

Commission on Safety and Abuse in America's Prisons
Written Submission of Vincent M. Nathan
Newark, New Jersey
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I appreciate this opportunity to share my comments with the members of the Commission. I shall address the subjects of crowding, the use of isolation, and the phenomenon of so-called "supermax" facilities.

A Brief Summary of the Recent History of Crowding in American Prisons

The decades of the 1980s and the 1990s were periods of enormous growth in the populations of adult prisons in the United States. Between 1980 and the end of 1994, this population rose from approximately 330,000 to slightly more than 1,000,000 – an overall average increase of 8.7% or 50,000 inmates per year.¹ By June 30, 2004, the number had reached 1,410,404.²

The first reaction of state governments to this phenomenon was to ignore it. Prisons reached levels of crowding that one can only describe as shocking: triple bunking in dormitories at The Penitentiary of New Mexico and the assignment of three, and sometimes four, prisoners to a 45 square foot cell in the Texas Department of Corrections, to mention only two examples.

In the face of inaction by state governmental officials, federal courts began to hear suits regarding the extent of crowding in American prisons, particularly state facilities, and they were shocked by what they heard and saw. The injunctive relief that these courts ordered led to the second level of reaction by state governments: construction of new prisons and expansion of existing ones. As a result, both operating and capital

¹ Bureau of Justice Statistics, *Prisoners in 1994* (NCJ 151654, August 1995).

² Bureau of Justice Statistics, *Prison and Jail Inmates at Mid-Year 2004* (NCJ 208802, April 2005).

construction budgets ballooned. Fiscal year 2003 projected operating budgets for state and federal corrections departments totaled \$34,881,048,621, and construction budgets totaled \$1,530,448,102.³ Prison expenditures increased 150% between 1986 and 2001,⁴ and the number of state, federal, and private correctional facilities grew by 204 between 1995 and 2000.⁵

Although the incarcerated population has continued to grow in the first years of the 21st century, the bursting of the economic bubble in the 1990s had a direct effect on the political ability and will of governors and legislators to continue funding major increases in prison populations. As a result, state governments have moved to a third level of response to the corrections population boom: efforts to stabilize or reduce incarcerated populations and correction budgets. Although correctional operating budgets continue to grow, often at the expense of primary and secondary education, Medicaid, support for public libraries, and other important needs, the rate of growth in corrections budget has slowed. In my own State of Ohio, the adult prison population appears to have stabilized, even to have enjoyed slight decreases, in the early 2000s. Rather than taking advantage of this development to reduce institutional populations to rated capacity levels, however, the legislature has required the Ohio Department of Rehabilitation & Correction to close several prisons. The same has occurred in other states as well. As a result, one finds double-celling the norm for general population housing units; perhaps more astonishing from a security point of view, one even sees

³ Criminal Justice Institute, *The Corrections Yearbook – Adult Corrections 2002* at 97 (2003).

⁴ Bureau of Justice Statistics, *State Prison Expenditures 2001* (NCJ 202949, June 2004).

⁵ Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities 2000* (NCJ 198272, August 2003).

punitive segregation units and non-classified intake centers – even death rows in a couple of jurisdictions – double-celled.

One effect of this development is headlines like the following: “Georgia May Furlough to Cut Prison Expenses,” “Alabama Parole Board Will Double Reviews,” “High Prison Costs Kill [Delaware] Sentencing Measure,” “Arizona Wants to Cut Sentences, Ease Parole,” “Kentucky Proposes Drug Treatment to Cut Costs, Delay 1,000-Bed Prison,” “New Jersey Seeks Ways to Increase Releases,” “Massachusetts Considers More Paroles to Cut Beds and Reduce Recidivism,” and “Alaska Defers Decision on Building New Prison.”⁶

Although the increase (or at least the rate of increase) in prison populations has abated somewhat in some states, this population continues to grow on a national level. Moreover, some projected increases (and corresponding budget shortfalls) are quite serious. For example, the September 26, 2003, issue of *Corrections Digest* reported that the South Carolina Corrections Department was seeking a 15% increase in its budget “to recover from cuts in recent years that have increased safety risks at a time when mandatory sentencing is pushing up the inmate population.” With a population of 24,000 at the time, South Carolina officials were projecting 31,000 by 2007. Predicted demographic changes that will increase the crime-prone population (males, ages 18 to 30) cause many to worry that the recent marginal respite in growth indeed may be temporary and short-lived.

