Standards Governing Legal Status of Prisoners

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INTRODUCTION

The bulk of the Standards for Criminal Justice1 (Standards) relates to the conduct of criminal proceedings and the professional activities of lawyers and judges. In contrast, at either end of the spectrum of the criminal process—law enforcement administration and corrections—the roles of legal professionals are less well defined and the claims of professionals in the other concerned professions to remain free from domination by judges and attorneys carry considerable weight. Nevertheless, citizens have clear legal rights during both the inception of criminal investigations and the enforcement of criminal sanctions. These legal rights merit effective implementation through courts and administrative organs. On these matters the organized bar is competent and obliged to speak. Both the first and second editions of the Standards have addressed selected law enforcement problems in the chapter on Urban Police Function.2 It was not until the second edition Standards were far along in preparation, however, that a decision was reached to prepare standards relating to the legal status of prisoners.

Indeed, that decision was arrived at rather late in a sequence of American Bar Association (ABA) activities which had their inception in an address by Chief Justice Warren E. Burger, delivered at the 1969 ABA annual meeting, where he urged the legal profession to focus its concern and abilities on the administration of the nation’s correctional systems.3 A few months later, the ABA House of Delegates created a Commission on Correctional Facilities and Services which, among its several reports and monographs, produced a first tentative draft of standards relating to the legal status of prisoners.4 When the Commission and the Section of Criminal Justice presented the draft to the House of Delegates in 1978, the House referred it to the Standing Committee to resolve points of conflict with correctional authorities. The committee in turn developed three successive drafts. The fourth tentative draft was modified in several respects before final adoption by the House in February 1981, when the draft became a new chapter

1. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).
2. Id. ch. 1.
twenty-three of the Standards.\textsuperscript{5}

The Legal Status of Prisoners Standards\textsuperscript{6} (LSOP) constitute but one of several national and international bodies of rules or standards. The United Nations has undertaken to implement the premise that no person should be subjected to cruel, inhuman, or degrading treatment or punishment.\textsuperscript{7} The United States National Advisory Commission on Criminal Justice Standards and Goals in 1973 issued detailed standards bearing on correctional administration,\textsuperscript{8} and the National Conference of Commissioners on Uniform State Laws covered many of the same concerns in its Model Sentencing and Corrections Act.\textsuperscript{9} Since 1975, the American Correctional Association and the Commission on Accreditation for Corrections have published ten volumes of standards to govern accreditation of correctional facilities. Three of those volumes bear substantially on the problems dealt with in the ABA Standards.\textsuperscript{10} Most recently, the United States Department of Justice issued standards governing prisons and jails for use in federal penal administration.\textsuperscript{11} Thus, during the 1980s there is no dearth of guidelines for correctional administration and judicial evaluation of the country’s penal facilities.

This article surveys the legal and administrative status of prisoners under the several contending standards, noting in the process the points on which the ABA Standards diverge substantially from other bodies of principles.

I. PRINCIPAL RIGHTS OR CLAIMS OF PRISONERS

A. Basic Principle

It must be stressed that the ABA’s choice of the word “status”, rather

\textsuperscript{5} ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS (Approved Draft, 1981) [hereinafter cited as LSOP].

\textsuperscript{6} Id.


\textsuperscript{8} U.S. NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS (1973) [hereinafter cited as NAC CORRECTIONS].

\textsuperscript{9} 10 UNIFORM RULES OF CRIMINAL PROCEDURE, MODEL SENTENCING AND CORRECTIONS ACT, (Approved Draft, 1979) [hereinafter cited as MODEL ACT].

\textsuperscript{10} AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (2d ed. 1981) [hereinafter cited as ACA-ACI]; STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (2d ed. 1981) [hereinafter cited as ACA-ALDF]; STANDARDS FOR THE ADMINISTRATION OF CORRECTIONAL AGENCIES (1979) [hereinafter cited as ACA-ACA]. See also note 312 infra.

than the word "rights", of prisoners was not casual or heedless. It was, instead, a statement of philosophy that the purpose of the ABA is not to provide an advance guard in a drive to expand prisoner rights beyond those now recognized by courts and legislatures, but to delineate the position of prisoners in relation to free citizens, on the one hand, and governmental authority, on the other. That is the thrust of standard 23-1.1:

Prisoners retain the rights of free citizens except: (a) as specifically provided to the contrary in these standards; or (b) when restrictions are necessary to assure their orderly confinement and interaction; or (c) when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of the prison system and the general public.\(^\text{12}\)

This restates in essence the constitutional principles enunciated by the United States Supreme Court.\(^\text{13}\) Standard 23-1.1 sets out a general philosophy which, however, is subject to qualification by the language of more specific standards.

B. Reception, Classification, Assignment, and Transfer

Classification is necessary in any prison system having more than one general holding facility. A failure to provide a diversity of classifications itself violates modern notions of penal administration.\(^\text{14}\) There are at least three bases for categorizing correctional facilities:

1. Security Classifications

Traditionally, facilities in the United States have been categorized as maximum, medium, and minimum security institutions, without any particular standards according to which a designation can be made. The operative issue, from the standpoint of individual prisoners, is the extent to which freedom of movement is controlled within a facility. On such a basis one may perceive, in decreasing order of severity, administrative segregation, maximum custody, close custody, medium security, minimum security, and community status.\(^\text{15}\) Unless facilities are categorized, rational assignment of individual prisoners is difficult to achieve.

2. Classification According to Objective Personal Characteristics

To some extent everywhere, separate facilities are provided for adults and young offenders, male and female offenders, pre- and post-adjudication detainees, and civilly and criminally incarcerated persons.\(^\text{16}\)

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\(^\text{12}\) LSOP, supra note 5, § 23-1.1.


\(^\text{14}\) ACA-ACI, supra note 10, § 2-4399; ACA-ACA, supra note 10, §§ 25, 27.

\(^\text{15}\) E.g., MICH. ADMIN. CODE R. 791.4401(3) (1977). The discussion to ACA-ACI, supra note 10, § 2-4401, recommends at least three degrees of custodial control for inmates. The MODEL ACT, supra note 9, § 4-402, contains somewhat different criteria: each facility or portion of a facility should be given a security classification based on the extent of perimeter security, freedom of movement of confined persons within a facility, nature of programs in a facility, and the extent of regimentation of confined persons within a facility.

\(^\text{16}\) See, e.g., DOJ, supra note 11, §§ 3.03-.05; ACA-ACA, supra note 10, §§ 2, 11-13, 16, 26;
under such a system is objective and mechanical; the primary limitation is that no discriminatory use can be made of external factors, particularly race, religion, sex, age, or handicapped status.\textsuperscript{17}

3. Classification Based On Individualized Treatment Needs

Penal legislation determines the extent to which prisoners are to be provided programs tailored to fit individual needs. If offender rehabilitation is the principal or a significant objective of a criminal justice system, and deterrence of future criminal conduct and segregation or incapacitation are of minimal significance, then substantial financial and personnel resources will be devoted to "treatment" of offenders.\textsuperscript{18} In contrast, if rehabilitation largely has been abandoned as a goal of a prison system and incarceration for a determinate or relatively fixed term is either punishment to deter crime or a means of segregating dangerous persons from society,\textsuperscript{19} then subjective personal characteristics of individual prisoners will play a relatively small role in penal administration, and classification largely will turn on factors in (1) and (2) above.

4. Administrative Procedures Affecting Classification

Correctional standards are more concerned with administrative procedures affecting classification than they are with criteria for classification generated in substantive law. Granted that conceptual limitation, there are several important dimensions of prisoner claims and protections in the setting of classification:

**Time of classification.** Classification should be conducted as soon after a prisoner has been received in a prison system or facility as is possible in light

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\textsuperscript{17} LSOP, supra note 5, § 23-6.14; DOJ, supra note 11, § 1.02; Model Act, supra note 9, § 4-111; ACA-ACI, supra note 10, § 2-4340; ACA-ALDF, supra note 10, § 2-5356; see also U.N. Standard Minimum Rules, supra note 7, R. 6(1). This is federal constitutional doctrine. Lee v. Washington, 390 U.S. 333 (1968); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Glover v. Johnson, 510 F. Supp. 1019 (E.D. Mich. 1981).

\textsuperscript{18} This is the clear objective of U.N. Standard Minimum Rules, supra note 7, R. 67(b), 69; see also id. R. 8 ("necessities of their treatment"), 59 ("individual treatment needs of the prisoners"). The ABA SENTENCING ALTERNATIVES AND PROCEDURES STANDARDS, supra note 1, ch. 18, particularly §§ 18-2.1, -4.1, embody a similar approach even though deterrence and segregation loom larger in the current standards than they did in the first edition. See, e.g., id. §§ 18-2.5, -3.2.

of the need to accumulate data appropriate to a classification decision.\textsuperscript{20} Although the ABA standard recognizes some flexibility in completing classification,\textsuperscript{21} it recommends a thirty-day period which corresponds to other standards covering the matter.\textsuperscript{22}

\textit{Place of classification.} None of the standards attempts to regulate the location of classification. It can be done at a central diagnostic facility and probably must be accomplished in that way if courts are not empowered to designate facilities to which convicted prisoners must be sent. After a first classification and assignment have been made, each institution then has a mechanism either for placement at a level of custody and programming within that institution or, if for a designated period a prisoner is assigned the highest security category within the institution, for reclassification and reassignment after an appropriate time has elapsed. Further transfers within a prison system are subject to central administrative control.\textsuperscript{23} The ABA Standards properly are silent on what is a purely administrative matter.

\textit{Classification procedures.} The ABA Standards are not silent as to procedures pursuant to which classification decisions are reached. American standards generally contemplate an active role for prisoners during classification which contrasts, favorably in the author's view, with the U.N. Standard Minimum Rules\textsuperscript{24} and practices in many other nations in which prisoners play a passive, receptive role.

Due process of law does not mandate that classification or reclassification be conducted according to procedures required for major disciplinary proceedings,\textsuperscript{25} even though prisoner misconduct may have impelled administrative review.\textsuperscript{26} Consequently, the ABA Standards\textsuperscript{27} like other rules and

\textsuperscript{20} At reception and classification, a legal basis for confinement must be documented, e.g., DOJ, supra note 11, §§ 8.02, 04, 05; ACA-ALDF, supra note 10, §§ 2.5009, 5344 and complete records must be maintained on all prisoners subject to appropriate audit controls. ACA-ACI, supra note 10, §§ 2-4115–4117.

\textsuperscript{21} LSOP, supra note 5, § 23-3.4(a) brackets the figure thirty, indicating scope for flexibility.

\textsuperscript{22} DOJ, supra note 11, § 9.07 recommends four weeks and MODEL ACT, supra note 9, § 4-408(c) thirty days.

\textsuperscript{23} ACA-ACI, supra note 10, § 2-4400 (discussion), suggests only that there should be "specific procedures relating to inmate transfer . . . from one institution to another."

\textsuperscript{24} U.N. Standard Minimum Rules, supra note 7, R. 69 ("a programme of treatment shall be prepared for him"). Interviews by the author with prison administrators in Japan and the People's Republic of China confirm that in those nations prisoners have no positive role to play in the determination of work or educational programs in which they are required to participate.

\textsuperscript{25} See text accompanying notes 273-94 infra.

\textsuperscript{26} Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Goodnow v. Perrin, 421 A.2d 1008 (N.H. 1980) (even though transfer was to federal prison in Pennsylvania). However, if some prisoners are allowed a hearing before a change in program assignment, a failure to grant such a hearing to all prisoners within an eligible class may deny equal protection. Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978). A state system of course is free to institute a hearing system under its own law, In re Westfall, 102 Cal. App. 3d 328, 162 Cal. Rptr. 462 (1980), and this may engender an entitlement to an administrative due process hearing under federal doctrine. Garcia v. De Batista, 642 F.2d 11 (1st Cir. 1981); Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980); Dickerson v. Warden of Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841 (1980).

\textsuperscript{27} LSOP, supra note 5, § 23-3.4(a)-(d).
standards,28 contemplate that procedures be as informal as possible. However, explanations must be given to prisoners about the classification process, the options open to them, and the criteria by which decisions are reached. The initial classification recommendations must also be communicated to prisoners and to a classification committee. Although some lawyers and others deeply concerned about prisoner rights have maintained that even initial classification decisions should be adversary in nature, including participation by counsel for prisoners desiring representation,29 an emerging consensus holds that adversarial proceedings are inimical to proper classification and reclassification. The use of adversarial proceedings reflects an “over-lawyering” which has characterized many dimensions of social welfare administration in the United States during the past two decades.

