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## Double-Edged Paring Knives: Human Rights Dilemmas for Special Populations

Giovanna Shay

*Western New England University School of Law*, [gshay@law.wne.edu](mailto:gshay@law.wne.edu)

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# Double-Edged Paring Knives

## Human Rights Dilemmas for Special Populations

By **Giovanna Shay**

It has become a commonplace observation that the United States is the world's largest jailer. In an August 2011 report, *SMART REFORM IS POSSIBLE*, the American Civil Liberties Union (ACLU) confirmed that while the United States makes up only 5 percent of the world's population, it incarcerates 25 percent of the globe's prisoners. This unprecedented level of incarceration, first described as "mass incarceration" by NYU sociologist David Garland, has brought increased attention to the problems of particular subsets of prisoners sometimes called "special populations." These groups include female prisoners; lesbian, gay, bisexual, transgender (LGBT), and questioning inmates; older prisoners; and prisoners with mental illness and physical disabilities.

Conditions for these prisoners can sometimes raise significant human rights issues. In its 2011 decision *Brown v. Plata*, affirming an order of a three-judge panel requiring California prisons to reduce their populations to 137.5 percent of design capacity, the Supreme Court described gruesome conditions for prisoners with mental illness. Prisoners with mental illness routinely waited months for care, producing a suicide rate 80 percent higher than the national average. Prisoners with mental illness were held for long periods in administrative segregation, where lack of human contact exacerbated their condition. Officials sometimes placed suicidal inmates in "telephone-booth sized cages"; the *Plata* opinion described one found standing in his own waste.

Another example of issues facing

special populations is that women prisoners and LGBT prisoners are vulnerable to sexual abuse while incarcerated. In an ongoing case in New York, *Amador v. Andrews*, a class of women prisoners has alleged systemic sexual abuse and harassment by corrections officers. This case follows suits in other states, including Michigan, where women prisoners represented by attorney Deborah LaBelle settled a suit involving allegations of egregious sexual abuse and retaliation. Transgender women in facilities designated for men face particular risks. A leading Supreme Court Eighth Amendment case involved the rape of a transgender woman, Dee Farmer, in the U.S. Penitentiary at Terre Haute, Indiana. And corrections officials have sometimes turned a blind eye to the rape of gay men. In a Texas state facility, Roderick Johnson was brutalized by other inmates for weeks, while corrections officers said, "We don't protect punks on this farm."

One of the ways that advocates have attempted to grapple with the issues of these "special populations" is through special classification methods, to parse prisoner populations and ensure their safety and appropriate treatment. American Bar Association (ABA) Standards—policies passed by the ABA to provide a model to jurisdictions—have incorporated such measures. However, these classification efforts have some drawbacks. They are "double-edged paring knives."

### **The Problem of "Special Populations"**

The incarceration crisis has focused

increasing attention on prisoners in special populations. The reason for this growing awareness is multifaceted. The absolute number of prisoners in special population groups has grown solely by virtue of the massive number of people currently incarcerated in the United States. As the ACLU report notes, many are serving long sentences, which leads to more elderly prisoners. And, according to the Sentencing Project, the incarceration rate for women has grown at a pace double that of men.

The heightened focus on treatment of incarcerated women is due in part to the work of human rights advocates. Reports by Human Rights Watch (HRW) and Amnesty International in the 1990s were among the first to draw widespread attention to the problem of custodial sexual abuse of women prisoners, as was a 1998 report by the U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy. This U.N. report was followed up by another mission in 2011, again examining the problem of violence against women in custody, among other issues. The focus on women prisoners has included not only the problem of custodial sexual abuse, but also issues relating to medical care, pregnancy, and parenting, such as the shackling of women prisoners laboring to give birth.

