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Professional Correctional Management Operating a Death Row Population: Putting Theory into Practice

Toni V. Bair*

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I. Introduction

I am a corrections consultant focused on professional correctional management, use of force, and the death penalty. I

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have previously testified and consulted in approximately twenty-five jail systems and seventeen prison systems in twenty-four different states, including the Federal Bureau of Prisons, in the areas of professional correctional management, failure to protect, excessive force, wrongful death, various death row cases, and several other cases regarding correctional as well as constitutional issues.

I also have more than thirty years of experience as a corrections practitioner in both juvenile and adult systems, jails, and state prisons. I have held the following positions in the corrections field: Counselor, Captain, Investigator, Unit Manager, Warden, Regional Administrator, and Assistant Commissioner.

I opened the first Utah Department of Corrections Youthful Offender Prison as a Warden and held that position from 1983 through 1984. I served as Warden of Virginia's Maximum Security Mecklenburg Correctional Center (MCC) from 1985 through 1986, as well as a Regional Administrator supervising eleven prisons in Virginia (including MCC) from 1987 through 1990. I also served as Assistant Commissioner in New York City for one of the nation's largest urban jails from 1990 to 1993, where I was responsible for overseeing the Department's compliance with constitutional issues and court orders in the seventeen jails throughout the five boroughs of New York City.

I participated in writing the Brief of Corrections Professionals as Amici Curiae in Support of Respondent in the Supreme Court of the United States in *Wilkinson v. Austin*.¹ In addition, I contributed to a recent amicus brief by corrections experts in support of appellee in the matter of *Prieto v. Clarke*.²

During the past thirty years, I have taught college courses at both the baccalaureate and master's levels at Weber State University, Utah State University, and John Jay College of

1. 545 U.S. 209 (2005). See Brief of Corrections Professionals as Amici Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495), 2005 WL 539139 (arguing that clear standards and criteria are essential to the supermax placement procedure).

2. 780 F.3d 245 (4th Cir. 2015). See Brief of Amici Curiae Corrections Experts in Support of Petitioner, *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (No. 13-8021, 14-6226), 2015 WL 4720277 (arguing against automatic and permanent placement of death-sentenced inmates into solitary confinement).

Criminal Justice. The courses I have taught include Prisons: Issues and Dilemmas, Criminal Justice Management, Corrections Law, Criminal Justice Ethics, Community Corrections, Victimology, Research Methods, Senior Seminar, and Foundations of Public Administration.

As a result of my academic training and my corrections experience, I have “been there, done that,” and have consistently demonstrated success at melding theory with practice.

II. Foundation of Professional Correctional Management

When a citizen is taken into custody and deprived of his or her freedom, the correctional institution that has physical custody of the sentenced offender has a legal³ and professional responsibility⁴ to ensure that the offender is placed in a setting that provides a secure, safe, and humane environment.

Secure means that there are *no* escapes. The public, prosecutors, and courts expect that when a convicted offender is sentenced and transferred to the custody of a prison, the individual remains there until he is either released by the system or his sentence expires.

Safe means that no harm—physical, emotional, or mental—befalls that individual while in the custody of the prison.

3. See 18 U.S.C. §§ 4000–4353 (2012) (governing the control and operation of federal prisons); 28 C.F.R. §§ 500–513 (2016) (controlling the general management, administration, inmate admission, classification, transfer, and programming of the federal Bureau of Prisons). At the state level, Title 53.1 of the Virginia Code, “Prisons and Other Methods of Correction,” governs state and local correctional facilities. See VA. CODE ANN. § 53.1-32 (2016) (“It shall be the general purpose of the state correctional facilities to provide proper employment, training and education in accordance with this title, medical and mental health care and treatment, discipline and control of prisoners committed or transferred thereto.”).

4. See *Standards*, AMERICAN CORRECTIONAL ASSOCIATION, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards__Accreditation/Standards/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad (last visited Sept. 8, 2016) (publishing twenty-two different manuals for the field of corrections, integrated into routine operations in more than 1,300 facilities and agencies in the United States, and affecting tens of thousands of inmates and staff daily) (on file with the Washington and Lee Law Review).

Correctional safety also includes the safety of all staff and visitors that interact with an inmate.⁵

Humane means that, while in custody, the inmate is treated humanely as dictated by evolving standards of decency, morality, professional correctional standards, state laws, local ordinances, and the Constitution of the United States.⁶ When offenders are sentenced to prison, they do not lose their constitutional guarantees.⁷

It is truly appalling that there are so many occasions in which inmates in our prison systems have their constitutional guarantees violated. These violations result in the filing of lawsuits and require adjudication by courts from the local level through the Supreme Court.⁸

Corrections institutions have a duty of care as it relates to those individuals incarcerated in their institutions.⁹ This duty of

5. In the years preceding the Mecklenburg escape, MCC was reported as having the highest inmate-on-guard assault rate in the state of Virginia. See DARYL CUMBER DANCE, LONG GONE: THE MECKLENBURG SIX AND THE THEME OF ESCAPE IN BLACK FOLKLORE 13 (1987) (“Mecklenburg has experienced more inmate assaults on correctional personnel than any other correctional institute in the state.”).

6. See Robert Worth, *A Model Prison*, ATLANTIC, Nov. 1995 (reporting on the McKean federal correction facility in Bradford, Pennsylvania, where one of the acting Warden’s twenty-eight rules included: “3. Inmates are *entitled* to a safe and humane environment while in prison”). In McKean’s first six years of operating, there were no escapes, no sexual assaults, no suicides, and just three serious assaults on staff members. *Id.*

7. See Cruz v. Beto, 405 U.S. 319, 321 (1972) (“[F]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ which include prisoners.”); see also Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) (“There is no iron curtain drawn between the Constitution and the prisons of this country.”).

