ARTICLES

LIFE AT LORTON: AN EXAMINATION OF PRISONERS' RIGHTS AT THE DISTRICT OF COLUMBIA CORRECTIONAL FACILITIES

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> [I]t is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within [prisons] — the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two, or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick and injured who cannot obtain medical care. . . . For those who are incarcerated within [these prisons], these conditions and existences form the content and essence of daily existence.[1]

While much disagreement remains over the purpose of incarceration and the treatment of those incarcerated, it is now well-settled that prisoners enjoy limited constitutional and statutory protection while incarcerated. It is not clear, however, that the progress in the law regarding prisoners' rights is reflected in the nation's prisons and the way in which these institutions actually deal with the nearly one million Americans who are incarcerated.[2] This article explores

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[1] Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980).

[2] At the end of 1994, the number of prisoners under the jurisdiction of federal or state correctional authorities reached a record high of 1,055,073. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE AND FEDERAL PRISONS REPORT RECORD GROWTH DURING LAST 12 MONTHS 5 (1995). When one includes individuals also on

the tension between the state of prisoners' rights law and the application of this law in a prison setting, by focusing on the District of Columbia Department of Corrections.[3] By examining a particular correctional system, this article aims to illustrate: (1) how a prison functions in actuality; and (2) how well the rights and living conditions of a group of prisoners stack up relative to the directives of the law.[4]

Section I of this article describes the facilities that comprise the District of Columbia correctional system. The sections that follow provide brief synopses of the current state of the law in several key areas of prisoners' rights, followed by an assessment of how the legal standards apply to those incarcerated at Lorton. Section II focuses on inmates' rights to freedom of speech, association and religion under the First Amendment. Section III explores inmates' Fourth Amendment rights related to searches and seizures. Section IV provides an overview of inmates' right to privacy, including the right to marry, and discusses the issue of AIDS in prison. Section V discusses inmates' claims under the Eighth Amendment, specifically those dealing with medical care, the use of force in disciplinary matters, and overcrowding. Section VI examines inmates' rights to procedural due process under the Fourteenth Amendment. Section VII examines inmates' right to equal treatment. Section VIII examines inmates' right to the assistance of counsel. The article concludes in

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parole or probation at the end of 1994, the U.S. correctional population for 1994 exceeded five million. This amounts to nearly 2.7 percent of the adult population of the United States. *U.S. Correctional Population Exceeds 5 Million*, WASH. POST, Aug. 28, 1995, at A4.

[3] All but two of the District of Columbia's correctional facilities are located in Lorton, Virginia. Unless this article refers to a particular facility, the term "Lorton" includes all the facilities located in Lorton, Virginia, as well as the D.C. Jail and the Correctional Treatment Facility located in Washington, D.C.

[4] My decision to focus on the District of Columbia correctional system [hereinafter "Lorton"] is based solely on my proximity to the facilities and my exposure to them. My assessment of what life is like for those incarcerated at Lorton is based, in part, on my observations while a law student instructor and a Clinical Fellow in the Street Law: Corrections Clinic at Georgetown University Law Center. The Street Law: Corrections Clinic links Georgetown law students with local correctional facilities, where the students teach the inmates a 12-week course in basic law. In addition to informal dialogue with numerous inmates during my numerous visits to Lorton, I also conducted lengthy interviews with groups of inmates and two administrators at Maximum and Central facilities at Lorton. My goal in writing this article is to present what life is like for those incarcerated at Lorton, to the extent this is possible without having been incarcerated there myself. As can be expected, the prisoners' accounts of the conditions of their confinement differ significantly in many respects from the adminstrators' perspectives. While I endeavor to present both sides whenever possible, I am inclined to credit the inmates' accounts since they are the ones who actually experience prison life. It is possible that the inmates' accounts of prison life are not always objectively accurate, but they are genuine and, therefore, a true rendering of what they feel and experience at Lorton.

Section IX with the author's own thoughts on how the treatment of prisoners at Lorton measures up to the legal standards for prisoners' rights.

I. DESCRIPTION OF LORTON

A. *Background*

In 1916, the D.C. Department of Corrections (D.O.C.) constructed a prison complex on a 3,000-acre site in the sprawling countryside of rural Virginia.[5] The complex consists of seven facilities, housing misdemeanor and felony offenders, with each facility classified at minimum, medium or maximum security levels. The D.O.C. also manages the Central Detention Facility ("Jail") and the Correctional Treatment Facility (CTF) as well as ten community correctional centers ("halfway houses"), all of which are located in the District of Columbia.[6]

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[5] The plot of land is federal land that was provided to the District for the purpose of operating its correctional system. DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, DEPARTMENT OF CORRECTIONS AT A GLANCE 1 (1995).

[6] Maximum Security, the highest security prison in the system, houses male inmates with the highest security designation of S-5. The facility is commonly referred to as "the Wall," due to the 27-foot-high perimeter of the facility, complete with four towers that are staffed around the clock. Prisoners are incarcerated in single cells in seven cell blocks. One of the cell blocks is for inmates in "general population," while the other six are for inmates who are high security risks, who have been placed in administrative segregation (otherwise known as "the hole," or "lockdown"), or who require protective custody or special handling. Movement in the prison is extremely limited. Most prisoners (anyone not in general population) cannot leave their cells unless they are in restraints (i.e., handcuffs and/or shackles and/or waist chains). Maximum Security has a court-ordered population cap of 645 prisoners. D.C. Dep't of Corrections, Department Order No. 5010.7 (1986); Jonathan M. Smith, *Enforcing Corrections-Related Court Orders in the District of Columbia*, 2 DIST. COLUM. L. REV. 237 app. B at 237-38 (1994).

Both Central Facility and Occoquan house male inmates with an SLD-4 security designation (High Security). Both facilities are surrounded by a double fence and are considered medium security prisons. The housing at both Central and Occoquan consists of large, barracks style dormitories. Central has a court-ordered population cap of 1326 prisoners, while Occoquan (the largest facility at Lorton) has a court-ordered population cap of 1760 prisoners. *Id.* at 276-77.

Youth Center, secured by a single fence, houses both SLD-4 (High Security) and SLD-3 (Medium Security) male inmates. Young adult offenders, ages 18 to 22, who are sentenced under the D.C. Youth Rehabilitation Act, D.C. CODE ANN. §§ 24-801 to -807 (1981 & Supp. 1995), are kept separate from adult misdemeanor offenders housed at Youth Center. Youth Rehabilitation Act prisoners are housed in double bunked rooms and misdemeanants are housed in large open dormitories. There are approximately 675 prisoners in Youth Center. Department Order No. 5010.7.

Modular Facility serves as an annex to the Jail and houses mostly pre-trial detainees and persons serving a sentence for a misdemeanor conviction. The housing is divided between single cells and large, open dormitories. All prisoners at Modular are male.

When Lorton was first constructed, "most inmates were white and, while the institution had its share of serious offenders such as murderers and rapists, prison records show that many were serving time for disorderly conduct and a variety of alcohol-related offenses."[7] While the prison's surroundings remain rural, the prison itself has changed a great deal since its inception. Over ninety percent of the inmates in the D.C. corrections system are now African American males.[8] The inmate population is also younger, as over half of the inmates are between the ages of twenty-one and thirty-five.[9]

B. *Current Status*

Aside from severe cases of abuse or riot situations, the general public hears little about inmates' suffering.[10] The District of Columbia is no exception, although in recent years the D.O.C. has certainly received an inordinate amount of negative publicity. On February 14, 1994, Walter Ridley, the D.O.C.'s Director, resigned amidst reports of corruption,[11] sexual harass-

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There is a court-ordered population cap at Modular of 688 prisoners. Smith, *supra* note 6, at 277.

Medium Security Facility houses approximately 1000 male inmates. Prisoners confined to the Medium Security Facility typically have a lower level custody classification than prisoners at Central or Occoquan. *Id.* at 278.

Minimum Security Facility, as the name implies, houses inmates with a security designation of SLD-2 (Low). (Inmates with the lowest security designation, SLD-1, are housed at the District's ten Community Correctional Centers or halfway houses.) Minimum is surrounded by a single fence and has no towers. Most inmates who are on their way out, who are within 24 months of their potential release date and have good prison records, or who are allowed to participate in work release programs, reside at Minimum. The facility houses approximately 950 men and 160 women in large, barracks-style dormitories. *Id.* at 277-78.

The Central Detention Facility (the "Jail") is operated largely as a pretrial detention facility. All persons incarcerated by the Department of Corrections, both male and female, are first confined at the Jail. The housing units consist of both single and double cells. There is a court-imposed population cap of 1684 prisoners at the Jail. *Id.* at 276.

The Correctional Treatment Facility (CTF) is the newest D.O.C. institution and is located next to the Jail. CTF, which also houses both men and women, consists of an intake and diagnostic unit, a women's prison, and a drug treatment program. Approximately 800 prisoners are incarcerated at CTF. *Id.*

[7] Courtland Milloy, *Alternatives to Prison*, WASH. POST, Feb. 20, 1986, at DC1.

[8] White males make up 1.8% of the population and African American females make up 6.6% of the population. White females and other ethnic groups comprise the remaining 1.2%. DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5, at 1.

[9] *Id.*

[10] Doretha M. Van Slyke, Hudson v. McMillan *and Prisoners' Rights: The Court Giveth and the Court Taketh Away*, 42 AM. U. L. REV. 1726 (1993).

[11] *See Where the Fox Guards the Chicken Coop*, WASH. TIMES, Nov. 17, 1993, at C2 (Walter Ridley was "weeding out drug dealers, users, and conspirators at [Lor-

ment,[12] drug abuse,[13] and deplorable medical conditions[14] at Lorton.[15]

Drug use at Lorton has reached such epidemic proportions that a federal judge in Alexandria, Virginia refused to send a prisoner convicted of possessing heroin inside Lorton back to the prison, declaring that "the ease with which inmates can obtain drugs in Lorton is a public scandal."[16] Approximately eighty percent of D.C. inmates have a history of substance abuse, although drug sales and drug possessions account for less than half (39.2%) of inmate offenses.[17]

Over one-third of Lorton inmates have been convicted of violent crimes, such as murder, rape and other sex crimes, assault, and armed robbery or burglary.[18] Violence and corruption are also rampant *within* the prison. In each of the past few years, prosecutors have handled nearly 100 cases involving crimes by inmates, corrections officers and visitors at Lorton "with charges ranging from murder to public corruption."[19]

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ton]"); *see also 4 Lorton Workers Guilty*, WASH. POST, Dec. 8, 1993, at D3 (reporting that four D.C. Corrections Department employees pleaded guilty to federal bribery charges); *Corrections Officers Held in Smuggling*, WASH. POST, Nov. 5, 1993, at B4 (noting that for the fifth time in four years, police and federal agents arrested D.C. corrections officers on charges of taking bribes and smuggling drugs into a Department of Corrections facility).

[12] In April, 1995, a federal jury awarded $1.4 million to six current and former correctional employees in a lawsuit claiming rampant sexual harassment in the Department of Corrections. Hamil R. Harris, *Barry Launches Fight Against Sexual Harassment*, WASH. POST, Apr. 27, 1995, at C3.

[13] *See Another Drug Raid at Lorton*, WASH. TIMES, Nov. 17, 1993, at C4; *D.C. Prison Employees Charged in Drug Investigation at Lorton*, WASH. POST, Nov. 17, 1993, at A1; *Lorton: No Drug Free Zone*, WASH. POST, Nov. 17, 1993, at A22.

[14] *See infra* Section V(A). *See also Cruelty Inside Prison Walls*, WASH. POST, Feb. 10, 1994, at A26 ("Corrections Chief Walter Ridley soon will be permanently off the scene, and a new health team has been sent to the jail. But given the department's track record, that isn't enough.").

[15] Margaret Moore, Walter Ridley's successor as the Director of the Department of Corrections, "take[s] exception to the . . . implication that D.C. Corrections is doing little or nothing to resolve its problems." Margaret Moore, *Cracking down at Corrections*, WASH. POST, July 26, 1994, at A18. In a response to a Washington Post editorial claiming that a sure way to resolve the agency's problems is to conduct a "shake-up of the troubled system's senior echelon," Ms. Moore vowed that she "will work to change a pervasive culture that has harmed a viable public service agency" but that "[s]ignificant and long-lasting positive changes in D.C. Corrections will be the result of an involved, time-consuming process and not a knee-jerk reaction to internal and external pressures to remove any employee without some clear and objective basis for doing so." *Id.*

[16] Bill Miller, *Drug Use at Lorton Called Public Scandal*, WASH. POST, Nov. 16, 1993, at A1.

[17] DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5, at 1.

[18] Such convictions account for 38.8% of the inmate population. *Id.*

[19] Miller, *supra* note 16, at A15.

Another condition at Lorton that has been the subject of litigation and long-standing concern is overcrowding.[20] In 1993, the average D.O.C. inmate population, excluding inmates housed in the Federal Bureau of Prisons and out-of-state facilities, was about 10,800.[21] The District's prison population has since risen to "a vastly overcrowded 11,000 men and women."[22] The District of Columbia has the highest rate of incarceration in the United States, locking up 1651 citizens per every 100,000.[23] The most recent statistics indicate that approximately one of every eight Washingtonians — more than 70,000 residents — is incarcerated, on probation, on parole, or under arrest.[24] The average cost to incarcerate an inmate was $22,000 in 1994.[25]

C. *Daily Life*[26]

Most inmates begin serving their time at the D.C. Jail, which serves as the detention or holding facility for individuals charged with, but not yet convicted of, a criminal offense. Following conviction, inmates are transferred to one of the seven Lorton facilities.

Upon arrival at a particular facility, each inmate attends an orientation[27] and receives a "Resident's Handbook" for that facility. The following excerpts from the Resident's Handbook for the Maximum Security Facility, which was "prepared to assist [the residents] in understanding the policies, procedures and operations of the Maximum Security Facility,"[28] provide those of us who have never been incarcerated with a glimpse of prison life:[29]

> *Dress*: You will be issued institutional clothing on your arrival at the Maximum Security Facility. The clothing is not permitted to be altered at

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[20] Overcrowding will be explored in greater detail *infra* Section V(C).

[21] DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5, at 1.

[22] Courtland Milloy, *Baring Their, Uh, Souls for Their Jailbirds*, WASH. POST, June 29, 1994, at B1.

[23] *No Escape from Lorton*, LEGAL TIMES, Jan. 30, 1995, at 32.

[24] *Id.*

[25] DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5, at 1.

[26] Unless specifically referring to the female or the male inmates, this article will use male pronouns to refer to both.

[27] Department Order No. 4020.1 § II sets forth the procedures for the inmate orientation, stating as its policy that "all incoming inmates receive orientation to the institutions' procedures, rules and regulations; the availability of programs and services; and the inmate's rights during his/her incarceration in the DCDC system." Department Order No. 4020.1 § II (1992).

