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Looking Behind the Locked Door: Prison Law Reform Proposals for the New Administration

Deborah M. Golden*

The United States incarcerates a higher percentage of its residents than any other country on earth.[1] One out of every hundred people in this country lives behind bars.[2] One in every thirty men between the ages of twenty and thirty-four and one in every nine black men in that same age group are locked up.[3] This huge—and growing—segment of the American population cannot be ignored by the new Administration.

For the purposes of this paper, incarcerated people in the United States can be divided into two groups: federal and state prisoners. There are over 200,000 people in the custody of the Federal Bureau of Prisons ("BOP").[4] The BOP is an agency within the United States Department of Justice, and as such falls under the President's direct control. The states hold almost 1.3 million people in custody.[5] Through the power of the bully pulpit and through legislation, the Obama Administration can exercise a fair amount of control over state departments of corrections.

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* Staff Attorney, D.C. Prisoners' Project, Washington Lawyers' Committee for Civil Rights and Urban Affairs.

I would like to thank my wife, Katie Feiock, for her endless support and invaluable editing.

[1] THE PEW CTR. ON THE STATES, THE PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. Ultimately, the United States must stop incarcerating so many people. A crowded system will always breed problems. Potential solutions for reversing the growth on the imprisoned population are outside the scope of this paper.

[2] *Id*. at 3.

[3] *Id*. at 3, 6.

[4] As of November 13, 2008, there were exactly 202,405 people in federal custody. Federal Bureau of Prisons, Weekly Population Report, http://bop.gov/locations/weekly_report.jsp (last visited November 13, 2008).

[5] THE PEW CTR. ON THE STATES, *supra* note 1, at 29.

As described below, the Obama Administration should set the following five goals for reforming prison-related law:

1. Make private prisons more accountable to the public.
2. Address problems with the Prison Litigation Reform Act.
3. Fulfill the promise of the Prison Rape Elimination Act.
4. Increase transparency in all detention facilities.
5. Prepare inmates for reentry and enfranchise former offenders.

I. Make Private Prisons More Accountable

Private, for-profit prisons and jails now house about 120,000 people.[6] The BOP is responsible for, and therefore has direct control over, almost 23,000 of those placements.[7] The next Administration should make sure that private, for-profit prisons and jails are held to the same standards as government-run prisons and jails and that these private companies make public their records of compliance with federal law and contracts.[8]

For-profit prison facilities are notoriously opaque and unaccountable.[9] The Supreme Court has held that the companies themselves, unlike prison companies that contract with state governments, cannot be held liable for constitutional violations.[10] Recent, more extreme decisions of the Fourth, Tenth, and Eleventh Circuits have held

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[6] WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2007 5 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (reporting 118,239 people in private prisons at midyear 2007).

[7] Weekly Population Report, *supra* note 4 (22,903 people at contract institutions).

[8] Private prisons have proven to be a disastrous idea when evaluated from either a cost savings or a human rights perspective. *See* TARA J. HERIVEL & PAUL WRIGHT, PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 119-27, 157-78 (2008); AM. FED'N OF STATE, COUNTY, AND MUN. EMPLOYEES, THE EVIDENCE IS CLEAR: CRIME SHOULDN'T PAY, *available at* http://www.afscme.org/workers/1238.cfm. Our government should abandon the idea of incarceration for shareholder gain. Recognizing the political barriers to abolishing the for-profit prison, I suggest ways to make the current system function at a marginally better level.

[9] *See*, *e.g.*, Margaret Talbot, *The Lost Children; What Do Tougher Detention Policies Mean for Illegal Immigrant Families*, THE NEW YORKER, Mar. 3, 2008, at 58 (explaining that private prison companies are not only not subject to the Freedom of Information Act, but actually have veto power over what information the government releases under the Freedom of Information Act; also explaining the actions Corrections Corporation of America ("CCA") took to keep journalists out of a CCA facility and to keep information from leaking out).