Nevertheless, standards governing prisoner status must take account of the possibility of abuse of discretion by classification officials. The Standards provide an initial check through a routine review by a classification committee of preliminary classification decisions,30 and then allow a formal classification hearing at the request of a prisoner dissatisfied with a provisional classification or reclassification decision.31 No special provision is made for further administrative or judicial review of classification matters, because the Standards envision grievance procedures based on a broad array of prisoner complaints.32

Reclassification. Initial classification determinations cannot be allowed routinely to stand intact without further evaluation throughout a prisoner’s period of incarceration. The approach of the Standards is to require routine periodic review at a recommended interval of six months and to allow prisoners to impel classification hearings if they are dissatisfied with refusals on the basis of a document review to revise an earlier classification.33 No provision is made in the ABA Standards for interim review at the request of a prisoner, unlike some other standards.34

28. DOJ, supra note 11, § 9.02; MODEL ACT, supra note 9, § 4-408; ACA-ACI, supra note 10, §§ 2-4400, -4403, -4407.
29. See, e.g., LSOP (Tent. Draft No. 1), supra note 4, at 455-58, § 3.5 and commentary; MODEL ACT, supra note 9, § 4.412(a)(1)-(iii).
30. LSOP, supra note 5, § 23-3.4(e)-(f). A similar approach is taken in DOJ, supra note 11, §§ 9.02, .09, .10; ACA-ACA, supra note 10, §§ 32-36; ACA-ACI, supra note 10, §§ 2-4400, -4405-4407; see also MODEL ACT, supra note 9, §§ 4-408, -412, -413.
31. LSOP, supra note 5, § 23-3.4(g) governs the troubling matter of the impact of pending detainers on classification. It provides that no consideration should be given to detainers pending more than a recommended six month period, on which there has been no action by the requesting entity despite a prisoner demand. Other detainers may be considered but should not be giving controlling weight in assigning security classifications.
32. LSOP, supra note 5, §§ 23-7.1(d)(vii); see text accompanying notes 210-26 infra.
33. Id., § 23-3.4(c), (e).
34. DOJ, supra note 11, § 9.08 (12 month interval, or more frequently as needed; inmates may request reviews of their progress and status, and request changes in program assignments, at any time); ACA-ACI, supra note 10, § 2-4407 (discussion indicates that inmates should be allowed to initiate reviews at any time to determine the extent of their progress and the effectiveness of their programming).
C. Circumstances of Confinement

Prison conditions "may deprive inmates of the minimal civilized measure of life's necessities," and so can "be cruel and unusual under the contemporary standard of decency" developed by the Supreme Court under the eighth amendment. Nevertheless, "to the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Granted such a limited scope of constitutional control over prison circumstances, criminal justice standards have a very substantial role to play in establishing criteria by which legislators and correctional administrators should govern penal institutions and by which courts can determine issues of constitutional adequacy.

Norms in light of which correctional facilities are accredited or inspected must be precise and incorporate by reference health and safety standards embodied in administrative regulations, inspection codes, and the like. The drafters of the ABA Standards recognized in this context that it is inappropriate for the ABA to parrot, and particularly to endeavor to improve upon, detailed criteria in other standards governing matters like institutional size and location, cell or dormitory dimensions, lighting, ventilation, toilet and bathing facilities, and laundry facilities. Administrators, legislators, and judges wishing detailed norms can find them in correctional standards. Consequently, the Standards set forth only general concepts essentially congruent with contemporary constitutional precedent.

Thus, correctional institutions should meet health, sanitation, fire, and industrial safety codes applicable to private residential facilities or public buildings like schools and hospitals, as well as any state standards directly governing correctional facilities. Although correctional administrators bear a principal burden in practice to see that compliance is constant, they cannot be given sole responsibility. Therefore, the Standards call for regular inspections by qualified inspectors independent of the facility or agency undergoing inspection. In contrast to correctional standards, the ABA is directly concerned about enforcement of health and safety standards and calls for the same enforcement sanctions, including abatement, and procedures.

37. See, e.g., DOJ, supra note 11, §§ 2.01-4.16; ACA-ACI, supra note 10, §§ 2-4127—4175.
38. LSOP, supra note 5, § 23-6.13. NAC CORRECTIONS, supra note 8, § 2.5 takes a like approach.
39. LSOP, supra note 5, § 23-6.13(a)(i)-(ii). Section 6.13(c) lists heating and ventilation systems to maintain humane comfort, natural and artificial light in living quarters sufficient to permit reading, an adequate balanced diet, adequate, clean and functioning private toilet and other facilities to maintain personal cleanliness, freedom from excessive noise, clean clothing and bedding appropriate to the season, and varied opportunities for daily physical exercise and recreation. A cross-reference is included to medical care. See text accompanying notes 46-60 infra.
40. Id. §§ 23-6.13(a)(iii). The preference, expressed through bracketed material, is for inspections at least annually, the frequency expressed also in DOJ, supra note 11, § 3.01 and ACA-ACI, supra note 10, §§ 2-4255 (sanitation and health), §162, §164 (fire and related safety facilities must be certified as in code compliance by independent qualified sources, and inspected annually). Accreditation standards require daily or weekly inspections by qualified administrators of each institution. Id. §§ 2-4163, 4248.
governing other facilities subject to public regulatory codes.\textsuperscript{41} Some standards express a clear preference for single-occupancy cells over dormitory quarters,\textsuperscript{42} although clearly that is not a constitutional minimum standard.\textsuperscript{43} The ABA Standards align basically with that position, in that prisoners in other than residential (community corrections) facilities "should have the opportunity to have their own separate living quarters of adequate size."\textsuperscript{44} However, some inmates clearly prefer communal living if quarters are adequately supervised. The standard provides specifically for staffing and other means of supervision sufficient for that purpose.\textsuperscript{45} Safety-related surveillance poses a conflict with inmate claims to privacy. The Standards can do no more than to urge that inmates not in separate living quarters be given at least some opportunity daily for personal privacy. There is no bar intended, however, against the use of closed-circuit television surveillance of either single- or multiple-occupancy quarters to ensure prisoner safety and compliance with institutional safety and health regulations.

The ABA takes no position for or against disciplinary detention\textsuperscript{46} as long as it is specifically provided for through adequately disseminated institutional rules and does not violate the principle of parsimony because disproportionate to the seriousness of misconduct for which it is a sanction.\textsuperscript{47} If, however, prisoners are placed in a restrictive category and specially housed, whether by way of disciplinary segregation or special administrative classification, they are not to be deprived of whatever is needed to maintain mental and physical well-being, including books or other reading matter, mail, physical exercise, items for personal care and hygiene, medical care,

\begin{itemize}
\item \textsuperscript{41} LSOP, supra note 5, § 23-6.13(a)(iv).
\item \textsuperscript{42} NAC CORRECTIONS, supra note 8, § 2.5(1); ACA-ACI, supra note 10, § 2-4129; cf id. § 2-4131 (multiple occupancy rooms must house not less than 3 nor more than 50 inmates; facilities are specified in detail). DOJ, supra note 11, § 2.02 provides that single-occupancy cells must house only one inmate.
\item \textsuperscript{43} Rhodes v. Chapman, 101 S. Ct. 2392 (1981).
\item \textsuperscript{44} LSOP, supra note 5, § 23-6.13(b).
\item \textsuperscript{45} Inmates have a constitutional claim to protection against physical or sexual assaults by other inmates, Ramos v. Lamm, 639 F.2d 599, 572 (10th Cir. 1980), cert. denied, 101 S. Ct. 1759 (1981); Leonardo v. Moran, 611 F.2d 397 (1st Cir. 1979); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978), cert. denied, 439 U.S. 837 (1978); Little v. Walker, 552 F.2d 193 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978), and therefore institutions must have enough staff to ensure inmate safety. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). Assaults by staff members also must be prevented. Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974).
\item \textsuperscript{46} Accreditation standards use the term segregation to encompass administrative segregation (based on a serious threat to life, property, self, staff, or other inmates or to the security or orderly running of an institution), protective custody (designed to safeguard inmates either at their request or according to a determination that they are in jeopardy), and disciplinary detention. ACA-ACI, supra note 10, § 2-4214 and discussion; see also DOJ, supra note 11, ch. 11. On administrative procedures required for transfers to administrative segregation, see Parker v. Cook, 642 F.2d 865 (7th Cir. 1981); Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980); Bono v. Saxbe, 620 F.2d 699 (7th Cir. 1980); Dickerson v. Warden of Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841 (1980). Whether solitary confinement constitutes cruel and unusual punishment turns on the circumstances as well as the duration of such detention. Hutto v. Finney, 437 U.S. 678 (1978); Littlefield v. Deland, 641 F.2d 729 (10th Cir. May 12, 1981); Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981); Lock v. Jenkies, 641 F.2d 488 (7th Cir. 1981). See generally NAT'L ASS'N OF ATTORNEYS GENERAL, ADMINISTRATIVE SEGREGATION OF PRISONERS: DUE PROCESS ISSUES (1979).
\item \textsuperscript{47} LSOP, supra note 5, § 23-3.1; see text accompanying note 266 infra.
\end{itemize}
light, ventilation, regular diet, and visiting or oral communication opportunities with other persons. Conditions cannot unnecessarily cause physical or mental deterioration.48

D. Medical Care and Delivery of Health Services

Deliberate indifference to the serious medical needs of prisoners constitutes "unnecessary and wanton infliction of pain"49 forbidden by the eighth amendment. Because inadequate delivery of health services has been prominent in prisoner litigation, the ABA Standards address basic concepts in some detail, although not to the same extent as do the American Medical Association50 and accrediting agencies.51

The basic constitutional standard is restated in section 23-5.1(a).52 No effort is made to specify the qualifications of those who provide medical care in prisons, beyond requiring that they possess those qualifications expected of medical care personnel performing like functions in the free community.53 Unlike the Model Act,54 the Standards embody no right of prisoners to resort to private medical care at personal expense, but neither do they condemn it under the broad language of section 23-5.2(a). Although there can be no unjustified sex discrimination under the Standards,55 it is appropriate to provide suitable prenatal and postnatal care for women prisoners.56


50. STANDARDS FOR HEALTH SERVICES IN PRISONS (1979); STANDARDS FOR HEALTH SERVICES IN JAILS (1979).

51. ACA-ACI, supra note 10, §§ 2-4271—4322.

52. LSOP, supra note 5, § 23-5.1(a).

53. Id. §§ 23-5.1(b). Institutional hospitals must meet the same standards as licensed general hospitals. Id. § 23-5.1(c). ACA-ACI, supra note 10, § 2-4284 requires appropriate state or federal licensure. The discussion to DOJ, supra note 11, § 5.06 notes that requirements of the United States Public Health Service Commission Corps or the Office of Personnel Management govern employment in federal institutions. Use of unlicensed, inadequately trained inmates as sole providers of health care falls below minimum constitutional standards, Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980), cert. denied, 101 S. Ct. 1759 (1981); Williams v. Edwards, 547 F.2d 1206, 1215-18 (5th Cir. 1977), but if qualified professional staff is present there seems to be no objection under either constitutional principles or the Standards to using inmates as orderlies and the like, as long as they do not control scheduling of health care appointments or access to health care services, or have access to surgical instruments, syringes, needles, medications, and health records. See DOJ, supra note 11, § 5.37; ACA-ACI, supra note 10, § 2-4288; AMA STANDARDS FOR HEALTH SERVICES IN PRISONS § 133 (1979). LSOP, supra note 5, § 23-5.6 prohibits administration of drugs by inmates under any circumstances.

54. MODEL ACT, supra note 9, § 4-105(c).


56. LSOP, supra note 5, §§ 23-5.7(a); see also DOJ, supra note 11, § 5.49. LSOP, supra note 5, §§ 23-5.7(b) contemplates the possibility of nursery facilities in institutions so that inmate
Adequate health care under the Standards requires that prisoners be given a comprehensive medical, psychiatric, and dental examination within a short time after admission to a correctional facility, at regular intervals thereafter, and upon release from confinement. Maintenance of professionally adequate health records also is indispensable to proper health protection. The Standards contemplate records compiled according to accepted medical standards, maintained in a confidential and secure manner during confinement and for a recommended five-year period following discharge.

Prisoners possess the same rights to accept or reject health care as do citizens generally. Therefore, the Standards recognize that prisoners may decline either examination or treatment unless (a) it is required by court order, (b) a responsible physician reasonably believes it necessary to detect or treat communicable diseases or otherwise to protect the health of other persons, or (c) the condition is emergent and treatment is necessary to prevent prisoners from being transferred without valid supporting reasons other than incarceration. Apger v. Beauter, 75 Misc. 2d 439, 347 N.Y.S.2d 872 (Sup. Ct. 1973) (interpreting statute).

Prisoners or those convicts who refuse to undergo treatment were held to be empowered to compel dialysis treatment for a prisoner whose refusal to undergo treatment was a protest to gain a transfer to a minimum security facility. Commissioner of Correction v. Myers, 399 N.E.2d 452 (Mass. 1979). Otherwise, there is probably no constitutional claim to order treatment for adults because they would be better off for it. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); Lang v. City of Des Moines, 294 N.W.2d 557 (Iowa 1980) (cannot force treatment for alcoholism during jail incarceration).

Healthy prisoners' constitutional rights are infringed if reasonable steps are not taken to safeguard them against communicable diseases of other inmates. Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974) (double-celling with known tubercular inmate); Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980) (failure to screen incoming jail inmates for communicable diseases); Hines v. Anderson, 439 F. Supp. 12, 23 (D. Minn. 1977) (inmates with contagious diseases to be segregated).
vent permanent and serious injury to the inmate-patient's health. A corollary to this is that inmates should not be made the subjects of nontherapeutic experimentation of any kind, even though ostensibly with informed, voluntary prisoner consent. The Standards, however, recognize the existence of a somewhat more difficult problem if experimental therapeutic treatments are used with prisoners. Presumably, private citizens can agree to participate for a fee or otherwise in any sort of experiment that is not immediately life-endangering and that otherwise is acceptable within medical and governmental guidelines. Prisoners, in contrast, are not allowed to agree to participate in nontherapeutic experiments because of a doubt that anyone confined or otherwise subjected to substantial governmental controls is free from inducements, subtle or otherwise, to consent. Under the Standards, however, prisoners can agree to participate in a therapeutic medical program not in general civilian use, as long as it has been approved as medically sound and in conformance with generally accepted medical standards, and is based on voluntary and informed written consent. Under such an approach, prisoners can consent to individualized treatment even though the treatment regimen is at the time in a somewhat preliminary or experimental phase and thus not routinely available to the general population. It must be stressed, however, that no apparently healthy prisoner can be allowed under the Standards to volunteer as a control.

