenge, *see* AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION, REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (Aug. 2004), *available at* http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

extreme isolation of prisoners, 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. Whatever problems exist now affect more people than ever. On any given day, there are about as many people incarcerated as live in the thirty-fifth most populous state, Nevada. And even this record figure understates substantially the human impact of our current correctional system: over the course of a year, approximately thirteen million people spend time behind bars in our nation's jails and prisons.[10] Our most basic democratic commitments forbid us to write off so many individuals as part of the governing as well as the governed people. Accordingly, the dignity and humanity of the men and women incarcerated in America must be front and center in our nation's criminal justice policy.

As the correctional landscape has been transformed by time and increased prisoner population over the past decades, relevant law has also changed considerably. Statutory and decisional law has in some ways expanded, and in other ways contracted, the scope of legal protection for prisoners. International human rights standards have likewise evolved substantially and 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."[11]

In light of all these changes since 1981, the 2010 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. (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.) 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 (DOJ) and state and local governments under the Civil Rights of Institutionalized Persons Act,[12] as well as non-DOJ consent decrees, as models for implementation

10. GIBBONS AND KATZENBACH, *supra* note 4, at 11.
11. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).
12. 42 U.S.C. § 1997 (2006).

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. As a result, many Standards aim to establish what might be called the infrastructure of constitutional compliance. The Constitution, for example, does not guarantee prisoners trained correctional officers. But Standard 23-10.3 nonetheless addresses the training of correctional officers because it is a necessary precondition for compliance with substantive constitutional requirements.

Two background points are relevant here. First, even in litigation, the Constitution, in certain circumstances, is understood to impose some infrastructure requirements on an incarcerating authority. Supervisory failures, such as failures to screen, train, supervise, or discipline, can all *cause* the violation of prisoners' rights, even though these failures alone 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 expose correctional institutions to damages liability or mandatory injunctions.[13] It is important to note, however, that the 2010 Standards go beyond these limited precedents for a second reason: the Standards are, appropriately, 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*:

> 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.[14]

The Standards' role is not to restate the litigated constitutional law of corrections, guided as that law is by this principle of deference. Rather, the Standards have as

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13. The Supreme Court has emphasized that when Congress enacted 42 U.S.C. § 1983, the cause of action for most civil rights litigation involving prisons, the statute was not intended to impose vicarious liability on government agencies or supervisors for the unconstitutional conduct of employees. That is, § 1983 does not implement the ordinary rule of respondeat superior. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986); Monell v. N.Y.C, Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). Nonetheless, the Court has held that an agency's deficient supervision of staff, such as a failure to train, supports a finding of liability against the agency itself, where a "constitutional wrong has been caused by that failure to train." City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989). Similarly, supervisors face liability for their "own culpable action or inaction in the training, supervision, or control of . . . subordinates." Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) (finding alleged failures to supervise sufficient to defeat summary judgment in prison suicide case against clinical director, mental health director, and warden); Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987). And the failure to screen employees can also, under limited circumstances, be actionable under § 1983. *See* Bd. of Comm'rs v. Brown, 520 U.S. 397, 412–13 (1997) (finding liability appropriate where hiring agency neglected to screen an employee who violated plaintiff's constitutional rights, if the agency "should have concluded that [the employee's] use of excessive force would be a plainly obvious consequence of the hiring decision").

14. 518 U.S. 343, 349 (1996).

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."

It may be helpful to highlight the connection between the ABA Standards and other professional standards. Mindful of the importance of the different professional standards that apply to prisons and jails, the Standards are very largely consonant with other applicable standards and are, as well, entirely consistent with good professional practice. The Standards do not, however, merely replicate or generalize the approaches taken by the American Correctional Association (ACA) and other similar groups. Indeed, most other professional corrections standards serve a different function than the ABA Standards. As accreditation standards, most other corrections standards are directed entirely at corrections administrators who have limited authority to change certain aspects of prison or jail administration. In addition, most professional standards in corrections are written by insiders—correctional officials and others actors who work in correctional systems in a variety of capacities.[15] The undeniable expertise of such corrections professionals can be usefully supplemented by the Bar's institutional commitment to the rule of law, equality, due process, and transparency in all institutions. The Bar is also uniquely well positioned to take into account the sometimes competing interests of prisoners, administrators, correctional officers, and the public. Accordingly, several of the Standards do impose stricter limits on prison and jail operations than, for example, those required by the ACA accreditation standards.[16] Although the number and scope of such divergences have been minimized, the few that remain are important.