If the nation is facing a resurgence of spirited growth in its adult prison population, one unhappy scenario is a repetition of the first level of states’ response to

⁶ These headlines are part of recent reports in various issues of *Corrections Digest* published by Washington Crime News. On request, the author can provide specific citations to these news stories.

prison crowding I have described earlier in this statement: to ignore the problem. Should this occur, prison conditions throughout the United States will deteriorate from a none-too-satisfactory level to one that is abominable. Equally troubling, federal courts may be less inclined (and less able) to intervene to enforce even those minimal constitutional standards that have escaped the retrenchment resulting from Supreme Court jurisprudence over the past 20 years. Specifically, the Prison Reform Litigation Act has weakened enormously the judicial process that led to the substantial reforms of prior decades. For all practical purposes, the federal legislation has reduced all prison reform litigation to *pro bono publico* status by reducing recoverable attorney fees far below reasonable market rates. In addition, judges have been deprived of important forms of assistance to bring the liability stage of litigation to an end (the practical elimination of consent decrees) and to manage the remedial stage of institutional reform litigation (limitations on the role of special masters).

In summary, any student of America's prisons should be concerned today that we may be entering a phase of renewed prison growth without the benefits of the judicial intervention which marked the 1970s and 1980s and without the economic resources of the 1990s that made it possible to implement reforms imposed by federal courts through consent decrees and other orders. Despite the fact that crime and criminal victimization measured by recent FBI National Crime Reports and BJS National Crime Victimization Studies reflect dramatic decreases in the volume of crime in the United States, public perceptions of crime appear to remain fixed on harsh punishments, including increased reliance on incarceration, for convicted offenders. These attitudes persist despite the fact

that only approximately 50% of state prisoners are incarcerated for crimes of violence and almost 70% of federal adult prisoners are serving sentences for drug offenses.

The Practical Effects of Prison Overcrowding

The deleterious effects of prison crowding are obvious to anyone familiar with the operation of correctional facilities. Crowded dormitories and multiple occupancy of cells defeat or at least seriously compromise efforts by staff to engage in direct surveillance of prisoners. As a result, the maintenance of order and lawful behavior among prisoners is compromised, and the level of inmate and staff safety plummets. Crowding and idleness go hand-in-hand, as it is impossible to find meaningful work and programmatic activities when the number of prisoners to be served outstrips available physical and human resources. The impact of crowding on the maintenance of physical facilities is horrendous and often beyond a system's budgetary ability to control. Broken toilets, compromised heating and ventilations systems, peeling paint, broken windows, mold-covered showers, generally filthy conditions, and other physical breakdowns contribute to tension, poor morale, and impaired self-image on the part of prisoners and staff.

In short, crowding at some difficult-to-define but ultimately evident point results in prisons that are inhumane, unsafe, idle, and hopeless — precisely the opposite of what conscientious prison administrators are attempting to accomplish. If state executives and legislators do not respond constructively to the deterioration of our prisons, and if federal courts cannot or will not resume their vigilant oversight of prison conditions, we can expect American prisons to become increasingly explosive. In the end, we shall have learned nothing from the tragedies of Attica, the Penitentiary of New Mexico, and other riots that have taken a horrendous toll on the lives and safety of inmates and correctional

staff. Moreover, by permitting our prisons to deteriorate into their former barbarous state, we eliminate any chance that prisons – as I believe they can – will contribute to the rehabilitation of offenders and their successful re-entry into the free-world community. The rallying cry of the criminal justice system then will become billions for retribution but nothing for the long-term amelioration of crime and the reform of criminals.

The Use of Segregation and the Development of “Super-Max” Prisons

Even apart from the unsuccessful Pennsylvania Quaker experiment in reliance on solitary confinement and religious penance as the sole means for rehabilitating prisoners, the fact is that segregation has always been a feature of American prisons. Correctional administrators rely on forms and degrees of segregation for several purposes. These include the punishment of offenders who commit serious violation of prison rules, the housing of inmates who require some degree of separation for their own protection, and the separation of prisoners whose conduct results in their characterization as “incorrigible” or more or less permanently dangerous to other prisoners and/or to staff. I know of no prison that does not have a disciplinary segregation unit (frequently known as the “hole”) to which serious rule violators are assigned for periods of time ranging from a few days to as many as three months.⁷ Likewise, protective custody units and so-called “administrative segregation” appear in one form or another in every prison system I have known.

