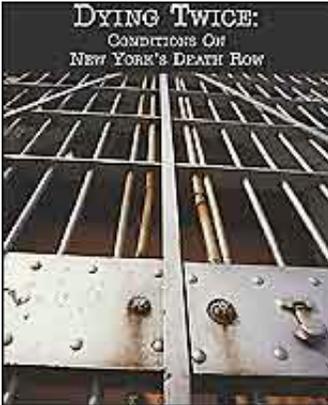


## DYING TWICE: CONDITIONS ON NEW YORK'S DEATH ROW



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"[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted upon him, the first being worse than the second."

-- Albert Camus, *Reflections on the Guillotine, Resistance, Rebellion & Death* 205 (1966).

### Introduction

In 1995, New York State revived the death penalty as a punishment for certain categories of murder, and established a "death row" for condemned men at the Clinton Correctional Facility in Dannemora, New York (variously, "Clinton" or the "Prison"). Four years later, in October 1999, two committees of the Association of the Bar of the City of New York joined together to study the conditions of confinement on this death row -- or, as it is officially called, the Unit for Condemned Persons (the "UCP"). These committees -- the Committee on Corrections and the Committee on Capital Punishment -- formed a joint sub-committee (the "Subcommittee") to study, assess and report on the conditions under which death row prisoners await their execution. This is the report of that Subcommittee.

The Subcommittee has worked on this project for nearly two years. In the process, we have interviewed a number of lawyers involved in death row litigation, including some with clients in New York's UCP; we have visited Clinton and interviewed that Prison's superintendent about the UCP; we have reviewed the literature on the organization and management of other death rows around the nation, and we have, with some difficulty, obtained a limited amount of information about the operation of the UCP from New York's Department of Correctional Services (variously, the "Department," "Corrections" and "DOCS").

In this last regard -- obtaining information from DOCS -- our efforts have been largely unsuccessful. Almost immediately after beginning our project, the Association's then president wrote to the Commissioner of Corrections for New York State, asking him to permit members of our Subcommittee to visit the UCP. This request was refused because of undefined security concerns. The Subcommittee's inability to visit the UCP, to gain a first hand inspection of its facilities, and to interview the inmate population, seriously restricted the factual record that we were able to compile.

Nevertheless, even our incomplete record reveals this basic point: the UCP has been modeled on the punitive segregation units that normally house inmates who violate important prison rules, that is, inmates who prove themselves to be violent and/or highly disobedient during their incarceration. The body of this report consists of an argument against this punitive segregation model, which punishes condemned inmates whether or not they have violated any prison rules.

We contend that -- even for ardent supporters of the death penalty -- death should be a sufficient punishment in itself. While they await execution, condemned prisoners who have obeyed prison rules should enjoy the same rights and privileges accorded inmates (including

a number of convicted murderers) within Clinton's general prison population. To the extent the punishments and restrictions imposed at the UCP serve no legitimate purpose, they should be lifted. This seems to us both simple justice and wise policy. Justice because it requires good reasons for the imposition of hardship, even on the condemned. Wise policy because it seeks to preserve the sanity of these men, and, with it, their capacity to function in society should their present sentences of death be reversed or commuted.

We regret that we have been unable to engage DOCS in this argument. Had it been more willing to cooperate with our examination, DOCS might have been able to defend the punitive segregation model, pointing out virtues that, on our own, we have been unable to identify. It is our hope that the circulation of this report will persuade DOCS that a fuller explanation of its policies is in its own interest, and that of the public it endeavors to serve.

## **I. A Description of Death Row**

### Location

The New York State Department of Correctional Services ("DOCS") calls the state's death row the Unit for Condemned Persons or "UCP". As of the date of this report, the UCP holds six condemned men, who are housed at Clinton Correctional Facility (previously identified as "Clinton" and the "Prison") in Dannemora.<sup>[1]</sup> This location, 15 miles south of the Canadian border in the northeastern corner of the state, is 322 miles from New York City, approximately a six-hour drive.

### Background

In 1995, when New York reinstated the death penalty, the Department of Correctional Services appointed a task force to develop rules for governing the state's new death row. Our Subcommittee has secured, through a Freedom of Information Law request, a small portion of the materials generated by that task force, although not its central memoranda and recommendations.<sup>[2]</sup> The materials produced, when read in light of the rules actually adopted, and supplemented by remarks made to us by several DOCS officials, make clear that DOCS modeled the UCP upon the state's punitive segregation or "Special Housing Units" ("SHU's") -- the units employed to deal with the system's most violent and intractable prisoners. The hallmarks of punitive segregation -- constant surveillance, nearly complete isolation of inmates from each other and from outsiders, and severe limitations on the privileges normally accorded inmates within the prison system -- all are present in the UCP.<sup>[3]</sup>

Significantly, no law requires DOCS to confine all condemned men to the UCP. To the contrary, Corrections Law §652(2) provides that a condemned prisoner:

may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.

This paragraph, although oddly worded, provides that when a defendant sentenced to death is remanded to the custody of DOCS, the Commissioner may determine that he can safely be confined within the general prison population. This, in turn, implies that an investigation should be made into each prisoner's personal characteristics, since those characteristics will determine if confinement within general population is likely to jeopardize "the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate."

This, however, is not the procedure that DOCS has adopted. Department of Correctional Services Directive #0054 states that all death-sentenced inmates shall, in the

first instance, be assigned to the UCP, but that, following this initial assignment, "at the Commissioner's discretion, the inmate can be released to the general population." The directive thus preserves the possibility that a condemned prisoner may be released into general population, but defers decision on such release until after the prisoner has been remanded to the UCP for an indefinite period. At some point after this remand, however, a rule-abiding, stable prisoner should, under the Department's own directive, be considered eligible for release from the UCP.