[28] DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, RESIDENT'S HANDBOOK, MAXIMUM SECURITY, at I (hereinafter RESIDENT'S HANDBOOK). Each facility has its own handbook that is ostensibly provided to each inmate as he enters the facility as part of his orientation, but most of the inmates interviewed for this article claimed they never received, nor even saw, such handbooks.

[29] However, "the adversity of the daily lives of the District's prisoners is almost beyond the comprehension of those who do not inhabit it." Smith, *supra* note 6, at 257.

any time . . . . You are permitted to wear recreational attire when participating in recreational activities.[30]

. . . .

Meals: All inmates are served three (3) meals per day. Inmates assigned to the general population cellblock are served breakfast from 5:45 a.m. to 6:45 a.m., lunch from 11:00 a.m. to 12:00 Noon, and dinner from 4:00 p.m. to 5:00 p.m. You will be released from your cellblock at a designated time by the Cellblock Officer.[31]
Official Counts:[32] Official counts are conducted at 7:30 a.m., 12:00 Noon, 3:30 p.m., 9:00 p.m., 11:30 p.m., 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:00 a.m., 5:00 a.m., 6:00 a.m., and after all mass movements unless otherwise authorized. You must be in your cell for the count unless you have specific permission to be on the outcount and your name has been sent to the Control Center. Count procedures are strictly enforced and interfering with the count will result in disciplinary action.[33]

. . . .

Visiting: Visiting is conducted on Tuesday and Thursday between the hours of 6:00 p.m. and 9:30 p.m., on Saturday between the hours of 8:00 a.m. and 1:00 p.m., and on Sunday from 8:00 a.m. until 2:00 p.m. Visiting is also conducted on holidays, observing the Sunday visitation hours. . . . All residents are permitted fifteen (15) hours of visiting each month. You may be permitted to have (2) adult visitors (sixteen (16) years of age or older) and as many children as there are on each occasion. If a visitor behaves inappropriately, their [sic] visiting privileges may be suspended. The introduction of contraband will result in permanent expulsion of the visitor.
Remember, Visiting is a Privilage [sic], Do Not Abuse it. . . .[34]

The experiences of the individual inmates vary greatly, depending largely on where they are incarcerated, their backgrounds, and their own coping mechanisms.[35] Some inmates feel that, as prisons go, Lorton is not too bad.[36] In fact,

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[30] RESIDENT'S HANDBOOK, *supra* note 28, at 2.

[31] *Id.* at 3.

[32] In order to "maintain an accurate, around-the-clock account of each inmate in custody," each facility is required to have at least seven official counts every 24 hours. With the exception of inmates who are approved for an outcount, inmates are restricted to their cells or assigned beds during official counts. Department Order No. 5010.2A §§ II, VII(B)(8) (1991).

[33] RESIDENT'S HANDBOOK, *supra* note 28, at 4.

[34] *Id.* at 9-10.

[35] For example, an inmate's mode of interacting with others — i.e., an aggressive or confrontational manner — can greatly shape his daily life, as can his physical and mental health during his incarceration.

[36] Gregory "Black" Coleman reported that each of the five times he went to prison, he "turned his sentence into a vacation of watching television during the day and getting high at night." Marcia Slacum Greene, *An Effort to Unlock the Past*, WASH. POST, Dec. 13, 1993, at A1.

in some ways, Lorton bears a striking resemblance to the inmates' life outside of prison. Eight of every ten prisoners grew up in Washington, D.C., and more than half of the inmates come from a single wedge of Washington "that begins in the heart of the inner city around 14th Street N.W. and generally fans east and southeast to the District line."[37] Not only do most inmates have ties to each other as neighbors or relatives, but they also share the same family and neighborhood ties with many of the guards.[38]

The vast majority of inmates, however, describe their incarceration as intolerable, and many believe that the conditions of detainment at Lorton are particularly unpleasant.[39] The remainder of this article will explore the accuracy of the inmates' perception that Lorton falls far short of the national standard in the area of prisoners' rights. Given the murky state of the law with respect to many of these rights, this article unfortunately can offer little resolution to the problems presented. Determining the legitimacy of a particular inmate's sense of entitlement is difficult when the law itself fails to definitively resolve the issues one way or the other. This article offers some suggestions and observations about how the conditions of confinement should be improved at Lorton, but its ultimate recommendation is addressed to the courts — until the law sets forth with greater clarity how a prisoner should be treated while incarcerated, the problems at Lorton and other correctional facilities will persist.

II. Rights Under the First Amendment

In 1986, the Supreme Court of the United States formulated a test for determining whether prison regulations violate inmates' constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[40] To make this determination, the Court uses a four-part inquiry:

1. Is there a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it?
2. Are there alternative means to exercise the right?
3. Will accommodating the right have a negative effect on the guards or other inmates?
4. Is there an obvious, easy alternative to the regulation available?[41]

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[37] Courtland Milloy & Milton Coleman, *Lorton, D.C.'s Other Neighborhood*, WASH. POST, Feb. 13, 1983, at A1.

[38] *Id.*

[39] All of the inmates whom I interviewed and who had been incarcerated elsewhere, either in federal prison or another state prison, found their experience at Lorton to be far worse. As one inmate put it, "Lewisburg [Federal Penitentiary in Pennsylvania] is professional. You can earn money and pursue hobbies. At Lorton, you can't do shit." Interview with Lorton inmate (Feb. 1994). Note that the names of some inmates that I interviewed have been omitted at their request to ensure confidentiality.

[40] Turner v. Safley, 482 U.S. 78, 89 (1986).

[41] *Id.* at 89-90.

Prison officials may, therefore, interfere with a prisoner's exercise of First Amendment rights only when such interference is reasonably related to a legitimate penal interest.[42] Determining the reasonableness of the interference with a prisoner's First Amendment right depends not only on the legitimacy of the penal interest involved, but also on which First Amendment right is being asserted.

A. *Freedom of Speech*

> Any time you pursue a grievance or petition the administration for anything they oppose, they'll punish you and transfer you. Like the guy who filed the John Doe lawsuit. He has been transferred three times. Each time he files against a facility, they transfer him. That's their deterrence.[43]

Using the *Turner* test, the Supreme Court decreed that inmates have the right to send and receive information, subject to limits "reasonably related" to a legitimate penal interest.[44] In *Turner*, the inmates at a Missouri prison challenged regulations that prohibited correspondence between inmates at different institutions.[45] Regulations permitted only correspondence with immediate family members who were inmates, and between inmates concerning legal matters. Other correspondence was permitted only if it was deemed to be in the best interest of the parties involved.[46]

The Court found that there were legitimate security interests justifying the inmate-to-inmate correspondence rule, given the potential for communication of escape plans and other violent acts. The Court therefore ruled that inmate-to-inmate correspondence may be banned entirely.[47] On the other hand, because outgoing correspondence poses the least threat to internal prison security or other penal interests, the Court ruled in another case that such communication may not be prohibited.[48]

As for incoming information, the Court allows for censorship given the greater security risks involved. However, the warden of a facility may reject an incoming publication only if it is "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."[49]

The D.O.C.'s stance regarding inmate correspondence is that it will "make

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[42] Thornburgh v. Abbott, 490 U.S. 401, 414-15 (1989); *Turner*, 482 U.S. at 88-89.

[43] Interview with a Central Facility inmate (Feb. 1994).

[44] *Turner*, 482 U.S. at 93.

[45] *See id.* at 78.

[46] *Turner* also involved a challenge to the prison's rule regarding inmate marriages. This aspect of the *Turner* ruling is addressed *infra* Section V(A).

[47] *Turner*, 482 U.S. at 91-93.

[48] Procunier v. Martinez, 416 U.S. 396, 415-16 (1973). *See also* Thornburgh v. Abbott, 490 U.S. 401, 411-12 (1989) (limiting *Martinez* to outgoing correspondence).

[49] 28 C.F.R. § 540.71(b) (1991). *See also Abbott*, 490 U.S. at 404, 416 (citations omitted).

provisions for correspondence between inmates and their relatives, friends, attorneys, executive officials or organizations, consistent with established DCDC rules and regulations and those of the U.S. Postal Service."[50]

Each institution at Lorton has a designated Mail Officer.[51] All incoming and outgoing mail is examined for cash, checks, money orders and contraband.[52] However, inmates are permitted to send sealed letters "to their attorney of record, the courts, officials of the confining authority, state and local chief executive officers and members of the D.C. Board of Parole."[53] Letters sent to such parties will not be opened; letters received from them "will be opened *in the presence of the inmate* and examined for contraband and other prohibited items."[54]

The only explicit limitation placed on an inmate's mail by the D.O.C. is found in Section VII(F) of Department Order 4070.4A, which precludes an inmate's access to any publications in which

> 1. The material contains instructions for the manufacturing of explosives, drugs, or other unlawful substances.
> 2. The material advocates violence within the institution.
> 3. The material is of a type which has demonstrably caused violence or other serious disruption of institutional security.
> 4. The material advocates racial, religious, or national hatred in such a way so as to create a serious danger of violence in the institution.
> 5. The material encourages sexual behavior which is criminal and/or in violation of institution rules or detrimental to rehabilitation.[55]

However, even though "no limits are placed on the volume of letters an inmate may send or receive when the inmate bears the mailing cost,"[56] nor on "the length, language, content, or source of mail or publication"[57] sent or received by the inmate, an exception is made "when there is reasonable belief that limitation is necessary to protect public safety or institutional order and security."[58] A similar exception applies to inmates housed in segregation, who

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[50] Department Order No. 4070.4A § II (1992). The Postal Service rules referred to deal with mail fraud. *See id.* Attachment No. 1 (reprinting 18 U.S.C. §§ 1341-1342 (1994)).

[51] *Id.* § VII(A).

[52] *Id.* § VII(C). If contraband is discovered in either incoming or outgoing mail, it will be seized, and both the sender and the inmate will be given a receipt and notice of seizure. Inmates may challenge the seizure through the Inmate Grievance Procedure (IGP), but Institution Administrators will determine the disposition of the contraband and take appropriate action. The IGP is discussed in more detail *infra* Section VI.

[53] *Id.* § VII(D).

[54] *Id.*

[55] *Id.* § VII(F).

[56] *Id.* § VII(E). Indigent inmates who have been designated as such by their Unit Manager are allowed to mail two postage-free letters per week. *Id.* § VII(G).

[57] *Id.*

[58] *Id.* § VII(E).

can "write and receive letters on the same basis as inmates in the general population, unless it can be shown to affect security."[59]

Such exceptions, which leave total discretion to the institution, run the risk of rendering the rest of Department Order 4070.4A moot. Inmates also complain that their mail can take several weeks to get to them, and that Section VII(B), which states that "[i]ncoming and outgoing mail will not be held for a period exceeding 24 hours, excluding weekends and holidays, and packages will not be held for more than 48 hours," is rarely followed.

Lorton inmates are also supposed to have "reasonable and equitable access to the use of telephones for personal and legal purposes," with the exception of those inmates who have been in punitive segregation for less than sixty days.[60] However, it was recently discovered that the D.O.C. has been tape-recording telephone calls made by inmates at Lorton. This practice, which inmates brought to the attention of members of the local defense bar in September, 1994, may have included privileged conversations between the inmates and their attorneys. The taping system was installed in 480 phones at Lorton on which prisoners are allowed to make collect calls. Walter Hill, the D.O.C.'s Director of Communications, maintains that signs are posted at all of the phones informing the inmates that calls made from those phones are recorded.[61] He adds that inmates can have access to private, non-monitored phone lines if they wish to speak privately with their attorneys, as long as they first seek permission from their case managers.[62] Even though Mr. Hill contends that such requests are usually granted within twenty-four hours, the inmates and their attorneys maintain that the wait for an unmonitored phone can be indefinite, due to the limited number of case managers.[63]

As for speech *within* the prison, the inmates and administrators have strongly divergent views regarding how freely inmates can speak with each other and with the guards. David Roach, the Administrator at Maximum Security, maintains that twenty years ago inmates did not talk back to officers, but that times have changed.[64] Mr. Roach contends that most inmates initiate the confrontations now, and that even if charged with a violation, they are defended by an attorney in a proceeding in which the prison must prove that a particular rule was broken.[65] The inmates complain that officers can address them in any manner they please, but if an inmate talks back to or disagrees with an officer, he is charged with a violation — disrespect, threatening conduct, or lying — and is punished accordingly.

There is no doubt that the freedom of speech of inmates is curtailed at

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[59] *Id.* § VII(L).

[60] Department Order No. 4070.1 § I (1992).

[61] *See* Eva M. Rodriguez, *Lorton Phone Tapes Anger Lawyers*, LEGAL TIMES, Sept. 26, 1994, at 1.

[62] *Id.*

[63] *Id.*

[64] Interview with David Roach, Warden of Maximum Security Facility (Feb. 1994).

[65] *Id.*

Lorton. However, less clear is the extent to which the speech is curtailed and how widespread the curtailment is. The Lorton regulations which deal with inmates' speech easily meet the *Turner* standards of being reasonably related to legitimate penal interests, but regulations would have to be quite egregious to fail the *Turner* test. Nonetheless, even properly worded regulations can be executed unconstitutionally. Even more invidious is the suppression of the inmates' speech not reflected in the regulations, such as punishment of inmates who challenge Lorton's rules and authorities. Such infringements are more difficult for Lorton to justify, but they are also more difficult to track and prove.

B. *Freedom of Association*

> Visits are piss poor down here at Lorton. Our people get harassed too much. Feds have your family go through a metal detector, that's it. You also get a lot of harassment from [the guards] during the visit. They go above and beyond the call of their job. For instance, you're only allowed to cuddle with your woman when she first comes in; after that, you're supposed to sit back in your chair. That's ridiculous.[66]

Inmates have a First Amendment right to freedom of communication and association, but these rights may be curtailed by legitimate penal concerns.[67]

In the Department Order regarding inmate visiting regulations, the D.O.C. states that it is its policy "to encourage inmates to maintain ties with their families, friends, and communities. Inmates incarcerated in Department of Corrections' institutions shall be allowed to visit with persons of their choice subject to the security concerns of the Department."[68] Such concerns could even justify banning a visitor permanently, as was the case in *Robinson v. Palmer*.[69] In *Robinson*, the D.C. Circuit upheld the prison officials' permanent ban on visits by a prisoner's wife after she was caught attempting to smuggle marijuana into the prison. The court stated that the ban was a reasonable response to the threat of future smuggling, and that the prisoner had other ways to communicate with his wife.[70]

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[66] Interview with a Maximum Security inmate (Feb. 1994).

[67] *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 132-33 (1977) (finding that rights associated with promoting unionization in prison must yield to interests of preserving order and authority); *see also* Thorne v. Jones, 765 F.2d 1270, 1272-75 (5th Cir. 1985) (holding that prison officials were justified in denying visitation rights in both cases), *cert. denied*, 475 U.S. 1016 (1986); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir.) (stating same as *Thorne*), *cert. denied*, 469 U.S. 845 (1984).