At the same time, as a recent article by sociologist Valerie Jenness in the *STANFORD LAW & POLICY REVIEW* has pointed out, numerous movements have coalesced to address prison sexual violence and custodial sexual abuse. This movement has

further highlighted issues affecting special populations, including gay and transgender prisoners, as well as younger prisoners and women. It produced the Prison Rape Elimination Act of 2003 (PREA), which established a National Prison Rape Elimination Commission (NPREC) to study the problem and propose regulations. The NPREC report, released in 2009, highlighted the heightened risk of abuse to prisoners with nonheterosexual orientations, among others. PREA mandates that the Department of Justice (DOJ) promulgate regulations designed to protect all prisoners from prison sexual violence. LGBT rights organizations contributed to the shaping of these proposed regulations through the notice-and-comment period. At the time this article went to press, the DOJ was at work on a final version of those regulations.

Perhaps one of the largest incarcerated special populations is the group of prisoners with mental illness. This group is so large, and overlaps with so many other cohorts, that it can hardly be called a subset. In 2006, HRW cited Bureau of Justice Statistics figures that more than half of male prisoners and about three-quarters of women prisoners suffered from a mental health problem. A 2003 HRW report, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS*, explained how jails and prisons have become social service agencies of last resort, due to the deinstitutionalization of persons with mental illness and a dearth of community-based resources. HRW noted that the Los Angeles and Cook County, Illinois jails were among the nation's largest mental facilities. The report recounted stories of prisoners with mental illness disciplined for "acting out," and placed in segregation, with the result that they decompensated yet further, sometimes with tragic results.

Long sentences have contributed to growth in the population of elderly prisoners. According to the ACLU report *SMART REFORM*, in Louisiana, where there is a rate of life sentences

four times the national average, the warden of the Louisiana State Penitentiary at Angola has publicly complained that the notorious prison is "turning into a nursing home." Caring for geriatric prisoners is expensive. The ACLU reports that it costs the state of Louisiana \$80,000 per year to house an ailing inmate. As a result of an unlikely coalition between the ACLU and the warden, this year the Louisiana state legislature passed a measure that would permit parole for prisoners over 60.

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**ABA Standards and Resolutions**

The ABA has been at the forefront of developing standards to ensure safety and dignity for the incarcerated. These efforts have included standards regarding the classification of prisoners who are sometimes termed "special populations." Of course, ABA Standards do not in themselves have the force of law. Their impact may be debated. However, ABA Standards can serve as models for jurisdictions seeking to enact best practices, and as a resource for advocates.

In its Criminal Justice Standards on the Treatment of Prisoners adopted in February 2010, the ABA emphasized the importance of screening and classification protocols for prisoners "vulnerab[le] to

physical or sexual abuse" [Standard 23-2.1(b)(i) Intake Screening]. The ABA Standards urge the use of "special protocols" for women prisoners, prisoners with mental disabilities, and prisoners who are "geriatric" or under eighteen. They also state that corrections agencies should provide housing and programming to "meet the . . . needs of special types of prisoners, including female prisoners, prisoners who have physical or mental disabilities or communicable diseases, and prisoners who are under the age of eighteen or geriatric" [Standard 23-3.2(a)]. The health care standard similarly mandates "special health care protocols" for "female prisoners, prisoners who have physical or mental disabilities, and prisoners who are under the age of eighteen or geriatric" [Standard 23-6.1(a)(iv)].

The ABA Standards contain numerous other specific provisions on management of "special populations," including "services for prisoners with mental disabilities" [Standard 23-6.1.1], "prisoners with chronic or communicable diseases" [Standard 23-6.1.2], "pregnant prisoners and new mothers" [Standard 23-6.9], "prisoners with disabilities and other special needs" [Standard 23-7.2], and "impairment-related aids" [Standard 23-6.10]. In the "Personal Dignity" part, it provides that correctional officials should not subject prisoners to "harassment, bullying or disparaging language or treatment" or to "invidious discrimination based on race, gender, sexual orientation, gender identity, religion, language, national origin, citizenship, age, or physical or mental disability" [Standard 23-7.1(a)].