In fact, it appears that the Commissioner has simply ignored both section 652(2) of the Corrections Law, and Directive #0054, and adopted a policy of consigning condemned prisoners to the UCP until they are either transferred to another facility for execution, or released by the Governor or the courts from their sentence of death. Thus, we know of no instance in which the Commissioner, or his staff, has ever conducted an investigation into whether a condemned prisoner should be released into general population; certainly, none of the six death sentenced prisoners remanded to the state system since 1995 has ever been so released. To the Subcommittee, the automatic and apparently irreversible assignment of all condemned prisoners to the UCP seems a clear violation of the purposes of the Corrections Law and the Department's own directive.

### The UCP within Clinton State Prison

The close connection between the UCP and Clinton's SHU is immediately apparent on a visit to the Prison. The UCP is located within a building in the eastern portion of the Clinton prison ground, which also houses the Prison's SHU. In 1995, when New York reinstated the death penalty, the Clinton SHU had three twelve-cell tiers, for a total of 36 cells. In order to house the new death row inmates, the state took one twelve-cell tier from the SHU, and dedicated it to the UCP.

New York currently has six male prisoners under sentence of death, each of whom has been assigned to a cell within the twelve cell tier that constitutes the UCP.<sup>[4]</sup> Although the Subcommittee was not allowed to visit the UCP, its layout has been described to us by the Superintendent of Clinton and several defense lawyers who have visited the UCP. The occupied cells are contiguous, with the primary entrance to each cell located upon a single hallway which spans the length of the UCP. The hallway wall opposite the cell doors contains a series of opaque windows that, when closed, prevent any outside view. The walls between each of the cells are solid and while the inmates can hold conversations among themselves, they are unable to see each other.

UCP cells consist of two compartments, a living area and a visiting/showering area. The primary living area is approximately 78 square feet and contains a toilet, sink, bed, mattress and pillow. The cells are not air conditioned and fans are not allowed in the cells. The visiting/showering area is accessible from the cells through an electronically controlled sliding door which, when activated by a corrections officer, allows the inmate to move to a small cubicle containing both the inmate's visiting and showering area. For visitation purposes, the inmate is always separated from visitors by a Plexiglas window. The men of the UCP are allowed three showers per week, in open stainless steel stalls that have no curtains.

### Illumination/Surveillance

Lights are kept on at the UCP 24 hours per day. While the Department of Correctional Services states that it has reduced the wattage of the lights in response to inmate complaints, these lights remain sufficiently bright to permit constant surveillance by the staff; several inmates have complained that the lights disturb their sleep.

UCP inmates live under constant, uninterrupted surveillance, including both 24-hour camera surveillance of their cells, and audio monitoring by installed microphones. On the rare occasions when the inmates are permitted to leave their living compartment, they are kept

under surveillance wherever they go: the reason curtains were removed from shower stalls was to permit the inmates to be monitored while they bathe.

### Visitation

The visitation rights of UCP inmates are limited to: (i) counsel, (ii) immediate family, (iii) media, (iv) those possessing a court order, and (v) spiritual advisors. These restrictions are more severe than those imposed on the general prison population, and more severe than those that New York imposed on the UCP twenty years ago.<sup>[5]</sup> Thus, the regulations in force in 1983, when the UCP was maintained at Green Haven Correctional Facility, permitted all the visitors authorized by present regulations, as well as visits by: (i) relatives who acted in the "parental role", and (ii) aunts, uncles, nieces, nephews and cousins by blood.

### Non-Legal Visits

Each UCP inmate is permitted one non-legal visit per week. Since UCP inmates, unlike those in the Prison's general population, are not permitted to receive visits from non-family friends, and since visits from the media and from spiritual advisors are rare, visitors to the UCP essentially consist of the immediate family of the condemned men.<sup>[6]</sup> For those inmates who are estranged from their immediate families, or whose families live in distant parts of the State, the "immediate-family only" policy effectively means no visitors at all.<sup>[7]</sup>

All visits to UCP inmates take place in the visiting area adjacent to the inmates' cells, under both video and audio surveillance by the correctional staff. The Plexiglas barrier prevents physical contact between inmate and visitor. The general population, on the other hand, may receive multiple visitors in multiple visitation periods with some direct physical contact. UCP inmates are limited to one ten-minute telephone call per week.

### Legal Visits

Defense lawyers who have visited the UCP inform us that each cell has its own visiting area, with a Plexiglas shield that separates the inmate from the visitor; it is here that attorney visits take place. Although audio surveillance is shut down during attorney visits, the confidentiality of attorney-client communications is highly compromised. A video camera on the visitor side of the Plexiglas is trained upon the inmate.

A telephone system recently has been installed to permit inmates to speak, in a normal voice, to visitors sitting on the other side of the Plexiglas partition. Defense counsel have informed us, however, that these phones don't function properly, and that inmates must speak very loudly, or even yell, to be heard through the Plexiglas shield. This makes their "privileged" communication clearly audible to any nearby guard or inmate. If several inmates are receiving visitors at the same time, all inmates and visitors, legal and non-legal, can hear each other.<sup>[8]</sup> The Plexiglas also interferes with the transfer of documents, including legal papers, which must be transmitted through a padlocked slot which an officer must unlock.

There is no limit to the number or duration of inmate telephone calls to counsel of record. However, defense counsel inform us that audio monitoring of the cells is not turned off during these telephone conversations, so that corrections personnel presumably overhear inmates' remarks to their lawyers. This seems to the Subcommittee an obvious violation of the inmates' right to confidential communication with their attorneys.

### Exercise

During the initial thirty-day adjustment period after arrival on the UCP, each UCP inmate is permitted an hour of outdoor exercise in a single person "cage." After this adjustment period, UCP prisoners are then allowed to exercise daily for one hour, by themselves, in a rectangular "dog-run" of approximately 2,000 square feet. All exercise is solitary and outdoors: when weather conditions are extreme, UCP inmates are provided with a

coat and galoshes, but are never provided with gloves.

### Oversight

Prison regulations require twice a week tours by the Superintendent, and once a week tours by both the First Deputy Superintendent and the Deputy Superintendent for Security. DOCS regulations do not, however, provide for oversight of the conditions on the UCP by any entity outside of the Department itself. We have been informed that the American Correction Association reviewed the plans for the UCP but has never visited the site in operation.