The chief differences in definition of these statuses are these. Disciplinary segregation is overtly punitive, calculated, and intended to punish the prisoner by

⁷ In my experience, 15 to 30 days is a more typical sentence.

depriving him or her of contact with others, reading material, recreation,⁸ and all other amenities. Protective custody and administrative segregation, however, are ostensibly non-punitive. The former is intended to protect prisoners, for example, those who are former law enforcement officers, those who commit notorious crimes, and those labeled as snitches, from harm at the hands of their peers (and sometimes from staff). Although such a prisoner's freedom of movement is severely curtailed and his or her congregate activity limited or eliminated, other privileges such as reading, smoking, commissary purchases, television, and recreation generally are available. The latter, as I have indicated, is intended to provide a controlled but non-punitive environment for prisoners who repeatedly engage in serious rule violations. In practice, it is often one very serious offense – homicide or serious non-lethal assault of another prisoner or a staff member – that results in long-term placement in administrative segregation. These prisoners suffer extreme isolation but are not deprived of all amenities, *e.g.*, television, outdoor recreation, etc. The difficulty these prisoners encounter is that the absence of congregate activity perforce limits the quality and quantity of their daily activities.

Whatever the stated intent of these statuses, all carry with them a level of control that is punitive in effect if not in intent. It is not uncommon for prisoners in any of these categories to spend 23 hours per day in their cell, leaving for a hour of recreation in a one-person recreation pen or cage. Meals are served in prisoners' cells, and showers may be available only two to three days a week. Programming, if any is available, is likely to be presented via closed circuit television. Because protective custody and administrative

⁸ I distinguish recreation from physical exercise. Courts have held that a level of exercise necessary to protect an inmate's physical health is constitutionally mandated.

segregation tend to be long-term classifications, the conditions these prisoners encounter are extremely unpleasant and, in the opinion of some, quite harmful.

Indeed, there is a category of literature that addresses specifically the psychiatric effects of solitary confinement. Psychiatrists such as Stuart Grassian, M.D., and Terry Kuypers, M.D., have built on earlier writings of criminologists such as Hans Toch. They have concluded that long-term assignments to segregated confinement under conditions that minimize almost all forms of interaction are dangerous in the case of inmates who are seriously mentally ill and may produce serious mental illness in psychologically or psychiatrically vulnerable inmates. Even a few days of such isolation, in Dr. Grassian's opinion, is sufficient to produce symptoms in the form of abnormal EEG pattern characteristic of stupor and delirium.⁹

There is now judicial precedent for the proposition that long-term segregation involving high levels of sensory deprivation is unconstitutional in the case of seriously mentally ill prisoners.¹⁰ To date, however, no court has held solitary confinement, even in the setting of a so-called "super-max" prisons, to be unconstitutional with respect to psychiatrically healthy inmates.

It is my opinion that overemphasis on the architectural design of super-max units or prisons misses the point. Every prison system will have a number of inmates whose behavior in prison and, in some cases, whose pre-incarceration criminal conduct will require an exceptionally high level of security. In addition, all but a few jurisdictions in the United States place condemned prisoners in extremely high-security settings. The

⁹ Proposed Testimony of Dr. Stuart Grassian in the case of Michael Ross, a Connecticut death row prisoner who dropped his appeals and was recently executed.

¹⁰ See Madrid v. Gomez, 889 F.Supp. 1146 (N.D. Cal. 1995), and Jones 'El v. Berge, 164 F.Supp.2nd 1096 (W.D. Wis. 2001).

purpose of placing an inmate in such a setting may be related to the prisoner's potential for escape (and, thus, the safety of the public), the inmate's history of violence or other serious rule violations, or the offender's need for protection. It is not, however, the impregnable perimeter security, the solid metal cell doors, or other architectural features that generally are the major subject of legitimate concern. For as long as I have been working in corrections, I have observed segregation units, including more recently super-max prisons, that provide this level of security and isolation.¹¹

As I do, Dr. Grassian focuses more on the activities that are available in a segregated setting rather than on the restrictive architectural setting, though these elements are to some extent interrelated. His concerns relate to

confinement alone in a cell . . . with minimal opportunities for social interaction, conjoint recreation or religious services, minimal educational or occupational programming, and very limited environmental stimulation. In general, in such settings, an inmate spends about 22-23 hours a day in his cell, with individual exercise and showering representing most of the time spent outside the cell. . . . Radio is often available, television sometimes; the opportunity for non-legal phone calls varies; visitation, however, is almost invariably non-contact. Some cells have windows affording a view of the outside world, but in many, there either is no window to the outside, or the window is only translucent and affords virtually no opportunity to see the outside world.