In a particularly ground-breaking provision, the ABA Standards recommend that correctional facilities make "individualized housing and custody decisions" for transgender prisoners who have undergone surgery or hormone treatment for gender identity disorder. The Standard [23-2.4] provides that "[i]n deciding whether to assign such a prisoner to

a facility for male or female prisoners and in making other housing and programming assignments, staff should consider on a case by case basis whether a placement would ensure the prisoner's health and safety." It also provides that "[t]he prisoner's own views with respect to his or her own safety should be given serious consideration." With respect to medical care for gender identity disorder, the Standards assure "treatment necessary to maintain the prisoner at the stage of transition reached at the time of admission . . ." [Standard 23-6.13].

At its Annual Meeting in 2011, the ABA passed a "Resolution on Security Classification Instruments and Needs Assessments for Women Offenders." The Resolution urged federal and local authorities to adopt "gender-responsive needs assessments and programming," to address women prisoners' higher incidence of domestic violence victimization, mental illness, and substance abuse, as well as their typically heavier parenting responsibilities. The report accompanying the Resolution explained that prisons often use classification instruments designed for men, frequently producing inappropriately high custody scores for women. It urged corrections authorities to adopt security risk assessments that avoided this "over-classification" of women prisoners, as well as to redefine the meaning of "maximum custody" for female inmates. Ultimately, the hope is that using appropriate classification tools for women could produce decarceration through placing more women prisoners in community corrections.

The ABA Standards also contain numerous provisions regarding the treatment of prisoners with mental illness, including a provision mandating "appropriate and individualized mental health care treatment" [Standard 23-6.11], and provisions restricting the use of segregated housing for prisoners with serious mental illness [Standards 23-2.8(a) and (b), 23-3.8]. The ABA Standards also include provisions for monitoring the mental

health of prisoners in administrative segregation [Standard 23-2.8(c)].

The ABA Standards are also notable for their emphasis on external oversight [Standard 23-11.3]. Professor Michele Deitch of the University of Texas LBJ Public Policy School, a co-chair of the ABA Corrections Committee Subcommittee on External Oversight, has written an article in the *AMERICAN CRIMINAL LAW REVIEW* entitled *Special Populations and the Importance of Prison Oversight*, arguing that external oversight can help prisoners in special populations. Deitch details how independent monitoring can protect prisoners who are in segregation, vulnerable to sexual assault, or living with disabilities or serious medical needs.

### Double-Edged Reforms

While standards governing the management of special populations may be necessary to ensure humane treatment and avoid victimization and loss of life, they can be controversial, even among human rights advocates. There are two types of critiques: that reforms perpetuate stigma and stereotypes and that reforms reinforce our reliance on prisons.

As an example of the first category, some critics charge that policies specific to women prisoners reinforce gender stereotypes. In a provocative essay in the book *THE VIOLENCE OF INCARCERATION*, prison abolitionist Cassandra Shaylor argues that "gender-responsive" programming is "essentialist" and risks stereotyping men as "violen[t] and dangerous[]" and women as "care givers" who are more deserving of a less-restrictive setting.

Brett Dignam, clinical professor of law at Columbia and a co-chair of the ABA Corrections Committee when the Resolution on Security Classification for Women Offenders was passed, acknowledged the controversy, saying, "[i]t's a double-edged sword." While gender-responsive programming can be very appealing, she explained, "implementation is always where you see the issues that are in conflict."

Dignam emphasized that security issues for women prisoners often overlap with their mental health needs, dramatizing the multifaceted nature of the problems.

Despite the danger of stereotyping, when faced with immediate threats to human life and dignity, some advocates favor adopting imperfect measures, reminiscent of Professor Margaret Radin's urging to adopt pragmatic solutions to "double-binds" in earlier feminist law reform efforts. In a recent article in the *AMERICAN CRIMINAL LAW REVIEW*, Professor Sharon Dolovich defended the Los Angeles County Detention Center's controversial policy of segregating gay prisoners in a special unit, known as K6G (a measure on which the ABA Standards take no position, according to the commentary). While critics deride the policy as stigmatizing and an unacceptable use of government power based on an identity category, Dolovich argues that it is the lesser of two evils, given the high level of violence and sexual victimization in that facility. She writes, "[g]iven the current state of the American carceral system—overcrowded, understaffed, volatile and often violent . . . there is at present no prospect for risk-free reform." By contrast, in a forthcoming article in the *CALIFORNIA LAW REVIEW*, Berkeley law professor Russell Robinson criticizes the K6G unit for relying on stereotypes about gay men and for forcing prisoners to come out in order to qualify for protection. He describes the choice to come out as a "double-edged" one for inmates because it could expose them to violence in other contexts.