In the summer of 2001, DOCS permitted the Correctional Association of New York to make its first visit to the UCP; we have been informed that the visit took place on June 22, 2001. As of the date of this report, the Correctional Association has not published an account of that visit.[\[9\]](#)

### Guidelines and Standards of Conduct for UCP

DOCS has promulgated a number of other rules to control the UCP, including:

1. No talking from one section to another.
2. No passing of anything from one cell to another.
3. No talking from the exercise yard into the housing unit (UCP or SHU).
4. When being escorted from the unit, the inmate's hands will be placed behind the inmate's back.
5. No talking after the quiet bell rings at 10:30 P.M.[\[10\]](#)

### Use of Restraints

All inmates assigned to the UCP are "mechanically restrained" whenever they are escorted off the unit (e.g., during their one-hour exercise period). Mechanical restraints include (i) handcuffing -- either in front with a waist chain, or in back with or without a waist chain and (ii) leg irons.

### Commissary Privileges

The commissary rights of UCP inmates are more limited than those of the general inmate population. A general population prisoner can spend \$55 on commissary items once a month and may purchase any item available (snacks, personal hygiene items etc.) A UCP inmate also may spend \$55 a month, but only \$15 of this may be spent on food. This limitation on discretionary food purchases imposes a real hardship on UCP inmates, since their normal meals are all served within a single eight-hour work-shift. Thus 16 hours can pass between an inmate's dinner and his next meal.

## **II. Inmate Concerns**

The Subcommittee has tried to determine how UCP inmates feel about the conditions of their confinement. Initially, we asked the Department of Correctional Services for permission to visit the UCP and speak to the inmates directly. This was refused. We then asked DOCS for a summary of the grievances filed by the UCP inmates. This was provided, but proved of limited utility: the summaries were so terse that we often found it hard to determine precisely what the complaints were about.[\[11\]](#)

Recently, however, the Subcommittee has received more substantial information about inmate concerns from two new sources. The first is the law firm of Sullivan & Cromwell ("S&C"), which represents four of the six UCP prisoners in connection with potential litigation

concerning aspects of their confinement. At our request, the firm asked its clients (the "S&C Clients") to respond to a number of questions about death row, advising them first that their answers might be included in our report. All four of the S&C Clients responded, articulating various concerns about the operation of the UCP which we summarize below.

The second new source of information came in response to the Freedom of Information Law ("FOIL") request. Among other items, DOCS' response to this request contained letters from two UCP inmates, each of whom is represented by Sullivan & Cromwell. The first of these letters was sent by one of the inmates to the Superintendent of Clinton (the "FOIL Letter"), and forwarded by the Superintendent to a Deputy Commissioner of DOCS. The second letter, by a different inmate, was in the form of a petition on behalf of all the UCP inmates and was submitted directly to DOCS (the "FOIL Petition").<sup>[12]</sup>

### Summary of the S&C and FOIL Material

As indicated, the Subcommittee has had access to the views of four UCP inmates, all of them clients of Sullivan & Cromwell. These inmates, in their comments to Sullivan & Cromwell and in the letters two of them sent to DOCS, have complained that certain conditions of their confinement are unnecessarily -- indeed, senselessly -- harsh and restrictive. These include: (i) their nearly complete isolation from other prisoners, (ii) restrictions on their exercise rights, (iii) restrictions on their commissary privileges, (iii) the lack of confidentiality in their communications with attorneys, (iv) the 24-hour a day illumination of their cells, (v) the uninterrupted video surveillance of their cells, (vi) limitations on their visiting rights, (vii) deficiencies in their access to medical care, and (viii) deficiencies in current grievance procedures.

#### 1. Lockdown

Many of the inmates complaints concern their lockdown in individual cells for 23 hours a day. This practice isolates them more or less completely from other inmates and confines their movements to the close quarters of their immediate unit. Both aspects of the lockdown - - isolation and physical confinement -- are demoralizing. Thus, while only one of the UCP inmates expressed a desire to be placed in the general population, almost all expressed a need to congregate with others, as well as a simple need for more freedom of movement. One of the S&C Clients complained of "[n]ot being allowed to go to church or see a doctor without first having it cleared by someone in Albany," while another wrote that "A person needs to be able to walk around . . . . Why can't we walk in the hallway for one hour every day?"<sup>[13]</sup>

#### 2. Surveillance

Many of the S&C Clients have complained about the uninterrupted surveillance to which they are subjected and the 24-hour illumination of their cells which makes such surveillance possible. The illumination rule is particularly distressing. Thus, one inmate stated that "the point that the lights in the cells remain on makes no sense. If a person wanted to cause physical harm to himself or others the act would be done regardless. . . . Also, it is very, very hard to sleep." A second wrote: "I've not had a decent night's sleep since the new lights were installed. It's uncomfortable sleeping with a towel over my head or sleeping with the light shining in my eyes." A third stated that he tries to sleep by putting his head under his blanket, but noted that the strategy is often ineffective since the officers wake him up and require that he uncover his head.

The UCP inmates thus object to 24-hour surveillance because the lighting it requires interferes with their sleep. However, they also have a more basic objection: the constant surveillance is a deep intrusion into their privacy. As one man wrote in questioning the need for constant surveillance: "For six years the UCP has been open [and] not once has there been a problem of violence or threat to the safety and security of the facility and it has nothing to do with the structure of how UCP is run. The men of UCP are just that, men who want the chance to show that we are not animals." In the words of another: "Video

surveillance denies me privacy when using the toilet, drying off after showers and privacy to pray". A third wrote: "We have no privacy. It's inhumane."