[68] Department Order No. 4080.1A § II (1992).

[69] 841 F.2d 1151 (D.C. Cir. 1988).

[70] *Id.* at 1156-57. Department Order No. 4080.1A § VII(J)(2) states that "[a]fter one year, termination of visiting privileges may be reconsidered." The following causes may result in visiting privileges being suspended or terminated:

(a) Introducing or attempting to introduce contraband into Department of Corrections facilities.

Each inmate at Lorton submits for approval a visitors list containing no more than twelve names.[71] However, the shift supervisor can authorize special visits by persons not on the approved visitors list.[72] Inmates normally are granted a minimum of twelve hours per month for visits;[73] visits are granted two days each week based on the first initial of an inmate's last name.[74] A visiting room is provided at each institution for inmates and their guests,[75] although contact visits are not permitted at the D.C. Jail.[76]

In a letter to *The Washington Post* regarding visitation at Lorton, Margaret Moore, the Director of the D.C. Department of Corrections, offered the following summary:

> Department policy governing inmate visitation outlines specific guidelines that include the practice of acceptable, but limited, physical contact. Regular visiting hours are scheduled at each prison facility to allow inmates the opportunity to maintain the family structure. Only individuals entered on an inmate's approved visitors list may enter the prison upon displaying proper identification. A barrier-free meeting area for inmates and their guests established within each prison is supervised by correctional officers in order to ensure the safety and security of the prison.[77]

At a June, 1994 town meeting, Ms. Moore promised to make improvements in the prison visitation program. Fielding complaints from inmates' wives and girlfriends about the strict dress code for visitors and the lack of conjugal visits, Ms. Moore assured the crowd that contact visits are allowed at all facilities in Lorton, but that the practice is prohibited at the D.C. Jail in the District.[78] She candidly offered, however, that she does "believe visitors should be

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(b) Refusal to submit to search procedures.

(c) Disorderly conduct during a visit, this includes socially unacceptable sexual behavior. Limited socially acceptable kissing, embracing, or holding hands may be allowed during contact visits.

(d) Failure to produce proper identification.

(e) Any other causes that are reasonably necessary to ensure the security of persons or the correctional institution.

Id. § VII(J)(1)(a)-(e).

[71] *Id.* § VII(A)(3). Inmates housed in the Department's community correctional centers and ex-offenders less than six months released from DCDC institutions shall not be approved for visiting lists. *Id.* § VII (A)(1)(b), (c).

[72] *Id.* § VII(G)(1). An example of a visitor likely to be approved is someone who resides more than 50 miles away.

[73] *Id.* § VII(F).

[74] *Id.* § VII(C)(3).

[75] *Id.* § VII(I)(1).

[76] *Id.* § VII(H)(1).

[77] Margaret Moore, *What Kind of Visits?*, WASH. POST, July 24, 1994, at C8.

[78] Milloy, *supra* note 22, at B6. Ms. Moore offered the following explanation for the continued ban on contact visits at the D.C. Jail:

> A detention or holding facility for persons charged with but not convicted of a criminal offense, presents a greater need to implement measures to ensure the

held to appropriate dress codes"[79] and that, while she is not philosophically opposed to conjugal visits, they simply are not a priority.[80]

The friends and family of Lorton inmates are not the only ones complaining about visitation. Inmates interviewed for this article, particularly those at the Maximum Security facility, complained that their visitation had been steadily declining.[81] They claimed that they were allowed only one hour of visitation (whereas they used to be allowed two hours for each visit) and that all family activities had been eradicated.[82] As John R. Young-Bey, a forty-one-year-old Maximum Security inmate serving sixty years to life for felony murder, put it, "We realize these were privileges, but they were shaved without any reason. We weren't abusing them."

Although Ms. Moore may be genuinely committed to improving visitation at Lorton, the bottom line is that only public pressure will prompt her to do so. Since nearly everything can be justified as a security concern or legitimate penal interest, neither the law nor Lorton regulations provides much guidance on the permissible limits of visitation.

C. *Religion*

> Lorton is pretty cool as far as religion goes, as long as you keep it to yourself. They don't let you have outside people participating.[83]

Prison officials must afford prisoners opportunities to exercise their religious freedom, subject to limits that are reasonably related to legitimate institutional concerns.[84] In *O'Lone v. Shabazz*, the Court upheld a prison regulation that prohibited prisoners who worked outside from returning to buildings during the day, even though the regulation had the effect of prohibiting some Muslim inmates from attending services. The Court reasoned that: (1) the regulation was rationally related to legitimate concerns of rehabilitation, insti-

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safety and security of the inmates, employees and visitors. Because at this stage of their custody, we know very little about them. We must take the requisite time to determine offenders' health and psychological status, if they require protective custody and if there are any security concerns resulting from pre-trial investigations. Therefore, inmates housed at the jail conduct visits with their guests via telephone from a physically separate area.

Moore, *supra* note 77, at C8.

[79] Milloy, *supra* note 22, at B6.

[80] *Id.* at B1. Ms. Moore later explained: "Given the myriad critical priorities facing the D.C. Department of Corrections, including staffing, security, overcrowding concerns, health care issues and physical plant problems, all of which have an impact on safety and security and demand immediate attention, the issue of conjugal visits is not a priority." Moore, *supra* note 77, at C8.

[81] Interviews with Maximum Security inmates (Feb. 1994).

[82] For instance, the inmates' children are no longer allowed to visit on special days.

[83] Interview with a Maximum Security inmate (Feb. 1994).

[84] O'Lone v. Shabazz, 482 U.S. 342 (1987).

tutional order, and security; (2) no ready alternatives to the regulations existed; (3) prisoners retained some freedom of religious expression, such as being allowed to celebrate Muslim holidays; and (4) accommodation of prisoners' practices would require extra supervision, threaten prison security, and create perceptions of favoritism.[85]

A prisoner asserting his right of religious liberty must establish that his beliefs are sincerely held,[86] and that they are religious in nature.[87] Although the prisoner must be sincere in his religious beliefs, there is no requirement that the beliefs be held by a majority of the members of the particular religion in order to be given First Amendment protection.[88]

The Senate recently debated the extent to which corrections institutions should be required to make adjustments in order to accommodate a prisoner's religious practices.[89] On November 11, 1993, President Clinton signed into law the Religious Freedom Restoration Act (RFRA).[90] The RFRA, which was passed by a large margin, was designed to change the standard by which courts evaluate state laws that restrict religious practice. The Senate specifically rejected an exemption for the nation's prisons from the stricter "compelling interest" standard.[91] However, the committee report makes clear that the legislative intent was to continue to grant substantial deference to prison administrators in the interest of security and institutional good order.[92] Therefore, prisons can continue to accommodate legitimate dietary requests while

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[85] *Id.* at 350-53.

[86] *See* Sourbeer v. Robinson, 791 F.2d 1094, 1102 (3d Cir. 1986) (holding that the right to free exercise of religion was not violated by prohibiting inmate in administrative custody from attending worship services where court inferred insincere belief because prisoner did not attend religious services while in general prison population and did not designate spiritual adviser while in administrative custody), *cert. denied*, 483 U.S. 1032 (1987).

[87] Africa v. Pennsylvania, 662 F.2d 1025, 1030, 1036 (3d Cir. 1981) (finding that although the prisoner's beliefs were sincere, the MOVE organization, described as "revolutionary" organization "absolutely opposed to all that is wrong," was not a religion), *cert. denied*, 456 U.S. 908 (1982).

[88] Martinelli v. Dugger, 817 F.2d 1499, 1503-05 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988).

[89] *Church, State . . . Prison*, WASH. POST, Oct. 19, 1993, at A22.

[90] 42 U.S.C. § 2000bb (Supp. V 1993).

[91] In Employment Div. v. Smith, 494 U.S. 872 (1990), the Court stepped back from the strict standard that state laws restricting the free exercise of religion had to be based on a compelling government interest and had to be the least restrictive means of protecting that government interest. Instead, the Court decreed that laws generally applicable to the public and not aimed at any religion — such as laws against peyote smoking, as was the issue in *Smith* — could be enforced even though some individuals might object on religious grounds. With the RFRA, the former compelling interest standard has been restored. *See* 42 U.S.C. § 2000bb(b).

[92] S. REP. NO. 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900.

still being able to turn down demands for special privileges based on allegedly religious grounds, such as "the carrying of small daggers or the wearing of elaborate costumes."[93]

The general view among Lorton inmates is that the institution is "pretty fair as far as religion goes."[94] As stated in a Department Order, "[i]t is the policy of the Department of Corrections to provide inmates with the opportunity to enjoy the most extensive freedom to practice religion. However, religious practices must conform to the constraints and requirements of existing laws, security, and orderly Department operations."[95]

Inmates may attend religious services and activities[96] and may meet together for prayer, study, and discussions,[97] but only with the appropriate Chaplain's approval,[98] and only "when the inmate's absence from his regular assignment will not interfere with the normal operation of the institution."[99] The "extensive freedom" Lorton endeavors to provide inmates with respect to their religious practices is evidenced by their handling of religious headgear and apparel, as well as by the dietary concessions made for inmates.

Religious headgear[100] and apparel[101] required by a faith and documented through the chaplaincy may be worn at all times in certain areas, including the visiting hall and dining hall, unless they "adversely impact on security."[102] Inmates also may abstain from consuming foods that are prohibited by their religious faith but that are served to the general population, and they can have alternate meals served[103] as long as their request for a specific religious diet is verified by the appropriate Chaplain.[104] In addition, "[c]anteen trucks will stock nonperishable pork-free items at all institutions,"[105] due to the large number of Muslims at Lorton. Lastly, unlike the policy that was upheld in *O'Lone v. Shabazz*, Lorton inmates may be excused from work for the observance of a special religious holiday, but they may be scheduled for work on other days to compensate for the loss of work.[106]

Religion is one area in which Lorton's inmates understandably have few

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[93] *Church, State . . . Prison, supra* note 89, at A22.

[94] Interview with Gary Jaggers (Feb. 1994). Jaggers is a 31-year-old inmate who has served 17 years of his life sentence for murder at Maximum Security. There was widespread agreement with this comment among the inmates.

[95] Department Order No. 4410.1B § II (1991).

[96] *Id.* § VII(A)(7).

[97] *Id.* § VII(A)(9).

[98] *Id.*

[99] *Id.* § VII(A)(7).

[100] The Department Order lists a fezz, kufi and turban under its applicable definitions. *Id.* §§ VI(A), (C), (F).

[101] The Department Order lists robes and prayer shawls as examples. *Id.* § VII(C).

[102] *Id.* §§ VII(C)(3), (4).

[103] *Id.* § VII(F)(1).

[104] *Id.* § VII(F)(2).

[105] *Id.* § VII(F)(3).

[106] *Id.* § VII(G)(2).

complaints. Lorton not only affords prisoners the requisite opportunities to exercise their religions beliefs, but actually exceeds constitutional requirements in the allowances it makes for inmates' religious observances and beliefs.

III. Rights Under the Fourth Amendment

A prisoner's Fourth Amendment rights are perhaps the most incompatible with the objectives of incarceration. The need for internal security and safety necessitates severe circumscription of an inmate's expectation of privacy. Even though prison officials cannot "ride roughshod over inmates' property rights with impunity,"[107] the Supreme Court has stated that "[i]t would be literally impossible to accomplish the prison objectives [of preventing the introduction of weapons, drugs, and other contraband into the premises] if inmates retained a right of privacy in their cells."[108]

A. *Searches*

> They'll pat you down several times a day just to harass you. Same with cell searches. They won't have a legitimate reason. An officer will go through all your stuff and search your cell just because he doesn't like you.[109]

Prisoners have no reasonable expectation of privacy within their cells.[110] An inmate's cell can therefore be searched at random without violating the Fourth Amendment.[111] Strip searches and body cavity searches, however, are another matter. Courts will closely scrutinize such searches due to the degree to which they invade an inmate's personal privacy and because of the potential for abuse.[112] In balancing the state's need for a particular search against the extent of the invasion suffered by the prisoner, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[113]

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[107] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[108] *Id.* at 527.

[109] Interview with a Maximum Security inmate (Feb. 1994).

[110] *Hudson*, 468 U.S. 517.

[111] However, when the purpose of the warrantless search is to uncover criminal evidence and not to further institutional security, there is a violation of a prisoner's Fourth Amendment rights. United States v. Cohen, 796 F.2d 20, 22-24 (2d Cir.), *cert. denied*, 479 U.S. 854 (1986).

[112] Bell v. Wolfish, 441 U.S. 520, 558-60 (1979).

[113] *Id.* at 559. Even though *Bell* dealt only with searches of pretrial detainees, several courts have applied the *Bell* balancing test to searches of prison inmates because the Supreme Court has not yet ruled on the constitutionality of routine body searches of inmates. Diane E. Wolf & Timothy R. Yee, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court & Courts of Appeals 1992-1993* (Pt. VI), 82 Geo. L.J. 1365, 1376 n.2940 (1994) (citations omitted).

Vincent Gibbons, the Chief Administrator at the Central Facility at Lorton, acknowledges that inmates' Fourth Amendment rights are "clearly diminished within prison."[114] He explains that it is "critical that we have the ability to search [the inmates'] property as the need arises and to do body cavity searches [because] we have an obligation to preserve the safety of the community and to ensure the safety of residents and staff."[115]

The inmates maintain that they are "patted down" several times each day, and that random cell searches are conducted "to harass you or because the officer doesn't like you."[116] The Resident's Handbook for Maximum Security advises that "Correctional Officers are required to perform a designated number of shakedowns per shift. You are required to submit to a shakedown upon an officer's request. These shakedowns are not limited to individuals, but also to living areas, buildings, work areas and recreation areas."[117]

Lorton's official policy on searches, as expressed in the Department Order regarding contraband, is that "clearly defined control measures" are taken "to prevent the introduction or attempted introduction of or use of contraband within its institutions and facilities."[118] Inmates are therefore strip-searched both immediately before and after visiting,[119] and subjected to random periodic urinalyses.[120] All persons entering a Lorton facility are also searched prior to their entry, and anyone refusing to submit to a search of his or her person or possessions is refused entry.[121]

Over the course of two years, ninety-three persons were caught with drugs at Lorton,[122] prompting one U.S. District Court Judge to conclude that "drugs are as easy to get [at Lorton] as they are on city streets."[123] Lorton has consequently stepped up its surveillance, including "prisoner shakedowns and prison sweeps, aggressive visitor searches and the use of drug-sniffing dogs."[124] The prevalence of drugs at Lorton is unfortunately "a problem [that] has never been limited to inmates or their visitors."[125] More than seventy guards and other corrections employees have been charged with bribery or drug violations

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[114] Interview with Vincent Gibbons, Warden of Central Facility (Jan. 1994).