It bears emphasizing in this regard that professional corrections standards are themselves thoroughly related to law and justice, not just to technocratic correctional expertise. (To illustrate, the cover art of the ACA's most recent edition of prison standards depicts a statue of blind Justice holding the scales of justice, with

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15. In recognition of the ABA's contribution and importance to American corrections, the American Correctional Association's Constitution requires that the ACA's Commission on Accreditation for Corrections include an ABA representative. *See* CONSTITUTION OF THE AMERICAN CORRECTIONAL ASSOCIATION, art. V § 1(11), *available at* http://www.aca.org/pastpresentfuture/constitution06.pdf.

16. For example, Standard 23-3.6(b) requires all prisoners—whether in jail or prison, and whether in segregated or ordinary housing—to receive a daily opportunity to exercise for an hour in the open air, weather permitting. The American Correctional Association similarly requires accredited jails to provide prisoners at least one hour per day for physical exercise outside the cell, outdoors when whether permits. Am. Corr. Ass'n, PERFORMANCE BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 91, Standard 4-ALDF-5C-01 (ACA 4th ed. 2003). But for prisons, such a general requirement is only implicit in the ACA's accreditation standards; prisons are required to have sufficient outdoor and covered or enclosed exercise areas "to ensure that each inmate is offered at least one hour of access daily." Am. Corr. Ass'n, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 43, Standard 4-4154 (ACA 4th ed. 2003). Moreover, the ACA's requirements for prisoners in segregated housing is that they should receive one hour per day out-of-cell exercise time only five days per week, not daily. *Id.* at 74, Standard 4-4270; PERFORMANCE BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 31, Standard 4-ALDF-2A-64.

the Constitution and a set of case reporters in the background.[17]) The Bar should, accordingly, remain a full partner in our polity's conversation about prison conditions. On the merits, it was the view of the Standards Committee, of course, that the ABA Standards appropriately balance the institutional interests at stake.

At the same time, the Standards avoid topics more appropriately left to operational experts rather than lawyers. The Standards are directed at establishing the conditions that should exist in confinement facilities. How these conditions come into being is left to the skill and resourcefulness of correctional administrators. The Standards do not set forth ideal doctor-prisoner ratios or promulgate rules governing minimum library collections or the like. Officials who run jails and prisons are better equipped than lawyer-observers to operationalize legal standards. For example, adequate light is necessary for humane operation of a prison. But translation of this general command into a specific measure of "footcandles"[18] in different settings is beyond the comparative advantage and appropriate role of the Bar. Likewise, the ABA Standards include general principles relating to correctional health care, but various health-related professional organizations (National Commission on Correctional Health Care, American Public Health Association, and others) set out far more operational detail that can be used by correctional administrators.

B. General Principles Governing Imprisonment

The Standards embody several key principles regarding the purpose and nature of incarceration: that restrictions imposed on prisoners should be justified rather than reflexive; that incarceration should be oriented toward prisoner re-entry; that conditions should be free from cruel, inhuman, or degrading treatment; and that facilities should be monitored and regularly inspected by independent government entities. These key principles are discussed in this section.

Running through the Standards are simultaneous substantive commitments: prisons must be safe, but, simultaneously, restrictions imposed on prisoners should be justified rather than reflexive.[19] Many restrictions imposed on prisoners are entirely legitimate and even necessary, but others are gratuitous and even harmful. The ABA has long endorsed the general principle that "prisoners retain the constitutional rights of free citizens" except "when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of

17. STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, *supra* note 16, cover; *see also id.* at xvi (listing as a benefit from the accreditation process "a defense against lawsuits through documentation and the demonstration of a 'good faith' effort to improve conditions of confinement"); William J. Rold, *The Legal Context of Correctional Health Care*, *in* NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS 137–47 (2003).

18. A "footcandle" is a measure of the light cast by a common candle at a distance of one foot from its flame.

19. Standard 23-1.1(a) emphasizes the first half of this dual commitment, while subdivisions (c) and (e) delineate the other half.

the prison system and the general public."[20] The ideal embedded in Standard 23-1.1(c)'s discussion of "necessary and proportionate" restrictions is similar. It goes beyond constitutional case law, but reflects both good correctional practice and international standards.[21] (Standard 23-1.1(e)'s reference to the purpose of imprisonment of unconvicted prisoners is framed in terms of their appearance at trial, but, of course, for those who face deportation rather than trial, the purpose is to ensure their appearance at relevant proceedings.)