### 3. Commissary Privileges

The UCP inmates attach great importance to the privilege of buying foods and other items at the Prison Commissary -- one of the very few activities in which they can exercise even a small degree of discretion. Virtually all expressed unhappiness with the restrictions imposed on their permitted purchases, especially those restrictions that were not imposed on the general inmate population. Thus, the inmates complained that: (i) their food purchases were confined to "junk food", while inmates in general population were permitted to buy nutritious items such as cold cuts and peanut butter, (ii) their purchases of toiletries, writing supplies, cassette tapes etc. were for some reason restricted, and (iii) their visits to the commissary were limited to one a month. In the words of one of these inmates, "the men on UCP go to commissary once a month, where if we were in general population we would go twice a month or every two weeks. The men on UCP should be allowed to go every two weeks and be allowed to purchase beverages, cereals, peanut butter, jelly, condiments, writing supplies, household items and special buy items like AM/FM cassette. We should have access to "hot pots" for tea and coffee and spending should be \$25 and not \$15."

### 4. Visiting Rights

#### a. Family Visits

The UCP inmates are very unhappy with the present arrangements for family visits. They are unanimous in asking for a room in which visits can be conducted in private, and with a degree of physical contact -- in which the inmates can touch, hold hands, and even hug their loved ones; such contact is now impossible, precluded by the thick sheet of Plexiglas that separates inmates from visitors. The inmates note that the rule against "contact" visits for UCP inmates is not imposed on other inmates in the system, including those serving disciplinary sentences in Clinton's Special Housing Unit.

The inmates are again unanimous in wanting to expand the list of permitted visitors to include cousins, aunts and uncles, in-laws and close friends. One of the S&C Clients, for example, complained that present policy prevented him from seeing his godmother, who raised him, or his cousin, with whom he grew up; we note that both these excluded visitors would have been permitted under the rules that governed UCP visitation in the early 1980's. Two of the S&C Clients noted that Clinton's remote location made it difficult for their family members to visit.

#### Telephone Calls To Family

In addition to restrictions on face-to-face visits, several of the S&C Clients objected to the rule that UCP inmates may place only one 10 minute telephone call per week to family members. The FOIL petitioner, for example, stated that ten minutes "is by no means adequate enough time for a reasonable conversation with loved ones", and asked that the time limitation either be abolished, or at least raised to 20 minutes. The FOIL letter writer concurred, stating that "[c]onsidering there are typically 3 or more people awaiting our weekly call that 10 minutes becomes little more than a brief hello and goodbye".

#### b. Legal Visits

Each of the S&C Clients complained about the lack of confidentiality in their meetings with defense counsel, stating that it was easy for them to hear each other's conversations. Several men also reported that they had overheard guards talking about what other inmates had said to their lawyers, adding that they were reluctant to tell their own lawyers certain things because they knew that their conversations were not private. The S&C Clients also complained that telephone conversations with their attorneys are not confidential. Calls to

attorneys must be placed from the inmates' cells, and the S&C Clients believe that the resulting conversations can be overheard by other inmates as well as by the audio microphones installed in each cell.

### 5. Grievance Procedures

The S&C Clients uniformly view the grievance procedure as ineffective, one stating that the procedure was "no help at all", another that "the grievance procedure does not exist in UCP". They were divided, however, on whether prison staff retaliated against inmates who filed grievances. While one inmate stated that "[t]he only retaliation for grievances are that they are either lost or ignored", another wrote that "I definitely believe that there is retaliation for putting in a grievance."

### 6. Medical Treatment

UCP inmates are divided on whether they receive adequate health care. One states that the care provided for non-emergency problems is "fair," while another writes that "I have been waiting two months to see a doctor for my lower back problems. I have filed a grievance and was told last month that a doctor will schedule me an appointment that was in January and it is now March and I have seen no one." A third states that "to see a doctor we have to call our lawyers, otherwise it could take months."

When the UCP inmates do receive medical care, it is often provided in their cells, rather than at the Prison's medical facilities. The S&C Clients are thus concerned that their conversations with health care providers are no more private and confidential than their conversations with counsel and family.

### 7. Other Concerns

The S&C Clients have expressed dissatisfaction with several additional aspects of their conditions of confinement. Many of their complaints seem reasonable, and could be remedied at very little cost. Thus, they ask for: the right to subscribe to newspapers, to use a typewriter, to have a desk or locker within their cells, to hold legal materials for longer than 24 hours, to keep personal underclothing and shower equipment, and to use fans during the summer.

## III. Analysis and Recommendations

The punitive segregation model, upon which New York has organized its death row, is by now very hard to justify. As the Clinton superintendent himself admits, the middle-aged prisoners on death row have turned out to be among the most obedient within the system. In the six years since the UCP has been established, there has not been a single reported incident of violence, nor a single attempted escape or serious security violation. In spite of this, the UCP continues to operate as if its six condemned men are serious threats to Prison security, who can be controlled only by round-the-clock surveillance and the most stringent restraints.

The punitive segregation model may have seemed a plausible way to organize the UCP in 1995, before the state had any actual experience with the type of prisoners its new death row would be receiving; six years later, the harsh restrictions imposed at the UCP appear to be gratuitous, a form of punishment that has not been judicially imposed and is unrelated to any actual misdeeds the inmates may have committed while in prison.<sup>[14]</sup> This model, in other words, does not fit the reality of today's UCP, which is a housing area populated by obedient, indeed often passive inmates, obsessed with working on their appeals, and posing little threat to prison security.

We therefore urge the Department of Correctional Services to abandon its present policy of holding all UCP inmates in close confinement and complete isolation until

immediately before their execution. Instead, we propose that DOCS adopt the same case-by-case analysis that it employs in determining how and where to house all other inmates entering the corrections system. Currently, each inmate entering New York State prison is classified according to "Security Classification Guidelines", which require an assessment of the security risks the inmate poses. These Guidelines identify two types of security risks: (1) public risk - a combination of the likelihood that an inmate will escape and the likelihood that he would be dangerous to the public were he to escape; and (2) institutional risk - the likelihood that he will be dangerous to staff, other inmates, or himself. Each inmate is evaluated by point scores which take into account such factors as the inmate's criminal history; history of violence; history of escape and abscondance; time to earliest possible release; family, employment, school and military history; and institutional disciplinary history.