Pharmaceuticals must be under strict control and supervision both to see that they are appropriately administered as medical treatment and to forestall illicit access. This is stressed in the Standards as in counterpart statements of principle. Ultimate responsibility for pharmaceuticals must lie with a physician in charge of institutional medical care, and only medical care staff should dispense prescription medications except in an emergency when custodial personnel may administer them at the direction of medically trained staff.

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64. LSOP, supra note 5, § 23-5.8(a); DOJ, supra note 11, § 5.50; ACA-ACI, supra note 10, § 2-4314.
65. LSOP, supra note 5, 23-5.8(b)-(e); a substantially similar position is taken in DOJ, supra note 11, § 5.51 and Canadian Correctional Service, Guidelines Covering the Professional Conduct of Health Professionals in the CCS ¶ 25 (mimeo, current but undated).
66. LSOP, supra note 5, § 23-5.8(b)(i), (c) (based on review by a committee established by law to evaluate the program's medical validity). This procedure is required under federal regulations as well. 45 C.F.R. §§ 46.301-.306 (1980).
67. LSOP, supra note 5, § 23-5.8(d). Informed consent requires advance information of (a) the likely effects, including possible side effects, of a procedure; (b) the likelihood and degree of improvement, remission, control, or cure resulting from a procedure; (c) any uncertainty as to benefits or hazards of a procedure; (d) existing reasonable alternatives to a procedure; and (e) an ability on a prisoner's part to withdraw from a procedure or regimen at any time. Id. § 23-5.8(e). Written consents should be reviewed by an independent committee including prisoners and ex-offenders which interviews a participating prisoner personally, id., § 23-5.8(d); specific judicial approval following an adversary hearing is required in instances of psychosurgery, electrical stimulation of the brain or aversive conditioning. Id. § 23-5.8(b)(iii).
68. LSOP, supra note 5, § 23-5.6.
69. Accreditation and inspection standards are in much greater detail than LSOP. DOJ, supra note 11, §§ 5.34-37; ACA-ACI, supra note 10, § 2-4317. ACA-ACI, supra note 10, §§ 2-4306-4307 provide for detoxification programs for chemically dependent inmates.
70. LSOP, supra note 5, § 23-5.6 also contains a flat prohibition against administration of drugs by prisoners. See also note 53 supra.
E. Religious Practices

Prison inmates do not lose their rights as citizens to hold whatever religious beliefs they wish.71 This constitutional right is restated in the Standards.72 Difficulties arise in and out of prison, however, over the extent to which the practice or exercise of religion can be regulated or subjected to sanctions. Certainly, the free exercise clause of the first amendment73 prohibits loss of livelihood based on practice of religious beliefs;74 the basic issue in prisons is the extent to which a penal environment requires restrictions on religious practices, as opposed to beliefs, not valid in the free community. The position of the Standards is that any religious practice may be engaged in if consistent with orderly confinement and institutional security.75

Although one may question the logic of the position, courts have ruled that the first amendment establishment clause76 is not violated through appointment of chaplains and religious counselors in prisons at public expense,77 a principle which presumably extends to chapels, religious furnishings and other amenities. Nevertheless, the first amendment coupled with fourteenth amendment equal protection requires that there be no discrimination among religious groups, a principle restated in the Standards.78

As long as new religions were relatively rare phenomena in society they posed no special difficulties for prison administration. During the past generation, however, American correctional officials have been confronted by religious groups, formal recognition of which they resisted until forced to comply by the federal courts. Landmark decisions flowed from efforts by adherents of the Black Muslim (now World Community of Islam) movement to gain freedom of worship, diet, and dress in prisons; the status of that group as a recognized religion is clearly established today.79 More recently,
a prison-generated religion, the Church of the New Song (CONS), has generated substantial litigation. What seemingly began as a frivolous effort to harass prison officials has gathered adherents both in and out of prisons and therefore has gained a limited measure of recognition.\textsuperscript{80} Other religious groups involved in current legal controversies include a Christian-oriented homosexual entity, the Universal Fellowship of Metropolitan Community Churches,\textsuperscript{81} the Native American Church,\textsuperscript{82} and even satanism.\textsuperscript{83} The Supreme Court is not generally receptive toward elaborate tests in light of which bona fide religious belief or status is to be ascertained.\textsuperscript{84} Thus, accreditation standards have ceased essaying judgmental criteria for prison administrators.\textsuperscript{85} For similar reasons, the ABA Standards eschew a black-letter definition of religion.\textsuperscript{86}

Consistent with constitutional precedent, the Standards provide that prisoners should be allowed diets of nutritious food consonant with their religious beliefs and opportunities to observe special religious rites, including fasting and special dining hours on major holidays generally observed within their religion, subject to the usual concerns of institutional order and security.\textsuperscript{87} Prisoners should also be allowed freedom to use of modes of dress or appearance, including religious medals and other symbols, as long as these do not interfere with identification and prisoner security.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{80} Remmers v. Brewer, 529 F.2d 656 (8th Cir. 1976); Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974); \textit{but see} Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Federal Bureau of Prisons, 620 F.2d 648 (7th Cir. 1980) (res judicata applied to district court ruling in another circuit that CONS is not a bona fide religion).
\item \textsuperscript{81} Lipp v. Procunier, 395 F. Supp. 871 (N.D. Cal. 1975).
\item \textsuperscript{83} Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976) (district court should not have dismissed satanist prisoner's claims on pleadings; factual hearings required).
\item \textsuperscript{84} In Thomas v. Review Bd., 101 S. Ct. 1425, 1430 (1981), the Court noted that "determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task"; "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."
\item \textsuperscript{85} The first edition of ACA-ACI, supra note 10, § 4304 (discussion) and ACA-ALDF, supra note 10, § 5278 (discussion) admonished that "the number of persons who practice the religion, the newness of the religion or the absence from the religion of a concept of Supreme Being should be irrelevant in determining what constitutes legitimate religious practices." \textit{See also} NAC Corrections, supra note 8, § 2.16. The current ACA-ACI, supra note 10, § 2-4462 discussion states only that "it is the responsibility of the institution to ensure that all inmates are able to voluntarily exercise their constitutional right to religious freedom when this freedom does not interfere with the order and security of the institution," the substantial equivalent to LSOP § 23-6.5(b). The discussion to DOJ, supra note 11, § 15.01 continues a standard that "[a] presumption of legitimacy attaches to newly formed religions, but the presumption may be rebutted by conduct which demonstrates that the religion is not authentic or that the religious group is not acting in good faith."
\item \textsuperscript{86} The Standing Committee thought it unnecessary to continue an admonition in the first tentative draft, LSOP (Tent. Draft No. 1), supra note 4, at 508, § 6.5(g), that such issues should be resolved by competent courts, not correctional authorities.
\item \textsuperscript{87} LSOP, supra note 5, § 23-6.5(c). Less direct reference to "facilities" and "symbols" is found in DOJ, supra note 11, § 15.01; ACA-ACI, supra note 10, § 2-4468 uses the formulation of "opportunities to adhere to the requirements of [prisoners] . . . respective faiths." Representative constitutional precedent includes Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Aziz v. Le Fevre, 500 F. Supp. 725 (N.D. N.Y. 1980); Schlesinger v. Carlson, 489 F. Supp. 612 (M.D. Pa. 1980); Finney v. Mabry, 458 F. Supp. 720 (E.D. Ark. 1978).
\item \textsuperscript{88} LSOP, supra note 5, § 23-6.5(f); freedom of personal grooming generally also is stated
A corollary to freedom to engage in personal religious practices is freedom from pressure to participate in religious activities. A greater problem in practice flows from routine solicitation and preservation of information about religious affiliation in prisoner files, because of its importance to administrative matters like issuance of passes to participate in scheduled religious activities, eligibility for special diets, and approval of requests for special visits by religious counselors. Maintaining such records throughout a period of incarceration does not violate the first amendment as long as prisoners have an avenue to change religious affiliation on the basis of whatever showing is reasonably required by correctional authorities. However, active consideration by classification committees or paroling authorities of recorded participation in religious activities might well amount to a subtle yet substantial pressure to adhere, or to appear to adhere, to orthodox religious beliefs and practices. Hence, the ABA position is that only "directory" information, i.e., an initial or amended indication of religious affiliation necessary to administrative activity, is to be retained concerning prisoner religious activities.

The Standards embody the premise that all prisoners, even those under disciplinary and other special management, should have access to religious counseling, which appears to be a constitutional right. Conversations with religious counselors, intended to be confidential, fall within a provision elsewhere in LSOP urging creation of an evidentiary privilege for all counselors covering information other than that about a contemplated crime, unless disclosure is required by court order.

F. Labor, Education, and Habilitation

A history of exploitation of convict labor during the nineteenth century and antipathy on the part of the burgeoning labor union movement toward uncompensated or minimally compensated prison labor, generated almost universal state statutory prohibitions against prison enterprises not related
directly to institutional maintenance (including production of foodstuffs) or to requirements of governmental agencies. Federal law today prevents state prison labor products from being shipped in interstate commerce.\(^{94}\) This legislation swiftly eradicated the abuses which engendered it, but also produced questionable consequences: public needs could not justify full employment for large prison populations; to a constantly increasing extent, the skills (if any) acquired in prison industries had few applications to civilian industry, particularly when budgetary restraints precluded acquisition of "state of the art" machinery and equipment; and artificial pricing of goods for governmental and institutional use constituted a constant drain on correctional budgets to the detriment of habilitation programs viewed by penal administrators as more beneficial than prison industrial programs. These problems have been overcome through work-release and work-study programs sponsored by local or regional industries, though only to a limited extent, since they benefit only a relatively small number of younger prisoners.

Another significant factor has been a decline in the prestige of the rehabilitative principle. Prisons are increasingly thought of as places for punitive treatment designed to deter and for segregation from society through a fixed term. Consequently, prisoners should not be forced to participate in programs which will improve them, but only in activities relating to cleanliness and order, food service, maintenance, and production of goods for public use.\(^{95}\) Nevertheless, whether habilitated or deterred, almost all prisoners return to communities where they must support themselves as an alternative to recidivating. There is increasing advocacy, therefore, of a reintroduction of private industry in prisons under conditions appropriate to forestall exploitation of prison labor for private gain.\(^{96}\) It was against that background that the first tentative draft of the Standards\(^ {97}\) and, to a somewhat lesser extent, the fourth tentative draft\(^ {98}\) urged the aspirational goal that prisoners should have access to fully remunerative employment and receive substantially the same workers' benefits as their counterparts in free society. But prisoners should be required as well to pay costs and contributions like those to which


\(^{95}\) LSOP, supra note 5, § 23-4.1; DOJ, supra note 11, § 1.10; cf. ACA-ACI, supra note 10, § 2-4334 (inmates must accept work assignments, enrollment in basic education programs, medical and dental care mandated by statute, and participation in other programs ordered by the sentencing court or required by statute).

\(^{96}\) Congress in 1976 added a new subsection (c) to 18 U.S.C. § 1761, see note 94 supra, allowing the Law Enforcement Assistance Administration (LEAA) to conduct up to seven pilot projects in which prisoners could receive full pay for industrial work, subject to a liability for deductions up to 80 percent of gross pay for deductions including federal and state taxes and fringe benefits, as well as a contribution of between 5 and 20 percent to a victim compensation fund. As of August 1981, LEAA had funded programs in Arizona, Kansas, and Minnesota. The remaining four projects are expected to be authorized by November 1981. Letter to author from George H. Bollinger, III, Acting Administrator, LEAA (August 26, 1981).

\(^{97}\) LSOP (Tent. Draft No. 1), supra note 4, at 458-65, §§ 4.1.-4 and commentary.

\(^{98}\) ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS §§ 23-4.2.-5 (Tent. Draft, No. 4, 1980).
free world workers are subject, including a reasonable sum to a corrections system to meet the costs of maintaining them. Because of substantial opposition to such a concept in the ABA House of Delegates, however, those sections and a counterpart section governing compensation for injuries or death were withdrawn by the Standing Committee from House consideration and consequently do not form a part of the Standards as ultimately approved.

To recapitulate, the position of the Standards is that prisoners may be compelled to keep their quarters clean and to participate in other activities essential to institutional security and order, including cleaning, sanitation, food service, maintenance, and prison industries producing goods for government use. Prisoners should expect no compensation for maintaining the cleanliness and orderliness of personal living quarters, but should be given compensation for other work, properly performed, adequate to permit commissary purchases and to allow accumulation of limited funds toward release. If prisoners want to participate in other programs and activities, including those which can contribute to self-improvement and education, they can and should be encouraged to do so, but are not to be compelled.