A second overarching commitment embodied in the Standards is a thoroughgoing orientation towards prisoners' re-entry into the community, first mentioned in Standard 23-1.1(b). Particularly in light of the massive numbers of prisoners and the prisoners' correspondingly increased role in their communities after they leave prison, the Standards, like many participants in the American criminal justice system, urge that prison itself should be oriented towards re-entry considerations. The Second Chance Act took important steps in this direction.[22]

The Standards' prohibition against "cruel, inhuman, or degrading" treatment or conditions, in Standard 23-1.1(d), both embodies the mandates of the Constitution and references language that often serves as the touchstone of the international law relating to the treatment of prisoners. This prohibition is derived from Article 5 of the Universal Declaration of Human Rights[23] and is contained in generally applicable multilateral treaties, including the International Covenant on Civil and Political Rights[24] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[25] In interpreting the prohibition against "cruel, inhuman, or degrading" treatment, international law emphasizes dignity: prisoners' humanity and dignity are to be respected at all times.[26] It is not the intent of these Standards to adopt international human rights law as binding in every

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20. ABA Res. 120B, 1995 ABA Midyear Meeting, *available at* http://www.abanet.org/crimjust/policy/cjpol.html#am95120b.

21. *See* Statement of basic principles for the treatment of prisoners, 15 G.A. Res. 45/111, ¶ 5, U.N. Doc. A/RES/45/111 (Dec. 14, 1990) (stating that "[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration," all prisoners retain human rights and fundamental freedoms set out in UN covenants); U.N. Human Rights Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment No. 21, ¶ 3, U.N. Doc. HRI/GEN/1/Rev. 1 at 33 (1994). ("Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.").

22. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008); *see also* REENTRY POLICY COUNCIL, http://www.reentrypolicy.org (last visited Dec. 30, 2010) (summarizing many recent relevant governmental initiatives).

23. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

24. G.A. Res. 2200 (XXI) A, ¶ 7, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

25. G.A. Res. 39/46, Annex, U.N. Doc. A/RES/39/46 (Dec. 14, 1984) (the "Torture Convention" is in Articles 10–13; extending the prohibition against cruel, inhuman, or degrading treatment or punishment is in Article 16).

26. *See* Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, ¶ 5, U.N. Doc. A/RES/45/111 (Dec. 14, 1990) ("All prisoners shall be treated with the respect due to their inherent dignity and value as human beings."); G.A. Res. 2200 (XXI) A, *supra* note 24, ¶ 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

respect, but international sources can provide insight into appropriate policy, and should inform domestic law.

The ABA's views on the oversight of prison operations are delineated in the Standards' provision that requires that a correctional facility be monitored and regularly inspected by independent government entities,[27] along with several standards in Part XI, which deals with accountability and oversight. As that policy recognizes, 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.

These principles—that restrictions imposed on prisoners should be justified, that incarceration should be oriented toward re-entry, that prisoners' dignity should be respected, and that oversight of correctional facilities is necessary—merit special attention in the context of segregation. Thus, the Standards and this Article take care to outline when it is justified to place prisoners in segregated housing and what process is due in making and reviewing placement decisions. Likewise, the Standards propose that effects of isolation be mitigated so that they do not become an obstacle to successful re-entry and so that prisoners' dignity and humanity be respected. This notion underpins the Standards generally, as well as those specifically dealing with segregation.[28] Oversight, although not specifically addressed here, has an important role to play in ensuring that the rights of prisoners in isolation are respected. Before delving into the specific Standards that relate to these principles, this Article gives a brief history of the practice of segregating prisoners.

II. THE RISE OF THE SUPERMAX

The Standards define segregated housing as follows: "housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. 'Segregated housing' includes restriction of a prisoner to the prisoner's assigned living quarters."[29]

Perhaps the best-known form of segregated housing is the so-called "supermax," an entire facility in which dangerous prisoners—often called "the worst of the worst"—are held in long-term solitary confinement. The forerunner of today's supermax facilities was the federal maximum security prison at Alcatraz, which closed in 1963.[30] Although a high-security control unit at the U.S. Penitentiary in Marion, Illinois, opened in 1978, the modern supermax prison was not born until USP Marion was locked down permanently in 1983, when prisoners murdered two

27. Standard 23-1.1(h).

28. *See generally* Standard 23-2.6–2.9; Standard 23-3.8–3.9.