Based upon this analysis, inmates are given a security classification and placed in an appropriate facility. We can see no reason why a similar analysis cannot be performed with inmates under sentence of death, and note that a number of other states currently undertake just such an analysis in determining where death sentenced prisoners should be assigned. Thus, Montana, which has approximately the same number of death-sentenced inmates as New York, employs a classification system, under which inmates on death row can earn privileges by engaging in good behavior. California, which has the largest death row in the Western hemisphere, classifies its death sentenced inmates as "Grade A" or "Grade B," the former constituting the majority of inmates, the latter a violent or gang-affiliated minority. The two groups enjoy different privileges and are housed in separate areas, with Grade B inmates consigned to a three-story building called the "Adjustment Center."<sup>[15]</sup>

We further note that many other states do not operate their death rows on a punitive segregation model,<sup>[16]</sup> and that one state -- Missouri -- actually integrates capital prisoners with the general population at a maximum security facility.<sup>[17]</sup> Another state, Montana, as we already have noted, allows its death-row prisoners to earn important privileges, including the right to congregate with other death-sentenced prisoners in a day room, to obtain more items from the commissary, and to have greater freedom to use the telephone.

In light of these considerations, the Subcommittee urges the Department of Correctional Services to conform its regulatory model to the actual reality of the UCP. Specifically, we make the following recommendations:

1. Protect the privacy of prisoner meetings with counsel, counsel representatives, psychologists and spiritual advisors.

At present, inmates cannot meet privately or communicate confidentially with their families, attorneys, health care professionals (including psychologists) or spiritual advisors. The inmates and their visitors are separated by a Plexiglas partition, which forces all parties to shout in order to be heard. The consequence, of course, is that entire conversations are audible throughout the cellblock, where they may be overheard by other inmates and correction officers. In addition, the partition prevents inmates and visitors from simultaneously reviewing documents; indeed, documents cannot even be transferred unless an officer unlocks a padlocked slot.

The Subcommittee believes that, at a minimum, the Plexiglas partitions should be removed, although a better solution would be to provide a separate room where privileged visits can be conducted "face to face". California, Florida, Georgia, Illinois, and Missouri allow such "contact visits" for both legal and non-legal visitors.

The Subcommittee also believes that audio monitoring of the inmates' cells should be suspended during their telephone conversations with counsel.<sup>[18]</sup>

2. Allow inmates to control their own lights.

The UCP's practice of illuminating cells 24 hours a day, with lights that are controlled

by officers, interferes with the inmates' sleep and seems to them a form of harassment. Inmates try to block out the light by placing a towel or blanket over their head -- anything to keep "the light [from] shining in my eyes" -- but the guards for some reason object to their doing so. The result, which one might expect, is that it is "very, very hard to sleep." The apparent justification for this "24-hour illumination" rule is that the lights permit night-time video surveillance of the cells; such surveillance in turn is justified by the fear of inmate suicide. The irony in this, however, is that the policy is so demoralizing to inmates, who are unable to see its point and complain bitterly that it interferes with their sleep, that it may increase the likelihood of the very act it is designed to prevent.

The UCP is very small and seems likely to remain so for the foreseeable future. Surely the prison can address its legitimate security and inmate safety concerns simply by having its night-time staff make more frequent rounds of the cells.

### 3. Expand the list of permitted visitors.

The severe restrictions that New York imposes on the list of permissible visitors to death row are unique, unnecessary and cruel. Prisoners cannot be visited by a life-partner, if there has been no formal marriage; they cannot be visited by relatives (such as cousins, step-siblings, uncles and aunts) who fall outside the narrow definition of "family" that DOCS employs for visiting purposes; and they cannot be visited by friends, no matter how close or long-established the friendship may be.

These restrictions on the visitation rights of condemned men, who are permitted no other form of society while awaiting execution, are more severe than those imposed on the general prison population, more severe than those imposed on condemned prisoners in other states, and more severe than those previously imposed in the UCP itself. The Subcommittee can see no justification for these unique and unprecedented restrictions, and therefore urges DOCS to immediately grant UCP inmates the same visitation rights afforded the general prison population at Clinton.

4. Give death row inmates the same commissary privileges that the general prison population enjoys.

UCP inmates are permitted to spend \$55 per month at the prison commissary, \$15 of which can be spent on candy and snacks. Inmates in general population are also given \$55 per month, which they can spend as they choose on a wide array of food products, toiletries, cards and other sundries. If a general population inmate violates a prison rule and is sentenced to disciplinary confinement, his monthly food purchases are limited to \$15 -- the maximum allowed death row prisoners even when they have not violated any rules.

DOCS should eliminate these severe and inexplicable restraints on the right of UCP inmates to buy food, especially because UCP inmates often wait 16 hours between their final meal of the day and breakfast. A number of states, including Alabama, California, Florida, North Carolina, Ohio, Louisiana, Illinois, and Texas allow death-row inmates the same commissary privileges as those inmates in the general population.<sup>[19]</sup>

5. Allow inmates to congregate within the UCP, and to engage in recreational activities in small groups in the exercise cages; afford them exercise equipment and gloves.

UCP prisoners are not allowed to congregate either with each other or with the general Prison population. They are, in other words, kept in virtual isolation, alone in their cells for 23 hours a day, and then alone in the exercise yard for the 24th hour. To our knowledge, DOCS has never publicly explained its policy of keeping these men so isolated, but we have assumed that it reflects a general early expectation that condemned men would be violent and intractable -- the worst of the worst in terms of prison discipline.

As Clinton's own superintendent freely admits, this has not proved to be the case.

Indeed, he has stated that the six inmates presently on death row are, in fact, older, more passive and more obedient than most of the rest of Clinton's population. This, moreover, is commonly the case with death row prisoners.[20] Although it is entirely possible that the next inmate assigned to the UCP will vary from the present rule, and prove as dangerous as DOCS originally expected all condemned men to be, this merely illustrates that presumptions about death row prisoners -- either favorable or unfavorable -- are very dubious, arising from intuitions and a very errant common sense rather than from a broad and consistent experience.