8. See Margo Schlanger, *Inmate Litigation Survey*, NAT’L INST. OF CORR. LARGE JAIL NETWORK 1, 2 (2003) (reporting an average annual litigation rate of twenty-seven lawsuits per 1,000 inmates in a study of twenty-seven state prisons); see also Ann Morrison Piehl & Margo Schlanger, *Determinant of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD., no. 1, at 80 (2004) (“In 1995, at the federal litigation’s numerical peak, inmates brought nearly 40,000 new lawsuits categorized as ‘prisoner civil rights cases’ in federal court—almost a fifth of the federal civil docket.”). But see *id.* at 81 (reporting a fourteen-year low in prison litigation in 2001, five years after the Prison Litigation Reform Act, at 22,000 filings).

9. See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 20–29 (3d ed. 2011) (reviewing the case law governing

care means that at all times inmates are not harmed in any way, be it physically, emotionally, or mentally.¹⁰ In addition, inmates' individual medical needs are taken care of because—by virtue of being incarcerated—they cannot take the responsibilities for themselves.¹¹ Finally, adequate food, shelter, and clothing must be provided, once again, because inmates are incapable of doing so for themselves.¹²

III. Decisive Leadership

Decisive leadership is the key to managing a professional correctional institution. All too often management encounters a problem that needs to be addressed, and rather than being decisive, they continue in a “business as usual” style. Often when asked, “Why do you do it that way?” the answer is, “Because that is the way we have always done it.” The question was not about how long a policy, procedure, or practice has gone on, but rather, what rationale justifies the policy, procedure or practice at issue.

A leader should always question policy, procedure, and practice, and make decisive changes as necessary. A leader should not just continue the status quo because that is the way things have always been done. My experience in corrections over

treatment of prisoners and outlining what correctional authorities should provide prisoners with, including “humane and healthful living conditions” and “safety from harm”).

10. *See id.* at 149 (“But because prisoners are precluded by their confinement from the possibility of arranging for their own care, they have a constitutional claim for health care against the jurisdiction that confines them.”).

11. *See* VA. CODE ANN. § 53.1-32 (2016) (requiring a health service program in state correctional facilities to provide medical services to prisoners and ensuring access to medical care regardless of the ability of the inmate to pay for services).

12. *See* 18 U.S.C. §§ 4042(a)(2)–(3) (2012) (requiring the Bureau of Prisons to provide “suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses” as well as to provide for their “protection, instruction, and discipline”); *see also* *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) (“[The prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights *except* those which the law in its humanity accords to him.” (emphasis added)).

the past thirty years¹³ is that all too often when management changes in prisons, the status quo is merely maintained without the new leadership evaluating the utility of continuing as usual. A fresh set of eyes by a decisive leader on how prisons are managed is always a good thing.

A decisive leader acts from Yoda's premise of "Do or do not, there is no try."¹⁴ When assigning staff to accomplish a task, decisive leaders expect that individuals will either accomplish the task agreed upon within the deadline or come back to the leader, give an explanation on why they cannot accomplish the goal, and offer a compromise or solution to address the problem. Whenever a subordinate responds that he or she will "try" to get the job done, it is important to explain that the only people who use the words "try" or "tried" are those who fail or have failed.

Decisive leaders are proactive and not reactive. They have a plan for where they are going. "If you don't know where you are going, you won't know when you get there."¹⁵ When I arrived as Warden of MCC, I was told that the Virginia state government had a motto of "Do What Is Right." That sounded good to me, so I inquired, "What is right?" My three administrative staff members looked at each other and they all shrugged. I asked how we could do things right if we did not know what right was. I challenged them to think about it and come up with a useable definition of "RIGHT."

Some time later, we used the letters found in "RIGHT" and developed the guideline for what we were going to do with respect to "Do What Is Right." *R* stands for responsibly; *I* stands for integrity; *G* stands for having goals; *H* stands for treating inmates and staff humanely; and *T* stands for accomplishing *RIGHT* together.

13. See *supra* Part I (reviewing the author's experience in corrections management).

14. STAR WARS: THE EMPIRE STRIKES BACK (LucasFilm 1980).

15. JESSE DUPLANTIS, THE EVERYDAY VISIONARY: FOCUS YOUR THOUGHTS, CHANGE YOUR LIFE 49 (2008); see also YOGI BERRA, THE YOGI BOOK (1998) ("You've got to be careful if you don't know where you're going, you might not get there.").

IV. A New Sheriff in Town

The new management team at MCC¹⁶ immediately began to implement major changes in the day-to-day operation of MCC, including operations on death row. First, we introduced the Accountability Responsibility Model to hold inmates accountable for their behavior and hold them responsible for their lives.¹⁷ This Model is designed to offer habilitative opportunities for the inmate population (including death row inmates) and is based around three principles: P, T, and A.

The *P* in this model stands for improving inmates' personality deficits through counseling sessions. These sessions include individual therapy, group therapy, psychotherapy, family counseling, and crisis intervention.

The *T* stands for training. Many inmates—if not most—do not have a trade or profession that they can turn to when released.¹⁸ Additionally, many inmates in prison today are neither interested in nor prepared to go to college to develop the skills to obtain a meaningful job.¹⁹ As a result, our management

16. See Molly Moore, *Utah Official Named Head of Mecklenburg*, WASH. POST, Jan. 5, 1985, <https://www.washingtonpost.com/archive/local/1985/01/05/utah-official-named-head-of-mecklenburg/c0a0b287-7f8e-4c37-bbd8-2be34fea705f/> (last visited Sept. 8, 2016) (reporting on newly appointed personnel following the Mecklenburg escape, to include the position of Virginia Corrections Direction, Warden, Assistant Warden for Security, Assistant Warden for Treatment, and Chief of Security) (on file with the Washington and Lee Law Review).

17. MARK BOVENS, *THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANIZATIONS* 46–49 (1998) (“[T]he larger and more complex the organization, the paradox of shared responsibility grows, [and it is] more difficult to hold multiple individuals responsible, but it is also a practical problem of accountability among many hands.”).