Although there is no specific mention of compensation for death or injury in the ultimate version of the Standards, prisoners have a claim to a healthful place in which to live and to institutional compliance with industrial safety codes applicable to counterpart facilities in the free world. Even if the Standards were silent on the matter, the constitutional case law is clear that prisoners must have a remedy for injuries sustained in unsafe prison work areas.

99. Id. § 23-6.12.
100. LSOP, supra note 5, § 23-4.1. Pretrial detainees should not be required to engage in programs or activities not related to institutional security and order. Id. § 23-4.1(a).
101. Id. § 23-4.1(a).
103. LSOP, supra note 5, § 23-4.2. Prisons are not bound under equal protection to provide work release programs in all institutions of the same category. Jamieson v. Robinson, 641 F.2d 138 (3d Cir. 1981). The MODEL ACT, supra note 9, §§ 4-701—706, recommends a voucher system under which prisoners may apply for or otherwise earn voucher credits to be used solely for the “purchase” of rehabilitation services. Some state prison systems also use a parole or performance contract plan under which prison residents can enter into agreements guaranteeing release by a fixed date if the contracting residents conform to all contract terms and attain all contract objectives which almost always are treatment oriented. See, e.g., id. § 4-701 commentary; MICH. ADMIN. CODE R. 791.7725 (1977).
G. External Contacts

Communications to which prisoners are parties merit broad first amendment protection, in part because free members of society also are involved. \(^{107}\) Therefore, as the Standards restate, limitations on prisoners' communication rights should be the least restrictive necessary to serve the legitimate interests of institutional order and security and protection of the public. \(^{108}\) Prisoner communications tend to fall within certain clearly defined categories.

1. Courts

Prisoners, like citizens generally, must have untrammeled access to courts on all matters, criminal and civil. \(^{109}\) Correctional authorities, therefore, are under a duty not only not to impede prisoner efforts to bring matters before the courts, but also to take reasonable steps to facilitate prisoner access to the judicial process. Thus, for example, prisoner work schedules cannot be set so that it is difficult or impossible for inmates to prepare needed documents or to engage in legal research. \(^{110}\) Subject to reasonable regulations based on institutional safety and security, prisoners should be allowed to keep legal documents and materials in their cells. \(^{108}\) Authorities also ought to see that prisoners have access to reasonable amounts of supplies in connection with litigation. \(^{111}\) These judicially delineated rights are restated and to some extent elaborated upon in the Standards. \(^{113}\)

The primary principle is that governmental authorities have a responsibility to assure free and meaningful access to the judicial process. Access must be without regard to whether an otherwise judicially cognizable issue relates to the legality of conviction or confinement, asserts legal rights against correctional or other governmental authorities, relates to civil legal problems, or amounts to a defense against prosecutions or actions in which

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108. LSOP, supra note 5, § 23-6.1(a). Constitutional doctrine seemingly allows restrictions on correspondence with other prisoners because no free citizen is affected by prison controls. Heft v. Carlson, 489 F.2d 268 (5th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971), cert. denied, 404 U.S. 1049, 105 U.S. 978 (1972); Thomas v. State, 285 Md. 458, 404 A.2d 257 (1979) (interprison mail can be examined and incriminating contents preserved as evidence). Prison authorities perhaps may establish lists of authorized correspondents for each prisoner. Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 210-12 (8th Cir. 1974). However, for such concepts to be invoked under LSOP § 23-6.1(a), a showing would be required that no less restrictive conditions are adequate to forestall an identified threat to institutional order and security.
112. Access to a typewriter is not a constitutional right, however, because pro se prisoners are allowed to file handwritten petitions. Ramos v. Lamm, 485 F. Supp. 122, 166 (D. Colo. 1979), modified on other grounds, 629 F.2d 559 (10th Cir. 1980), cert. denied, 101 S. Ct. 1759 (1981).
113. LSOP, supra note 5, § 23-2.1. See also DOJ, supra note 11, §§ 1.03, 12.07; ACA-ACI, supra note 10, §§ 2.022, -4323, -4378.
prisoners are respondents. As a corollary to this principle, prison authorities cannot read, censor, or alter prisoner legal documents, and cannot use a prisoner's decision to seek judicial relief to affect adversely program status within a correctional institution or opportunity for release. Moreover, correctional authorities should allow prisoners a reasonable amount of free stationery and postage to communicate with courts, and cannot intercept any communication reasonably anticipated to be directed to a court unless under court order or otherwise authorized by law. If written communications to courts are not effective under the circumstances, free telephone contact with court officials should be permitted. Prisoners should be allowed to prepare and retain legal documents subject only to reasonable regulations, dictated by considerations of institutional safety and scheduling, bearing on time, place and manner of preparation and circumstances of retention. The principle of least restrictive alternative is specifically advanced in this setting.

The Postconviction Remedies Standards urge a single and comprehensive remedial procedure which should have priority over other matters. This is supported in LSOP, which calls for prompt resolution of disputes involving legality, duration, or conditions of confinement.

2. Public Officials

The right to petition government officials for redress of grievances is a first amendment right. It is restated and implemented in the Standards.
through a prohibition against interception of communications to officials of the confining authority, state and local chief executive officers, and legislators and administrators of grievance systems. The Standards confirm the right to circulate petitions for signature subject only to reasonable time and place limitations.

3. Counsel

The sixth amendment right to counsel in criminal and quasi-criminal cases carries with it the right of access to counsel during confinement so that counsel may prepare for a constitutionally competent presentation of a prisoner-client's case. Consequently, visual monitoring of attorney-client conferences has been held to be an unreasonable interference with confidential attorney-client communications protected by the sixth amendment. The contents of communications to and from counsel cannot be read but can be visually inspected for presence of contraband. It is proper, however, to require attorneys to confirm beforehand to prison authorities the existence of an attorney-client relationship and to identify specific communications as coming from them. Prison authorities are prohibited from defining providers of legal assistance by, for example, refusing to allow law student interns or legal assistants employed by lawyers to interview prisoners in connection with litigation.

Under the Standards, prisoners have the same liberty to retain and consult private counsel on all legal matters as private citizens do. Correspondence and other communications between attorneys and prisoner-clients are

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125. LSOP, supra note 5, § 23-6.1(d)(ii). Reasonable amounts of stationery and free postage should be available for the purpose. Id. § 23-6.1(e). Visits with public officials should not be counted against visiting periods and should be unlimited except as to time and duration. Id. § 23-6.2(e). See also DOJ, supra note 11, § 12.07; ACA-ACI, supra note 10, § 2-4378.

126. LSOP, supra note 5, § 23-6.6(b), but prisoners cannot practice intimidation against other prisoners or persons in the process. This does not extend to a right to strike or take other concerted action to affect institutional conditions, programs, or policies, id. § 23-6.6(c), which conforms to current Supreme Court doctrine. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).


130. Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978).


132. LSOP, supra note 5, § 23-2.2(c). For the scope of assistance to prisoners in the context of administrative and other hearings within the correctional system, see text accompanying notes 277-78, 291-92 supra.
subject to interception only pursuant to court order or as otherwise authorized by law. 133 Visits with attorneys should be free from limitations other than as to time and duration and should not count against established visiting periods for family and friends. 134

A troubling issue has been provision by inmates of assistance to other prisoners in the preparation of legal documents. The potential in such a practice for exploitation of some prisoners by others is evident. Nevertheless, the Supreme Court has held that if prison administrators do not make available or facilitate access to more professionally qualified sources of legal assistance, they cannot punish or otherwise interfere unreasonably with inmates who provide uncompensated assistance in legal matters. 135

Access to adequate legal materials relates to representation by counsel in that, as a constitutional matter, if competent legal assistance is not made available to prisoners, prisons must provide them with basic legal research materials. 136 The Standards take a "both-and" position on the matter. Correctional authorities should make educational services available even to prisoners who have access to legal services, either through special printed materials or through a collection of standard legal reference materials bearing on criminal law and procedure and cognate constitutional issues. 137

4. Correspondence Generally

Because communications rights of nonprisoners are affected directly, the Supreme Court has ruled that censorship or other controls on correspondence cannot be exercised unless prison officials meet a burden of showing that their impositions advance "one or more of the substantial governmental interests of security, order, and rehabilitation" and are no broader or stricter than required for the purpose. 138 Under that constitutional standard, as indicated earlier, correspondence with legal counsel cannot be read but can

133. LSOP, supra note 5, § 23-6.1(d)(i). Indigent prisoners should be allowed reasonable amounts of stationery and postage for the purpose, id. § 23-6.1 (e), and access to free telephone services for calls to attorneys in connection with current litigation if correctional authorities determine that written communications are ineffective under the circumstances. Id. § 23-6.1(f). See also DOJ, supra note 11, § 12.07; ACA-ACI, supra note 10, §§ 2-4338, -4378.
134. LSOP, supra note 5, § 23-6.2(e). See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 101 S. Ct. 1759 (1981); State ex rel. McCamie v. McCoy, 276 S.E.2d 534 (W. Va. 1981), both eliminating restrictions on time and duration of counsel interviews. Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), held that preconviction detainees subject to transfer to a distant state penitentiary where they could not readily contact counsel and witnesses had a claim to an administrative pretransfer hearing.
137. LSOP, supra note 5, § 23-2.3(a). See also DOJ, supra note 11, § 1.05; ACA-ACI, supra note 10, §§ 2-4326.
only be inspected for contraband. Nor can correspondence with religious counselors or functionaries be limited unreasonably. Correspondence among prison inmates, however, may be barred or regulated, and authorities may proscribe libelous or obscene contents or material which clearly is inflammatory and subversive of institutional discipline.

The \textit{Standards} provide that envelopes, packages, or containers sent to or from prisoners may be opened and inspected to determine if they contain contraband, with the limitation that communications reasonably anticipated to be between prisoners and their counsel may be opened and inspected only in an affected prisoner’s presence. Written communications are not to be read and oral communications intentionally overheard unless prison administrators have received reliable information that a particular communication may jeopardize public safety or the security or safety within a correctional institution, or is being used to further illegal activity. If communications are directed to counsel or specified persons or organizations like courts, officials of the confining authority, state and local chief executive officers, legislators, grievance system administrators, and paroling authorities, there can be no interception without a court order or specific authorization by law.

The era of closely controlling printed matter ordered or received by prisoners has largely drawn to a close. The position of the \textit{Standards} is that limitations can be imposed on printed materials which otherwise can be mailed lawfully only if bottomed on the overriding considerations embodied in section 23-1.1. The latter are broad enough to comprehend the "publishers only" limitation on casebound books sustained by the Supreme

\begin{footnotesize}
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\item[139.] See note 129 \textit{supra}.
\item[140.] Cruz v. Beto, 405 U.S. 319 (1972) (listed a prohibition against correspondence with a Buddhist counselor as an element of improper interference with first amendment rights).
\item[141.] See note 108 \textit{supra}.
\item[142.] Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976), \textit{cert. denied}, 431 U.S. 931 (1977); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976).
\item[143.] Wilson v. Prasse, 463 F.2d 109, 113 (3d Cir. 1972) (as long as authorities were not motivated by racial or religious prejudice in evaluating material).
\item[144.] LSOP, note 5, § 23-6.1(b); the proviso was added by amendment during House of Delegates consideration. \textit{See also} DOJ, \textit{supra} note 11, § 12.05; ACA-ACI, \textit{supra} note 10, §§ 2-4338, -4370, -4375-77.
\item[145.] LSOP, \textit{supra} note 5, § 23-6.1(c); note 264 \textit{infra}. \textit{See also} DOJ, \textit{supra} note 11, §§ 12.05-.06; ACA-ACI, \textit{supra} note 10, § 2-4375 and discussion.
\item[146.] LSOP, \textit{supra} note 5, § 23-6.1(d). On provision of a reasonable amount of free stationery and postage to help indigent prisoners maintain ties with family and friends in the community, see \textit{§} 23-6.1(e); DOJ, \textit{supra} note 11, § 12.08 (but reasonable limitations on postage allowance may be imposed on inmates who abuse an unlimited postage allowance policy); ACA-ACI, \textit{supra} note 10, § 2-4371. There may be a constitutional dimension to this. Secretary v. Allen, 286 Md. 133, 406 A.2d 104 (1979) (evidehtary hearing required on lawfulness of limitation to seven paid first-class letters weekly). Under LSOP, \textit{supra} note 5, § 23-6.1(f) pay telephones should be available to inmates, a position also taken in DOJ, \textit{supra} note 11, § 12.10 and ACA-ACI, \textit{supra} note 10, § 2-4379, but free calls for indigents are allowed only for communications with attorneys of record and officials of courts in which their current litigation is pending.
\item[147.] LSOP, \textit{supra} note 5, § 23-6.1(g); \textit{see also} DOJ, \textit{supra} note 11, § 12.01; ACA-ACI, \textit{supra} note 10, § 2-4373. Libelous or obscene matter is not mailable. \textit{See note} 142 \textit{supra}.
\item[148.] \textit{See text} accompanying note 13 \textit{supra}. \textit{Cf.} DOJ, \textit{supra} note 11, § 12.02 (no publication is rejected solely because its content is religious, philosophical, political, social, or sexual, or because its content is unpopular or repugnant).
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Court, as well as subject matter which might facilitate assaults or escapes. Refusal to forward or deliver material presumably is a proper subject for grievance proceedings covering all forms of prisoner complaints.