[115] *Id.*

[116] Interview with Michael Davis (Feb. 1994). Davis is serving a life sentence at Maximum Security for first degree murder. There was unanimous agreement with this comment.

[117] RESIDENT'S HANDBOOK, *supra* note 28.

[118] Department Order No. 5010.3, § 1(b) (1988).

[119] *Id.* § 4(c).

[120] *Id.* § 4(b). The urinalysis is administered in accordance with Department Order No. 6050.2B (1992).

[121] Department Order No. 5010.3 § 4(d).

[122] Toni Marshall, *Drug Arrests Cited in Lorton's Defense*, WASH. TIMES, Nov. 17, 1993, at C5.

[123] *Id.*

[124] *Lorton: No Drug Free Zone*, *supra* note 13, at A22.

[125] *Id.*

as a result of undercover operations during 1992 and 1993 alone.[126] While it is difficult to keep drugs out of even the most secure environment, "it certainly doesn't help when the staff is greasing the skids and circumventing the system."[127] Even though all officers are required to be frisked every time they enter a prison facility, the searches are often mere formalities since "officers extend a certain bit of professional courtesy to each other," and they "have to be careful about how and where they search each other."[128]

In an attempt to rectify the situation and to "ferret out those employees who are involved with crime both inside and outside our facilities and who violate the code of conduct for corrections professionals,"[129] Ms. Moore has established a twenty-four-hour "corrections desk" within the Metropolitan Police Department's Office of Internal Affairs, which is responsible for investigating correctional employees suspected of criminal misconduct.[130] In addition, applicants for prison positions now undergo strict background checks,[131] and are subject to drug testing as part of their pre-employment screening and during their first year on the job.[132]

There is no doubt that Lorton inmates have minimal Fourth Amendment rights. Inmates at any Lorton facility will complain about the lack of privacy and the searches of their cells and their bodies. However, one cannot fault Lorton for this, as it is merely complying with the law.

B. *Seizures*

> One time the suspect in a stabbing [at Central Facility] wore a certain type of coat and boots. [The guards] searched all our cells, and they ended up taking 30 to 40 sets of coats and boots that looked like the kind the suspect had on. They finally caught the guy, but they never returned our coats and boots to us.[133]

The Supreme Court ruled in *Hudson v. Palmer* that the seizure by prison officials of an inmate's property does not constitute a Fourth Amendment violation if the seizure serves legitimate institutional interests.[134] Finding that the

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[126] *Id.*

[127] *D.C. Prison Employees Charged*, *supra* note 13, at A1.

[128] *Id.* at A18.

[129] Moore, *supra* note 15, at A18.

[130] *Id.*

[131] One of the employees arrested in the most recent raid at Lorton was hired as a clerk at a medium-security facility while on parole from Lorton, where he served time for rape and robbery. The arrests of the officers stemmed from a time when the Department of Corrections "hired hundreds of employees without background checks or the results of FBI fingerprint checks." *Officials Arrest 21 as Probe Continues*, WASH. TIMES, Nov. 17, 1993, at C4-C5.

[132] *D.C. Prison Employees Charged*, *supra* note 13, at A1.

[133] Interview with a Central Facility inmate (Feb. 1994).

[134] Hudson v. Palmer, 468 U.S. 517, 528 n.8 (1984).

need for institutional security outweighs the privacy interest within a prisoner's cell, the Court acknowledged that prison officials have the power to seize inmates' property.[135] The Court cautioned, however, that this does not "mean that prison attendants can ride roughshod over inmates' property rights with impunity."[136] The Court suggested that instead of pursuing a claim under the Fourth Amendment, a prisoner's redress for wrongful destruction of property lies with administrative grievance procedures or state law.[137] The Court added that if cell searches are conducted in a particularly egregious manner, prisoners may pursue a claim of cruel and unusual punishment.[138]

If officials determine that a Lorton inmate "is responsible for introduction or attempted introduction, possession or use of contraband,[139] administrative actions will be taken in accordance with . . . [the] Lorton Regulations Approval Act of 1982."[140] The Act, which "set[s] forth the administrative procedures for adjustment and housing actions and the code of offenses governing residents" of Lorton,[141] allows for the confiscation of contraband.[142]

Each inmate is authorized to keep personal property, but this is limited to what can safely be stored in the designated storage space (e.g., one foot locker per resident, one wall locker per room, one shelf, etc.) of each facility.[143] The inmates complain that their personal property is often taken from them when they move from one facility to another, or when they are placed in lockdown.[144] Charles James-Bey,[145] who has been incarcerated at Maximum Security since 1982, claims he still has not retrieved the property taken from him when he was transferred to a federal penitentiary in Lewisburg, Pennsylvania in 1984, even though he returned to Lorton in 1987. John R. Young-Bey, another Maximum Security inmate, claims his property was properly inventoried when he was transferred to Central Facility in 1987, but that it has never been returned to him. Both men insist that the administrative remedies for such confiscations are useless, and that they simply have to "deal with

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[135] *Id.* at 527-28.

[136] *Id.* at 530.

[137] *Id.*

[138] *Id.*

[139] Contraband is defined as "any illicit drug, weapon, or any items not issued by D.C. Department of Corrections, not purchased from a Department canteen or not specifically authorized for use by the Director or his designee, or any letter or message intended to be received by an inmate." Department Order No. 5010.3 § 3 (1988).

[140] *Id.* § 4(f).

[141] Lorton Regulations Approval Act of 1982, Act 4-224, § 2, 29 D.C. Reg. 3484 (1982).

[142] *Id.* § 105.

[143] Department Order No. 4050.1A § 4(a) (1979).

[144] Lockdown, otherwise known as "Adjustment Segregation," consists of confinement in a control cell without privileges for a designated period of time. Lorton Regulations Approval Act, *supra* note 141, § 105.4.

[145] Many Muslim inmates, as part of their Islamic faith, add "Bey" to their last names.

it."[146] Once property is confiscated, it is difficult to get it back, even if it was taken erroneously or proves not to be contraband.[147]

When such abuses occur, Lorton's inmates can pursue remedies such as suing the District in small claims court for the return of the missing property.[148] Although the Court does not sanction these abuses, the law is clear that the seizure of inmates' property — whether for legitimate reasons or not — does not constitute a violation of their Fourth Amendment rights.

IV. Right to Privacy

The right to privacy is not explicitly provided for in the Constitution, but rather stems from several constitutional amendments.[149] It has been interpreted to protect individuals' rights to make decisions about family life and reproduction.[150] While prisoners are granted some freedom of choice in these areas, their decisions are limited by valid penal concerns.[151]

A. *Right to Marry*

> If you find someone who's going to marry you while you're locked up, then you know that person really loves you. It makes you feel human and a part [of society]. Lorton's pretty good about inmate marriages — I know several guys who have gotten married at Lorton.[152]

Even while incarcerated, a prisoner maintains a fundamental, but not absolute, right to marry.[153] The right to marry is subject to substantial restrictions as a result of incarceration and the pursuit of legitimate correctional goals. *Turner v. Safley* involved a prison regulation under which inmates were allowed to marry only with the permission of the superintendent.[154] Furthermore, inmate marriages were permitted only for "compelling reasons," which were limited to pregnancy or the birth of an illegitimate child.[155] The Supreme Court ruled in *Turner* that the prison's marriage regulation was unconstitutional because it failed to meet the first factor of a four-part test, finding no rational connection between the regulation and the legitimate government

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[146] Administrative remedies and procedures are discussed *infra* Section VI.

[147] Interview with John R. Young-Bey, a Maximum Security inmate (Feb. 1994).

[148] *See* D.C. Code § 12-309 (Michie 1995).

[149] The unenumerated right to privacy has stemmed from judicial interpretations of the Fourth, Fifth, Ninth and Fourteenth Amendments. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[150] *See* cases cited *supra* note 149.

[151] *See* Wolf & Yee, *supra* note 113 at n.2941.

[152] Interview with a Minimum Security inmate (Feb. 1994).

[153] Turner v. Safley, 482 U.S. 78 (1987).

[154] *Id.* at 78, 95-97.

[155] *Id.* at 96-97.

interest put forward to justify it.[156]

Lorton's policy regarding inmate marriages, in keeping with the ruling in *Turner*, is to "generally permit [them], unless [the D.O.C.] reasonably determines that an inmate's marriage would conflict with the legitimate correctional interests of the agency."[157] An inmate who wants to marry must submit a written request to his Unit Manager or Chief Case Manager,[158] including "a written statement verifying the intended spouse's consent to marry."[159]

In order to be approved, inmate marriages must meet the following criteria:

1. The inmate is legally eligible to marry;
2. The inmate is not judged mentally incompetent, as determined by psychological evaluations and the recognized psychiatric authorities;
3. The intended spouse has verified his/her consent to marry an inmate in writing;
4. The marriage arrangement does not conflict with the legitimate correctional interests of the Department of Corrections.[160]

The catch-all is, of course, the last criterion. It appears, however, that Lorton interprets its regulation liberally. Most inmates have no complaints about Lorton's handling of marriage requests, and everyone seems to know "at least a couple guys" who have gotten married while at Lorton.

B. *AIDS in Prison*

> It's scary, man. You're going to see a lot of guys dying from [AIDS] in here, and it ain't going to be pretty.[161]

AIDS has become the number one killer in prison, but "efforts to control the spread of the disease in corrections facilities are taking place against a backdrop of mounting criticism from prisoners' rights advocates and tough-on-crime legislators."[162] Even though prisoners retain some rights to privacy in preventing nonconsensual disclosures of their medical conditions or diagnoses, claims by HIV-positive prisoners of discriminatory treatment because of their medical condition — brought under the Equal Protection Clause, Due Process

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[156] The prison's rationale for its marriage rule was that such marriages presented security concerns due to potential fights over love triangles and that female inmates needed to be self-reliant for their rehabilitation. The Court, decreeing the rule an exaggerated response to these concerns, found that there was no valid rational connection between the regulation and the penological interests involved. Since the regulation failed the first prong of the test, the Court did not address the other three prongs. The four factors of the test are set forth *supra* Section II.

[157] Department Order No. 4160.6 § II (1990).

[158] *Id.* § VII(B)(1).

[159] *Id.* § VII(B)(3).

[160] *Id.* § VII(A)(1)-(4).

[161] Interview with an Occoquan Facility inmate (Feb. 1994).

[162] *AIDS Forces Officials to Study Policy*, CITY & STATE, Sept. 27, 1993, at 9.

Clause, Eighth Amendment or First Amendment — have generally failed.[163]

Lorton, at least with respect to its written policies, takes great effort to maintain the confidentiality of its inmates with AIDS. The physician in charge of an AIDS case is required to report the case, but "[a]ll information contained in reports shall be used for statistical and public health purposes only. Health Services employees shall not disclose the identity of any AIDS case except with the written permission of the patient."[164]

Lorton's policy is laudable in theory, but in practice, it leaves a lot to be desired. One inmate, who is HIV-positive and has lost seventy pounds since 1992, never asked for care during the prison officials' daily medical rounds because she "was afraid other inmates would see her records because they are kept in an open cart during the rounds."[165]

Far more troublesome than Lorton's lack of respect for the privacy rights of its inmates with AIDS, is the treatment (or lack thereof) it provides such inmates. More than twenty percent of all D.C. prisoners are infected with HIV.[166] Treating an inmate with AIDS is

> wildly labor- and time-intensive. Guards transport all sick prisoners back and forth from various institutions to D.C. General [Hospital] for care, where they must be housed in a special 'locked ward' of the hospital. If, as frequently happens, the ward is already full of inmates requiring specialized care, AIDS patients must be shackled to a bed in a regular hospital room with a 24-hour armed guard at the door — even prisoners who are so near death they couldn't possibly escape. These AIDS patients, for whom treatments like AZT prolong life and increase expense, are a serious burden for D.C. officials.[167]

A far cheaper way to treat inmates with AIDS is to not treat them at all; some argue that this is the District's current, unspoken policy.[168] In order to

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[163] Wolf & Yee, *supra* note 113, at 1377 n.2943 (citations omitted).

[164] Department Order 6012.2 § 5(e). In addition, all reports are required to "be placed in an opaque envelope, sealed and hand-carried to addressees within [specified] time frames." *Id.* § 5(f). However, the D.C. prisons' Health Services may "release information pertaining to the communicable disease status of the patient (i.e., whether the patient should be handled following enteric precautions, blood and body fluid precautions, or respiratory isolation precautions)." Department Order No. 6012.3 § 7 (1988).

[165] Brooke A. Masters, *D.C.'s Female Inmates Get Poor Care, Expert Testifies*, WASH. POST, June 16, 1994, at D3.

[166] Stephanie Mencimer, *D.C.'s New Death Row: AIDS is Devastating the District's Prisons and Busting its Budget*, WASH. POST, Jan. 31, 1993, at C1. William Hall, M.D., the Associate Director for Health Services, District of Columbia Department of Corrections, testified at the District of Columbia Council budget oversight hearings for the Department of Corrections in February, 1992, that he believes the rate of infection to be as high as 25%. Smith, *supra* note 6, at 258.

[167] Smith, *supra* note 6, at 258.

[168] Mencimer, *supra* note 166, at C1. The most recent and tragic incidence of the District's "non-treatment" policy involved the death of an inmate with AIDS at the

treat the disease, those carrying the virus must be identified. Lorton, however, does not conduct mass testing for HIV, the AIDS antibody. HIV testing is performed only where "clinically indicated," as determined by a physician.[169] Because the D.O.C. will not test for HIV unless prisoners first show symptoms of the disease, inmates who wish to be tested must obtain a court order requiring corrections officials to administer the blood test.[170] Such a policy, argue health experts, prisoners-rights groups, and judges, "may deprive inmates of critical medical and psychological help."[171]

In May of 1992, the D.C. Agency for HIV/AIDS released a five-year plan outlining recommendations for slowing the spread of the disease and containing medical costs both within and outside of the corrections system.[172] However, there is little evidence that the D.O.C. is implementing the plan's recommendations quickly, if at all.[173] The D.O.C. has yet to launch a comprehensive policy for the identification and treatment of AIDS among the prison population.[174] Even when required to take certain steps, such as distributing condoms in all correctional institutions, the D.O.C.'s implementation has been slow and problematic. For instance, the D.O.C. initially

> require[d] that a condom-seeking prisoner first make an appointment with a case manager — which require[d] a wait of anywhere from several hours to several days. If an inmate [was] lucky enough to score an appointment, the caseworker [would] give him a how-to-wear-a-condom 'safe sex' lecture before handing him his rubber.[175]

Prison officials now make condoms available for inmates to take at will by placing them in boxes at prison infirmaries, but they do not keep tabs on who is using them or how often they are being used.[176]

Even though the D.O.C.'s stated policy is "to provide clinically appropriate treatment and housing for all patients with infectious diseases,"[177] its own Department Order indicates that its efforts fall far short of its policy. Inmates who test positive for HIV, for example, "will continue to be housed in the

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D.C. Jail. The inmate, who died while tied to a wheelchair with a urine-soaked sheet, was ignored for days by jail staff who did not want to go into his cell because of the stench. Toni Locy, *The Doctor is in to Cure District's Jail*, WASH. POST, Aug. 21, 1995, at B1.