[10] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).

that individuals employed by private prisons contracting with the federal government cannot be sued for violations of the Constitution.[11] Although some injured incarcerated persons may have tort remedies, other victims have no recourse when their rights are infringed. For example, if a federally-contracted private prison discriminates on the basis of race, or retaliates against a person for filing a lawsuit, state law is highly unlikely to allow for recovery in tort.[12] The new Administration should make it a priority to present a legislative fix to this problem. Otherwise, private companies will continue to operate with an immunity the federal government does not enjoy, while individuals who have been harmed are left without recourse.

To remedy this fundamental unfairness, the Obama Administration must require that any federal contracts with private prison companies mandate that the companies publicly disclose information regarding their compliance with those contracts and all applicable legal standards. All federal contracts should also mandate that private companies comply with requests for information on the same terms as federal agencies under the Freedom of Information Act. If a private prison company fails to comply, either the courts or the contracting agency must enforce the requirement through appropriate penalties.

II. Fix the Prison Litigation Reform Act

The next Administration must reform the Prison Litigation Reform Act ("PLRA"). The PLRA, contained in the Omnibus Consolidated Rescissions and Appropriations Act of 1996,[13] severely limits federal causes of action brought by anyone who is incarcerated. One section requires that plaintiffs must exhaust such administrative remedies "as are available" before bringing any federal action.[14] If a plaintiff does not file all available grievances and strictly comply with whatever administrative time limits and other requirements that a facility[15] itself issues, that person loses her or his right to go to

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[11] *See* Alba v. Montford, 517 F.3d 1249, 1254 (11th Cir. 2008); Holly v. Scott, 434 F.3d 287, 291 (4th Cir. 2006), Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1101 (10th Cir. 2005), *aff'd by equally divided en banc court*, 449 F.3d 1097 (2006).

[12] Such violations do occur. *See*, *e.g.*, Johnson v. California, 543 U.S. 499, 502 (2005) (describing an "unwritten" California Department of Corrections policy of racially segregating prisoners); Crawford-El v. Britton, 523 U.S. 574, 578-79 (1998) (describing alleged retaliation against a prisoner for using the court system to challenge previous perceived deprivations).

[13] Pub. L. No. 104-134, 110 Stat. 1321 (1996).

[14] 42 U.S.C. § 1997e(a) (2006).

[15] The PLRA applies to any facility in which a plaintiff is incarcerated, whether a jail, prison, or police lock-up.

federal court.[16] Another provision of the PLRA precludes compensation to a plaintiff unless he or she can show a physical injury.[17] Courts have uniformly required that a qualifying physical injury be more than *de minimis*.[18] This section of the PLRA has limited recovery in cases of very serious abuse and has even been used to say rape is not a compensable injury.[19] Under this provision, even an American prisoner subjected to much of what we saw in the pictures from Abu Ghraib would not be able to recover.

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[16] Woodford v. Ngo, 548 U.S. 81, 85 (2006).

[17] 42 U.S.C. § 1997e(e) (2006).

[18] *See, e.g.*, Jarriett v. Wilson, 162 Fed. Appx. 394, 400 (6th Cir. 2005); Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003); Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002); Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated by* 197 F.3d 1059 (11th Cir. 1999) (en banc), *reinstated in part on reh'g by* 216 F.3d 970 (11th Cir. 2000) (en banc); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); Singlar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