5. Visitation

Almost all prison inmates eventually return to the free community. Therefore, it is important to preserve as many family and community ties as possible to encourage swift reintegration into society following release. In many instances today this is accomplished through assignment to community corrections centers and work or study release programs in which controls are minimal. The Standards recommend use of home furlough programs to the extent they are consistent with community and institutional security.

Nevertheless, for most prisoners a more important practical concern is visitation at correctional facilities by family members and friends. Although it has been implied that long-term prisoners cannot be denied visits if such a deprivation will be detrimental to physical or mental health, the more relevant constitutional standard appears to be that there is no absolute right to visits. Consequently, reasonable limitations can be imposed on contacts with casual acquaintances, smuggling of weapons and contraband.

149. Bell v. Wolfish, 441 U.S. 520, 548-53 (1979), embodied in DOJ, supra note 11, § 12.02. See also Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980); Trapnell v. Rigginsby, 622 F.2d 290 (7th Cir. 1980) (sustaining requirement that nude and seminude photographs come from commercial sources, not persons well known to prisoner); Rich v. Luther, 514 F. Supp. 481 (W.D. N.C. 1981); In re Smith, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980).

150. Cf. MICH. ADMIN. CODE R. 791.6603(3) (1977); MICH. DEPT OF CORRECTIONS DIR. PD-DWA-64.03 (Feb. 1, 1976), restricting specific information about manufacturing weapons, explosives, incendiary devices, poisons or dangerous drugs; clearly inflammatory writings including but not limited to advocacy of disorder, violence or insurrection against correctional facilities or personnel; material describing or showing acts of homosexuality, sadism, violent sexual practice or unlawful sexual behavior; and detailed instruction in martial arts including judo, karate, aikido, kung fu and similar techniques.

151. LSOP, supra note 5, § 23-7.1(b)-(c). Procunier v. Martinez, 416 U.S. 396 (1974), required hearings before correspondence can be interrupted. This has been invoked in the setting of control over incoming publications. Hopkins v. Collins, 547 F.2d 503 (5th Cir. 1977).

152. See NAC CORRECTIONS, supra note 8, §§ 9.9, 16.14.

153. LSOP, supra note 5, § 23-6.2(a); see also DOJ, supra note 11, § 12.16; ACA-ACI, supra note 10, §§ 2-437, 4419, 4455.


155. [I]nstitutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on . . . visits. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude."


156. Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980) (authorities could bar visits by women under circumstances suggesting their relationship to prisoner was not conducive to rehabilitation); Hamilton v. Saxbe, 428 F. Supp. 1101, 1111-12 (N.D. Ga. 1976), aff'd sub nom. Hamilton v. Bell, 551 F.2d 1056 (5th Cir. 1977). There is obviously no protected claim of access to consenting sexual partners from among prisoners of the opposite sex, Dodson v. State, 268 Ind.
can be forestalled through reasonable security measures, and visitor attire can be subjected to reasonable restrictions. There is no right to conjugal visits, although some authorities intimate that contact visits may be a protected right at least for preadjudication detainees.

The Standards adopt a position consonant with current precedent that visits should be encouraged, subject to overriding concerns of institutional and public safety and order, through provision of reasonable visiting hours, including weekend and holiday times, for the convenience of visitors. No specific mention is made of conjugal visits, but it is recommended that extended visits between prisoners and their families in suitable accommodations should be allowed those not on home furlough status, which, in the exercise of administrative discretion, could accomplish the equivalent to conjugal visitation. Visiting facilities should be informal and should allow opportunities for physical contact. Under such circumstances, however, visitors may be subjected to nonintrusive forms of personal search. A preference is expressed for minimum visits of one hour each, with a possibility of cumulating time allotments to facilitate longer visits. This is important when family members must travel long distances to visit a prisoner. Prisoners in disciplinary segregation should have the same visitation rights as overall it. Visiting facilities should be informal and should allow opportunities for physical contact. Under such circumstances, however, visitors may be subjected to nonintrusive forms of personal search. A preference is expressed for minimum visits of one hour each, with a possibility of cumulating time allotments to facilitate longer visits. This is important when family members must travel long distances to visit a prisoner. Prisoners in disciplinary segregation should have the same visitation rights as


157. Magnetometers and like detection devices can be used in public buildings generally, McMorriss v. Alioto, 567 F.2d 897 (9th Cir. 1978), which presumably would extend to prison facilities; hand-carried items also are subject to visual inspection. United States v. Kelley, 393 F. Supp. 755 (W.D. Okla. 1975); State v. Colby, 263 S.C. 468, 210 S.E.2d 914 (1975). On submission to strip searches as a condition to visitation, see Wool v. Hogan, 505 F. Supp. 928 (D. Vt. 1981) (strip search requirement for visitor suspected of carrying contraband not unreasonable when metal detectors could not detect contraband like drugs carried beneath clothing); In re French, 106 Cal. App. 3d 74, 164 Cal. Rptr. 564 (1980) (could not suspend visiting privileges of five women who refused strip searches not shown to be reasonably related to institutional security). Before visitors can be subjected to other forms of search and seizure, adequate legal grounds must exist independent of the fact they are visitors—stop-and-frisk or personal search following a legal arrest being the most usual. State v. Custodio, 607 P.2d 1048 (Haw. 1980) (strip search reasonable); State v. Hall, 292 N.W.2d 749 (Minn. 1980).


159. McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), cert. denied, 423 U.S. 859 (1975). See also n.156 supra. It was held unreasonable to deny contact visits between preconviction detainees and their young children when suitable facilities were available to accommodate such visits. In re Smith, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980).


161. LSOP, supra note 5, § 23-6.2(b), cross-referencing § 23-1.1. See also DOJ, supra note 11, § 12.12; ACA-ACI, supra note 10, §§ 2-4380-81, -4385.

162. LSOP, supra note 5, § 23-6.2(c); see also DOJ, supra note 11, § 12.13; ACA-ACI, supra note 10, § 2-4384.

163. LSOP, supra note 5, § 23-6.2(c); see also DOJ, supra note 11, § 12.12; ACA-ACI, supra note 10, § 2-4383.

164. LSOP, supra note 5, § 23-6.2(d); see also ACA-ACI, supra note 10, § 2-4382.

165. LSOP, supra note 5, § 23-6.2(e). Visits with counsel, clergy and public officials are not to count against visiting periods and should be unlimited in number.
those in the general prison population, subject only to considerations of institutional security and order.\textsuperscript{166}

Although for the most part prisoners should be allowed to receive whomever they wish, subject to frequency limitations and scheduling requirements, the \textit{Standards} recognize that correctional authorities may disqualify for good cause certain people as visitors.\textsuperscript{167} Examples include abuse of visitation regulations on earlier occasions\textsuperscript{168} and reasonable suspicion that criminal activity may ensue.\textsuperscript{169} Exclusion of visitors is subject to prisoner grievance proceedings.\textsuperscript{170}

Many if not most American prisons are remote from metropolitan centers from which the bulk of their inmates are sentenced. Regardless of whether or not this poses a constitutional issue,\textsuperscript{171} prison administrators should do whatever they can to facilitate visits by providing local transportation and furnishing information about transportation alternatives.\textsuperscript{172}

6. Visits by Media Representatives and Groups

It is implicit if not express in American constitutional decisions that the right of prisoners to communicate with members of the public generally carries with it a right to contact the press and other communications media.\textsuperscript{173} It is doubtful that the first amendment supports a direct claim by communications media representatives to initiate interviews with prisoners whom they select,\textsuperscript{174} although an absolute ban on access to penal facilities by the media and public might produce a constitutional infringement.\textsuperscript{175} The \textit{Standards} endorse a position that correctional authorities should accommodate media and public group requests to visit correctional institutions, provided visits are conducted so as to safeguard the privacy and dignity of inmates and

\textsuperscript{166} Id. \S 23-6.3; see also DOJ, supra note 11, \S 12.14; ACA-ACI, supra note 10, \S\S 2-4227, - 4381.

\textsuperscript{167} LSOP, supra note 5, \S 23-6.2(d); see also DOJ, supra note 11, \S 12.12; ACA-ACI, supra note 10, \S 2-4381 (discussion).

\textsuperscript{168} See Patterson v. Walters, 363 F. Supp. 486 (W.D. Pa. 1973) (wife earlier had passed controlled substance to inmate husband).


\textsuperscript{170} LSOP, supra note 5, \S 23-6.2(d). In Rowland v. Wolff, 336 F. Supp. 257 (D. Neb. 1971), the court accepted as sufficient an administrative inquiry which concluded that female relatives in fact had introduced a weapon into the facility, even though it had not been discovered in the inmate relative's possession).

\textsuperscript{171} See Ali v. Gibson, 631 F.2d 1126 (3d Cir. 1980), cert. denied, 449 U.S. 1129 (1981) (reversing district court order voiding assignment to mainland federal prison making it very difficult for family members to visit him); Goodnow v. Perrin, 421 A.2d 1008 (N.H. 1980) (burdensome transfer to federal institution in another state, rendering it difficult to manage family visits, was not cruel and unusual punishment).

\textsuperscript{172} LSOP, supra note 5, \S 23-6.2(f); DOJ, supra note 11, \S 12.15; ACA-ACI, supra note 10, \S\S 2-4385 (discussion), -4386.

\textsuperscript{173} Pell v. Procunier, 417 U.S. 817 (1974), in disallowing a press claim to interview selected inmates, noted the availability of communications and visitations between prisoners and press representatives. Decisions indicating such a prisoner right to exist include Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1977); Taylor v. Sterrett, 532 F.2d 462, 481-82 (5th Cir. 1976); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).


\textsuperscript{175} Pell v. Procunier, 417 U.S. 817 (1974).
promote institutional security and order.\textsuperscript{176} Conversations conducted under such circumstances should be monitored only under emergency circumstances.\textsuperscript{177}

\textbf{H. Miscellaneous Claims or Rights}

1. Prisoner Publications

The first amendment does not guarantee prisoners freedom to publish intramural newspapers and the like,\textsuperscript{178} although administrators may well consider that a helpful step toward maintaining inmate morale. If prisoner publications are allowed, regulations controlling them are presumed valid.\textsuperscript{179} Some courts have ruled that administrative due process governs official censorship of contents,\textsuperscript{180} while others are satisfied with a more informal consultative approach.\textsuperscript{181} Contents improper in incoming publications, if proposed for internal dissemination,\textsuperscript{182} should be subject to censorship as a reasonable exercise of power in the interests of institutional security and discipline.\textsuperscript{183}

The ABA position is that newspapers and other communications media by and for prisoners should be encouraged within limits of resources and facilities.\textsuperscript{184} The expectation is that prisoners themselves must bear the costs, although naturally no bar is intended to use of public funds and facilities for the purpose. Advance review of content is appropriate so that persons or groups under attack can be given a contemporaneous opportunity to reply,\textsuperscript{185} and material can be excised which is not within first amendment protection or otherwise not publishable because it constitutes a substantial threat to institutional security.\textsuperscript{186} Objections to administrative interference with prisoner communications media should be lodged under grievance ma-

\textsuperscript{176} LSOP, supra note 5, § 23-6.4; see also DOJ, supra note 11, § 1.14; ACA-ACI, supra note 10, § 2-439.

\textsuperscript{177} The provision cross-refers to § 23-6.1(c)-(d), which requires reliable information that a particular communication may jeopardize public safety or institutional security or safety, or is being used in furtherance of illegal activity; if counsel or certain public authorities participate, a court order or authorization by law is necessary. See text accompanying notes 144-45 supra, 262 infra.


\textsuperscript{179} Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979).


\textsuperscript{182} See notes 141-42, 150 supra.

\textsuperscript{183} Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980); Blue v. Hogan, 553 F.2d 960 (5th Cir. 1977). This is the standard governing censorship of correspondence. Procunier v. Martinez, 416 U.S. 596 (1974).

\textsuperscript{184} LSOP, supra note 5, § 23-6.7(a). See also MODEL ACT, supra note 9, § 4-124; NAC CORRECTIONS, supra note 8, § 2.15; ACA-ACI, supra note 10, § 2-4459 (activities generally initiated by inmates under staff supervision).

\textsuperscript{185} To the extent prison broadcasting stations are subject to FCC regulations an opportunity for reply probably is necessary. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

\textsuperscript{186} LSOP, supra note 5, § 23-6.7(b).
2. Confidentiality of Prisoner Records

The ABA is concerned, as are accrediting organs, that prisoner records and other institutional data compilations specific enough to enable individual prisoners to be identified be held confidential unless: (a) a prisoner concerned consents; (b) the disclosure is made to an official or agency requesting in writing that the material be available in connection with a criminal investigation; (c) the material is solicited for statistical, research or reporting purposes in a form adequate to forestall identifying particulars concerning individual prisoners; or (d) disclosure is required by a valid court order. The Standards also endorse a claim by prisoners to have access to their files to inspect and copy information as long as it does not constitute diagnostic opinion which might seriously disrupt a program of rehabilitation, reveal sources of information obtained under a promise of confidentiality, create a possibility of physical or other harm to any other person, or jeopardize prison security if disclosed.