The Future of Solitary Confinement

The concerns expressed about even short-term exposure to solitary confinement notwithstanding, there is little reason to believe that the use of solitary confinement for disciplinary reasons will abate. Indeed, a relatively recent Supreme Court decision held

¹¹ Indeed, it is the older disciplinary segregation and administrative segregation units that were not designed for these purposes that, in my experience, pose the most serious problems of physical conditions and architectural design.

that assignment to solitary confinement, absent the loss of good time or any other effect on the length of an offender's sentence, does not constitute an "atypical and significant hardship in relationship to the ordinary incidents of prison life," thus triggering no due process requirement whatsoever. I am aware of no jurisdiction that has abandoned pre-Sandin due process standards for disciplinary hearings that may result in assignment to disciplinary segregation, and this, in my opinion, reflects well on the professionalism and understanding of likely practical consequences of correctional administrators throughout the United States. At the same time, I am aware of no jurisdiction that proposes to eliminate the use of solitary confinement as a response to serious misbehavior by inmates, and I do not believe that there is a consensus even among medical and mental health experts that relatively short periods of disciplinary isolation are likely to be physically or mentally harmful.¹²

Protective custody presents special problems in connection with the use of solitary confinement. Although a prison administrator's obligation to safeguard the physical welfare of prisoners is one of paramount consideration, the level of deprivation involved in long-term solitary confinement is inappropriate for prisoners who have not given cause for punishment within the prison setting. Thus, every inmate assigned to protective custody status, whether voluntarily or involuntarily, should have the benefit of an exit plan that sets forth reasonable expectations that, if met, will result in the prisoner's return to a general population setting as quickly as possible. In extreme cases, the exit plan may have to incorporate the possibility of a transfer to another jurisdiction

¹² One must add a caveat at this point. Prisoners in disciplinary segregation often commit additional disciplinary offenses while they are segregated. This can result in "stacked" sentences to disciplinary segregation that are quite lengthy. In these cases, disciplinary segregation begins to merge with long-term administrative segregation.

under the Interstate Compact. During the course of an inmate's confinement in a protective custody environment, prison officials should take steps to ameliorate the negative physical and mental consequences of long-term segregation, as I discuss below.¹³

The most difficult group of prisoners with whom correctional administrators must deal is that assigned to long-term administrative segregation, including condemned prisoners on death row. Here, it seems to me, that the goal should be to separate these prisoners by characteristics and potential for violence or escape (classification) and to place inmates in the least restrictive setting given their assignment to a segregated unit. This is an area in which I believe that most correctional administrators have been insufficiently creative. It is possible to provide social interaction, including group meals, religious and other programming, and recreation to relatively small groups of prisoners (five to ten) whose characteristics and backgrounds indicate their likely compatibility. There is no reason for prisoners to be locked in their cells during virtually all waking hours. Indeed, a regimen of six to eight hours of out-of-cell activity per day is not unrealistic. Forms of contact (or semi-contact) visiting can be implemented, and these prisoners' needs for personal and legal telephone calls, access to legal materials, or other legal assistance can be met. Distance learning via closed circuit television is becoming fairly common on community college and university campuses; its educational effectiveness is not in serious doubt. In summary, prison administrators must accept the

¹³ A particularly difficult problem correction administrators face in connection with a protective custody population is the fact that this group may contain both potential victims and potential predators. The range of characteristics of this population includes everything from young, sexually vulnerable inmates, to prisoners with unpaid gambling debts, to inmates who have offended a particular organized group or gang, to inmates who have assaulted or killed the "wrong" powerful prisoner, to predators who have sought protective custody in order to get to and kill another inmate in the protective custody unit.

harmful implications of long-term segregation status and take meaningful steps to ameliorate these potential harms.

What I am suggesting is a somewhat radical alteration of the paradigm of long-term segregation. One cannot reasonably expect corrections officials to move precipitously from the status quo to the more open setting I have described. One of the primary and most often criticized characteristics of judicial reform of prisons has been its slow pace. Although this is a fair complaint in many respects, the pace of judicially-ordered reform has taken into account, often quite candidly, the need to allow change to be translated into written policy and training before implementation. Corrections, like other bureaucratic agencies (including, for example, universities), does not embrace fundamental change overnight. Given the nature of the corrections clientele, the costs of the unintended consequences of quick fixes often are high and particularly dangerous.

Thus, the movement to reduce if not altogether eliminate the harm of solitary confinement is one that requires a joining of hands by governors, legislatures, committed correctional administrators, courts, and persons and organizations dedicated to the cause of prison reform in the United States. One can dismiss this observation as an unrealistic cliché; the simple fact of the matter, however, is that power among the actors in American corrections today is widely diffused, and supposed practical and legal impediments to joint efforts at reform are less rational than they have ever been.