[19] *See*, *e.g.*, Pearson v. Wellborn, 471 F.3d 732, 734, 744 (7th Cir. 2006) (no physical injury where corrections officers trumped up disciplinary charges in order to keep a man in severely restrictive maximum-security prison for over a year in retaliation for his First Amendment-protected complaints about prison conditions); Jarriet, 162 Fed. Appx. at 400 (6th Cir. 2005) (no physical injury where a man was forced to stand in a two-and-a-half square-foot cage for twelve hours, during ten of which he was naked, and previous injuries were exacerbated); Alexander v. Tippah County, 351 F.3d 626, 628-29, 631 (5th Cir. 2003) (no physical injury where two men were housed in a bare, squalid isolation cell, where they had to defecate into a clogged floor drain, had no means to wash, and were forced to sleep on a bare cell floor covered with sewage and vomit); Styles v. McGinnis, 28 Fed. Appx. 362, 364-65 (6th Cir. 2001) (implicitly finding that rape itself is not enough of a physical injury under the PLRA by looking to other injuries where plaintiff characterized an unusual rectal exam as a sexual assault); Davis v. District of Columbia, 158 F.3d 1342, 1345, 1348 (D.C. Cir. 1998) (no physical injury when a corrections officer opened the sealed medical records of an HIV-positive man and announced this confidential information to other prisoners); Hancock v. Payne, No. Civ. A. 103CV671MR JMR, 2006 WL 21751, *1, *3 (S.D. Miss. Jan. 4, 2006) (holding sexual battery, sodomy, and other related assaults were not a physical injury); Trevino v. Johnson, No. Civ. A. 905CV171, 2005 WL 3360252, *1, *5 (E.D. Tex. Dec. 8, 2005) (no physical injury where, in retaliation for filing a grievance, prison officers sprayed the plaintiff's cell with gas, punched him twice in the face, and later contaminated his food with feces); Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270-71 (N.D. Fla. 2002) (suggesting rape itself might qualify as a "physical injury" under the PLRA, but instead finding adequate physical injury not in the mere act of oral rape, but in the resulting shock and vomiting rather than in oral rape); Moya v. City of Albuquerque, No. 96-1257 DJS/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (no physical injury where male corrections officers strip-searched women, driving one to attempt suicide).

Using dogs to terrify prisoners, forcing men to wear women's underwear and leashes to humiliate them, and even forcing people to make a human pyramid while naked for the amusement of prison staff would inflict not physical injuries, but emotional ones uncompensable under the PLRA. Finally, the PLRA restricts attorney fees, severely limiting the representation available to people who are incarcerated.[20]

Democratic Representatives Robert Scott of Virginia and John Conyers, Jr., of Michigan, introduced H.R. 4109, the Prison Abuse Remedies Act of 2007, to fix these and other onerous provisions of the PLRA. While it is unlikely to pass in the 110th Congress, this bill provides a good outline for future legislative efforts. In particular, the Obama Administration should push for the following provisions:

1. Repeal the PLRA provision that prohibits incarcerated plaintiffs from bringing lawsuits for mental or emotional injury without demonstrating a physical injury.
2. Amend the requirement that plaintiffs exhaust administrative remedies before filing suit to require instead that plaintiffs present their claims to prison officials before filing suit. If the plaintiff fails to do so, the court may stay the case for up to ninety days and provide prison officials an opportunity to resolve the complaint.
3. Restore judicial discretion to grant the same range of remedies in prisoners' civil rights actions as in other civil rights cases.
4. Allow incarcerated claimants who prevail on civil rights claims to recover reasonable attorney's fees.
5. Allow indigent incarcerated people whose cases are found to state a valid claim at the preliminary screening stage to pay a partial filing fee rather than the full filing fee, which is now $350 in district courts and $450 in appellate courts.[21]
6. Amend the "three-strikes" provision[22] by limiting it to plaintiffs who have had three separate lawsuits dismissed as malicious within the past five years.

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[20] The PLRA restricts attorney fees awarded pursuant to 42 U.S.C. § 1988 to 150 percent of the hourly rate "established" for defense counsel under the Criminal Justice Act, a rate much lower than the prevailing rate for civil rights claims. *Compare, e.g.*, Salazar v. District of Columbia, 123 F. Supp. 2d 8 (D.D.C. 2000) (noting typical attorney fee award for attorneys with 1-3 years experience was $184 per hour), *with* U.S. Court of Appeals for the Seventh Circuit, Criminal Justice Act Hourly Rates of Compensation as imposed by Congress, http://www.ca7.uscourts.gov/cja/cjarates.htm (showing current CJA rate of $100). The attorney fees restrictions apply not just to cases involving prison conditions, but to all cases brought by prisoners. 42 U.S.C. § 1997e(d)(3). Also, up to 25 percent of money judgments received by a plaintiff may be used to satisfy attorney fees claims. 42 U.S.C. § 1997e(d)(2). Furthermore, defendants cannot be made to pay fees greater than 150 percent of a money judgment, even if their actions cause the fees to increase. *See, e.g.*, Sallier v. Ramsey, 142 Fed. Appx. 905 (6th Cir. 2005) (interpreting 42 U.S.C. § 1997e(d)(2)).