Our concern with the present state of fairly extreme isolation that is imposed on UCP inmates arises, in part, from the extensive body of literature concerning the destructive psychological effects of solitary confinement and the sensory deprivation it usually entails. This literature has become well known in the corrections community, largely through the work of Dr. Stuart Grassian, who has identified what he calls "solitary confinement psychosis". Grassian, S. & Friedman, N., Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, International Journal of Law and Psychiatry, 8, 49-65 (1986). Those who suffer from this syndrome, according to Dr. Grassian, display symptoms including "massive" anxiety, perceptual distortions and hallucinations, difficulty with concentration and memory, acute confusion, primitive and aggressive fantasies, persecutory ideation at times reaching the level of delusion, motor excitement often associated with violent, destructive or self-mutilating outbursts, etc. See also, Benjamin and Lux, "Solitary Confinement as Psychological Punishment", California Western Law Review, 13, 265-296(1977).[21]

These considerations persuade the Subcommittee that death row prisoners should be allowed some congregation rights unless and until their own behavior proves them to require isolation. We do not now specify the precise form these rights should take -- whether congregation should be with other UCP inmates alone, or with members of the general population in supervised settings such as prison jobs or educational programs. We merely contend that DOCS should abandon the present regime of complete and perpetual isolation, sporadically lifted for family, attorney and medical visits.

The Subcommittee also urges DOCS to relax the extreme and strange restrictions it presently imposes on recreational activities. Today, recreation at the UCP means standing alone in an empty outdoor cage, a condition few outside death row would find particularly stimulating. Inmates should be allowed engage in recreational activities in groups and should further receive some type of athletic equipment, such as a basketball, jump rope or weights.[22]

These proposals -- to relax the isolation under which death row prisoners are held -- are hardly radical. Indeed many other states already allow death row inmates to congregate. Thus:

- North Carolina allows death-sentenced inmates to congregate in a day room from 7:00 a.m. to 11:00 p.m., where there is a television. Death-sentenced prisoners may also participate in weekly religious services and may attend a 90-minute bible study class taught by the prison chaplain. The death-sentenced prisoners eat in dining halls in groups, not alone in cells.
- California, which has the largest death-row population in the country, allows death row inmates to congregate both inside the prison and outside in the prison yard, and to engage in activities such as chess, cards and board games.
- Florida, Ohio, Illinois, Louisiana, and Pennsylvania allow inmates under sentence of death to exercise together during their recreational period.
- Georgia allows condemned inmates to socialize within their cell blocks for several hours each day, during which time they can play cards, chess and checkers. Death row inmates also are allowed, twice weekly, to exercise with each other.

## 6. Outside Monitor

In addition to these recommendations for changing specific conditions of confinement at the UCP, the Subcommittee strongly recommends that the state create a mechanism for regular outside oversight of conditions on the UCP. The UCP is unique among housing areas in New York prisons since it is the only location that contains prisoners who have been sentenced to death, and it is the only housing area to which professional corrections monitors have not had regular access.<sup>[23]</sup>

The importance of visits, scheduled and unscheduled, by an outside monitor seems obvious. In the first instance, of course, the role of a monitor is to conduct inspections to determine if regulations are being followed. This, however, is not the only service a monitor may provide. A monitor also would be a source of unfiltered information about conditions within the UCP, information both about how inmates are treated and how public funds are being spent. Finally, a monitor represents an extra-institutional vehicle for lodging complaints. Today, UCP prisoners primarily present their complaints to the correctional staff with whom they come in contact. This is unfair to the inmates, because the correctional staff is hardly impartial, and because DOCS seems to have adopted a presumption that inmate requests are unreasonable.<sup>[24]</sup> This implicit presumption may be seen in the response by DOCS General Counsel to the FOIL Petition, which we attach as an exhibit to this report. The Petitioner submitted several modest requests for changes in the UCP, among which were: (i) an increase in the variety of toiletries that UCP inmates were permitted to purchase at the commissary, (ii) the right to use typewriters, and (iii) a relaxation of the rule that UCP inmates can make only one 10 minute telephone call per week to family members. DOCS rejected each of these proposals in a perfunctory letter that advanced arguments we find difficult to take seriously. Thus, DOCS asserted that (i) "Additional toiletries would present administratively [sic] and security implications", (ii) "Typewriters present unique security concerns" and "can be used to secrete contraband", and (iii) since there is only one telephone on the UCP "Increasing the maximum time that inmates may speak on the telephone with family members would necessarily impact the time that inmates have to communicate with their attorneys".<sup>[25]</sup>

Latent in DOCS' response to the Foil Petition is a hostility, or at least an aversion, to inmate complaints. Given this aversion, we believe that some other method must be found to identify problems at the UCP. This is a role that can be filled by an independent, outside monitor.<sup>[26]</sup>

We do not now suggest the particular form that a monitoring agency should take. What is important is that it be independent of the executive branch, to which DOCS belongs, that it have a professional staff, however small, and that it have clear statutory authority to make unannounced visits to the UCP.

## **CONCLUSION**

It is a terrible thing to be condemned to death, and confined for years in a small cell, with little to do except to prepare for execution. It seems self-evident that the conditions under which the condemned spend those last years should not involve additional punishment. Yet, at present, the six condemned prisoners on New York's death row endure a host of indignities and restrictions that normally are employed only as punishment for the violation of important prison rules. To impose these conditions on the UCP's inmates as a matter of course, that is, even if they have obeyed every rule that the system enacts, is harshness without purpose, a fair definition of cruelty.

We have argued in this report that no restriction should be imposed on UCP inmates that is not imposed on the general prison population without a specific and persuasive justification for distinguishing between the two groups. It is because we can see no important distinction between convicted murderers who have been sentenced to death, and are therefore lodged in the UCP, and convicted murderers who have been sentenced to terms of

life without parole, and are therefore lodged in general population, that we have strongly recommended abandoning the special restrictions imposed on the UCP.