[169] Department Order No. 6012.3 § 5(i) (1988).

[170] Daniel Klaidman, *D.C. Prisoners Denied AIDS Tests; Policy Impedes Inmates' Efforts to Join Drug-Rehab Progrms or Receive Early Treatment for Disease*, LEGAL TIMES, Aug. 21, 1989, at 1, 16.

[171] *Id.* at 16.

[172] *See* Mencimer, *supra* note 166, at C1.

[173] *Id.*

[174] *Condom Handouts Urged for Inmates*, WASH. TIMES, June 13, 1991, at B3.

[175] Mencimer, *supra* note 166, at C1.

[176] *Condoms for Convicts Draw Fire*, WASH. TIMES, Apr. 14, 1995, at C4.

[177] Department Order No. 6012.3 § 1(b) (1988).

general population."[178] Despite the fact that the Department Order provides that "[l]iterature relating to the disease will be made available to the resident,"[179] AIDS activists argue that "there is no adequate AIDS education available to inmates."[180]

The D.O.C.'s treatment of inmates with AIDS is fueled by "what appears to be stunning indifference to the prison epidemic by city corrections officials."[181] One woman, who was allowed a rare "contact" visit with her son while he was being "treated" for AIDS in the infirmary at the D.C. Jail, found him "in a fetal position, filthy and in pain. The thrush in his mouth was so bad he couldn't eat." She maintains that AIDS didn't kill her son, but that "[n]eglect did."[182] In short, the AIDS epidemic has only made an existing problem — the deplorable health care at Lorton — even worse.[183]

V. Rights Under the Eighth Amendment

The Eighth Amendment protects prisoners against cruel and unusual punishment during confinement. The extent of that protection, however, was recently scrutinized — and ultimately limited — by the Supreme Court.[184] In *Wilson v. Seiter*, the Court distinguished between official conduct that is part of the punishment formally imposed for a crime and official conduct that does not purport to be punishment, such as conditions of confinement, medical care, and restoring official control over inmates.[185]

The Court reasoned that the text of the Eighth Amendment prohibits "only cruel and unusual *punishment*," and that "[t]he infliction of punishment is a deliberate act intended to chastise or deter."[186] A prisoner challenging official conduct that is not part of the formal penalty for his crime must therefore demonstrate (1) a "sufficiently serious" deprivation, and (2) that officials acted with a "sufficiently culpable state of mind."[187]

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[178] *Id.* § 5(g)(1).

[179] *Id.*

[180] Klaidman, *supra* note 170, at 17.

[181] Mencimer, *supra* note 166, at C1.

[182] *Id.* at C2.

[183] The medical care available at Lorton is discussed more fully *infra* part V(A).

[184] Wilson v. Seiter, 501 U.S. 294 (1991).

[185] *Id.* at 298-302.

[186] *Id.* at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

[187] *Id.* at 298. The circuits are unclear as to the requisite degree of subjective intent on the part of prison officials that must be shown in order to raise an Eighth Amendment claim. Wolf & Yee, *supra* note 113, at 1379 n.2950. The D.C. Circuit, albeit prior to the *Seiter* ruling, had already clearly stated its position on the matter. *See* Inmates of Occoquan v. Barry, 844 F.2d 828, 839 (D.C. Cir. 1988) (holding that the Eighth Amendment was not violated when food, shelter, health care, and personal security are provided).

A. *Medical Care*

Say your shoulder is out of place. They'll give you a Motrin and tell you you'll be okay. They give you Motrin for everything, as if Motrin solves everything.[188]

The Supreme Court has adopted a "deliberate indifference" standard to determine whether officials display the requisite culpable state of mind with respect to medical care.[189] Prison officials cannot be deliberately indifferent to a prisoner's serious medical needs.[190] Deliberate indifference is manifested "by prison doctors in their response to the prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[191]

In the District of Columbia, an inmate can either file a complaint pursuant to the Eighth Amendment claiming he received inadequate medical care, or he can allege medical negligence under D.C. Code Section 24-442.[192] The D.O.C. has a duty of reasonable care pursuant to that provision to care for and protect inmates.[193] Needless to say, proof of medical negligence is a lower standard than proof of an Eighth Amendment violation.

In a 1987 malpractice suit brought by an inmate, the D.C. Court of Appeals decreed that D.C. prisoners are entitled to the same standard of medical care that physicians provide to private patients. The prisoner alleged that the D.O.C. failed to provide him with proper medical treatment for an infection that developed following his surgery in 1980 for a ruptured hernia. The court found that the level of care provided to the inmate fell below the level of competence expected in such a situation.[194]

Given the deplorable state of medical care at Lorton, it is no wonder that the D.O.C. is continuously sued over its mistreatment of sick inmates.[195] The city budgets several million dollars each year in anticipation of the fines and damage awards it expects to pay for negligence and poor prison health care.[196] The lawsuits are bound to increase, considering that the health of Lorton inmates is worsening, "in part because of the AIDS epidemic and the spread of tuberculosis, a seldom-fatal disease that

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[188] Interview with a Maximum Security inmate (Feb. 1994).

[189] Estelle v. Gamble, 429 U.S. 97 (1976).

[190] *Id.*

[191] *Id.* at 104-05.

[192] D.C. CODE § 24-442 provides, in pertinent part: "Said Department of Corrections . . . [shall] be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institutions."

[193] *Id.*

[194] District of Columbia v. Mitchell, 533 A.2d 629, 649 (D.C. App. 1987).

[195] *See, e.g., id.* (prisoner awarded $250,000 due to prison's failure to treat prisoner's serious injuries in a timely fashion); *see also* Smith, *supra* note 6, at 263 n.135 (citing Crawford v. District of Columbia, C.A. No. 92-1871 (D.D.C.)(Hogan, J.), in which a prisoner was awarded $150,000 due to prison's two-year delay in diagnosing a lump on prisoner's scalp which later turned out to be cancer).

[196] Mencimer, *supra* note 166, at C2.

recently has killed 14 prisoners."[197]

In response to several lawsuits and as a result of the District's continual failure to correct the various problems relating to health services, a special officer was appointed to monitor and report on the District's compliance. The court-ordered report[198] regarding medical conditions at the D.C. Jail "paints a portrait of a health system in chaos with a filthy, roach-infested infirmary and a staff that often fails to respond promptly to emergencies."[199] The report, in which court-appointed Special Officer Grace Lopes describes the D.O.C.'s treatment of inmates as callous, cruel and unprofessional,[200] "is replete with examples of inmates who were ignored when they complained of serious ailments or who failed to receive basic care."[201]

The following excerpts from the report illustrate the disarray and gross negligence that typify the medical care available at the jail:

> Medical personnel change wound dressings in a filthy utility room while inmates sit on a low-standing, open, flushable basin that's routinely used as a urinal by inmates and staff alike.
>
> Infirmary patients and their sick cellmates are left to sleep within several feet of open toilets that are overflowing with urine and feces.
>
> Incontinent, physically disabled inmates are often changed and cared for by other inmates. One bedridden inmate receives "physical therapy" from two inmates who are confined to wheelchairs — they push the bed to the center of the room, each gets on a side and picks up a sheet and moves his legs up and down.[202]

The report also states that one thirty-three-year-old inmate has been left to crawl around his cell and other parts of the jail for more than a year after telling doctors he is unable to walk. Since doctors have found no organic cause for his problem, a jail psychiatrist wrote that not walking is the inmate's way of "coping with D.C. jail life."[203]

The report also blasted the Jail's mental health facilities, finding the level of care "frequently substandard and at times dangerous and negligent."[204] Nine prisoners have killed themselves at the D.C. Jail since 1993, prompting a national expert on jail suicide to conclude that the D.C. Jail's death rate is catastrophic and the worst he has ever seen.[205] In an attempt to address its mishandling of suicidal inmates, the D.O.C. issued a departmental order in June, 1993 regarding suicide prepared-

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[197] Saundra Torry & Amy Goldstein, *Health Care Faulted at D.C. Jail*, WASH. POST, Oct. 22, 1993, at A1.

[198] Smith, *supra* note 6, at 245.

[199] Torry & Goldstein, *supra* note 197, at A1.

[200] *Cruelty Inside Prison Walls*, WASH. POST, Feb. 10, 1994, at A26.

[201] Torry & Goldstein, *supra* note 197, at A16.

[202] *Cruelty Inside Prison Walls, supra* note 200, at A26.

[203] Torry & Goldstein, *supra* note 197, at A1.

[204] *Id.*

[205] Toni Locy, *Report Lambastes D.C. for Jail Suicides*, WASH. POST, Oct. 12, 1994, at D1, D5.

ness.[206] Such efforts have not slowed the alarming suicide rate at the Jail, however, and even Margaret Moore acknowledges that there are "life threatening deficiencies at [the Jail]."[207] To her credit, Ms. Moore has developed training programs and suicide prevention policies. The recommendations include better inmate screening and staff training in suicide prevention, CPR and crisis intervention.[208]

The report also found that the Jail does not adequately help the many inmates withdrawing from alcohol or other drugs. For example, an inmate who was correctly diagnosed as suffering from heroin withdrawal was given the wrong kind of medicine and died within an hour.[209]

In addition to the AIDS epidemic, with which all the nation's prisons have had to deal, the District has been faced with an alarming spread of tuberculosis ("TB") among its inmates. Although TB, once forecast to disappear by the end of the century, is ordinarily not fatal, it has killed at least fourteen District prisoners in recent years.[210] The disease is particularly prevalent in prisons, where crowded conditions make the disease spread more easily.[211] But it is the quality of the Jail's medical care that accounts for the recent outbreak of TB, as evidenced by the fact that neither Virginia nor Maryland prisons have had a single TB-related death in recent years.[212]

Efforts to screen prisoners for TB at the D.C. Jail are inadequate,[213] and treatment of TB and other diseases has been hampered by shortages of medicine.[214] The problem is exacerbated by the highly contagious nature of the disease, given that "the failure to provide appropriate respiratory isolation facilities . . . subjects other inmates, correctional and medical staff, as well as the community at large, to unreasonable risk of infection."[215]

An even more troubling critique from the report is that "[c]orrections officials haven't just tolerated the deficiencies, they have repeatedly

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[206] Department Order No. 6080.2 sets up different types of suicide watches and requires that an inmate be placed immediately on constant watch status "[a]nytime there are suicidal indicators evident in an inmate, e.g., verbalization or suicidal gestures, or a staff person has sufficient reason to believe that the inmate is contemplating suicide." Department Order 6080.2 § VI(A)(1) (1993).

[207] Locy, *supra* note 205, at D5.

[208] *Id.*

[209] Torry & Goldstein, *supra* note 197, at A16.

[210] *Id.* at A1.

[211] *Id.* at A16.

[212] *Id.* at A1. *See also* OUT FRONT, Fall 1993, at 4 (on file with author). This publication is produced by family members of inmates.

[213] Torry & Goldstein, *supra* note 197, at A16.

[214] *Id.*

[215] Paul Duggan, *D.C. Fails to Isolate Inmates with T.B.*, WASH. POST, May 5, 1994, at C1. The D.O.C. agreed to pay fines of $5,000 per day, per inmate, for every day that an inmate with infectious tuberculosis is not isolated in a properly equipped room, and $1,250 for each inmate suspected of having the illness who is not properly quarantined. *Id.*

waltzed into federal court and concealed their failures by swearing to a litany of inaccurate and misleading information about conditions in the Jail."[216] Despite critical interim reports by the court-appointed monitor's health expert, the Jail failed to make any improvements in the specified problem areas.[217] On March 16, 1994, the court found the District in contempt for failing to comply with previous court orders designed to improve medical and mental health services.[218]

In July, 1995, Senior U.S. District Judge William B. Bryant's patience finally ran out. In rejecting the District's request for yet more time to comply with his previous court orders to improve the medical conditions at the Jail, Judge Bryant seized control of the Jail's medical and mental health services and appointed a receiver with the power to both recommend and implement change.[219] The Jail's medical services, while arguably the worst within Lorton and certainly the most publicized, unfortunately are not the only instance of poor health care for Lorton inmates. Inmates at the other Lorton facilities in Virginia encounter many of the same medical care deficiencies, and suffer from a slew of other problems as well.[220]

The D.O.C. has repeatedly been ordered, most recently by a federal judge in July, 1994, to replace its unlicensed physician assistants with licensed medical staff members at its Lorton facilities.[221] One inmate died after a bowel obstruction was misdiagnosed by a physician assistant, and another inmate nearly died after being given an injection of cleaning solution.[222] Lorton's response, however, was to fire its unlicensed physician assistants without replacing them. Sick call at Occoquan Facility was consequently suspended for a week, leading inmates there to set trash

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[216] *Cruelty Inside Prison Walls, supra* note 200, at A26.

[217] Several months after the filing of one such report, and despite giving the jail prior notice, the monitor's health expert conducted a follow-up inspection of the jail's infirmary and found "soiled and dirty mattresses, filthy sheets and bed clothing, stained walls and floors, dirt encrusted toilets and sinks, live and dead roaches, broken radiator covers, mottled walls evidencing substantial roof leaks in several rooms, and the use of stained and dirty toilets for washing underclothes and socks." *Id.* In late 1989, the special officer reported that "there are multiple serious systematic problems which result in inadequate care and unnecessary suffering." Smith, *supra* note 6, at 250.

[218] Smith, *supra* note 6, at 248.

[219] Toni Locy, *U.S. Judge Seizes Control of D.C. Jail Medical Care*, WASH. POST, July 12, 1995, at B1. Dr. Ronald M. Shansky, who became the court-appointed receiver on August 21, 1995, plans to occasionally sleep at the jail to ensure that he is seen as a presence there. Locy, *supra* note 168, at B5.

[220] *See* Smith, *supra* note 6, at 249 (citing Twelve John Does v. District of Columbia, No. 80-2136 (D.D.C.) (Green, J.), 668 F. Supp. 20 (D.D.C. 1987), *rev'd*, 841 F.2d 1133 (D.C. Cir. 1987), which resulted in a consent decree regarding the health services — among other dangerous and unconstitutional conditions of confinement — at Central Facility).

[221] *See* Toni Locy, *D.C. Corrections Told to Replace Doctors' Aides; Injunction is First Action in Lorton Inmates' Suit*, WASH. POST, July 13, 1994, at C3.