29. Standard 23-1.0(r).

30. CHASE RIVELAND, NAT'L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1, 5 (1999), *available at* http://www.nicic.org/pubs/1999/014937.pdf.

correctional officers on the same day.[31] The federal Bureau of Prisons opened another high-security facility in Florence, Colorado, in 1994; by 1999, more than thirty states operated supermax prisons.[32] 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.

Living conditions in this kind of isolated setting are generally the same; however, a prisoner may be sent to segregation after a classification or other non-disciplinary 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 (in which event it is referred to as "protective custody"), and other times to punish. 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 period of time; 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, Standards 23-3.7 and 23-3.8 limit the degree of sensory deprivation and isolation in segregation, and Standard 23-3.9 deals with facility "lockdowns," which can sometimes operate, de facto, as wholesale reclassification of an entire prison unit's population into segregation until the lockdown is lifted. Finally, 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 necessarily is—and require instead development of high-security mental health housing appropriate for prisoners whose mental illness interferes with their appropriate functioning in general population.

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*:[33]

> 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

31. *Id.*
32. *Id.*
33. 545 U.S. 209 (2005).

> 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.[34]

Some prisoners are sufficiently mentally resilient (or their stays in segregation sufficiently short) that isolating confinement does them no lasting harm; for others, however, the human cost of segregation 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 violently 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.[35]

The modern evidence is compelling. In short, as a leading expert summarizes, conditions resulting in minimal environmental and social interaction "can cause severe psychiatric harm."[36]

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 in segregation. Extreme isolation is not about physical protection of prisoners from each other. Rather, 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."[37]

The following sections address the Standards regulating the use of isolation, beginning with permitted rationales for segregated housing, moving to the process

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34. *Id.* at 214.

35. *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).

36. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 327 (2006).

37. Rob Zaleski, *Supermax Doesn't Reflect the Wisconsin Dickey Knows*, CAPITAL TIMES (Madison, Wis.), Aug. 27, 2001, at B1. (quoting Walter Dickey, former head of the Wisconsin Department of Corrections).

for placing an individual in isolation, and finally discussing the goal of making segregation less isolating and therefore less damaging.

III. RATIONALES FOR SEGREGATED HOUSING

Any placement of a prisoner in segregated housing, defined in Standard 23-1.0(o) to include "housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action," including "restriction of a prisoner to the prisoner's assigned living quarters," must be justified. Such justification is vital regardless of the length of segregation, because even short-term segregated housing imposes serious burdens on prisoners (even, or perhaps especially, when prisoners are segregated for their own protection). In addition, isolation can be particularly damaging to youthful prisoners,[38] and adult facilities housing minors should implement specific policies that take account of this developmental difference; segregation for youthful prisoners should be even more disfavored than for adults.

One permissible justification for the use of segregation is medical or mental health care purposes. This type of segregation, typically termed "seclusion," should be tightly constrained, just as medical and mental health uses of restraint devices are limited.[39] Medical isolation is appropriately used to house prisoners with infectious tuberculosis.[40] But true isolation is generally not required for other communicable diseases.[41] For example, the recent public health threat in jails and prisons posed by the virulent staph skin infection known as MRSA (methicillin-resistant *Staphylococcus aureus*) may necessitate the use of single cells so that uninfected prisoners are not exposed to infectious dressings,[42] but more stringent isolation is not ordinarily medically justified.

The use of segregated housing may also be justified in order to facilitate an investigation dealing with serious misconduct or crime. The Standards allow this. But Standard 23-2.6 requires that the term of such investigatory (administrative) segregation not extend past thirty days. By that time, investigation needs have largely faded, and the segregation has become, de facto, punitive. (Sometimes,

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38. *See* AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 60 (2005), *available at* http://www.amnestyusa.org/us/clwop/report.pdf; *see also* Meg Laughlin, *Does separation equal suffering?*, ST. PETERSBURG TIMES, Dec. 17, 2006, at A1, *available at* http://www.sptimes.com/2006/12/17/State/Does_separation_equal.shtml.

39. *See* STANDARDS FOR HEALTH SERVS. IN PRISONS P-I-01 (Nat'l Comm'n on Corr. Health Care 2008) (restraint and seclusion).