3. Voting

The fourteenth amendment by its terms permits states to forfeit the right of convicted felons to vote. Preconviction detainees not under a

187. Id §§ 23-6.7(c), -7.1. See text accompanying notes 210-26 infra.
188. LSOP, supra note 5, § 23-6.11(a).
189. DOJ, supra note 11, § 21.18; ACA-ACI, supra note 10, §§ 2-4120, -4125-26; ACA-ACA, supra note 10, §§ 73, 78.
190. Cf. decisions creating a psychotherapists' privilege against revealing information critical to a confidential therapeutic relationship. Alfred v. State, 554 P.2d 411 (Alaska 1976); In re "B", 482 Pa. 471, 394 A.2d 419 (1978). The Standards urge a privilege for all information given by prisoners to correctional employees serving in a counseling relationship unless the information bears on a contemplated crime or disclosure is required by court order. LSOP, supra note 5, § 23-6.11(c).
191. Cf. a similar restriction under the Freedom of Information Act, 5 U.S.C. § 552. Id § 552(b)(7)(D) states:
   (b) This section does not apply to matters that are:
   . . .
   (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . .
See Nix v. United States, 572 F.2d 998 (4th Cir. 1978).
192. LSOP, supra note 5, § 23-6.11. See also DOJ, supra note 11, § 21.19; ACA-ACI, supra note 10, § 2-4123.
valid felony conviction must, however, be given opportunities for absentee registration and voting.  

Nevertheless, whatever the federal constitutional doctrine, the position of the ABA is that conviction should not work a deprivation of the franchise, whether through automatic operation of law or the action or inaction of governmental officials. The Standards recognize a practical political problem which can result if convicted felon is allowed both to retain the vote and to establish voting residence in the locale of their incarceration. A large voting prisoner population in a rural county might well assert a controlling leverage in local government. Accordingly, prisoners should not be authorized to establish a voting domicile solely on the basis of physical presence in an institution, but instead should be allowed absentee voting rights in the place of their residence at time of conviction and incarceration.

4. Prisoner Organizations

Prisoners have absolute freedom to believe as they will and to express their beliefs in writing to others. They have no absolute right to form prisoner organizations and to engage in collective activity directed against prison administrations. Nor can they insist on opportunities to participate in activities of outside organizations not unreasonably viewed by correctional authorities as inimical to prisoner rehabilitation or institutional discipline and order.

The ABA standard adopts a somewhat more liberal stance than that state probationers to regain franchise while not extending the same benefit to successful federal probationers resident in the state).


196. LSOP, supra note 5, § 23-8.4.


201. Jones v. Prisoners' Labor Union, 433 U.S. 119, at 136. The Court noted, however, the desirability of contacts with outside organizations and individuals who may aid prisoner rehabilitation and postrelease reintegration in society. In contrast, the California Supreme Court has ruled that although prison union meetings can be prohibited in the reasonable interests of institutional security, In re Reynolds, 25 Cal. 3d 131, 159 P.2d 86, 157 Cal. Rptr. 892 (1979), or correspondence from a paroled union officer to incarcerated union members. In re Brandt, 25 Cal. 3d 136, 559 P.2d 89, 157 Cal. Rptr. 894 (1979). It is not a first amendment violation to allow volunteers from religious groups to visit jail inmates as long as their preaching is not forced on uninterested inmates. Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980).

202. LSOP, supra note 5, § 23-6.6(a). See also DOJ, supra note 11, § 1.13; ACA-ACI, supra note 10, § 2-4338. Subsection (b) covers the right of petition; see text accompanying notes 124-26 supra.
stitutional precedent requires, in that it encourages lawful organizations and their activities within prison confines, subject to considerations of public safety and institutional security and order. The position is clear, however, that the ABA does not endorse a right on the part of prisoners to strike or to take other concerted action to affect institutional conditions, programs or policies.

5. Personal Privacy

The ABA endorses a standard of privacy of living quarters for prisoners, consistent with their security classification, and freedom from sexual discrimination. These provisions must be administered against the statutory background of federal legislation forbidding sex-based discrimination and requiring bona fide occupational qualifications for assignments based on gender. Prisoner privacy cannot, therefore, be accomplished through a ban against assignments of staff members to custodial supervision of inmates of the opposite sex, but instead must rest on special training on supervising prisoners of the opposite sex as well as specialized assignments within broad employment categories.

I. Grievance Procedures

Although it is not clear that due process requires a grievance mechanism to resolve prisoner complaints, establishment of formal grievance procedures by legislative or administrative action is most advantageous to courts and administrators because thereafter a failure of prisoners to invoke them means they have not exhausted available administrative remedies. Exhaustion of administrative remedies is a prerequisite to federal habeas

203. E.g., guards can be stationed at religious meetings. United States ex rel. Jones v. Run
dle, 453 F.2d 147 (3d Cir. 1971); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967). Participation by nonprisoners should be encouraged. LSOP, supra note 5, § 23-6.6(a). See also DOJ, supra note 11, § 19.01; ACG-ACI, supra note 10, §§ 2-445-56.

204. LSOP, supra note 5, §§ 23-4.2, -6.6(c).

205. Id. § 23-6.14(b).

206. Id. § 23-6.15.


corpus,\textsuperscript{212} damage actions based directly on the eighth amendment,\textsuperscript{213} actions under the Federal Civil Rights Act,\textsuperscript{214} contempt actions alleging failure to comply with federal district court regulatory orders,\textsuperscript{215} or state appellate review of administrative activity.\textsuperscript{216} Grievance procedures also may generate a comprehensive record reducing the scope of or eliminating the need for federal district court hearings.\textsuperscript{217} Although every effort should be made to resolve prisoner grievances informally as far as possible,\textsuperscript{218} the ABA urges the adoption of grievance procedures to resolve complaints concerning institutional policies, rules, practices and procedures.\textsuperscript{219} These procedures should not serve as devices to review specific dispositions on the merits by internal adjudicative bodies like parole, classification and disciplinary boards.\textsuperscript{220} The intent of the Standards is that the latter determinations be reviewable through normal administrative review mechanisms established under a state administrative procedures act.\textsuperscript{221}

To facilitate and standardize grievance procedures, special forms should be provided so that grievants may note briefly the nature of their complaints, the administrators involved and the remedy sought.\textsuperscript{222} The essentials of a fair grievance proceeding are recapitulated in the Standards:\textsuperscript{223} (a) a written response to each grievance containing reasons for the decision; (b) reasonable time limits within which a response must be given;\textsuperscript{224} (c) advisory review of grievances; and (d) a method of resolving jurisdictional issues. Grievances should be possible over a broad array of issues,\textsuperscript{225} and prisoners should have adequate assurances against reprisals based on grievance filings.\textsuperscript{226}

Correctional administration within an institution should be subject to

\begin{itemize}
  \item \textsuperscript{212} Antonelli v. Ralston, 609 F.2d 340 (8th Cir. 1979) (federal prisoner); Mason v. Ciccone, 531 F.2d 867 (8th Cir. 1976) (requirement does not serve to suspend the writ).
  \item \textsuperscript{213} Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).
  \item \textsuperscript{217} Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).
  \item \textsuperscript{218} LSOP, supra note 5, § 23-7.1(a).
  \item \textsuperscript{219} \textit{Id.} § 23-7.1(b). \textit{See also DOJ, supra note 11, § 1.11; ACA-ACI, supra note 10, §§ 2-4343. \textit{Staff and inmates should participate in the design of grievance procedures. LSOP, supra note 5, § 23-7.1(d)(v).}
  \item \textsuperscript{220} LSOP, supra note 5, § 23-7.1(b).
  \item \textsuperscript{221} \textit{Id.} § 23-7.2(a). \textit{See also Frazee v. Iowa Bd. of Parole, 248 N.W.2d 80 (Iowa 1976) (parole revocation); Lawrence v. Michigan Dep't of Corrections, 88 Mich. App. 167, 276 N.W.2d 554 (1979) (major misconduct cases are "contested cases" reviewable in designated trial courts under the state act); contra, Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976) (major disciplinary proceeding in federal prison system).
  \item \textsuperscript{222} LSOP, supra note 5, § 23-7.1(c). Use of standard forms may be made a condition to availability of a grievance procedure. Mahler v. Slattery, 489 F. Supp. 798 (E.D. Va. 1980).
  \item \textsuperscript{223} LSOP, supra note 5, § 23-7.1(d).
  \item \textsuperscript{224} A recommended period is 30 working days; a failure to respond within that period should be taken as a denial of relief. \textit{Id.} § 23-7.1(d)(ii). A different response time may be necessary in emergencies. \textit{Id.} § 23-7.1(d)(iii).
  \item \textsuperscript{225} \textit{Id.} § 23-7.1(d)(vii).
  \item \textsuperscript{226} \textit{Id.} § 23-7.1(d)(vi).
inspection by administrative authorities at the departmental level who act outside institutional staff structure and usual channels of management control.\textsuperscript{227} The approved edition of the \textit{Standards} does not advocate establishment of the office of a special correctional ombudsman or mediator as did the first tentative draft.\textsuperscript{228} If such a functionary is established, however, oversight jurisdiction should extend to receipt and investigation of prisoner complaints.\textsuperscript{229}

II. CONTROL AND DISCIPLINE OF PRISONERS

A. \textit{Use of Force}

Incarceration inevitably requires the use of force to maintain discipline, security and order. Consequently, prison administrations should develop detailed policies governing use of all levels of force and provide for their periodic documented review and revision.\textsuperscript{230} There are certain legal limitations in light of which institutional policies must be administered. Prison administrators cannot use force of any kind, including chemical sprays and the like,\textsuperscript{231} for purposes of punishment because that would violate the eighth amendment ban against cruel and unusual punishment.\textsuperscript{232} A basic principle is that no more force may be used than is reasonably necessary to cope with the particular circumstances.\textsuperscript{233} Nondeadly physical force is the standard. Chemical devices are not to be used routinely and affected prisoners must be given immediate physical examinations and medical treatment.\textsuperscript{234} Deadly force, according to principles applied to law enforcement officers generally,\textsuperscript{235} may be used only in necessary defense of prison personnel, in-

\textsuperscript{227} \textit{Id.} \textsuperscript{§} 23-7.3(a). High-level departmental oversight is necessary even though other state agencies have investigating or reporting authority on the pattern of the federal General Accounting Office. \textit{Id.} \textsuperscript{§} 23-7.3 and commentary.

\textsuperscript{228} See LSOP (Tent. Draft No. 1), \textit{supra} note 4, at 574-78; \textit{MODEL ACT, supra} note 9, \textsuperscript{§} 4-201 and comment. It is, however, ABA policy that such systems ought to be established, a policy which did not require restatement in the \textit{Standards}. \textit{See 96 ABA REPORTS} 541-42 (1971); \textit{94 ABA REPORTS} 119-21 (1969).

\textsuperscript{229} LSOP, \textit{supra} note 5, \textsuperscript{§} 23-7.3(b).

\textsuperscript{230} \textit{Id.} \textsuperscript{§} 23-6.12. More detailed guidelines than those in LSOP may be found, e.g., in DOJ, \textit{supra} note 11, \textit{§§} 6.17-33, 21.08-09; ACA-ACI, \textit{supra} note 10, \textit{§§} 2-4096-98, 4185-91.


\textsuperscript{232} Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980); State ex \textit{rel.} K.W. \& C.W. v. Werner, 242 S.E.2d 907 (W. Va. 1978). However, an isolated attack by a guard is not punishment under the eighth amendment; the latter requires action for a penal or disciplinary purpose authorized by a higher prison authority. George v. Evans, 620 F.2d 495 (5th Cir. 1980); Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980).

\textsuperscript{233} Necessary physical contacts by custodial officers are privileged. Picariello v. Fenton, 491 F. Supp. 1026 (M.D. Pa. 1980).