[222] *Id.*

cans on fire and stop working for four days in protest.[223]

Another complaint, levelled by Lorton's female inmates in a class-action lawsuit alleging that conditions at Lorton violate female prisoners' civil and constitutional rights, is that the District provides "deficient" and "inadequate" obstetric and gynecological care to female prisoners.[224] An expert on prison health care investigating the women's complaints found that Lorton's female prisoners receive poor medical care.[225] Noting that the prison staff recorded women's symptoms on charts with drawings of men with the genitals crossed out, the expert testified that some pregnant women were not given proper food, vitamins or classes. He also stated that Pap smears — which department policy requires within a month after an inmate is admitted — were not done in nine of the seventy D.C. cases he reviewed.[226] Incidents the female inmates cite in the lawsuit include one woman giving birth in her cell before medical personnel arrived and another waiting eighteen months for a biopsy after complaining of a painful, leaky breast.[227]

The administrative response to Lorton's health care crisis is that inmates have a far better deal than the general public.[228] The wardens maintain that inmates can see a physician every day if they choose, whereas most people outside of prison have to wait much longer for a consultation with a physician.[229] The procedure is that inmates at Lorton sign up for sick call or, if they are in lockdown cells, sign the sick call list. If the problem is acute, the inmates are taken to the infirmary within their facility. If the problem is of a more serious nature, they are transported to D.C. General Hospital, where they are assessed. They are then treated, either at the hospital or back at Lorton.[230]

The problem, according to the Lorton administration, is that the inmates traditionally have received minimal health care prior to incarceration so they arrive at Lorton with "very high needs."[231] The administration also points to the tremendous burden on the medical staff.[232] Few would disagree that the prison health system is severely understaffed. This problem is exacerbated by "the fact that many of the front line treatment staff are unlicensed, inadequately trained and poorly supervised paraprofessionals,"[233] which results in many of the physicians feeling overworked, overwhelmed, and unresponsive to prisoners' needs.

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[223] *Protest Brings Changes at Lorton*, WASH. POST, Apr. 13, 1995, at J1.

[224] Masters, *supra* note 165, at D3.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] Interview with David Roach, Warden of Maximum Security (Jan. 1994).

[229] *Id.*

[230] If the medical problem is an emergency, the inmates at the Lorton, Virginia facilities are taken to Fairfax Hospital in Fairfax, Virginia.

[231] Interview with Vincent Gibbons, Warden of Central Facility (Jan. 1994).

[232] Interviews with Vincent Gibbons, Warden of Central Facility and David Roach, Warden of Maximum Security Facility (Jan. 1994).

[233] Smith, *supra* note 6, at 258.

The inmates have a different take on Lorton's health care system. They contend that many inmates do not avail themselves of the opportunity to see a physician because they do not want to deal with the hours of waiting that are inevitably involved, especially since all inmates are shackled the entire time.[234] Charles James-Bey twice refused medical care because he "didn't want to deal with the two days it takes for the hand swelling [from the chains] to come down."[235] Darrone Sampson, another Maximum Security inmate, has not sought medical treatment when he should have because he did not want to repeat the experience of being chained to a bench all day or "sitting in a bullpen"[236] while waiting to see a physician.

The inmates also maintain that the quality of the care leaves a lot to be desired. As one inmate put it, "Blood gets you out. You have to be bleeding to get really serious attention; otherwise, you get Tylenol."[237] Nor, according to inmates, is the sick call list implemented properly. Charles James-Bey has had his name on the Dentist List since August of 1992, but he had not yet seen a dentist when interviewed for this article in February of 1994.[238] Sylvester R. King was awaiting prescription glasses that were apparently ready but had never been brought to him as of the time he was interviewed for this article.[239] Kenard E. Johnson-El sued the District of Columbia because he was unable to keep a scheduled appointment with a dermatologist at another Lorton facility regarding his scalp condition due to "a lack of available transportation."[240] As a result of the delay or denial of medical treatment, Johnson-El's condition worsened and his hair began to fall out.[241]

Given the nation's health care crisis, problem-free prison health care is an unrealistic expectation. But Lorton inmates who have also been incarcerated elsewhere maintain that Lorton's health care deficiencies are unusually egregious.[242] It is no wonder that every inmate interviewed for this article who has also been incarcerated in a federal penitentiary maintains that the health care available in the federal facilities is far better.[243]

B. *Use of Force*

They've got these Ninja Turtle suits.[244] It's seven of them against one person. They whip you; they beat you bad. It's part of their recreation.

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[234] Interview with Charles James-Bey Maximum Security inmate (Feb. 1994).

[235] *Id.*

[236] The "bullpen" is the holding cell in which inmates are often required to await being seen by a physician.

[237] Interview with Maximum Security inmate (Feb. 1994).

[238] Interview with Charles James-Bey, Maximum Security inmate (Feb. 1994).

[239] Interview with Sylvester R. King, Maximum Security inmate (Feb. 1994).

[240] Johnson-El v. District of Columbia, 579 A.2d 163, 165 (D.C. 1990).

[241] *Id.*

[242] Interviews with Lorton inmates (Feb. 1994).

[243] *Id.*

[244] This is how the inmates refer to the riot gear worn by the guards.

> That's how they get their thrills. Once they subdue you, that should be the end of it, but it's not.[245]

In *Whitley v. Albers*, the Supreme Court held that the use of force by prison officials to maintain or regain control of prisoners may constitute cruel and unusual punishment if the force amounts to "the unnecessary and wanton infliction of pain."[246] The Court, however, cautioned that prison officials' actions generally do not constitute cruel and unusual punishment if such actions further legitimate penal interests.[247] On the other hand, if the force used meets the *Whitley* standard, a prisoner need not prove he has sustained a serious injury.[248]

The D.O.C.'s official policy regarding the use of force is "to use only the degree of force which is necessary to protect and ensure the safety of inmates, staff and other persons. The use of force is permissible only when other options are inappropriate or impossible."[249] Physical force and the application of restraints[250] are "intended to be used as control measures when absolutely necessary,"[251] and should "NEVER be used as a form of punishment."[252]

The Department Order provides that nondeadly force may be used for the following reasons:

1. In self defense;
2. In defense of another person;
3. To prevent or quell a riot or disturbance;
4. To protect government property; and
5. To maintain control and enforce regulations.[253]

Deadly force[254] is permissible only when "all reasonable precautions are taken to avoid endangering the lives of innocent persons."[255] The D.O.C. deems the following situations worthy of the use of deadly force:

1. To prevent the escape of an inmate who is housed in a correctional institution and considered a "clear and present danger" to other persons.[256]

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[245] Interview with a Maximum Security inmate (Feb. 1994).

[246] Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

[247] *Id.*

[248] Hudson v. McMillian, 503 U.S. 1, 3 (1992) (citing *Whitley*, 475 U.S. at 321).

[249] Department Order No. 5010.9 § II (1992).

[250] Restraints are defined as "security instruments used to physically control the movement of inmates such as handcuffs, leg irons, and belly chains." *Id.* § V(C).

[251] *Id.* § VI(A).

[252] *Id.* § VI(B).

[253] *Id.* § VI(D).

[254] Deadly force is defined as "force that is likely to cause death or serious bodily injury." *Id.* § V(A).

[255] *Id.* § V(E).

[256] The actual wording of Section V(E)(1) is ambiguous:

> With the exception of the Community Correctional Centers and Minimum Security Facility, [deadly force may be used] to prevent the escape of an inmate who is

2. To prevent the commission of any act that could result in death or grievous bodily injury to a person.

3. To prevent the destruction of property, upon determining that the damage or loss of property would facilitate escape, loss of life or grievous bodily harm.

4. To prevent escape during an escorted trip outside a correctional institution when the inmate's custody level requires an armed escort.[257]

Restraint equipment *must* be applied in the movement or transfer of inmates and during cell searches,[258] and *may* be applied in the following additional instances:

1. To prevent self-injury;
2. To prevent injury to others;
3. To prevent property damage;
4. To control violent behavior; and
5. For medical and psychiatric purposes.[259]

Restraint equipment is never supposed to be applied as a method of punishment, around the head or neck, or "in any way that causes unnecessary physical discomfort, inflicts physical pain, or restricts blood circulation."[260]

Most inmates undoubtedly would argue that the D.O.C.'s policies regarding the use of force look good on paper, but are not actually implemented by the officers. While most of the officers encountered in the author's many trips to Lorton treated the inmates with decency and even a modicum of respect, there was enough evidence of harassment and abuse to corroborate the inmates' claims of mistreatment.

Inmates insist that the use of force as punishment, rather than for reasons delineated in the Department Order, occurs. "[The officers] will beat your ass good," stated Irvin Brockman-Bey, a Maximum Security inmate whose jaw was once broken in a tussle with officers.[261] Another inmate, Sylvester King, stated that "they will mace an entire block down to get the block quieted down."[262]

In addition to the anecdotal accounts of excessive force at Lorton, the

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housed in a correctional institution and considered a 'clear and present danger' to other persons. In the event of an attempted escape from a Community Correctional Center or the Minimum Security Facility, the use of deadly force shall be *prohibited* unless it's reasonable to conclude that an escapee is a 'clear and present danger' to other persons.

Id. § V(E)(1). This ambiguity raises the question of whether it is therefore acceptable to use deadly force in the other facilities even when it is unreasonable to conclude that the escapee poses a "clear and present danger."

[257] *Id.* § V(E)(1)-(4).

[258] *Id.* § VI(F)(3).

[259] *Id.* § VI(F)(1)(a)-(e).

[260] *Id.* § VI(F)(4)(a)-(c).

[261] Interview with Irvin Brockman-Bey, a Maximum Security inmate (Feb. 1994).

[262] Interview with Sylvester King, a Maximum Security inmate (Feb. 1994).

D.O.C. has admitted to incidents in which officers have gotten out of hand.[263] In November, 1993, several guards at Maximum Security were either transferred to another facility or relieved of their duties after assaulting an inmate while he was in protective custody.[264] The inmates maintain that the D.O.C. disciplines officers for such abuse only when a case receives media attention.[265]

The legal standard for justifying the use of force — that it must further "legitimate penal interests"[266] — is, of course, not difficult to meet. Much of what goes on at Lorton can be justified under this amorphous standard. The unfortunate reality is that those cases which fail under *Whitley* inevitably boil down to the prisoner's word against the officer's, and of course the officer generally prevails in such showdowns.

C. *Overcrowding*

> In the Wall,[267] you don't really experience overcrowding because it's one man to a cell. But that don't make up for the other stuff that goes on at Max. At Central or Occoquan,[268] though, they pack you in there like sardines — and they're in trouble with the courts about it.[269]

The Supreme Court has adopted the same standard — "deliberate indifference" — for conditions of confinement as it has for medical care. Lorton fares no better in this realm than it does with respect to health care. Despite numerous consent decrees,[270] Lorton continues to be "overcrowded, poorly maintained and plagued with violence."[271]

In 1986, prior to the surge of arrests resulting from "Operation Clean Sweep,"[272] Lorton was already considered filled to capacity with just under 6000 inmates.[273] The District's prison population has practically doubled since then.[274] This population explosion is "a result of the institution of mandatory

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[263] Martin Weil, *Lorton Guards Probed in Inmate Attack*, WASH. POST, Dec. 1, 1993, at D3.

[264] *Id.* The inmate was a former D.C. police officer, which is why he had been placed in protective custody. *Id.*

[265] Interview with a Maximum Security inmate (Feb. 1994).

[266] Whitley v. Albers, 475 U.S. 312, 322 (1986).

[267] This is how inmates refer to Maximum Security.

[268] Every facility except Maximum uses some form of dormitory-style housing.

[269] Interview with a Maximum Security inmate (Jan. 1994).

[270] See *supra* note 221 for a list of some of the consent decree cases, and *supra* note 6 for a listing of each facility's court-imposed population cap or capacity.

[271] Smith, *supra* note 6, at 241.

[272] "Operation Clean Sweep" was an anti-drug initiative instituted by then-Mayor Marion Barry in 1991. It resulted in an extraordinary increase in arrests and detentions in the District of Columbia. In about 18 months, D.C. police made 46,000 arrests, one for every 14 District residents. James J. Fyfe, *Why Won't Crime Stop?*, WASH. POST, Mar. 17, 1991, at D1, D2.

[273] *Id.*

[274] Approximately 11,000 men and women are currently incarcerated in District of

minimum sentences for certain crimes, increased rates of re-incarceration for violation of parole, and a trend toward longer sentences in general."[275] While these factors are certainly not unique to D.C., the District nonetheless has the highest per capita incarceration rate in the country.[276]

In 1988, in response to what had become a crisis point, the D.C. legislature passed the Prison Overcrowding Emergency Powers Act.[277] The Act allows the Mayor, at the D.O.C. Director's request, to declare a prison state of emergency "[w]henever the population of the prison system exceeds the rated design capacity for 30 consecutive days."[278] When a state of emergency is declared, Lorton will produce a list of eligible, sentenced inmates[279] who will be released early to "reduce the prison population to the rated design capacity."[280]

In another crisis-style management approach, the District unilaterally closed its prisons to newly sentenced inmates during a six-week period in the fall of 1988. The result was that federal prisons, which were also crowded, were forced to accept more than 400 D.C. inmates.[281] Another tactic the District tried was the Interstate Corrections Compact Act of 1988, which enabled Lorton to send its prisoners to other state prisons.[282] In addition, the D.C. Government passed the Medical Parole and Geriatric Release Act, which allows for the release of older prisoners who are not considered a threat to

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Columbia correctional facilities. Smith, *supra* note 6, at 240 & n.19 (citing Campbell v. McGruder, No. 1462-71, 1987 WL 8724 (D.D.C. Mar. 11, 1987), 224th Report to the Court, Attach. 1, p.3 (Mar. 1, 1994); DISTRICT OF COLUMBIA FISCAL YEAR 1995 OPERATIONS BUDGET AND REVISED FISCAL YEAR 1994 REQUEST PUBLIC SAFETY AND JUSTICE, 93, Table II).

[275] *Id.* at 240.

[276] The District's incarceration rate is more than twice that of any state. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 2.

[277] D.C. CODE § 24-901 (Supp. 1988); *see* Department Order No. 4370.1 (1988).

[278] *See* Department Order No. 4370.1 § 5(a).

[279] Eligible inmates have "an established parole eligibility date, short term date or full term date of not more than 180 days from the date the emergency was declared." *Id.* § 5(b).

[280] *Id.* § 5(a).

[281] In 1990, prisoners who were transferred out of state to ease the overcrowding in the District's prisons brought a class-action lawsuit against the District. *See* Green v. District of Columbia, No. 90-793, 1991 WL 251936 (D.D.C. Nov. 12, 1991), 134 F.R.D. 1 (D.D.C. 1991). The court ordered the District to ensure that such prisoners have access to a law library, pens and writing paper, legal telephone calls and access to a photocopy machine. In 1992, the District was held in contempt for failing to provide the services, and a settlement was ultimately reached. Smith, *supra* note 6, at 256 (citing Order, Sept. 25, 1992); *In D.C., it's Often Government by Decree*, WASH. POST, Oct. 3, 1994, at A6.