18. Christy Visher, Sara Debus & Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Releases in Three States*, URBAN INSTITUTE JUSTICE POLICY CENTER 2 (Oct. 2008) (reporting on pre-prison employment experiences and finding that almost a third of prisoners were unemployed in the six months preceding their incarceration, 30% had not held a job for at least a year prior to entering prison, and 11% reported income from illegal activities).

19. See Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report: Education and Correctional Populations*, U.S. DEPT OF JUSTICE, NCJ 195670 (Jan. 2003) (revised Apr. 15, 2003) (reporting in 1997 that 41% of prisoners in federal, state, and local jails had not completed high school or a high school equivalent program).

team developed vocational training programs to assist the inmate in securing a marketable skill prior to release. Vocational programs included electrical/electronics, sewing, carpentry, barbering, cosmetology, and plumbing, to name a few.

The A stands for academics. MCC offered GED courses and college courses, taught on-site and via online instructors. It was our goal that all inmates, including those on death row, should have a high school education. Historically, inmates who have not graduated from high school recidivate at an approximate rate of 67.8%.²⁰ However, inmates who have a high school education when they leave prison recidivate at an approximate rate of 40%; inmates who earn an associate's degree reduce their likelihood of re-incarceration by 62%.²¹ Because recidivism is difficult to quantify, the reliability and validity of recidivism rates should be viewed with some skepticism.²² Over the years, however, the numbers have remained about the same.²³ Clearly, inmates who leave prison with a viable technical skill, a high school diploma,

20. See Alexia D. Cooper, Ph.D., Matthew R. Durose & Howard N. Snyder, Ph.D., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUSTICE STATISTICS, NCJ 244205 (Apr. 22, 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986> (last visited Sept. 7, 2016) (reporting that about two-thirds, 67.8%, of released prisoners were arrested for a new crime within three years, and about three-quarters, 76.6%, were arrested within five years) (on file with the Washington and Lee Law Review).

21. See WENDY ERISMAN & JEAN BAYER CONTARDO, INST. FOR HIGHER EDUC. POL'Y, *LEARNING TO REDUCE RECIDIVISM: A 50 STATE SURVEY OF POSTSECONDARY CORRECTIONAL EDUCATION POLICY* 5 (2005) ("Among prisoners in 1997, 34% of those with at least some college were first-time offenders, compared to only 23% of those without a high school diploma or GED."); *id.* at 9 ("Recidivism rates . . . were . . . 46% lower than for ex-offenders who had not taken college classes. . . . [P]risoners who had participated in education programs were 29% less likely to have been sent back to prison [C]ompleting an associate's degree . . . reduc[ed] the likelihood of re-incarceration by 62%."). See generally John Nuttall, *The Effect of Earning a GED on Recidivism Rates*, CORRECTIONAL EDUCATION ASSOCIATION (Sept. 2003) (finding a statistically significant effect of education on lowering recidivism rates across several studies).

22. See ERISMAN & CONTARDO, *supra* note 21, at v (describing data collection for recidivism rates).

23. See *id.* at ix (detailing statistics of recidivism from the 1990s to early 2000s).

or a bachelor's degree have a meaningful opportunity to become self-sufficient and productive.²⁴

Next, we introduced Unit Management, a concept first introduced by the Federal Bureau of Prisons as a paradigm to operate each housing unit and the prison as a whole.²⁵ The Federal Bureau of Prisons identifies eight essential ingredients for the success of Unit Management: (1) Leadership, (2) Unit Plan and Mission, (3) Adequate Resources, (4) Competent Staff, (5) Quality Performance, (6) Interdepartmental Cooperation, (7) Monitoring and Evaluation, and (8) Analysis and Refinement.²⁶ The Virginia Department of Corrections (VDOC) still utilizes Unit Management today, as do many other state prison systems.²⁷

Unit Management breaks down the supervision and management of a prison or jail into smaller housing units by assigning three supervisors and an appropriate number of correctional officers to each housing unit.²⁸ The correctional officers work only in their assigned housing unit and do not transfer to other units on a regular basis.²⁹ By assigning a

24. *See id.* ("By improving the mental, physical, and social well-being of prisoners, as well as providing them with job training and other skills, these programs benefit society at large by reducing crime and strengthening communities.").

25. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, ABOUT THE FEDERAL BUREAU OF PRISONS 4 (June 2015) ("Unit Management is a hallmark of the Bureau's inmate management philosophy . . . [giving] inmates direct daily contact with the staff who make most of the decisions impacting their daily lives."); *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PUB. NO. 5321.07, UNIT MANAGEMENT MANUAL 3 (1999) (emphasizing the Unit Management approach of placing staff and inmates in close physical proximity with each other to increase daily contact and access).

26. UNIT MANAGEMENT MANUAL, *supra* note 25, at 3–8.

27. *See Offender Management Overview*, VA. DEP'T OF CORR. <https://vadoc.virginia.gov/offenders/offender-mng-oview.shtm> (last visited Sept. 7, 2016) (describing the process from arrest to release of the average inmate, including intake, assignment, and programming needs) (on file with the Washington and Lee Law Review).

28. *See* UNIT MANAGEMENT MANUAL, *supra* note 25, at 3 ("The concept of Unit Management is to place inmates in close physical proximity to the staff working with them so that staff and inmates are easily accessible to one another daily.").

29. *See id.* at 5 ("To enhance staff continuity . . . [staff] will not be arbitrarily moved between various housing units.")

consistent team to the housing unit, staff become personally involved with assigned inmates, better know their needs, and can better assist in preparing them for release. In addition, staff members are held accountable for what goes on in the unit, and can no longer say that they were not working there when an incident took place.³⁰ At MCC, a Lieutenant, a Sergeant, and a Counselor comprised the Unit Management Team and were responsible and accountable for everything that took place on their unit.