40. Standard 23-2.7(a)(iii); *see also* Standard 23-6.12(b); STANDARDS FOR HEALTH SERVS. IN CORR. INSTS. VI.A.B.2.c (Am. Pub. Health Ass'n 2003).

41. *See* STANDARDS FOR HEALTH SERVS. IN CORR. INSTS. at VI.A.B.1.b (HIV); VI.A.B.3.a(3) (Hepatitis A); VI.A.B.3.c(3) (Hepatitis C); VI.A.B.4.g(1)(b), (2)(b), (3)(b), (4)(b), (5)(b), (6)(b) (sexually transmitted diseases); VI.A.B.5.a(2) (lice); VI.A.B.5.b(2) (ringworm); VI.A.B.5.c(2) (scabies).

42. *See* CLINICAL PRACTICE GUIDELINES: MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS (Fed. Bureau of Prisons 2005), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf.

prisoners plead guilty to serious misconduct simply as a way of getting out of segregation imposed during an investigation.) Alternative methods to safeguard the integrity of investigations include unit and facility transfers, separation orders, and the like.

Standards 23-2.7 and 2.9 deal with the more limited category of long-term segregation—segregated housing "that is expected to extend or does extend for a period of time exceeding 30 days."[43] Standard 23-2.7 delineates the appropriate substantive predicate for this type of segregation, whether it is imposed for punishment, security, or health care reasons. These Standards allow long-term disciplinary segregation of up to a year for very serious misconduct and terms of disciplinary segregation of up to thirty days for minor misconduct. Administrative segregation and supermax units currently house many prisoners placed there not because they are dangerous, but because they are disruptive or have disobeyed facility rules.[44] But under this Standard, non-disciplinary long-term segregation cannot be imposed unless the prisoner is dangerous to himself or herself or to others.

Disciplinary segregation is also limited under the Standards: a rule infraction may be punished by more than thirty days in segregation only if it was very severe, posing a serious threat to security or safety.[45] An example of a system that implements this approach is the Federal Bureau of Prison's disciplinary scale, under which violations classified as "greatest severity" can be punished with up to sixty days in disciplinary segregation, but violations one level down, of "high severity," can receive only up to thirty days. (Greatest severity includes killing, assault "when serious physical injury has been attempted or carried out," escape from a secure institution, and the like, as well as narcotics possession.)[46] Other sanctions for prisoner misconduct remain available, including forfeiture of sentencing credit earned for good behavior. And if a disciplinary infraction indicates that a prisoner poses a continuing serious security threat, the prisoner is eligible for segregated confinement not for discipline but rather as a classification measure, under subdivision (a)(ii).

The Standards also authorize long-term segregation for security reasons. Subdivision (a)(ii) authorizes the long-term segregation of a prisoner based on the security risk posed either *by* or *to* that prisoner. If the justification for segregation is risk posed *by* the prisoner, segregation is further limited by the requirements of subdivision (b), which requires consideration of less restrictive alternatives in light

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43. Standard 23-1.0(o).

44. *See supra* text accompanying note 34.

45. Standard 23-2.7(a)(i); *see also* Standard 23-4.3(b) ("Only the most severe disciplinary offenses . . . ordinarily warrant a sanction that exceeds [30 days] placement in disciplinary housing . . . .") (bracket in original).

46. Bureau of Prisons, Policy Statement 5270.07, ch. 4 (Inmate Discipline and Special Housing Units) (Dec. 29, 1987 and modifications), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf. *Compare id.* ch. 4, at 4 (listing violations classified in the "greatest severity" category), *with id.* ch. 4, at 7 (listing violations classified in the "high severity" category).

of the particular threat posed. The provisions in subdivision (b) are intended to ensure that long-term segregation of a prisoner based on the threat that prisoner poses to others is not predicated merely on the prisoner's offense. In addition, the predicate for long-term segregation cannot be, simply, gang affiliation ("membership in a security threat group"). Rather, as subdivision (b)(iv) specifies, prison authorities must have "specific and reliable information" (not a mere accusation) that the prisoner "either has engaged in dangerous or threatening behavior directed by the group or directs the dangerous or threatening behavior of others."

If the justification for segregation is risk posed *to* the prisoner, segregation is further limited by the requirements of Standard 23-5.5 (protection of vulnerable prisoners), which dictates that prisoners assigned to protective custody must be "housed in the least restrictive environment practicable, in segregated housing only if necessary." Whether the justification for segregation is the risk *to* a prisoner or *by* a prisoner, assignments to long-term segregation are governed by the procedures for placement and retention in long-term segregated housing outlined in Standard 23-2.9.