\textsuperscript{234} Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980) (power to use force against individual prisoners is more limited than to quell general disturbances).

mates or other persons or in forestalling escape. In actual or threatened emergencies, inmates can be physically confined to quarters until institutional order is assured.\textsuperscript{236} Personal restraints like handcuffs, irons and straitjackets are to be used only if necessary to prevent individual prisoners from escaping during transfer or injuring themselves or others.\textsuperscript{237}

The Standards essentially restate these principles.\textsuperscript{238} In particular, instances should be minimized in which physical or life-endangering force need be invoked.\textsuperscript{239} Deadly force\textsuperscript{240} can be used to prevent escape from facilities used primarily to house felony convicts unless the employee using that force actually knows either that the escaping person has not been charged with or convicted of a felony involving violence, or that the escapee is unlikely to endanger human life or inflict serious bodily harm on someone if not prevented from escaping. If an institution houses misdemeanants or preconviction detainees, deadly force necessary to forestall escape can be used only if the user of the force knows there is a substantial risk that the escaping individual will cause death or serious bodily harm unless prevented from escaping, or believes in the exercise of on-site professional judgment that lesser force would fail or endanger other lives.\textsuperscript{241} Deadly force cannot be used to prevent destruction of property or maintain institutional security unless there is an independent basis in the law of the jurisdiction governing self-defense or defense of others.\textsuperscript{242} Whenever force of any sort is used, correctional administrators should require reports which should be promptly reviewed for factual sufficiency, supplemented by additional factual investigations if needed.\textsuperscript{243}

\section*{B. Search and Seisure}

Imprisoned persons have a much reduced scope of constitutional protection against various forms of search and seizure, compared to citizens in free society, because of supervening considerations of institutional security and order and a need to prevent introduction of contraband substances into a

\begin{itemize}
  \item \textsuperscript{237} Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979); Picariello v. Fenton, 491 F. Supp. 1026 (M.D. Pa. 1980). Drugs should never be used as a restraining mechanism for security purposes. DOJ, supra note 11, § 6.18.
  \item No due process administrative hearing is required to "lock down" a penal institution for several months after a period of rioting. Hayward v. Procunier, 629 F.2d 599 (9th Cir. 1980).
  \item LSOP, supra note 5, § 23-6.12(a). A corollary is that an appropriate array of control devices and weapons should be provided within an institution, \textit{id.} § 23-6.12(b), and regularly inspected, \textit{id.} § 23-6.12(c); care should be exercised in the assignment of staff to positions in which force, including deadly force, may have to be used, and proper entry and ongoing education must be provided for and participated in by persons receiving such assignments. \textit{id.}
  \item \textsuperscript{239} Id. § 23-6.12(a)(i).
  \item Deadly force is defined to include "force that a trained and authorized professional employee uses with the purpose of causing, or which he or she knows will create a substantial risk of causing, death or serious bodily harm." \textit{id.} § 23-6.12(a)(iii).
  \item \textsuperscript{241} Id. § 23-6.12(a)(ii)(A)(2). Note that what is contemplated is a good-faith subjective evaluation by the correctional employee concerned, not an objective reasonable person standard as in orthodox criminal law.
  \item \textsuperscript{242} Id. § 23-6.12(a)(ii)(B). Unreasonable interpretations of circumstances would render correctional employees criminally liable if death or physical injury of a prisoner or another ensued. See Model Penal Code §§ 3.04 (P.O.D. 1962), 210.4 (1981).
  \item LSOP, supra note 5, § 23-6.12(d).
\end{itemize}
prison setting. Therefore, there is no requirement that advance judicial authorization be obtained before prisoner living quarters can be searched, or sanitation or safety inspections conducted. Nor does the fourth amendment require that prisoners be physically present during search of living quarters or personal property.

The Standards expand the constitutional minima in some respects. No special authorization of any sort is required for searches of areas of an institution other than prisoner living quarters, and routine periodic visual inspection of prisoner living areas can be undertaken by correctional authorities, without specific advance authorization, to confirm compliance with health, safety and security regulations. Both routine and random shakedown inspections can be conducted without a special underlying cause but should be authorized in advance by the chief or acting chief executive of an institution. If, however, an intrusive living quarters search is neither routine nor random, but is focused on an individual, the ABA recommends advance written authorization by a supervisor of the employees carrying out the search, based on a reasonable belief that contraband or other prohibited material will be found. Immediate search can be made if a correctional officer reasonably believes material which is sought would be disposed of while the otherwise necessary prior approval is obtained. All searches of prisoner quarters and possessions should be conducted so that damage to property and invasion of privacy are kept to a minimum. Written reports should be prepared concerning all searches for which advance authorization

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246. LSOP, supra note 5, § 23-6.10(a).

247. Id. § 23-6.10(b).

248. Id. § 23-6.10(c).

249. The Standards do not define contraband in this context and other contexts like inspection of correspondence under § 23-6.1. The Supreme Court used a formulation of "money, drugs, weapons, and other contraband," Bell v. Wolfish, 441 U.S. 520, 559 (1979), and state courts have approved and applied statutory definitions like "any tool or other thing that may be used to facilitate [escape] or any other thing which a person confined in official custody is prohibited by statute or regulation from making or possessing," ME. REV. STAT. tit. 17-A, § 756 (Supp. 1977); State v. Bishop, 392 A.2d 20 (Me. 1978), and "any article or thing which a person confined . . . is prohibited by statute, rule, regulation or order from obtaining or possessing, and whose use would endanger the safety or security of such institution or any person therein." OR. REV. STAT. § 162.135(1) (1977); State v. Meyer, 283 Or. 449, 583 P.2d 553 (1978).

250. LSOP, supra note 5, § 23-6.10(d).

251. Id., proviso.

252. Id. § 23-6.10(e). Intentional or negligent deprivation of prisoner property does not violate the fourteenth amendment unless it is accomplished without due process of law, which is not the case as far as the Federal Civil Rights Act is concerned unless there is no state tort remedy available to prisoners. Parratt v. Taylor, 101 S. Ct. 1908 (1981).
is required or which result in seizure of contraband or other forbidden material. If property is taken, a copy of the report or a portion of it should be given an affected prisoner as a receipt.253

Physical searches of prisoners are indispensable in many situations, for example, following transportation outside institutional confines or contact visits. The Supreme Court found no constitutional infringement in visual inspections of body cavities following contact visits,254 although there might be an infringement of personal privacy if searches of that sort are not conducted in private by custodial officers of the same sex.255 The Standards urge detailed regulation of physical searches through institutional rules. Noninvasive sensors instead of body searches should be used whenever possible.256 Pat-down searches, however, are appropriate to determine whether prisoners are carrying contraband or other prohibited material.257 Strip searches and visual inspections of body cavities ought to rest on articulable suspicion that a prisoner is carrying contraband, etc.258 Digital or instrumental inspection of anal or vaginal cavities should be authorized in a written document from the chief executive officer of an institution embodying a factual basis supporting a reasonable belief that the prisoner in question is secreting contraband or other prohibited material there.259 The recommendations concerning written reports and receipts apply in this setting also.260

The monitoring of oral communications must rest on reliable information that a particular communication may jeopardize the safety of the public or the safety or security of a correctional institution, or is being used to further illegal activity.261 There may, however, be a statutory bar to monitoring telephone conversations without the express permission of one of the parties to the conversation or a valid court order.262

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254. Bell v. Wolfish, 441 U.S. 520, 558 (1979). In Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980), the court expressed concern over strip searches of prisoners in administrative segregation before and after noncontact visits.
256. LSOP, supra note 5, § 23-6.10(f)(i).
257. Id. § 23-6.10(f)(ii).
258. Id. § 23-6.10(f)(iii). Such searches should be conducted by a supervisor in a private place out of the sight of others, except that the prisoner may request the presence of another available officer of the institution. Sims v. Brierton, 500 F. Supp. 813 (N.D. Ill. 1980), held it improper to require a prisoner to submit to anal cavity inspections after visits with a law student intern aiding him in preparing a deposition, in the absence of a showing of abuse of regulations by such interns.
259. LSOP, supra note 5, § 23-6.10(f)(iv). Such searches should be conducted by a medically trained person, other than another prisoner, in the prison hospital or another private place; a prisoner may request the presence of another available officer of the institution. Medically-trained personnel may object to being used for security rather than therapeutic purposes, so that an institution may have to train custodial staff members in the necessary techniques. See DOJ, supra note 11, § 6.13 (discussion).
260. LSOP, supra note 5, § 23-6.10(g); see note 253 supra.
261. LSOP, supra note 5, § 23-6.1(c); more stringent limitations govern communications with counsel and public officials. Id. § 23-6.1(d).
262. Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979); contra, United States v. Paul, 614 F.2d 115 (6th Cir.), cert. denied, 446 U.S. 941 (1980) (distinguishing Walonis on the basis it was
C. Disciplinary Rules and Their Enforcement

Penal statutes provide insufficient criteria for operation of prisons. Detailed rules and regulations are required incorporating sanctions for disobedience. There are two dimensions to this: norms must be made known to those regulated by them, as correctional officials cannot condemn without prior notice what they find improper; and regulations must be specific enough that inmates know what is prohibited. Sanctions also should be precise for each infraction.

The Standards urge correctional administrators to promulgate clear, written rules governing prisoner conduct. Clarity requires a specific definition of offenses, schedules of minimum and maximum sanctions applicable to each infraction, and specific criteria for disciplinary and classification systems. In particular, a principle of parsimony in sanctioning is advocated: the least severe punishment appropriate to each infraction is all that should be imposed. It is essential that all prisoners receive personal notice of rules and sanctions in a language they can understand, upon entry into an institution. Supplementary oral explanations should be given if needed.

More legal problems have arisen from enforcement than from promulgation of disciplinary rules. Misconduct which also amounts to a crime poses an especially sensitive problem. Prison discipline is not criminal punishment, so double jeopardy does not bar pursuit of both administrative discipline and criminal prosecution. Nevertheless, investigative acts by prison authorities, if violative of the fourth, fifth or sixth amendment, can render evidence inadmissible and thus frustrate prosecution. There also is a self-incrimination problem under such circumstances. Although prison hearing officers and boards may consider adversely to prisoners a failure to

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263. See State ex rel. Gillespie v. Kendrick, 265 S.E.2d 537 (W. Va. 1980) (must publish jail rules according to which infractions are determined and sanctioned).

264. See Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 759 (Iowa 1979) (prison rules must be intelligible); cf. Procunier v. Martinez, 416 U.S. 396 (1974) (Court invalidated mail regulations forbidding statements that "magnify grievances," "unduly complain" or "belittle the[ ] staff or our judicial system or anything connected with [the] Department of Corrections," or which contain "disrespectful comments" or "derogatory remarks").

265. LSOP, supra note 5, § 23-3.1. See also DOJ, supra note 11, § 10.01; ACA-ACI, supra note 10, § 2-4345. The first tentative draft of the Standards called for active prisoner participation in rule-making. LSOP (Tent. Draft No. 1), supra note 4, at 572-73. The approved version, however, goes no further than to endorse promulgation of disciplinary and other rules through procedures established under an administrative procedure act, LSOP, supra note 5, § 23-7.2(a); prisoners should be given notice of rules, id. § 23-7.2(b), which in practice means under a state act they will have an opportunity to submit objections or proposed changes before final rule adoption.

266. LSOP, supra note 5, § 23-3.1(a)(i). A similar standard of proportionality appears in DOJ, supra note 11, § 10.01.

267. LSOP, supra note 5, § 23-3.1(b). See also DOJ, supra note 11, § 10.02; ACA-ACI, supra note 10, §§ 2-4346, -4395. Institution personnel also must be conversant with rules, their rationale and available sanctions. DOJ, supra note 11, § 10.03; ACA-ACI, supra note 10, § 2-4347.

refute data showing a violation, statements exacted from prisoners at official instance are compelled and cannot be used by the prosecution during subsequent criminal proceedings (other than perhaps for impeachment). Accordingly, although prosecuting officers legally cannot forbid prison administrators from investigating and punishing independently criminal infractions of prison disciplinary rules, the Standards endorse the principle that prison administrators should take the initiative of laying such matters before local prosecutors so that a prompt joint determination can be made on whether or how to proceed. In the interim, prisoners who may be or have been prosecuted criminally can be confined to quarters or transferred to a higher security classification.

Disciplinary proceedings, at least those which may result in loss or forfeiture of good time credits and thus prolong confinement, are subject to several federal constitutional requirements. First, "advance written notice of the claimed violation" is required. Second, there must be a hearing at which a prisoner respondent may "call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Reasonable limits may be placed on this claim to prevent repetitive statements or to guard against a risk of reprisal or an undermining of authority. Such a hearing, however, is not intended to be adversary in the same sense as a criminal proceeding, so that prisoners have no right to confront sources of adverse data, and prison authorities need not justify to a prisoner respondent their decision not to summon a particular witness.