By combining secure, safe, and humane treatment, the Accountability Responsibility Model, and the Unit Management theory, we developed a workable professional correctional model in the operation of MCC, and later the Central Region—where I was promoted to Regional Administrator in charge of supervising eleven prisons, including MCC.

V. Death Row and Isolation/Segregation

The Virginia Director of Corrections recruited me in December of 1984 after the infamous escape of six death row inmates and an unfortunate death row hostage situation at MCC has transpired.³¹ After those incidents, most of the prison management staff were either fired or transferred to other facilities and an interim Warden and Assistant Wardens were assigned to oversee MCC until the hiring of a new Warden.³²

Shortly after my arrival at MCC as the new Warden, the Commissioner and I selected two new Assistant Wardens and a Chief of Security—we all were tasked with turning MCC

30. See ABOUT THE FEDERAL BUREAU OF PRISONS, *supra* note 25, at 5 (“Unit staff are directly responsible for inmates housed in their units in programs designed to meet their needs.”); see also *id.* at 4 (stressing the daily contact aspect of unit management between staff and inmates, thus increasing awareness among staff).

31. See Frank Douglas, *New Details on 19-day Chase Emerge*, RICHMOND TIMES-DISPATCH, May 26, 1985 at A1 (describing the largest death row escape in history on its one-year anniversary).

32. See Moore, *supra* note 16 (reporting that the former warden was demoted to an administrative job after the escape) (on file with the Washington and Lee Law Review).

around.³³ We faced inmate unrest, low staff morale, a federal consent decree and contempt order,³⁴ and an exhaustive study by the Virginia Board of Corrections³⁵ that made numerous recommendations for improvement.

When I arrived at MCC in January 1985, the institution was in total chaos and death row was locked down.³⁶ Prior to the escape and hostage incident, the housing unit that held all of the approximately forty death row inmates operated as a modified general population.³⁷ The inmates were allowed out of their cells for most of the day and were allowed to mingle and eat their meals communally in their pods of approximately ten to fifteen inmates. Even though only one pod of death row inmates was involved in the escape and hostage incident,³⁸ all of the pods were placed on lock-down.

33. See *id.* (reporting on newly appointed personnel following the Mecklenburg escape, to include the position of Virginia Corrections Director, Warden, Assistant Warden for Security, Assistant Warden for Treatment, and Chief of Security).

34. See, e.g., *Gross v. Tazewell Cty. Jail*, 533 F. Supp. 413, 418 n.3 (W.D. Va. 1982) (highlighting water and sewage problems at the Mecklenburg facility); see also Tom Sherwood, *Mecklenburg Improvements Ordered*, WASH. POST (Apr. 6, 1985), <https://www.washingtonpost.com/archive/local/1985/04/06/mecklenburg-improvements-ordered/927bb0e3-5079-4489-b7c5-323ef75058f8/> (last visited Sept. 8, 2016) (describing the seventeen-page agreement between the ACLU and MCC, revising a previous 1983 order) (on file with the Washington and Lee Law Review).

35. See DANCE, *supra* note 5, at 97–100 (describing the review of corrections management and facilities reports prompted by the escape, from one issued days later by the then-acting warden to reports by the State Department of Police, by the Virginia Secretary of Transportation and Public Safety and a specially formed “Mecklenburg Correctional Center Study Committee”).

36. See Michael Hardy & Joseph Gatins, *A Year After the ‘Great Escape’ Officials Sift Through Hard Lessons*, RICHMOND TIMES-DISPATCH, May 26, 1985, at A1 (“It was a hellhole seething with violence and tension.” (quoting the author, Toni V. Bair, in the article)).

37. See PETER M. CARLSON, *PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY* 435 (2013) (reporting that several states elect to mainstream their death-sentenced inmates and allow them to participate fully in work, education, recreation, and other programming opportunities).

38. See Mara Bovsun, *Mecklenburg Six: How Death Row Inmates Busted Out of a Prison that Was Considered ‘Escape Proof’*, N.Y. DAILY NEWS (June 14, 2015, 12:18 AM), <http://www.nydailynews.com/news/crime/prison-serving-time-hell-article-1.2256866> (last visited Sept. 8, 2016) (describing the circumstances and participants of the escape) (on file with the Washington and Lee Law Review).

We soon returned death row to a general population unit. In my opinion, there is no sound penological rationale for not allowing death row inmates to live in a general population setting housed within their own units. All other inmates who are sentenced by the courts to state or federal prisons go through an initial reception and orientation phase to determine the least restrictive environment they can handle, as well as determining the extent of their programmatic needs.³⁹ This practice is normal in all state and federal prisons, but does not include the death row population. Usually, these inmates are automatically sent to death row, which unfortunately often means segregation or isolation.⁴⁰ In this situation, they are deprived of most, if not all, programming opportunities and congregate activities.⁴¹

Virginia's (and some other states') justification for placing death row inmates in segregation or isolation includes the need to protect the offenders, the staff, and the public.⁴² Virginia houses 4,132 inmates who have been convicted of murder.⁴³ Of those, only seven are housed on death row.⁴⁴ The obvious question is:

Review).

39. See, e.g., VA. DEPT OF CORR., OPERATING PROCEDURE 830.1–2 (2015) (setting forth the processes for both offender facility management classification and security classification).

40. See, e.g., *id.* at 830.2 (“7. Any offender sentenced to Death will be assigned directly to Death Row and assigned the designated point score of ‘99’ points for initial classification. No reclassification will be completed.”).

41. These opportunities and activities include, for example, the chance to spend meals, recreation, programs, visitation, and out of cell time together. See CARLSON, *supra* note 37, at 435 (defining segregation units, used on death row in a majority of jurisdictions, as “highly controlled custodial environments that offers a high degree of accountability for . . . inmates who are deemed to present the most extreme threat”).