[21] All other indigent federal plaintiffs may be excused from the entire filing fee. *See* 28 U.S.C. § 1915 (2008).

7. Repeal the provisions extending the PLRA to juveniles confined in juvenile facilities.

The Obama Administration should adopt the solutions outlined in H.R. 4109 and ensure that a similar act passes. The federal courts should once again be open to all who seek to protect their constitutional rights and should provide recompense for abuses of those rights.

III. Fully Fund the Prison Rape Elimination Act and Speed the Release of Standards for Preventing Prison Rape

Congress has estimated that over one million people have been sexually assaulted in prison or jail in the last twenty years.[23] There is broad bipartisan consensus that sexual assaults in prison must be prevented. The Obama Administration must contribute tangibly toward that effort by fully funding the Prison Rape Elimination Act and by speeding the release of national standards for preventing and responding to sexual assault behind bars.

The Prison Rape Elimination Act of 2003 ("PREA") already requires, *inter alia*, that the Department of Justice compile statistics on prison assaults and issue grants to help departments protect inmates from assault. [24] The Act also establishes both a bipartisan "National Prison Rape Elimination Commission" to recommend best practices to prevent rape in detention and a national clearinghouse within the National Institute of Corrections to provide technical assistance to authorities responsible for preventing prison rape.[25] To carry out these mandates, PREA authorized appropriations of more than sixty million dollars each year for fiscal years 2004 through 2010.[26] However, Congress appropriated only thirteen million dollars for initial implementation, and funding has decreased since then: the Bush Administration requested only two million dollars in the 2007 budget cycle. In 2008, the Administration bundled the request for PREA funding with other law enforcement needs, allowing the mandates of PREA to remain essentially unfunded. The Obama Administration must prioritize full funding for PREA in its first budget request.

Earlier this year, the National Prison Rape Elimination Commission released draft standards for practices and procedures to prevent rape in prisons, jails, juvenile facilities, community corrections centers, and police lockups. The Commission is currently

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[22] Under the current "three strikes" provision, prisoners, unless in imminent danger of physical injury, must pay the entire filing fee up front if they have ever previously brought three actions or appeals that were dismissed for being frivolous or malicious, or for failing to state a claim. 28 U.S.C. § 1915(g) (2008). No other class of plaintiffs is subject to such an onerous provision.

[23] 42 U.S.C. § 15601(2) (2008).

[24] *Id.* §§ 15603, 15605.

[25] *Id.* §§ 15604, 15606.

[26] *Id.* §§ 15603-15606.

reviewing feedback that it will incorporate into final recommended standards, which it will submit to the Attorney General. The Attorney General will then have one year to issue national standards for detecting, preventing, reducing, and punishing prison rape.[27] These standards will be immediately binding on the Federal Bureau of Prisons, and states that do not implement the standards will risk losing five percent of the federal grant money they receive to run their prisons.[28]

The Obama Administration can speed this process in two concrete ways. First, the Attorney General does not need an entire year to promulgate national standards. Given the serious nature of the problem, and the irreparable harm caused by rape, the new Attorney General should issue national standards as soon as practicable. Second, the new Administration must ensure that the BOP issues program statements to guide the practical, day-to-day implementation of the national standards.

IV. Increase Transparency in all Corrections Facilities

The Obama Administration must strive to make all corrections facilities operate more transparently. Corrections facilities, by their very nature, operate outside of the mainstream national polity. To increase safety and reduce abuse and assault, external oversight is critical.[29] Without accurate information, lawmakers cannot appropriately target reform attempts. The Commission on Safety and Abuse in America's Prisons[30] has recommended both independent external oversight by government agencies and a national non-governmental organization that would inspect facilities and operate much like the International Red Cross does with respect to prisoners of war.[31] The Obama administration, through the Department of Justice or through a separate executive commission, can create such an oversight organization.

Additionally, the Death in Custody Reporting Act must be reauthorized. Before it expired in 2006, [32] the Act required state agencies that received federal funds to report

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[27] *Id.* § 15607(a)(1).