The Supreme Court refused to require representation by legal counsel in such hearings. However, in instances of illiterate inmates or matters

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271. LSOP, supra note 5, § 23-3.3(a). See also DOJ, supra note 11, § 10.07; ACA-ACI, supra note 10, § 2-4344. Prosecutors should reach a charging decision promptly; in the interim, correctional authorities should exercise care in continuing internal investigations and disciplinary action lest the rights of public and the right of the prisoner to a fair criminal trial be infringed. There is no responsibility, however, to suspend disciplinary proceedings.
272. LSOP, supra note 5, § 23-3.3(b). A ninety-day maximum period for special handling is recommended before formal charges are filed; after charging, special status may continue until a criminal proceeding is concluded. After disposition of criminal charges, prisoners may be reclassified and, if disciplinary proceedings were suspended during criminal proceedings, administrative action may continue. Id. § 23-3.3(c).
275. Id. at 566; Williams v. Davis, 386 So. 2d 415 (Ala. 1980); Cruz v. Oregon State Penitentiary, 48 Or. App. 473, 617 P.2d 644 (1980) (officials can take witness request as a request for an administrative investigation of prisoner allegations); State ex rel. Irby v. Israel, 95 Wis. 2d 697, 291 N.W.2d 643 (Wis. App. 1980). Prisoners have been held to have a claim to discovery of exculpatory materials by analogy to United States v. Agurs, 427 U.S. 97 (1976), and Brady v. Maryland, 373 U.S. 83 (1963). Chavis v. Rowe, 613 F.2d 1281 (7th Cir. 1981).
presenting complex issues on which an inmate, unaided, probably could not collect and present data necessary for an adequate comprehension of the case, there can be a claim to aid from another inmate or, if that is not allowed, to adequate substitute assistance "in the form of help from the staff or from a sufficiently competent inmate designated by the staff."277 This is so even though the alleged misconduct also is criminal and the right to counsel will attach in the course of ensuing criminal proceedings.278

Decision makers must be independent of the officials or employees responsible for bringing charges.279 An adjudicator must prepare "a written statement . . . as to the evidence relied upon and the reasons for the disciplinary action taken."280 In an unusual situation, certain data may be omitted from findings because of a concern for individual or institutional safety, but if this is done an adjudicator should "indicate the fact of the omission" in the findings.281 Judicial review is not constitutionally required.282

For the most part, the ABA Standards rest on this constitutional law. They continue to differentiate between hearings for minor and major infractions, not essaying a black-letter test to distinguish them.283 Other standards-generating bodies have abandoned the distinction because of the practical administrative problems it presents.284 All disciplinary hearings require written notice within a recommended seventy-two hours after an incident, followed within a recommended twenty-four additional hours by service of copies of any other written data a tribunal may consider.285 Hearings should ensue within a recommended three days after notice.286 Respondents have the right to be present and to speak in personal defense;287 they also have the right to a written decision based on a preponderance of the evidence, specifying reasons, promptly and in no event later than a recommended five days after hearings.288 Further review by the chief executive

281. Id. at 565.
283. LSOP, supra note 5, § 23-3.2 passim. This builds on the federal constitutional doctrines described in text accompanying notes 273-76 supra. No test is attempted because courts make their own ad hoc determinations whether McDonnell et al. govern. McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).
284. DOJ, supra note 11, ch. 10; ACA-ACI, supra note 10, at 91 (introductory note). Minor matters should be resolved informally if at all possible. DOJ, supra note 11, § 10.05; ACA-ACI, supra note 10, § 2-4349.
285. LSOP, supra note 5, § 23-3.2(a)-(i), (b). See also DOJ, supra note 11, §§ 10.05, 08-11; ACA-ACI, supra note 10, §§ 2-4351, 4357-4359. Special prehearing detention is dealt with in LSOP, supra note 5, §§ 23-3.2(e); DOJ, supra note 11, §§ 10.12-13; ACA-ACI, supra note 10, § 2-4353.
286. LSOP, supra note 5, § 23-3.2(a)-(ii), (b). See also DOJ, supra note 11, § 10.12; ACA-ACI, supra note 10, § 2-4359.
287. LSOP, supra note 5, § 23-3.2(a)-(iii), (b). DOJ, supra note 11, § 10.14 and ACA-ACI, supra note 10, § 2-4360 contemplate the same right unless respondent behavior justifies exclusion (or under DOJ the right is waived in writing).
288. LSOP, supra note 5, § 23-3.2(a)-(iv), (b). See also DOJ, supra note 11, § 10.17; ACA-ACI, supra note 10, §§ 2-4364-65.
officer of the institution then should be available to an adjudicated respondent within a relatively short period.\textsuperscript{289} All adjudicators must be impartial.\textsuperscript{290}

The Standards incorporate the essence of the McDonnell representation test.\textsuperscript{291} Prisoner respondents should have access to legal advice and counseling in advance of hearings governing the length of imprisonment, but should have no guaranteed right to representation by legal counsel during such hearings.\textsuperscript{292}

In major disciplinary hearings respondents may request the attendance of anyone in the "local prison community" with relevant information and may examine or cross-examine such a person, subject only to limitation if the data sought are cumulative. A respondent may be excluded during witness examination if the physical safety of a person would be endangered by the presence of a particular witness or a disclosure of the witness's identity.\textsuperscript{293} If disciplinary charges are not confirmed after hearings, all references to the charges and their aftermath must be physically removed from files and the fact they were brought cannot be used adversely to a prisoner in any way.\textsuperscript{294}

### III. Civil Disabilities

Part VIII of the Legal Status of Prisoners Standards covers civil disabilities, a topic which might well have been lodged in the context of the Sentencing Alternatives and Procedures Standards,\textsuperscript{295} but was not. The ABA endorses a basic policy that, with rare exceptions, all laws or regulations subjecting convicted persons to collateral disabilities or penalties, or deprivation of civil rights, should be repealed.\textsuperscript{296} To the extent such collateral consequences of convictions remain in force, no individual should be subjected to them unless an administrative hearing is held beforehand to establish that they are necessary to advance an important governmental or public interest.\textsuperscript{297} Disabilities should be imposed only for fixed periods, at the expiration of which an affected citizen should have a claim to reconsideration of the appropriateness of the penalty or disability.\textsuperscript{298} In either event, the burden should rest on

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\textsuperscript{289}. \text{LSOP, supra note 5, § 23-3.2(a)(v); appeal should be lodged within a recommended five days and resolved within 30, and enforcement of sanctions should be suspended during appeal unless individual safety or security otherwise will be affected adversely. See also DOJ, supra note 11, § 10.19; ACA-ACI, supra note 10, § 2-4368 (and § 2-4366, calling for routine review by wardens of all hearings and sanctions to assure conformity with policy and regulations).} \\
\textsuperscript{290}. \text{LSOP, supra note 5, § 23-3.2(c). See also DOJ, supra note 11, § 10.09; ACA-ACI, supra note 10, § 2-4361; note 279 supra.} \\
\textsuperscript{291}. \text{See text accompanying notes 277-78 supra.} \\
\textsuperscript{292}. \text{LSOP, supra note 5, § 23-3.2(a)(iii), commentary and proviso. Both DOJ, supra note 11, § 10.16 and ACA-ACI, supra note 10, § 2-4362 contemplate assistance by staff members selected by prisoner respondents.} \\
\textsuperscript{293}. \text{LSOP, supra note 5, § 23-3.2(b). See also DOJ, supra note 11, § 10.15; ACA-ACI, supra note 10, § 2-4363.} \\
\textsuperscript{294}. \text{LSOP, supra note 5, § 23-3.2(d). See also DOJ, supra note 11, § 10.20; ACA-ACI, supra note 10, § 2-4367.} \\
\textsuperscript{295}. \text{STANDARDS FOR CRIMINAL JUSTICE, supra note 1, ch. 18.} \\
\textsuperscript{296}. \text{LSOP, supra note 5, § 23-8.1.} \\
\textsuperscript{297}. \text{Id. § 23-8.3(a)-(b).} \\
\textsuperscript{298}. \text{Id. § 23-8.3(c). Even during the initial stated period, an individual under disability}
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those urging a disability to prove a need for it. 299 Collateral consequences also can be forestalled or abrogated through expungement of convictions, which the ABA endorses in all criminal cases, not only those in which proba-

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ABA advocacy of abrogating restrictions on voting rights based on penal convictions has been mentioned. 301 The ABA rejects as well the following restrictions: loss of entitlements to initiate and defend civil actions under one's own name; eligibility to serve on juries except during actual confinement, probation or parole; power to execute judicially enforceable documents and agreements; and status to serve as court-appointed fiduciary except during actual confinement. 302 Nor should convicted persons lose their eligibility to marry 303 or to terminate marriage, 304 be deprived of parental rights, including the right to grant or withhold consent to adoption, or be disabled from adopting children. 305 Property and financial rights, including vested pension eligibility, should remain unaffected by criminal convictions, 306 and efforts by insurance carriers to impose special premium rates on convicted persons should be officially resisted unless a basis for such rate differentiations is established before state regulatory agencies. 307 The Standards recommend a maximum five-year period beyond which criminal convictions should not be revealed by commercial reporting agencies providing data in connection with credit or employment. 308

Loss of eligibility to engage in various occupations may well frustrate whatever rehabilitation or deterrence has been accomplished through conviction and enforcement of penal sanctions. Therefore, the ABA position is that barriers to employment because of criminal convictions must rest on the existence of a substantial relationship between adjudicated criminal activity and later employment. 309 Legislatures should prohibit unreasonable barri-

should be able to obtain relief by showing the disability no longer effectuates the governmental interest for which it was imposed originally.

299. Id. § 23-8.3(d). If, however, an affected person alleges a conviction has unfairly affected eligibility for private employment, he or she bears the burden of persuasion. See id. § 23-8.8(a)-(b).

300. Id. § 23-8.2.

301. See text accompanying notes 194-97 supra.

302. LSOP, supra note 5, § 23-8.3.


304. Conviction or confinement alone should not amount to abandonment for purposes of divorce or child custody, and convicted persons should be given appropriate aid in protecting their marital and parental status during confinement. LSOP, supra note 5, § 23-8.6(b).

305. Id. § 23-8.6(a).

306. Id. § 23-8.7(a)-(b).

307. Id. § 23-8.7(c).

308. Id. § 23-8.7(d). Limited coverage of the problem is found in federal legislation, 15 U.S.C. § 1681c(a)(5) (1976), but only if a credit line is for $50,000 or under or employment is at an annual salary of $20,000 or less.

309. LSOP, supra note 5, § 23-8.8(a). Factors bearing on employability include likelihood of opportunity to commit similar future offenses, time elapsed since conviction, conduct following
ers by both private and public employers against hiring criminal convicts. The extent to which removal of disabilities is accepted in a jurisdiction is an index of the degree to which the concept of either rehabilitation or measured retribution has gained public acceptance.

The Future Role of the Standards

Implementation of most of the Standards can be accomplished through new legislation and rules of court governing criminal proceedings. For the most part, revision machinery is either under the control of judges and lawyers or receptive to recommendations from the legal profession. This is not as true of changes in correctional administration, a field in which there has been relatively little formal involvement by the legal profession and which has come under serious judicial scrutiny only in the past decade or so. Establishing a functional role in correctional reform is much less easy for the ABA to accomplish than in more directly legal fields.

It is unlikely as well that the ABA can gain a significant foothold in the recent American phenomenon of accreditation of correctional institutions, systems and programs. That process was launched less than a decade ago by the American Correctional Association and is now the responsibility of the Commission on Accreditation for Corrections. The criteria for accreditation have been established from within the world of corrections administration. The ABA Standards are unlikely to be referred to other than as background against which accreditation panels can determine sufficiency of compliance with the more generally phrased ACA Standards.

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Conviction, the circumstances of crime and offender and the likelihood such circumstances will reoccur.

310. Id. § 23-8.8(b). Protective legislation should cover denial of and discharge from employment; denial of fair employment conditions, pay or promotion; rejection of membership in unions or other organizations affecting employment; and denial or revocation of licenses required for a profession or occupation. The latter also is covered in id. § 23-8.8(f), which urges a substantial relationship between the crime and the occupational activity at issue.

311. Id. § 23-8.8(d). “Public employment” is defined in id. § 23-8.8(e). Conviction may justify forfeiture of elective or appointive office, held at the time of conviction, but should not automatically bar eligibility for future elective or appointive public office. Id. § 23-8.8(c).

312. See generally COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION: BLUEPRINT FOR CORRECTIONS (1978); Sechrest, The Accreditation Movement in Corrections, 40 FED. PROB. No. 4, (Dec. 1976). By the end of 1980, nearly 600 correctional facilities and programs had received or were engaged in preliminary procedures required for accreditation. Commission on Accreditation for Corrections, 1980 Annual Report (1981). The ten volumes of ACA Standards, supra note 10, provide compliance criteria in reference to which accreditation is determined. Applicant institutions or agencies, after being granted candidate status, first conduct an elaborate self-evaluation to determine probable compliance levels. They next request a site inspection by a team of three or four professional consultants retained by the Commission. The team prepares a comprehensive report on compliance status which then is reviewed by a panel of five commissioners which meets with representatives of a candidate institution, considers appeals against audit team recommendations, and confers a three-year accreditation on agencies in compliance with a stated number of standards. The entire commission serves as an appeal body if objections are made to denial or deferral of accreditation. Agencies must present for approval action plans covering standards with which they are in noncompliance. Recertification requires repetition of the entire process of self-study, field audit and panel evaluation. Although in its early years the accreditation process was financed chiefly through LEAA and private foundation grants, the fees paid by candidate agencies now come close to meeting all expenses.
Consequently, a more limited scope for ABA implementation activity may prove possible in the instance of LSOP than is true of all other standards except possibly the Urban Police Function Standards. Its impact may be twofold only. One is as a statement of policy by the ABA itself, so that future activities of ABA committees, sections and divisions can be guided by House of Delegates policy determinations. If the LSOP Standards merit revision, in the view of any ABA entity, the Standing Committee offers the mechanism through which recommendations for changes in black-letter text can be transmitted to the House of Delegates for consideration. The second is to provide guidelines for courts in state or federal litigation attacking prison or jail conditions. The ABA Standards are recognized by many correctional authorities as relatively more detailed on legal issues and therefore of greater intrinsic value as norms than the more succinctly phrased ACA Standards. They possess the cachet of the world's largest association of legal professionals. Therefore, to the extent a jail, prison or prison system in fact complies with the (minimum) recommendations set forth in LSOP, it is exceedingly unlikely that a court will find a deprivation of rights guaranteed by the federal or a state constitution. To the degree a correctional facility or program falls short of compliance, there is the risk that the ABA Standards, as well as other standards and guidelines, will be invoked by courts in placing legal restrictions on correctional administration. Thus, time may establish that the greatest leverage favoring use of LSOP by prison administrators and legislators will stem from their use as criteria by courts engaged in constitutional litigation.

313. Standards for Criminal Justice, supra note 1, ch. 1.
315. The Standards urge state legislators to implement their contents and provide sufficient resources to ensure implementation of prisoners' legal rights. LSOP, supra note 5, § 23-7.4.