42. See VA. DEPT OF CORR., *supra* note 39, at 841.4 (“Offenders shall be placed in a restrictive housing unit only when their presence in the general population poses an unacceptable risk to the offender, other offenders, institutional staff, or the safe, secure operation of the institution.”).

43. Expert Report of D. Scott Dodrill at *17, *Porter v. Clarke*, No. 1:14-cv-1588 (E.D. Va. July 8, 2016), 2016 WL 3766301, *appeal filed*, No. 16-7044 (4th Cir. Aug. 4, 2016).

44. See *Virginia's Death Row Inmates*, VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <https://www.vadp.org/dp-info/virginias-death-row-inmates> (last visited Sept. 8, 2016) (listing current inmates sentenced to death) (on file with the Washington and Lee Law Review).

Why are the death row inmates more dangerous to the public, staff and other offenders, while the other 4,125 inmates who have also committed murder are not? This makes no sense and has no sound penological justification.

There have been numerous studies tracking inmates sentenced to death who have been exonerated, have had their sentences commuted, or have been given clemency.⁴⁵ Only a small percentage of inmates to receive the death penalty are actually executed.⁴⁶ According to a study of federally sentenced capital offenders, only a 0.3% difference exists between the prevalence of serious assaults between inmates found not to be a future danger for prison violence by a jury and those inmates who were found to be a future danger by a jury.⁴⁷

Historically, death row disciplinary records do not substantiate the claim that segregation and isolation are necessary to protect the public, staff, or other inmates.⁴⁸ Research has shown that death row inmates are not more likely, and are frequently much less likely, to be violent while incarcerated than

45. See generally Matthew Heise, *The Geography of Mercy: An Empirical Analysis of Clemency for Death Row Inmates*, 39 T. MARSHALL L. REV. 3 (2014); Matthew Heise, *An Empirical Analysis of Clemency and Its Structure*, 89 T. VA. L. REV. 102 (2003).

46. See U.S. BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2013-STATISTICAL TABLES (Dec. 2014) (reporting that, of all death sentences since 1973, 58.2% overturned, 24.8% executed, 9.3% died by other causes, and 7.1% of sentences commuted); cf. *Executions per Death Sentence*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited Sept. 8, 2016) (surveying executions in all fifty states from 1977 to 2010, and finding the execution rate varied from 0% in New York to 72.5% in Virginia) (on file with the Washington and Lee Law Review).

47. See Jonathan R. Sorenson & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1251–56 (2000) (reviewing statistics on subsequent violent assaults by capital offenders while imprisoned); see also Mark D. Cunningham & Jonathan R. Sorenson, *Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. AM. ACAD. PSYCHIATRY L. 61, 61 (2010) (evaluating a study of seventy-three capital offenders and finding the rate of misconduct equivalent to, if not less, than that of other inmates in federal prisons).

48. See Cunningham & Sorenson, *supra* note 47, at 62, 1265–67 (estimating the likelihood of violence based on institutional factors).

other inmates in general population who have committed murder.⁴⁹

VI. Programming for Death Row

VDOC Director Clarke testified in *Prieto v. Clarke* that death row inmates are not eligible for reclassification or removal from solitary confinement because death row inmates, “by virtue of their sentence,” will not “reintegrate back into society.”⁵⁰ Director Clarke, however, also testified that offenders in general population serving “life without parole” sentences are provided programming to reintegrate them into the prison community.⁵¹

Assumption: Death row inmates do not require rehabilitative programming because they will not be reintegrated into the community. It is incorrect to assume that under VDOC’s current death row isolation/segregation policy no inmates will be integrated back into society and/or the prison general population community. A team of legal experts and statisticians from Michigan and Pennsylvania used the latest statistical techniques to produce a peer-reviewed estimate of the death penalty’s “dark figure”—how many of the more than 8,000 men and women who have been put on death row since the 1970s were falsely convicted.⁵² Samuel Gross, a law professor at the University of

49. See *id.* at 1265 (reporting zero occurrences of accomplished serious assaults among the seventy-three capital offenders studied).

50. See *Prieto v. Clarke*, 12cv1199, 2013 U.S. Dist. LEXIS 161783, at *21–22 (E.D. Va. Nov. 12, 2013) (“The VDOC’s policy toward death row inmates largely rests on two fundamental assumptions: first, that these inmates inherently present a greater risk to prison safety because they ‘have nothing to lose,’ and second, that they are less deserving of limited prison resources because they will never reenter society.”).

51. See *id.* at *22 (“Although the VDOC’s stated reasons for separating death row inmates and denying them programming apply with equal force to both classes, inmates serving life sentences are presumptively assigned to the general population units at SISP, where they may avail themselves of limited programming.”).

52. See Ed Pilkington, *US Death Row Study: 4% Of Defendants Sentenced to Die Are Innocent*, THE GUARDIAN (Apr. 28, 2014), <https://www.theguardian.com/world/2014/apr/28/death-penalty-study-4-percent-defendants-innocent> (last visited Sept. 8, 2016) (noting what the researchers

Michigan Law School and the lead author of the research, estimates that 36% of the 8,000 individuals sentenced to death between 1973 and 2004—some 2,675 people—were taken off death row after doubts about their convictions were raised.⁵³ Therefore, it is essential that death row inmates are allowed access to programming in light of the fact that so many (36%) are taken off of death row⁵⁴.

Several other considerations should be addressed in a corrections system's decision to provide programs for death row inmates.

A. Distraction

Providing programs for death row inmates keeps them busy doing positive things that will benefit them personally and the staff generally.⁵⁵ When inmates are occupied with positive activities, they are not focused on planning or creating disturbances that threaten the secure, safe, and orderly operation of the prison.⁵⁶ When an inmate is actively involved in some type of program, disciplinary actions decrease and the day-to-day

termed a conservative estimate) (on file with the Washington and Lee Law Review).