One final point that bears emphasis relates to lockdowns. A lockdown, defined as a decision by correctional authorities to suspend activities in one or more housing areas of a correctional facility and to confine prisoners to their cells or housing areas, can reproduce the conditions of segregated housing, even for those prisoners not otherwise considered appropriate for segregation. Without some regulation of lockdowns, the requirements of other Standards would be undermined. While a brief lockdown is a legitimate response to an emergency security need, once the emergency has passed and correctional authorities have regained control of the facility, Standard 23-3.9 requires that the lockdown be lightened and then lifted. The 1983 lockdown at the federal penitentiary at Marion that inaugurated the current wave of supermax confinement is far from the only time a sustained lockdown was used as an informal method of imposing long-term segregation. In some cases, lockdowns have lasted for more than two years, although the term "lockdown" would seem to cover only very temporary (e.g., day-long) measures in response to isolated problems.

IV. PROCEDURAL PROTECTIONS RELATING TO SEGREGATED HOUSING

Recognizing segregation's potential to do harm, the Standards set forth procedures to be followed before placing a prisoner in long-term segregated housing for security reasons, whether that placement is meant to protect the prisoner from others, or to protect others from the prisoner. This decision is a special classification decision and, as such, all the protections set forth in Standard 23-2.3, which delineates procedures governing *all* classification and reclassification, apply as well—in particular, the requirement that the written decision (required under subdivision 23-2.9(a)(viii)) "should be made available to the prisoner, and should be explained by an appropriate staff member if the prisoner is incapable of

understanding it." The disclosure limitations in Standard 23-2.3(b) apply as well.

The Supreme Court has addressed procedural due process in the context of a classification decision to send a prisoner to indefinite isolation in administrative segregation, which is covered by Standard 23-2.9(a). In *Wilkinson v. Austin*,[47] the Court found a liberty interest at stake, and therefore held that some process was due.[48] The Court approved the procedural protections that Ohio had put in place.[49] Standard 23-2.9(a) goes beyond the process deemed sufficient in *Wilkinson* by giving prisoners the right to call available witnesses, to access the information that forms the basis of the classification decision, and to confront and cross-examine witnesses. There is no constitutional right to these procedural protections, but the Standard includes them because of their clear importance to accurate and fair decision-making.

Witnesses against the prisoner may appear in person, or their evidence may be offered as written witness statements. Either way the prisoner must, as subdivision (a)(iv) specifies, be able to ask questions of the witness. If the prisoner's writing is not sufficiently fluent for effective response to written witness statements, that triggers subdivision (a)(vi), which requires that "counsel or some other appropriate advocate for the prisoner" be provided to any prisoner found by the decision-making committee to be unable to prepare and present evidence and arguments effectively on his or her own behalf. As the word "advocate" connotes, this is more than a mere assistant, carrying out the prisoner's instructions. The advocate can, however, be a prison employee if that employee is given sufficient independence to serve the assigned function. Some prisoners will need such an advocate because, at the time of the long-term segregation hearing, they are already in (short-term) segregation, and are therefore unable to talk to potential witnesses on their own behalf. Other prisoners need access to an advocate because of cognitive impairments or illiteracy. Whatever the source of the prisoner's need for assistance, the point of the requirements in subdivision (a) is to allow the prisoner a meaningful opportunity to participate in the proceedings and rebut the adverse evidence. The Standards also require planning and regular reviews toward release from segregation—Standard 23-2.9 emphasizes re-entry within the prison regimen through the provision of a full classification review every ninety days. Each of these safeguards exceeds the constitutional minima deemed sufficient in *Wilkinson*. Nevertheless, they are crucial to implement the general approach of Standard 23-1.1, which states that "[r]estrictions placed on prisoners should be necessary . . . to the legitimate objectives for which those restrictions are imposed." Changes that might be implemented after the reviews include increasing out-of-cell time and

47. 545 U.S. 209 (2005).

48. *See id.* at 223–24 ("[R]espondents have a liberty interest in avoiding assignment to [long-term segregated imprisonment].").

49. *See* Wilkinson v. Austin, 545 U.S. 209, 225–28 (2005) ("Ohio's New Policy is adequate to safeguard an inmate's liberty interest in not being assigned to [long-term segregated housing].").

opportunities for work, programming, and recreation, and allowing some interaction with other prisoners. (Note that individualized plans described in Standard 23-3.8(b), setting out expectations for the segregated prisoner's behavior, are not an effective strategy for prisoners with serious mental illness.[50]) But, such prisoners should not, under these Standards, be housed in long-term segregation.