To complicate matters yet further, not even decarceration efforts are immune from "double-edged" dilemmas. Recently, the *L.A. TIMES* reported that, in an effort to reduce overcrowding in the wake of the *Plata* decision, California corrections officials would release thousands of nonviolent women prisoners who met the definition of "primary caregiver." The story quoted prison officials as saying that

more than 4,000 of the 9,500 women prisoners in California might qualify. Although corrections officials would not tell journalists how many male prisoners might be released under the measure, far fewer are expected to qualify. Apparently, California officials are first planning the release of eligible women. Indeed, the legislative director for the state senator who introduced the measure candidly admitted to the L.A. TIMES that, "In crafting the bill, the Senator's intent was to single out female inmates with children." However, the sponsor could not do that without running afoul of equal protection, and so substituted the term "primary caregiver."

The second critique leveled by commentators is that advocating higher standards for conditions of confinement can prove counterproductive, by perpetuating the cycle of prison-building. In her 2003 book *ARE PRISONS OBSOLETE?*, Professor Angela Y. Davis urged that rather than focus on "generating the changes that will produce a *better* prison system," we should pursue "strategies of decarceration." A recent study of Florida's history of prison litigation and prison building by Northwestern University sociologist Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, suggests that consent decrees ultimately contributed to prison growth, by mandating construction of new facilities.

Indeed, the potential for this dynamic was evident in the *Plata* case.

At oral argument in the Supreme Court, the justices discussed new construction of prisons as one of the possible remedies. In a podcast on scotusblog, former U.S. Solicitor General Paul Clement, counsel for one of the *Plata* plaintiff classes in the Supreme Court, stated candidly that California's draconian sentencing policies would have been fine if the state had only built enough prisons.

These controversies expose tensions regarding the role of prison conditions reform in the vast American corrections system. In an unexpected twist, the economic crisis may be pointing us toward new solutions to these dilemmas.

### **Lasting Solution: Fewer Prisoners**

One of the few silver linings of the current economic situation is that it has made clear that historic levels of American incarceration are unsustainable. The NEW YORK TIMES reported recently a "trend to lighten harsh sentences catch[ing] on in conservative states," notably Texas. The ACLU report described how traditionally "tough on crime" states like Texas, Mississippi, and Kentucky have reduced their incarceration rates through measures such as increasing the use of pretrial release, eliminating mandatory sentences and recidivism provisions, decriminalizing minor offenses, and implementing geriatric parole.

In an op-ed in the NEW YORK TIMES in the summer of 2011, Brigham Young University profes-

sor Shima Baradaran argued that reforming pretrial detention standards is probably a better "way to shrink prisons" than a court order like the one in *Plata* that may prompt mass transfers to county jails.

In a new State Policy Implementation Project, which Professor Baradaran helps to lead, the ABA Criminal Justice Section (CJS) seeks to implement such reforms. Building on the urgency created by the fiscal crisis, the CJS has inaugurated the State Policy Implementation Project to work state by state on reducing incarceration through legislative and policy changes. The CJS describes key issues, including changes to pretrial release procedures, decriminalization of minor crimes, improved reentry efforts, expanded use of supervised release, and reliance on community corrections.

While this new effort may not eliminate all of the double-edged dilemmas, it is hoped to reduce the number of incarcerated people. Shrinking the number of U.S. prisons will provide the most lasting resolution to these human rights issues.

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*Giovanna Shay is an associate professor of law, Western New England University School of Law, and co-chair, Corrections Committee of the ABA Criminal Justice Section. Thanks to my co-chair, David Ball, for his feedback. The views expressed in this article are the author's alone and may not reflect ABA policy or the views of other Criminal Justice Section members.*