53. See Pilkington, *supra* note 53 (discussing exoneration rates on death row).

54. See Baumgartner & Dietrich, *infra* note 85 (analyzing reversal rates on death row during the 1990s and early 2000s); Matt Ferner, *These Programs Are Helping Prisoners Live Again On The Outside*, HUFFINGTON POST (July 28, 2015 12:00 AM) http://www.huffingtonpost.com/entry/if-we-want-fewer-prisoners-we-need-more-compassion-when-they-re-enter-society_us_55ad61a5e4b0caf721b39cd1 (last updated Sept. 9, 2015) (last visited Sept. 9, 2016) (describing the four main goals of rehabilitative programs in jails and prisons as survival, stabilization, self-sufficiency, and goal setting) (on file with the Washington and Lee Law Review).

55. See Ferner, *supra* note 54 (describing the effects of providing programming for rehabilitation)

56. See Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J.L. & POL'Y 125, 133–34 (2006) (describing how providing safe and communal activities for inmates involved in gang-related activities decreases the likelihood of violence and “provide a transition to a more normal way of life”).

supervision of that offender is not on the high security level it normally would be.⁵⁷

B. Role Model

Not all death row inmates will initially take advantage of the programs that are offered to them. I found this to be true as we started developing programs for the death row population at MCC. We provided adult education, basic GED courses (reading, vocabulary, math, social studies, science), individual counseling, religious instruction, and legal assistance for both death row and general population inmates. We discovered over time that, as other death row inmates saw what was taking place with their cellmates, many of them gravitated toward programs. The inmates in the programs became role models and encouraged the other inmates to participate, which reduced infractions and misused idle time.⁵⁸

C. Prisoners' Suggestions

We were open to hearing suggestions for programs from the death row population. One inmate, Roger Coleman, approached me asking if I would approve a program that he wanted to create called "The Choice is Yours."⁵⁹ He wanted to bring "at risk" kids into the visiting room of the prison to see and hear what it was

57. See *id.* at 126 ("American prisons promote violence and abuse by their design and operation. The anti-social nature of the prisoners themselves is not solely responsible for violent and abusive behavior.").

58. See Ferner, *supra* note 54 (detailing the support and encouragement that re-entry programs provide to inmates).

59. See Glen Frankel, *Burden of Proof Jim McCloskey Desperately Wanted to Save Roger Coleman from the Electric Chair. Maybe a Little Too Desperately*, WASH. POST (May 14, 2006), <https://www.washingtonpost.com/archive/lifestyle/magazine/2006/05/14/burden-of-proof-span-classbankheadjim-mccloskey-desperately-wanted-to-save-roger-coleman-from-the-electric-chair-maybe-a-little-too-desperately-span/d6faeab8-98dc-4cf9-ba19-14c3be835cfe/> (last visited Sept. 8, 2016) (discussing Coleman's conversation of the program with Jim McCloskey) (on file with the Washington and Lee Law Review).

like to be locked up in prison and especially on death row⁶⁰. Roger and other inmates would then come into the visiting room and sit down with the kids to have a face-to-face, frank discussion about the outcome of their behavior if they continued on the road that brought them to the attention of the authorities in the first place.⁶¹ Most of the kids who participated in this program were referrals from the juvenile court or from junior and senior high school guidance counselors who were having difficulty with these particular students. When discussing Roger's proposed program, I stressed that it should not be a "scared straight" program, as history has shown that these programs do not work.⁶²

The Choice Is Yours was more about the loss of freedom and opportunity.⁶³ The inmates talked about what they had to give up and what they would never have again. One inmate talked about how much he would like to just be able to get up at night and have a glass of milk or a slice of cold pizza. Another talked about not having seen the moon for over a year due to the orientation of his cell window. Of course, the inmates also shared the harsh realities of the prison society and the loss of family and friends due to their incarceration.

Another inmate, Joe Giarratano, approached me and wanted to offer "jailhouse lawyering" to the general population of MCC. Giarratano had been imprisoned in VDOC since the early '80s. A self-taught legal scholar, Giarratano was a voracious reader and had turned himself into a premier jailhouse lawyer.⁶⁴ Talk with

60. See *id.* (noting Coleman's commitment to the success of the program).

61. See generally SHIRLEY DICKS, *THE CHOICE IS YOURS* (2003) (interviewing death row inmates to educate teens about the dangers of crime, lack of education, drugs, and imprisonment).

62. See *Justice Department Discourages the Use of "Scared Straight" Programs*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Mar. 2011), https://www.ncjrs.gov/html/ojjdp/news_at_glance/234084/topstory.html (last visited Sept. 9, 2016) (quoting Jeff Slowikowski, Acting Administrator of OJJDP, as saying "The fact that [Scared Straight] programs are still being touted as effective, despite stark evidence to the contrary is troubling") (on file with the Washington and Lee Law Review).

63. See DICKS, *supra* note 61 (describing the consequences of incarceration).

64. See B. Drummond Ayres, Jr., *Last Plea by Condemned Inmate Who Has Rare Blend of Defenders*, N.Y. TIMES (Feb. 17, 1991), <http://www.nytimes.com/1991/02/17/us/last-plea-by-condemned-inmate-who-has-rare-blend-of-defenders.html> (last visited Sept. 8, 2016) ("Mr. Giarratano (pronounced jara-TAHN-o) has

any of the attorneys who were present at the Symposium and they all will attest to the legal mind Giarratano developed while incarcerated on death row.

Because of Giarratano's program, general population inmates were allowed to forward to Giarratano legal materials with questions about what they needed to do. The staff members of the death row and general population housing units would inspect these materials. Because Giarratano was well versed in the legal system, he became a trusted source for the other inmates.

Another program Giarratano suggested was building a new law library for death row inmates. At the time, MCC had a population of more than three hundred inmates, with forty on death row. Many of the other general population inmates were taking up most of the available hours for the Law Library. Giarratano told me that having access to the Law Library was more critical for death row inmates, as they were trying to save their lives. I agreed, and challenged him to come up with a solution.