V. MITIGATING THE EFFECTS OF ISOLATING CONDITIONS

The Standards insist on conditions of confinement that are conducive to prisoners' mental and physical well-being, even in segregated housing. None of the Standards interfere with the key security feature of segregated housing—the separation of prisoners from each other. But even extremely dangerous prisoners need mental, physical, and social stimulation. Avoiding the most damaging conditions for them is not only more humane but also serves prison and public safety, because it promotes their rehabilitation, or at least prevents debilitation. The Standards ban what is termed "extreme isolation," conditions that generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.[51] Isolation is more likely to become extreme, and therefore damaging to a prisoner's mental and physical health, the longer it lasts, and the more thorough the sensory and social deprivation imposed. To avoid extreme isolation, the Standards require that even prisoners properly in segregation be allowed various sorts of stimulation, including human contact. For example, personal visitation cannot be eliminated for more than thirty days,[52] and counsel and clergy visits can be restricted only if the prisoner has committed misconduct with respect to such visits.[53]

When a prisoner is placed in segregation for reasons other than discipline, Standard 23-3.8 also requires "as much out-of-cell time and programming participation as practicable." Even for a prisoner who cannot safely spend any time out of cell, programming that makes use of a television or books is possible. The physical environment in segregated housing also must be conducive to well-being. A segregation cell must be at least eighty square feet. Space should be commensurate with the amount of time the prisoner is required to spend in the cell; for long-term segregation with the minimum out-of-cell time,[54] more space should be provided, both to allow some large-muscle exercise within the cell and to decrease mental

50. *See, e.g.*, Walker v. State, 68 P.3d 872, 882, 884 (Mont. 2003) (finding that plaintiff's mental illness was severely worsened as a result of being housed in segregation and subjected to certain behavior modification plans by prison officials).

51. Standard 23-3.8(b).

52. Standard 23-3.7(c)(iii).

53. *See* Standard 23-3.7(d) ("Correctional authorities should be permitted to reasonably restrict, but not eliminate . . . clergy visits . . . if a prisoner has engaged in misconduct directly related to such visits . . . .").

54. *See* Standard 23-3.6(b) (stating that correctional authorities should provide all prisoners daily opportunities for significant out-of-cell time and that each prisoner should be offered at least one hour per day of exercise in the open air, if the weather permits).

stress. Each prisoner in segregation should be permitted a bed and mattress off the floor, a writing area and seating, a storage compartment, natural light, and light sufficient to permit reading.[55] These requirements apply to those in segregated as well as non-segregated housing, unless correctional authorities have a particular security reason to limit a particular prisoner.[56] Restrictions should be made item by item; it is difficult to think of a situation in which any prisoner should be denied natural light, but much easier, for example, to imagine appropriate reasons to deny a prisoner a storage compartment. Additional requirements of darkness during sleeping hours, adequate ventilation and living-area temperature, access to health care and water, and other environmental considerations[57] also apply in segregation as elsewhere.[58]

One important sign of mental or physical health deterioration for prisoners in segregation is the refusal to eat, drink, or participate in the limited programming or recreation available to them.[59] That is why it is crucial, and required by the Standards, for correctional staff to take note of and investigate such refusals, both by recording them in the log required by Standard 23-2.8(c)(i) and by taking more expedited action when it is appropriate.

Because suicide is a particularly acute problem in segregated housing, anti-suicide measures should be more exacting in such housing than is required by Standard 23-5.4(e), which relates to suicide prevention measures in regular housing areas. The problem of suicide in segregated housing should be ameliorated, as well, by the rule against housing prisoners with serious mental illness in segregated housing.[60] In addition, Standard 23-5.4(c)'s rule that correctional authorities should avoid isolating prisoners at risk of suicide disagrees with the isolation with which correctional authorities frequently respond to suicidal prisoners, because experts agree that isolation is convenient but counterproductive. As one leading expert has explained:

> In determining the most appropriate housing location for a suicidal inmate, correctional officials (with concurrence from medical and/or mental health staff) often tend to physically isolate and sometimes restrain the individual. These responses might be more convenient for all staff, but they are detrimen-

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55. *See* Standard 23-3.3(b) (asserting that each prison cell should have "a bed and mattress off the floor, a writing area and seating, an individual secure storage compartment . . . , a source of natural light, and light sufficient to permit reading").