The Subcommittee recognizes that, even if adopted, the changes we propose may not substantially improve the life of the condemned, each of whom will still suffer under the knowledge that he faces execution. Indeed, it has been noted that "we know little about the experience of living with a death sentence." Nevertheless, we believe that it is better to await death in a humane environment than in one that is harsh and restrictive, and it is toward the end of humanizing the UCP that we submit our proposals.

We urge DOCS to consider our arguments seriously and in goodwill, for this is the spirit in which they are advanced. And we ask them to consider a fact of great importance: it is by no means certain that any of the men on death row will be executed. Some may be returned to the general prison population, where they will be expected to function as members of the prison community. Others may even be found innocent of any offense, and released into civil society. In no case is it in society's interest to impose onerous conditions that may lead to the mental or spiritual breakdown of the prisoner and make it impossible for him to become a functioning member of prison or civilian society. In no case is it in our interest to needlessly inflict pain. But needless, purposeless pain is precisely what is being endured at the UCP today.

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[1]There presently are no women under sentence of death in New York State. Nevertheless, a facility for such women has been established at the Bedford Hills Correctional Facility in Westchester County.

[2]DOCS has also declined to identify the task force members, citing what seem to us chimerical concerns for their safety. Our FOIL submission requested such names, and when this request was denied, we lodged an appeal. The appeal essentially upheld DOCS refusal to disclose the names in question.

[3]The SHUs themselves have been regularly criticized as unduly harsh, and accused of producing the defiant, anti-social behavior they seek to punish and deter.

[4]This arrangement is designed to allow for minimal contact with the institutional staff and absolutely no contact with non-UCP inmates. New York State Department of Correctional Services Directive No 0054, "Unit for Condemned Persons," June 26, 1998, ("DOCS Dir. No. 0054") at 1.

[5]The modern history of the death penalty in New York has been concisely described in Hoffmann, et. al., *Plea Bargaining in the Shadow of Death*, 69 *Fordham L. Rev.* 2313, 2334 (2001). As the authors note, the Court of Appeals invalidated New York's death penalty statute in 1984 and "[f]rom that time until the enactment of the current statute in 1995, the death penalty was not authorized in New York." The more liberal UCP regulations referred to were promulgated in 1983.

[6]A single media visit may, at the request of the inmate and with the approval of the Superintendent, be substituted for the non-legal family visit. No UCP prisoner has yet allowed a media visitor.

[7]Family members include legal spouse, children, parents or step-parents, brothers and sisters, grandparents, foster parents or legal guardians, and grandchildren. The "family-only" restriction is lifted during the period just prior to execution while the inmate is held at the Capital Punishment Unit ("Death House") at Green Haven State Prison.

[8]Compounding these problems is the cramped space on the visitors' side of the Plexiglas. It is difficult for three people to occupy this space, thus making visits by the

interdisciplinary legal teams often present in capital appeals quite arduous.

**[9]The Correctional Association of New York is a privately funded organization that is authorized by state law to visit New York State's prisons. Its members and staff comprise a visiting committee, which inspects prisons and issues reports.**

**[10]These Rules have been extracted from Clinton Correctional Facility Policy and Procedure 445, "Unit for Condemned Persons" (April 14, 2000) at 9.**

**[11]Quite apart from the difficulty in deciphering the grievance breakdown, we cannot assume that inmates are only concerned with those rules and practices about which they file formal complaints. Because the grievance procedure requires the inmates to complain about prison conditions to prison personnel, the degree of inmate candor is open to serious question; it seems entirely plausible that they submit grievances about issues that do not seem to them sensitive, that is, issues about which they do not fear reprisal.**

**[12]Both the FOIL Letter and the FOIL Petition contained complaints about specific conditions at the UCP. The FOIL Letter appears to have been the basis of DOCS' decision, in March 2000, to increase from \$5 to \$15 the monthly spending allowance for UCP inmates on candy and snack items. DOCS rejected all the requests contained in the FOIL Petition.**

**[13]We note that, even in the notoriously harsh Angola Prison in Louisiana, condemned inmates are allowed one hour of "tier time," during which they may walk up and down the cell block and associate with the other prisoners.**

**[14]While the Department did not have any experience with the type of prisoners its new death row would receive, it had considerable experience with death row before 1984, when the Court of Appeals struck down New York's then governing death penalty statute. The regulations in place in 1984 were significantly less harsh than the regulations DOCS adopted in 1995, when the death penalty was re-instated.**

**[15]See, Nieves "Rash of Violence Disrupts San Quentin's Death Row," New York Times, May 22, 2001 at page 12.**

**[16]As of the date of this report, 38 states, and the federal government, have a death penalty statute. We did not study each state with a death row, but rather concentrated on the states with the largest populations on death row: California, Texas, Alabama, Georgia, Florida, Ohio, Illinois, North Carolina, and Pennsylvania. Additionally, we looked in-depth at two other states: Montana, a state with approximately the same number of men on death row as New York, and Missouri, which has a substantial death row population of approximately 75 inmates. In 1992, Missouri abandoned the segregation model of death row (i.e. separating death-sentenced prisoners from the general prison population) and has integrated its death row prisoners with its general population at a maximum security facility.**

**[17]In spite of the Subcommittee's strong conviction that the UCP inmates are overly isolated, we take no position on whether the UCP should be integrated into Clinton's general population. We hesitate to do so for several reasons: first, the inmates themselves are not unanimous in wanting such a change, second, while we are confident that the present UCP inmates would pose no serious threat to prisoners in general population, we are less confident that the reverse is true.**

**Nevertheless, the Missouri experience is very instructive.** Missouri houses approximately 75 death-sentenced prisoners at its Potosi Correctional Center, and all have been integrated with the general population of this maximum security facility since 1992. It is Missouri's position that all maximum security prisoners pose essentially the same risks to the public safety. Thus, each is assessed based upon his institutional behavior, with isolation

reserved for those prisoners who demonstrate that they cannot be housed safely with general population maximum security prisoners. In the nine years since Missouri has implemented this model, there has not been an increase in conduct violations in either group: the death-sentenced inmates or the general population.