Later, he sent me a kite (a note from an inmate to other inmates, staff, or both) saying that he had a solution, and he asked if we could talk. I went to death row and Giarratano suggested to me that we build a Law Library exclusively for death row use, leaving the prison Law Library for the general population inmates. I indicated that it sounded good, but that there was a cost issue to be resolved. Giarratano met with the other death row inmates and they all agreed to access their commissary accounts and contact friends and family to send them money to help in defraying the cost of a Law Library for death row. Bottom line, with the death row inmates' help, we were able to build, staff, and purchase sufficient legal books to provide a functioning Law Library exclusively for death row.

Programming for the MCC inmate population included: basic education and high school courses (reading, vocabulary, math, social studies, and science); college classes offered by a local

built a national reputation as a 'jailhouse lawyer,' framing not only his appeals but also those of other inmates, some in prisons in other states. Recently, an article he wrote on prisoner appeals was accepted for publication by The Yale Law Journal.") (on file with the Washington and Lee Law Review).

junior college; correspondence courses offered by Liberty University; an electrical and electronics vocational program; sewing class; and a TV repair program.

As mentioned, some of the above-referenced programs were developed at the suggestion and request of the inmate population. As with all programming, inmates could only participate if they were infraction-free and demonstrated compliance with the rules and regulations of the facility.

Another major professional correctional rationale is that by providing positive, meaningful activities for the death row population, inmates are constructively busy and not planning disruptions.⁶⁵ We all want willing compliance to rules and regulations. Inmates who are constructively busy feel better about themselves, are easier to get along with, and are consequently easier to manage.

VII. MCC Death Row as a General Population Housing Unit

The MCC death row population was safely managed when the inmates were allowed to interact with one another, be in a pod with each other ten to twelve hours per day, recreate together by playing basketball in groups of no more than six, take classes together in their pods with the teacher sitting outside the pod in the sally-port, and correspond with general population inmates on their appeals. Disciplinary infractions, particularly violent infractions, remained low during this time period.

A special monthly evening meal competition was originally designed to reward the pod with the fewest number of disciplinary infractions. However, we discovered that there were so few infractions that we changed the competition to track minor grievances, rather than disciplinary infractions. The management decision to return death row to a general population status did

65. See Ferner, *supra* note 54 (discussing the kinds of activities provided in re-entry programs aimed at livelihood, residence, family, health and sobriety, criminal justice compliance, and social and civic connections); Specter, *supra* note 56, at 131 (noting the decrease in violence by inmates when correctional facilities are run with humane and integrated conditions).

not create inmate violence, major disciplinary infractions, or any threat to the public, staff, or other inmates.

This management style continued for two years while I was the Warden at MCC and when I was promoted to Regional Administrator, where I supervised not only MCC, but also nine other institutions. It bears noting that Virginia's death row population was significantly larger (more than forty inmates) during the 1980s and 1990s than it is today (seven).⁶⁶ Despite this larger population, we still successfully managed the death row population utilizing a general population housing paradigm.⁶⁷

VIII. What Other State Departments of Corrections Are Doing— ASCA Study 2014

ASCA is a national Association of State Correctional Administrators.⁶⁸ ASCA periodically compiles reports on the surveys that it conducts.⁶⁹ In 2014, it published a report on a national survey regarding the operation of death rows for those states that have the death penalty.⁷⁰

Colorado and Missouri successfully manage their death row populations without automatically placing them in isolation or

66. See *Virginia's Death Row Inmates*, *supra* note 44 (detailing the inmates on death row in Virginia); *infra* note 67 (discussing the death row population in Virginia since the mid-1990s).

67. See Frank Green, *Executions, Death Sentences Continue to Drop in U.S.*, RICHMOND TIMES-DISPATCH (Dec. 16, 2015), http://www.richmond.com/news/local/crime/article_ec977a59-66ab-5798-9df0-cd1fc83dee71.html (last visited Sept. 8, 2016) (noting the population decrease in Virginia's death row from a peak of near sixty) (on file with the Washington and Lee Law Review).

68. See *Organization of ASCA: About the Work*, ASSOC. OF STATE CORR. ADM'RS, <http://www.asca.net/projects/22/pages/172> (last visited Sept. 8, 2016) (detailing the history of the organization) (on file with the Washington and Lee Law Review).

69. See *id.* (describing the activities of the non-profit organization throughout the United States, including hosting trainings, conducting surveys, and publishing bi-monthly newsletters).

70. Sarah Baumgartel et. al., *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (rev'd Aug. 31, 2015).

segregation.⁷¹ Colorado places its death row inmates in “Close Custody,” a general population unit that is more closely supervised and monitored than a normal general population unit.⁷² Missouri, for its part, does not place its death row population in segregation at all; death-row inmates are interspersed within the general population of the institution.⁷³

Since 1991, Missouri has “mainstreamed” its death-sentenced inmates into the general population of Potosi Correctional Center (PCC), affording them recreation, programming, and meals with other inmates.⁷⁴ Death-sentenced inmates are housed in these conditions until they receive an execution date, at which point they are moved to protective custody and then into a holding cell two to three days prior to their execution.⁷⁵ This Missouri study showed that death-sentenced inmates were half as likely to engage in violent misconduct at PCC and did not commit any homicides or attempted homicides.⁷⁶

States like Kentucky and Tennessee offer educational and other programming far exceeding the programming offered by the VDOC.⁷⁷ Both Kentucky and Tennessee permit death row

71. See *infra* notes 72–76 and accompanying text (describing the procedures in Colorado and Missouri).

72. COLORADO DEPARTMENT OF CORRECTIONS, REGULATION #600-0, OFFENDER CLASSIFICATION 2 (Jan. 1, 2015), http://www.doc.state.co.us/sites/default/files/ar/0600_01_010115.pdf (defining classes of custody as minimum, minimum-restricted, medium, and close).