[282] Approximately 215 District prisoners are incarcerated in a privately run county jail in Tennessee. *See* Smith, *supra* note 6, at 278.

society.[283]

These "solutions" were short-lived, however, and the District was repeatedly hauled into court on charges of overcrowding of its facilities.[284] The most recent case to address overcrowding at Lorton was brought on March 28, 1990 on behalf of the prisoners confined to the Modular Facility.[285] Although the prison was designed to hold 400 prisoners, more than 900 prisoners were being held there on the day the lawsuit was brought.[286]

According to Vincent Gibbons, the District has made dramatic improvements over the past five years in response to the *Twelve John Does* consent decree.[287] Others contend, however, that any improvements in the population caps are merely a result of "the city spend[ing] a great deal of its time shuffling prisoners in and out of pretrial detention facilities, out-of-state facilities and early-release programs."[288]

The reality is that despite the District's efforts, these problems have persisted unabated for twenty years.[289] Indeed, the courts and counsel for the prisoners contend that the District's efforts have been minimal at best. As expressed by the Honorable William B. Bryant, "[N]othing is done except at the end of a cattle prod . . . [T]he cattle prod is a motion for contempt."[290] Even when the "cattle prod" forces the District to respond, as it did by building a new $3 million protective custody cellblock at Occoquan Facility in response to a 1989 court order, there is no guarantee that Lorton's overcrowding will be eased. The new cellblock, which could house as many as 108 inmates who need protection from other inmates, has stood empty since its completion in November, 1994 because the District claims it does not have the money to open it.[291]

VI. RIGHT TO PROCEDURAL DUE PROCESS

You know it's wrong, what the officer did. And he knows it's wrong. But you're not going to be able to prove it. The officers always get the benefit

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[283] D.C. CODE ANN. § 24-261 (Supp. 1995).

[284] See *supra* note 221 for cases involving consent decrees resulting from these court actions.

[285] *See* Smith, *supra* note 6, at 253.

[286] *Id.* at 253 n.76.

[287] Interview with Vincent Gibbons, Warden of Central Facility (Jan. 1994).

[288] Karen Goldberg, *Fewer Inmates in D.C. Prisons*, WASH. TIMES, Dec. 3, 1990, at B1.

[289] Smith, *supra* note 6, at 271.

[290] *Id.* at 241 (citing Transcript of Hearing on Plaintiffs' Motion for an Order to Show Cause Why the Defendants Should Not be Held in Contempt at 10, Inmates of D.C. Jail v. Jackson, (D.D.C.), (No. 75-1668); Campbell v. McGruder, No. 1462-71 (D.D.C.).

[291] Hamil R. Harris, *District's Cash Crisis Leaves New Cells at Lorton Empty*, WASH. POST, Mar. 25, 1995, at B1.

of the doubt.[292]

The Fifth and Fourteenth Amendments to the Constitution of the United States prohibit the government from depriving persons of life, liberty or property without due process of law. The threshold question in any due process claim is whether a protected liberty or property interest has been interfered with by the state.[293] Liberty interests may be created by the Constitution, a court order, a statute, a treaty, a regulation, or a standard practice, policy or custom.[294] The test is (1) whether a liberty or property interest is involved, and (2) whether procedural safeguards are constitutionally sufficient to protect against any unjustified deprivation.[295]

Due process questions in the prison context most frequently arise when a prisoner is subject to disciplinary action. In *Wolff v. McDonnell*,[296] the Supreme Court held that certain minimum procedural safeguards must be provided if a disciplinary hearing could deprive a prisoner of good-time credits or result in disciplinary segregation.[297] The procedural requirements include written notice at least twenty-four hours in advance of the hearing on the alleged violation, an opportunity to be heard, an opportunity to call witnesses unless doing so would jeopardize prison security, and a written statement detailing the evidence relied on and reasons for the disciplinary action.[298] The Supreme Court later added that a higher standard must be met — the prison action must be supported by "some evidence" in the record — when a liberty interest is at stake at a hearing.[299]

The procedural safeguards available to Lorton inmates at disciplinary hearings are set forth in D.C. Code, Section 24-442 and in Chapter Five of the District of Columbia Municipal Regulations (DCMR).[300] To determine "the relative seriousness of prison offenses and . . . the appropriate severity of the penalties to be imposed for each offense if an accused is found guilty,"[301] the offenses are classified as (a) Class I — Serious Offenses;[302] (b) Class II —

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[292] Interview with a Central Facility inmate (Feb. 1994).

[293] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

[294] Wolf & Yee, *supra* note 113, at 1386.

[295] *Thompson*, 490 U.S. at 460.

[296] 418 U.S. 539 (1974).

[297] *Id.* at 557-58.

[298] *Id.* at 563-67.

[299] Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454 (1985).

[300] The Lorton Regulations Approval Act of 1982 contains the same rules as these provisions and is the Act to which Lorton administrators refer for such matters.

[301] D.C. Mun. Regs. tit. 28, § 501.2 (1987).

[302] Class I Offenses include murder, burglary, manslaughter, kidnapping, armed robbery, first degree burglary, assault, forcible sexual abuse, restraint (defined as "willfully restraining another person under circumstances which expose the other person to a risk of bodily injury"), arson, tampering with a witness or informant, bribery, escape (which includes attempting to escape), possession of major contraband (defined as any weapon, intoxicating beverage, narcotic drug or drug paraphernalia, or marijuana),

Major Offenses;[303] and (c) Class III — Minor Offenses.[304]

The official record of the alleged offense consists of a disciplinary report, which is prepared by the accusing official.[305] The shift supervisor then investigates the charges, and decides to either reject the disciplinary report, reprimand and warn the accused inmate, or refer the matter for an adjustment hearing.[306] The accused inmate is entitled to written notice of the hearing date at least three days prior to the hearing.[307] He also has the right to call witnesses,[308] to be represented by counsel,[309] and to an administrative appeal.[310] The Adjustment Board must issue its decision in writing, setting forth "the factual information upon which the finding is based."[311]

In addition to the penalties designated for Class III Offenses, inmates may also be subject to any of the following penalties: assignment to adjustment segregation[312] for a designated period;[313] change in custody status or housing

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theft, receiving stolen property, engaging in a riot, inciting to riot, damage or destruction of property, and forgery and tampering. *Id.* §§ 502.1-.17.

[303] Class II Offenses include bodily injury, homosexual activity, fighting, lack of cooperation (defined as "willfully refusing to perform duties assigned" or "failing to respond to any question or direction of a D.O.C. employee" or "willfully disobeying a valid order of a D.O.C. employee"), gambling, threatening conduct, falsifying physical evidence, lying, possession of contraband (defined as possession of any paper money or coins, possession of any article not issued by or authorized by the Administrator, or use of any article contrary to its intended use), creating a disturbance, and giving a false alarm. *Id.* §§ 503.1-.12.

[304] Class III Offenses include unauthorized use of property of another, being out of place or absent at count, abuse of privileges (which includes taking excess food from the serving line in the dining hall), creating a health, safety or fire hazard, abuse of living quarters (defined as failing to make one's bed or keep one's belongings in the designated storage unit), disorderly appearance and clothing, willful disobedience of a general order (examples include engaging in loud or boisterous talk, willfully failing to promptly proceed from place to place within the institution, and approaching or speaking to any visitor other than counsel without authorization), and disrespect (defined as making obscene or abusive remarks to or about D.O.C. employees). *Id.* §§ 504.1-.9.

[305] *Id.* § 506.1.

[306] *Id.* § 507.2.

[307] *Id.* § 507.12.

[308] *Id.* § 507.13(b).

[309] *Id.* § 507.13(c).

[310] *Id.* § 513.9.

[311] *Id.* § 512.7. The following penalties for Class III Offenses, however, may be imposed without referring the matter to the Adjustment Board and without making any written record: (a) reprimand and warning; (b) restitution, where appropriate; and (c) confiscation, where appropriate. *Id.* § 505.5(a)-(c).

[312] Adjustment segregation is defined as "confinement in a control cell without privileges, but with uncensored correspondence, access to religious and legal reading matter, and at least two (2) hours per week of out-of-cell recreation." *Id.* § 505.4.

[313] The designated periods are as follows: up to seven days for Class III Offenses, and up to 14 days for Class I and Class II Offenses. *Id.* §§ 505.2(c), 505.3(a).

assignment;[314] forfeiture of all or part of earned good time;[315] transfer to Maximum Security status;[316] extra duty assignment;[317] or loss of pay, reduction in grade, or change of work assignment when the offense was committed in the performance of a work assignment.[318]

The D.C. Court of Appeals has held that Lorton's disciplinary hearings must meet the procedural requirements set out by the Supreme Court in *Wolff v. McDonnell* and *Superintendent, Mass. Correctional Inst. v. Hill*.[319] The D.C. Court has also pointed out, however, that there is no constitutional right to a full trial-type hearing in prison discipline cases and that there is no D.C. statute which requires such a hearing.[320]

The bottom line is that, despite certain procedural safeguards afforded Lorton inmates in disciplinary hearings, there are significant limitations to such hearings. These include limitations on the number of witnesses that a prisoner may call,[321] the prisoner's right of confrontation,[322] and even the prisoner's right to know the names of the witnesses[323] and all the evidence relied upon by the board in making its decision.[324]

The inmates interviewed for this article also maintained that the administration does not always abide by its own rules and regulations. Specifically, they complained that the time frames for disciplinary hearings and appeals are not adhered to, and many said that their appeals took as long as a month, rather than the three days provided for in the regulations.[325] The inmates also complained that their punishments are often more severe than those prescribed in the regulations.[326] For instance, inmates claim that they tend to spend far

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[314] *Id.* § 505.2(b).

[315] *Id.* § 505.2(a).

[316] *Id.* § 505.2(e).

[317] *Id.* § 505.2(f).

[318] *Id.* § 505.2(d).

[319] *See* Vaughn v. United States, 598 A.2d 425 (D.C. 1991) (inmate entitled to minimum procedural rights and written record of findings since transfer from the Youth Center to an adult facility because of a "no further benefit" determination was equivalent to a revocation of good time credits). For a discussion of *Wolff*, see text accompanying notes 296-98. For a discussion of *Hill*, see *supra* text accompanying note 299.

[320] *See* Singleton v. District of Columbia Dep't of Corrections, 596 A.2d 56 (D.C. App. 1991) (court lacked jurisdiction to review prison housing board's decision since non trial-type hearing did not qualify as contested case).

[321] D.C. Mun. Regs. tit. 28, § 525.3 (1987) (prisoner may call two witnesses, but the right to call more than two "shall be subject to control by the Adjustment Board").

[322] *Id.* § 525.5 (witness may be questioned by a department official out of the prisoner's presence if the board finds that allowing the prisoner to confront the witness would pose a threat to the witness's safety).

[323] *Id.* § 526.3.

[324] *Id.* § 526.4.

[325] Interviews with Central Facility and Maximum Security inmates (Feb. 1994).

[326] Interviews with Central Facility inmates (Feb. 1994).

more than fourteen days "in the hole"[327] for a Class I offense, because they are placed in solitary confinement while their case is pending and, if transferred to Maximum, while awaiting the transfer.[328]

In addition to disciplinary hearings for their own violations, Lorton inmates are provided with "an administrative procedure through which [they] may seek formal redress of *their* grievances."[329] The Inmate Grievance Procedure (IGP) is intended to provide inmates with "an expedient formal system for resolving grievances when informal procedures have failed."[330] The inmates contend, however, that both systems, the formal *and* informal, fail them.[331]

When an inmate is unable to resolve a complaint through informal means,[332] he may file a formal grievance by completing the IGP Form and describing the specific incident, charge, or complaint.[333] Each inmate is supposed to be informed about the IGP procedure upon arrival at a Lorton facility.[334] The procedure requires that inmates receive written justification for any decision which is rendered on a grievance or grievance appeal.[335] Although the IGP looks good on paper, Lorton inmates interviewed for this article feel that the grievance procedure is "just for show," unanimously agreeing that only those inmates with particularly egregious complaints can prevail in the IGP process.[336]

VII. RIGHT TO EQUAL TREATMENT

Mario Vilche pleaded with the bewildered prison guard in Spanish and in shards of broken English. He shoved the doctor's order toward the guard,

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[327] *Id.*

[328] *Id.*

[329] Department Order No. 4030.1D § I (1992) (emphasis added).

[330] D.C. CODE ANN. § 12-309 (1981). If an inmate does resort to suing the District, he must give the District notice — in the form of a letter to the Mayor — within six months of the injury or damage he sustained. The letter must state the approximate time, place, cause, and circumstances of the injury or damage. *Id.* The statute allows a police report to serve as sufficient notice in lieu of a letter to the Mayor, but such an alternative is obviously moot for inmates who do not have access to the police at the time they sustain their injury or damage. The notice requirements have been strictly enforced with respect to inmates. *See, e.g.*, Winters v. District of Columbia, 595 A.2d 961 (D.C. 1991) (finding that inmate's letter did not adequately state the date, place and factual cause of the injury; amended complaint filed by attorney did not suffice because it was not filed within six months of the accident).

[331] Interviews with Central Facility and Maximum Security inmates (Feb. 1994).

[332] Informal means consist of "verbally notifying and discussing the complaint with the relevant parties or an appropriate DCDC employee." Department Order No. 4030.1D § VII(F)(1) (1992).

[333] *Id.* § VII(F)(2).

[334] *Id.* § VII(A)(1).

[335] *Id.* § VII(F)(8).

[336] Interview with Central Facility and Maximum Security inmates (Feb. 1994).

but there was still no response, no acknowledgment of Vilche's problem. Within a week, Vilche was seriously ill and had to be transferred from his prison cell at the D.C. Detention Center to the emergency room of D.C. General Hospital. He should have been receiving dialysis treatment three times a week. But he couldn't communicate that simple, urgent message, because he spoke virtually no English and the guard spoke no Spanish. And no one was on hand to translate.[337]

While individuals do not forfeit all equal protection rights upon incarceration,[338] they certainly do not enjoy the same degree of protection that they would outside of prison. Practices that result in unequal treatment among prisoners are permissible if such practices are rationally related to a legitimate penal interest.[339]

When one considers that the population of the District of Columbia and its prison facilities is overwhelmingly African American,[340] it is not surprising that there are no lawsuits filed by African American inmates alleging unequal treatment based on race.[341] Equal protection complaints, however, also arise from unequal treatment of prisoners based on gender.[342] The District's female inmates have recently filed several lawsuits alleging that the programs, services, and living conditions for women prisoners are generally inferior to those provided for Lorton's male prisoners. Further, thirteen Hispanic inmates have filed a class action lawsuit alleging systemic discrimination within the District's prison system.[343]

In 1989, the D.C. Public Defender Service filed a class action lawsuit on equal protection grounds on behalf of all female prisoners sentenced under the Youth Rehabilitation Act of 1985 (YRA).[344] The lawsuit alleged that young female inmates are housed with more hardened criminals, are not allowed to participate in college-level educational classes, are trained only in such "traditionally female areas" as sewing and typing, and do not have access to psycho-

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[337] Eva M. Rodriguez, *Barriers Behind Bars? Latinos Charge D.C. Prison With Bias*, LEGAL TIMES, Oct. 3, 1994, at 1.