56. *See* Standard 23-3.8(e) ("Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).").

57. Standard 23-3.7(a) (listing as other environmental considerations: sufficient light to permit reading in prisoner's housing area; a "standard menu" of healthful food, except as permitted by Standard 23-3.4(c); and counsel or clergy visits).

58. *See* Standard 23-3.1(a).

59. *See* Standard 23-3.8(f) (stating that correctional staff should monitor and assess such specific indicators of mental or physical health deterioration).

60. Standard 23-2.8(a).

> tal to the inmate since the use of isolation escalates the inmate's sense of alienation and further removes the individual from proper staff supervision. To every extent possible, suicidal inmates should be housed in the general population, mental health unit, or medical infirmary, located close to staff. Further, removal of an inmate's clothing (excluding belts and shoelaces) and the use of physical restraints (e.g., leather straps, straitjackets, chairs, etc.) should be avoided whenever possible, and used only as a last resort when the inmate is physically engaging in self-destructive behavior. Handcuffs should never be used to restrain a suicidal inmate. Housing assignments should be based on the ability to maximize staff interaction with the inmate, not on decisions that heighten depersonalizing aspects of incarceration.[61]

Similarly, the American Public Health Association Standards state that "[i]solation may increase the chance that a prisoner will commit suicide and must not be used as a substitute for continuity of contact with staff and appropriate supervision. (The practice of placing suicidal prisoners in 'safety cells' instead of talking to them and maintaining continuing observation is inappropriate.)"[62] The requirement of continuous *staff* observation follows best practices. Some prison systems instead use a "buddy" system, assigning one prisoner to watch another. The National Commission on Correction Health Care explains that this is not an acceptable approach: "[W]hen an actively suicidal inmate is housed alone in a room, supervision through continuous monitoring by staff should be maintained. Other supervision aids (e.g., closed circuit television, inmate companions or watchers) can be used as a supplement to, but never as a substitute for, staff monitoring."[63] The Department of Justice also takes this approach in its decrees.[64]

CONCLUSION

In this era of limited judicial enforcement of prisoners' rights, improvements to prison and jail conditions must not rely entirely on judicial enforcement. Instead, correctional administrators such as Commissioner Dora Schriro, prisoners' advocates such as David Fathi, and others must lead the way to more humane and

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61. Lindsay M. Hayes, National Center on Institutions and Alternatives, *Key Components of a Suicide Prevention Program* (2007), http://www.ncianet.org/suicideprevention/publications/guidingprinciples.asp (last visited Dec. 30, 2010).

62. AM. PUB. HEALTH ASS'N, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS § V.E.4., at 60 (2003).

63. NAT'L COMM'N ON CORR. HEALTH CARE, PRISON HEALTH STANDARDS § P-G-05(7), at 102 (2008).

64. The Department of Justice Civil Rights Division has found constitutional violations in many small jails' failure to screen prisoners for suicide risk and to implement suicide prevention policies. *See, e.g.*, Consent Order at 20–23, United States v. City of Corinth, No. 1:94-cv-311 (N.D. Miss. Sept. 2, 1994), *available at* http://www.clearinghouse.net/chDocs/public/JC-MS-0008-0003.pdf ("Defendants shall screen all inmates for suicide risk and other special needs prior to their admission to the Jail."); Consent Decree at 21–26, United States v. Alcorn Cnty., No. 1:94-cv-00271-LTS (N.D. Miss. Aug. 2, 1994), *available at* http://www.clearinghouse.net/chDocs/public/JC-MS-0007-0004.pdf ("Defendants shall ensure that suicide prevention measures are in place . . . .").

smarter correctional practices. In her essay in this Symposium, Commissioner Schriro highlights three features of effective and humane detention systems: "capacity" (a term that encompasses policy, physical plant, skilled personnel, etc.), "competency" (the term she uses to refer to consistent effectiveness), and "commitment" (to all the varied stakeholders—prisoners, labor, etc.).[65] As she discusses, the Standards aim to improve all three. They are designed to deepen *capacity* and *competency* by informing policy and encouraging necessary improvements related to physical plant, training, etc. And they insist on *commitment* to the large variety of nationwide stakeholders, emphasizing the common humanity of prisoners.

65. *See* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441 (2010).