73. See George Lombardi et al., *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and its Legal Significance*, 61 FED. PROBATION 3, 4 (1997) (detailing the history of Missouri’s move to desegregate death-row inmates).

74. See Lombardi et al., *supra* note 73, at 5 (discussing the benefits of moving capital punishment inmates into general population).

75. See *id.* (presenting pre-execution protocol).

76. See Mark D. Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 BEHAVIORAL SCI. & L. 307, 313–16 (2005) (analyzing empirical data).

77. See, e.g., *Education*, TENNESSEE DEPARTMENT OF CORRECTION, <https://www.tn.gov/correction/topic/tdoc-rehabilitation-education> (last visited Sept. 8, 2016) (explaining how all facilities offer adult basic education and high school equivalency test preparation) (on file with the Washington and Lee Law Review); *Death Row Conditions*, DEATH PENALTY INFORMATION CENTER, <https://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls> (last

inmates to be outside of their cells for several hours per day for group recreation between death row inmates, regular contact visits, educational programming, and work opportunities.⁷⁸

Other jurisdictions are also exploring safe alternatives to solitary confinement.⁷⁹ The Vera Institute of Justice issued a Request for Proposal and subsequently partnered with five states and local corrections systems (Nebraska, North Carolina, Oregon, New York City, and Middlesex County, New Jersey) to “significantly reduce their reliance on segregated housing through the advancement of safe and effective alternatives.”⁸⁰ After a full review of the policies and practices of each system, the Vera Institute will make “recommendations on policy and practice changes that will safely and effectively reduce the use of segregation in system facilities.”⁸¹

Having testified in several death row court cases, the main reason I hear to justify death row inmates being locked in segregation is because of their sentence, *not* their behavior.⁸² In every other instance in today’s prison culture, an inmate is only

visited Sept. 8, 2016) (identifying access to television, visits with lawyer, and individual academic study packets for death row inmates in Tennessee).

78. See, e.g., KENTUCKY CORRECTIONS, POLICY NO. 10.2, SPECIAL MANAGEMENT INMATES 7–8 (Aug. 5, 2016), <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH10/PPP%2010-2%20Special%20Mgt%20IMs%20-%20Eff%208-5-16.pdf> (allowing for conversation between inmates in the same unit, access to legal materials and assistance, visitation and telephone privileges, and special unit recreation programs)

79. See Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?_r=0 (last visited Sept. 8, 2016) (exploring changes in Mississippi and noting planned changes for Colorado, Illinois, Maine, Ohio, and Washington) (on file with the Washington and Lee Law Review).

80. *Safe Alternatives to Segregation Initiative*, VERA INSTITUTE OF JUSTICE, <http://www.vera.org/project/safe-alternatives-segregation-initiative> (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

81. See *id.* (pairing an advisory council of practitioners from state and local corrections systems, experts in corrections management, criminal justice policy, mental health, and special populations with the selected sites to mentor, train, and provide best practices knowledge with the goal to reduce the use of segregation).

82. See, e.g., *Prieto v. Clarke*, 12cv1199, 2013 U.S. Dist. LEXIS 161783, at *21 (E.D. Va. Nov. 12, 2013) (noting that the inmate had not engaged in any behaviors that would support segregated housing).

sent to segregation or isolation due to their negative behavior, *not* because of their sentence.⁸³

Many states justify omitting programming for their death row population because death row inmates will inevitably die.⁸⁴ Thus, providing programming would be a waste of resources. However, national statistics show that very few of the 2,984 inmates presently on death row will be executed.⁸⁵

IX. Conclusion

I look forward to the day when corrections can put thousands of attorneys out of work. If correctional managers totally embraced professional correctional management and remediated existing management errors, there would be a marked decrease in the need for inmate lawsuits.⁸⁶ A management model that ensures that all inmates are managed under an umbrella of safety, security, and humaneness would be welcomed by all.

It is not rocket science. Administrators and managers who hold their staff accountable and responsible for everything they do in supervising inmates would drastically reduce, if not almost

83. See Specter, *supra* note 56, at 134 (“It is easy to blame prisoners for prison violence. But . . . the amount of violence in a prison is a function of its culture, the effectiveness of its management, and, at times, the political reality that excuses the mistreatment of prisoners.”).

84. See *supra* notes 50–54 (discussing significant reversal rates on death row as evidence that inmates need access to re-entry programming while incarcerated)

85. See Frank R. Baumgartner & Anna W. Dietrich, *Most Death Penalty Sentences are Overturned. Here’s Why That Matters.*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/> (last visited Sept. 8, 2016) (reviewing every death sentence from 1973 to 2013 and finding that of the 8,466 sentences handed down by U.S. courts, only 16% of death row inmates had been executed, making it three times more likely that a capital sentence would be overturned than carried out) (on file with the Washington and Lee Law Review).

86. See Specter, *supra* note 56, at 131 (“[W]ell-run prisons are relatively safe, while those that are poorly managed are not. The control of violence, therefore, depends not only on executing accepted policies for regulating the use and supervision of force, but also on the overall management of the facility.”).

eliminate, the federal § 1983⁸⁷ actions that are so prevalent in corrections litigation.⁸⁸

I would like to say that I am optimistic; however, since retiring from actively managing and administering prisons, I remain very busy consulting and providing expert testimony in the areas of professional correctional management. It appalls me that there are still so many cases filed because administrators, managers, and supervisors in our prison systems are not insisting, demanding, and holding accountable corrections staff who violate the constitutional rights of inmates entrusted to their care.

87. See 42 U.S.C. § 1983 (2012) (providing a civil action for the deprivation of any rights, privileges, or immunities by a person acting under color of statute or law).

88. See *supra* note 8 and accompanying text (describing the prevalence of prison litigation actions in federal court).