[28] *Id.* § 15607(c)(2).

[29] *See* COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 76-79 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

[30] This Commission is co-chaired by the Honorable John J. Gibbons, former Chief Judge of the Third Circuit, and former United States Attorney General Nicholas Katzenbach.

[31] COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 29, at 79-82.

[32] *See* H.R. Rep. No. 110-512, at 3 (2008) (report on the Death in Custody Reporting Act of 2007).

basic information about any deaths that occurred while a person was in state custody.[33] In 2008, the House passed a version that would have also required the Attorney General to study the data to determine ways to reduce the number of deaths.[34] This bill will not likely become law before the end of the 110th Congress. The bill should be reintroduced with a further provision requiring federal facilities to report deaths of individuals in BOP or other federal custody. Knowing how many people die while they are in the custody of the government—and why—is an essential step toward meaningful reforms to increase safety in the correctional system.

V. Prepare People in Prison for Reentry: Fund the Second Chance Act and Enfranchise Ex-Offenders

The majority of incarcerated people eventually return to the general community. The Obama Administration needs to focus on rehabilitating offenders to stop the cycle of recidivism. Nearly 650,000 people come out of prisons each year and more than 10,000,000 come out of jails.[35] It is senseless to use prisons simply as warehouses for people convicted of crimes. The entire society will benefit if prisons instead give people some tools to better their lives. Congress made one step in this direction this year, when it passed the "Second Chance Act of 2007: Community Safety Through Recidivism Prevention."[36] The Second Chance Act, which President Bush signed into law in April, provides for programs to help reintegrate incarcerated people into communities—including drug treatment and prison-based family treatment programs—and improves the BOP process for preparing people for reentry.[37] Unfortunately, no money has been allocated to these efforts. The new Administration must make sure that these measures are fully funded.

The Obama Administration must also move ex-offenders back into the political mainstream by using the federal power to regulate federal elections. [38] An estimated 5.3 million citizens have lost their right to vote due to a felony conviction.[39] The Commission

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[33] *See* Pub. L. No. 106-297, 114 Stat. 1045 (2000).

[34] *See* H.R.. 3971, 110th Cong. § 3 (2007).

[35] Second Chance Act of 2007, 42 U.S.C. § 17501(b) (2008) (congressional findings).

[36] Pub. L. No. 110-199, 122 Stat. 658 (cofidified at 42 U.S.C. § 17501 *et seq.* (2008)).

[37] 42 U.S.C. §§ 17521, 17541 (2008).

[38] Congress has the power to standardize requirements for federal voters. *See* Memorandum from Deborah Goldberg & Erika Wood, Brennan Ctr. for Justice, to Spencer Overton (Aug. 15, 2005), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_47571.pdf.

[39] THE SENTENCING PROJECT, FEDERAL VOTING RIGHTS FOR PEOPLE WITH CONVICTIONS, *available at* http://www.sentencingproject.org/tmp/File/fd_bs_peoplewithconvictions.pdf

on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, recommended restoring all voting rights for felons (except those who committed capital crimes or who are registered sex offenders) who have completed their sentences and also recommended that departments of corrections notify felons when they are eligible to vote.[40] Allowing these citizens to vote would not only increase participation in the political process, but would also reduce recidivism, and thus increase public safety.[41] President Obama should propose that ex-offenders in every state be allowed to vote in federal elections.

Conclusion

While people who are incarcerated will never be a popular interest group, public safety, public health, and budget requirements will compel that the Obama Administration to face the issues affecting incarcerated people head-on and to do what is fiscally, legally, and morally sound. Indeed, President Obama's administration must look critically at the effects of our national addiction to incarceration and prioritize concrete reforms in the operations of our nation's prisons, jails, and the legal system with which they intersect. These improvements will not only benefit individual offenders, but will help create a safer and stronger nation.

(citing JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006)).

[40] COMM'N ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 41 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf.

[41] Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004) (finding 12 percent of voters were re-arrested versus 27 percent of non-voters). The authors of this study theorize that voting reduces recidivism by increasing the pressure on the individual to behave as a good citizen.

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