[18]The Subcommittee notes that the six inmates currently held in the UCP are by and large engaged in the initial phase of challenging their conviction and sentence, that is, in their direct appeals. In this phase, the relevant facts are those already adduced in the hearings and trials that led up to the sentence of death. At some point in the future, however, some or all of these inmates will move from direct to collateral attack on their conviction and sentence, most commonly through petitions for a writ of habeas corpus. Collateral attacks may re-open the record and entail factual investigation and analysis. At this second stage, confidential communication with counsel and forensic teams is essential. If it appears in the post-conviction stage, for example, that trial counsel was ineffective by failing to present to the jury in mitigation at sentencing that the defendant as a child endured years of sexual abuse from a parent, it cannot be expected that the inmate will shout this history over a Plexiglas barrier for all to hear. Similarly, the rapport necessary to conduct a forensic psychiatric evaluation fully is impaired by the denial of contact visitation and the sense of being overheard, when, at this stage, evaluation of the defendant's competency for execution may be critical in obtaining a stay.

**[19]California death-row inmates may also receive packages from friends and relatives, and the packages may include food items.**

[20]Robert Johnson, *Death Work: A Study of the Modern Execution Process* 138 (Brooks/Cole Publishing, 1990) notes that:

**Except for their sentences, condemned prisoners are not very different from typical prisoners. The vast majority of the condemned have criminal records that are no worse than those of other chronic felons, and a sizeable minority, in fact, have no prior record of felony convictions or imprisonments.....Thus condemned prisoners are, at least for those years when their executions are not imminent, no more dangerous or desperate than other prisoners, and accordingly, could be managed in regular prisons.**

[21]The most relevant comparison to New York's death row comes from Craig Haney's "Infamous Punishment: The Psychological Consequences of Isolation" (1993), based on interviews with prisoners in the SHU at California's Pelican Bay State Prison. With its high-tech security, starkly austere conditions, and high degree of isolation, the SHU at Pelican Bay closely resembles New York's Unit for Condemned Persons. Haney observes that:

**Prisoners who are housed inside these units are completely isolated from the natural environment and from most of the natural rhythms of life. . . Their movements are monitored by video camera, watched by control officers on overhead television screens. In the control booth, the televised images of several inmates, each in separate exercise cages, who then walking around and around the perimeter of their concrete yards, like laboratory animals engaged in mindless and repetitive activity.**

He is emphatic in his analysis of the effects of such conditions:

**The psychological consequences of living in these units for long periods of time are predictably destructive, and the potential for these psychic stressors to precipitate various forms of psychopathology is clear-cut. When prisoners who are deprived of meaningful social contact begin to shun all forms of interaction, withdraw more deeply into themselves and cease initiating social interaction, they are in pain and require psychiatric attention. They get little or none. Prisoners who have become uncomfortable in the presence of others will be unable to**

**adjust to housing in a mainline prison population, not to mention free society. They are also at risk of developing disabling, clinical psychiatric symptoms. Thus, numerous studies have underscored the role of social isolation as a correlate of mental illness. Similarly, when prisoners become profoundly lethargic in the face of their monotonous, empty existence, the potential exists for this lethargy to shade into despondency and, finally, to clinical depression. For others who feel the frustration of the totality of control more acutely, their frustration may become increasingly difficult to control and manage. Long-term problems of impulse control may develop that are psychiatric in nature.**

These considerations are especially salient with death row inmates, who often spend decades under the utmost stress: awaiting execution. The inmates at New York's UCP are, at present, in the early stages of this death watch. The Subcommittee anticipates that the full impact of the extreme isolation in which they are held may not be seen for years. We fear, however, that at some point the impact of awaiting execution in nearly complete isolation will prove overwhelming.

**[22]The Subcommittee believes that UCP inmates should have the option of participating in job programs at Clinton, even though we have been unable to determine if many of them would exercise that option. Unfortunately, here, as elsewhere, our limited contact with the UCP's population has impeded our efforts at a comprehensive assessment of the UCP's operation. Nevertheless, we note that** fourteen states allow death-sentenced prisoners to participate in jobs programs, although generally only limited jobs are open to death sentenced prisoners. These states are: Arkansas, Colorado, Connecticut, Indiana, Kentucky, Maryland, Missouri, Montana, Nebraska, New Mexico, Ohio, Pennsylvania, Tennessee, and Washington.

**[23]It is true that, in the summer of 2001, DOCS allowed the Correctional Association to visit the UCP, a decision for which the Department should be commended. The Correctional Association, however, may lack the staff and resources to regularly monitor the UCP.**

**[24]The present system also is unfair to the corrections staff, who lack a mechanism for presenting their perspectives to independent, impartial parties. A monitoring system could blunt the force of unsubstantiated complaints against prison guards.**

**[25]DOCS response did not make clear why a second telephone line could not be installed at the UCP, or why the security dangers posed by manual typewriters could not be met by bolting them to a desk.**

**[26]Outside oversight of correctional facilities long has been accepted in New York State and New York City. Three very different models exist today:**

**1. Private citizens: Since 1846, the privately funded Correctional Association has been authorized by state law to visit New York State's prisons. Its members and staff comprise a visiting committee, which inspects prisons and issues reports.**

**2. Executive branch appointees: The New York State Commission of Corrections (SCOC) is comprised of three salaried commissioners, each of whom is appointed by the Governor. The SCOC sets minimum standards for state prisons and local correctional facilities. Unlike the CA, to our knowledge the SCOC never has inspected the UCP.**

**3. Appointees from executive, legislature and judiciary: The New York City Board of Corrections (BOC) consists of nine unsalaried members who are supported by a small, full-time paid staff. Three members each are appointed by the Mayor and the City Council, and three are nominated jointly by the Presiding Justices of the First and**

## Second Departments, thereby creating a perception of independence.

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^Abstained on the vote concerning the report.

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