[338] Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam).

[339] *See, e.g.*, Fields v. Keohane, 954 F.2d 945, 951 (3d Cir. 1992) (holding equal protection was not violated by District of Columbia statute allowing for assignment to federal facility because statute was rationally related to government interest in alleviating overcrowding).

[340] African-Americans account for 97% of Lorton's inmate population. DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5, at 1.

[341] The author's search failed to reveal any such cases.

[342] More than 50,000 females currently serve time in state and federal correctional institutions. Most female prisoners were sentenced for non-violent — usually drug- and alcohol-related — offenses. CORRECTIONS COMPENDIUM, Jan. 1994, at 6. At Lorton, females account for approximately eight percent of the inmate population. DISTRICT OF COLUMBIA DEP'T OF CORRECTIONS, *supra* note 5.

[343] *See* Rodriguez, *supra* note 337, at 1.

[344] Masters, supra note 165, at D3.

logical services.[345] Furthermore, many D.C. Superior Court judges send women to federal facilities rather than sentencing them under the YRA because they are thought to have a much better chance at being rehabilitated in a federal prison.[346] This results in the women getting locked up in facilities that are even farther away from D.C. than Lorton, and also denies them the opportunity to have their crimes expunged from their criminal records — one of the main advantages of being sentenced under the YRA.[347]

In a much more comprehensive and far-reaching lawsuit, eight current and former female inmates filed a class action against the District of Columbia alleging violations of their civil and constitutional rights at all of the Lorton facilities.[348] The plaintiffs alleged that Lorton's female inmates were sexually harassed and assaulted, denied appropriate medical care, kept in unsanitary conditions, and allowed to participate in fewer educational and recreational programs than men.[349]

Female inmates testified that they and fellow inmates had performed sexual acts for their jailers in exchange for food and cigarettes,[350] and that those housed at C.T.F. went several months without sanitary napkins because their jailers ran out of them.[351] The plaintiffs requested that the court impose an extensive set of requirements on the D.O.C. to "remedy problems of discrimination and reduce sexual misconduct."[352]

The lawsuit filed on behalf of Lorton's Hispanic prisoners alleges that the District's efforts to serve the Hispanic prison population have "failed, consistently and miserably."[353] The Hispanic inmates point to the language barrier as the source of much of the discrimination they suffer, because it results in abuse from guards and other inmates, as well as missed opportunities for parole and vocational and work-release programs. The plaintiffs also contest the District's practice of keeping Hispanic inmates in higher-security facilities simply because they are immigrants.[354]

The legal standard is again skewed in the prison's favor, because it is not

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[345] *Id.*

[346] *Id.*

[347] D.C. CODE § 24-806 (Michie 1995).

[348] Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994).

[349] *Id.*

[350] *Female Inmates Tell of Sex for Favors in Jail*, WASH. POST, June 17, 1994, at C7.

[351] *Id.*

[352] Masters, *supra* note 165, at D3. Judge Green issued an order in December, 1994, granting many of the plaintiffs' requests. *Women at the Bottom of the Scale*, WASH. POST, Dec. 15, 1994, at A26. The D.O.C. promptly appealed and requested a stay of the judgment. An agreement on most issues was recently reached through mediation, with the plaintiffs still maintaining that they were the prevailing party.

[353] Rodriguez, *supra* note 337, at 6.

[354] The case is currently pending before Judge Joyce Hens Green of the U.S. District Court for the District of Columbia. *See id.*

difficult to defend practices that need only bear a rational relation to a legitimate penal interest.[355] Even given this generous standard, however, the District has been unable to justify most of its differential treatment of women and Hispanic prisoners at Lorton.

VIII. Right to the Assistance of Counsel

Prisoners retain a Sixth Amendment right to counsel for criminal prosecutions arising while they are incarcerated.[356] The right does not extend to disciplinary actions,[357] however, or to administrative segregation based on suspected criminal activity unless the prisoner has been charged with a crime.[358] The right attaches only at or after the initiation of judicial proceedings against the defendant.[359]

Although inmates are not constitutionally entitled to counsel for litigation that they initiate,[360] many members of the District's legal community would like to see Lorton's inmates represented in such cases. Since 1988, prisoners' cases have constituted the largest single category of civil *pro se* filings in the District.[361] At a 1988 meeting of the D.C. Bar, U.S. District Judge Louis Oberdorfer

> urged members of the bar to take up this cause, as other lawyers volunteered in the civil rights struggle 25 years ago, by accepting cases, mobilizing public opinion on behalf of these "disenfranchised and despised" clients and lobbying for whatever changes in the law are required to make the prisons decent and humane.[362]

In 1990, the District Court and the D.C. Bar united to establish a permanent panel of lawyers to take on the inmates' *pro se* civil cases.[363]

Once an inmate has an attorney, whether or not it is one to which he is entitled under *United States v. Gouveia*,[364] Lorton takes the inmate's relationship with his attorney very seriously. The D.O. which governs the attorney-client relationship states:

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[355] Turner v. Safley, 482 U.S. 78 (1987).

[356] United States v. Gouveia, 467 U.S. 180, 187, 192 (1984).

[357] Baxter v. Palmigiano, 425 U.S. 308, 315 (1976). In this context, Lorton provides more than is required by entitling inmates to counsel during disciplinary hearings. *See* D.C. Mun. Regs. tit. 28, § 507.13(c) (1987). See *supra* Section VI for a discussion of inmates' other rights during such hearings.

[358] *Gouveia*, 467 U.S. at 192.

[359] *Id.*

[360] *See* U.S. Const. amend. VI (guaranteeing the right to assistance of counsel "[i]n all criminal prosecutions").

[361] Anne Kornhauser, *Judges Try to Link Lawyers with Needy Litigants*, Legal Times, Aug. 20, 1990, at 2, 20.

[362] *Judge Oberdorfer's Challenge*, Wash. Post, July 16, 1988, at A24.

[363] *See* Kornhauser, *supra* note 361.

[364] *See supra* text accompanying note 356.

> The Department recognizes the uniqueness of the attorney-client relationship and the obligation that the Department has to ensure that this relationship is not hampered by either unreasonable restrictions or by practices of persons employed by the Department. No employee in the Department shall interfere with reasonable access between residents and any attorney as provided by this Order.[365]

An inmate's access to his attorney is not entirely unhampered, however. Any correspondence between an inmate and his attorney, while not supposed to be read for content, is opened and examined for contraband by the officer on duty.[366] Attorneys wishing to confer with their clients in person must call the facility no later than 4:00 p.m. on the day preceding the intended visit,[367] and must come during designated hours unless the Superintendent authorizes an emergency visit.[368] Further, the recent discovery that inmates' calls to their attorneys are taped[369] is another indication that Lorton does not take a hands-off approach with respect to inmates' access to their attorneys.

IX. CONCLUSION

During the recent political debate over the crime bill,[370] many expressed the view that society should be tougher on criminals. These people undoubtedly have never visited Lorton, because one glimpse at the reality of prison life — a cramped cellblock, a shackled inmate — is enough to change anyone's mind about how "easy" the District's criminals have it. Indeed, it is hard to imagine it being any harder on the District's prisoners with respect to many conditions of their confinement.

Lorton is not entirely without merit, however. Many administrators at Lorton are committed to rehabilitating the District's inmates during their confinement and are genuinely concerned about their welfare. As Vincent Gibbons, Warden of Central Facility, expressed, "Most of us see the sentence the [inmate] has received as punishment, and we are not here to increase it."[371] In addition to endeavoring to keep the inmates "in a safe and humane manner," Mr. Gibbons and many of his colleagues view rehabilitation of the inmates as

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[365] Department Order No. 4160.3C § 3 (1979).

[366] *Id.* §§ 5(a)(10), 5(c)(3). Although letters are supposed to be opened only in the presence of the inmate, the inmates complain that they are not present when their incoming and outgoing attorney-client mail is opened.

[367] *Id.* § 5(a)(4). Attorneys must also have delivered a letter to the Administrator of the facility where their clients are housed, stating that an attorney-client relationship exists. *Id.* § 5(a)(1).

[368] *Id.* § 5(a)(3).

[369] See *supra* Section II(A) for a discussion of the taperecording of telephone calls made by Lorton inmates.

[370] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[371] Interview with Vincent Gibbons, Warden of Central Facility (Jan. 1994).

their "primary function."[372]

The most overwhelming problem at Lorton, and the one from which all the other problems undoubtedly stem, is overcrowding. Meeting even the minimum standard for prisoners' rights is difficult when the prisons are practically bursting at the seams. It is distressing, given the ramifications of overcrowded prisons, that the District does not do everything within its power to address this problem.[373] Even more distressing, however, is the fact that the District is in perpetual contempt of court orders with respect to this and other problems with its prisons.

The District provides three explanations for its non-compliance with the many court orders regarding its prisons: the high rate of incarceration in the District of Columbia, the complexity of the problems involved, and the lack of financial resources to address the problems.[374] In his article describing the District's corrections-related court orders, Jonathan Smith makes short shrift of the District's excuses.[375] He stresses that the high incarceration rate is within the exclusive control of District officials.[376] While he acknowledges that the problems involved are complex, Mr. Smith notes that more than twenty years of litigation is enough time to develop solutions.[377] Finally, with respect to the District's contention that it lacks financial resources, Mr. Smith points out that

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[372] Indeed, the author's own exposure to Lorton stemmed from Lorton's commitment to the rehabilitation and education of its inmates. *See, e.g.*, Department Order No. 4110.4D (1992) (establishing guidelines for the implementation of a higher education program for District inmates); Department Order No. 4120.1 (1987) (providing for vocational technical education and apprenticeship training programs for inmates at Lorton). In addition, Lorton has an inmate recreation program, which is "designed to increase inmate participant's [sic] physical fitness, opportunities for artistic expression, and reduce inmate idleness." Department Order No. 4151.1 § II (1992).

The District's current budget crisis, however, has directly impacted such initiatives within the prisons. The Street Law: Corrections Clinic, for instance, is no longer in existence because the D.C. government cut off its funding in March 1995.

[373] As Jonathan Smith explains:

> The Court set the population limits at the highest level consistent with what is required to prevent cruel and unusual punishment, not the level necessary to ensure a safe and rehabilitative environment. These court orders are the minimum that the United States Constitution requires, which is far less than is required by the standards established by professional correctional associations, or than is humane or desirable.

Smith, *supra* note 6, at 272.

[374] *Id.* at 267.

[375] Mr. Smith is the Executive Director of the D.C. Prisoners' Legal Services Project, Inc. The Project is a private, non-profit, public interest law firm established to provide free civil legal services to persons incarcerated in the District's prison system. The Project also functions as a clearinghouse on local prisoners' rights litigation.

[376] Smith, *supra* note 6, at 267.

[377] *Id.*

> the failure to comply with court orders leads to costly civil damages, contempt fines, attorneys fees and the costs of special masters. In the end, it may well be cheaper for the District to operate a constitutional correctional system that complies with constitutional requirements than it is to defend the system currently in place.[378]

Many people share Mr. Smith's view that the District's Department of Corrections is "an agency that is in complete disarray, under-funded, poorly managed and in a constant state of crisis."[379] The frustration with the District's mishandling of its prisons has reached such a peak that some support transferring the control of Lorton from the District to federal authorities. In fact, Congress is currently considering legislation to close Lorton and move the inmates into federal prison.[380]

Merely transferring control of Lorton, however, will do little to address the underlying problems involved.[381] While the District's flagrant disregard for court orders designed to remedy serious problems at its correctional facilities is certainly reprehensible, the more pervasive problem facing Lorton is the unpopularity of prisoners. As U.S. District Judge Louis Oberdorfer stated in an address to the D.C. Bar about the "silent crisis" of the District's prisons, "Persons who have been convicted of serious crimes are not an attractive charity. They are disenfranchised and have no political power and most are uneducated and unable to manage their own legal affairs at all."[382]

Until public opinion is mobilized on behalf of Lorton's inmates, the political pressure necessary to address their needs and remedy Lorton's many problems will be lacking.[383] Hopefully, the recent surge of cases and newspaper articles about the unconstitutional treatment of many Lorton inmates will do a lot to garner public support for them. After all, even if one does not share the view that "[prisoners] have a right to decent living conditions, appropriate health

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[378] *Id.* at 268.

[379] *Id.* at 241.

[380] *See* H.R. 461, 104th Cong., 1st Sess. (1995) (Lorton Correctional Complex Closure Act). The sponsors of this bill are Rep. Frank R. Wolf (R-Va.), Rep. James P. Moran, Jr. (D-Va.), and Rep. Thomas M. Davis, III (R-Va.).

[381] The proposal "will deprive the District of control over an essential governmental function and will require that District prisoners be separated from their families." *Lorton Correctional Complex Closure, 1995: Hearings on H.R. 461 Before the Subcomm. on the District of Columbia of the House Comm. on Government Reform and Oversight*, 1995 WL 352750 (F.D.C.H.) (testimony of Jonathan Smith, Executive Director, D.C. Prisoners' Legal Services Project).

[382] *Doing Right by Prisoners*, WASH. POST, July 1, 1989, at A20 (op-ed).

[383] So far, Margaret Moore appears committed to remedying the problems plaguing Lorton. The *Washington Post* has commended her efforts, noting that "[t]oday's solutions [] may be found in the caliber of [her] leadership." *D.C. Justice: Starting to Mend*, WASH. POST, Sept. 27, 1994, at A27. The newspaper later cautioned, however, that "the acid test for the newest corrections chief will be her performance, not her pledges." *What Kind of Jail?*, WASH. POST, Oct. 13, 1994, at A18.

care, freedom from assault and humane treatment,"[384] it is in society's interest to rehabilitate its prisoners.

Regardless of what they did to get into Lorton, the District's prisoners will one day be getting out of Lorton. As Craig Pruitt, a former inmate, explains, "Citizens as a whole look at prisoners as 'They did it. They deserve what they get.' . . . That doesn't make sense. If you want to keep people from returning to prison, you have [to] help them."[385] In the end, the best way for the District to address its prison overcrowding crisis could be to rehabilitate its inmates so that they do not once again return to fill its prisons.

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[384] *Doing Right by Prisoners*, *supra* note 382, at A20 (editorial).

[385] *A Prisoners' Paper*, WASH. TIMES, Dec. 13, 1990, at B1.