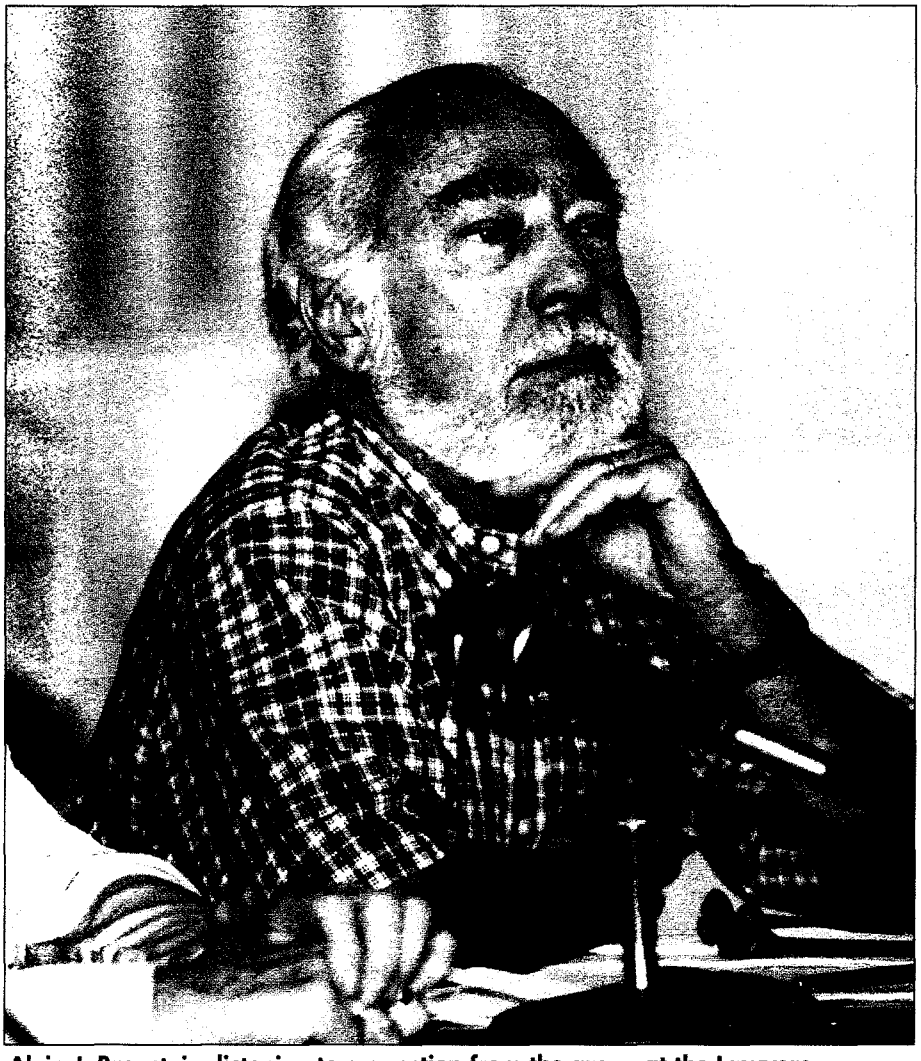
THE NATIONAL PRISON PROJECT JOURNAL

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 10, NO. 3, SUMMER 1995 • ISSN 1076-769X

Bronstein Leaves NPP But Not Human Rights Work



The New York Times

Alvin J. Bronstein, listening to a question from the group at the Lawyers Constitutional Defense Committee reunion in Jackson, Mississippi this June.

Alvin J. Bronstein announced last month that he would step down as executive director of the National Prison Project at the end of this year.

Bronstein will continue as part-time special counsel to the ACLU. He will also be active as a board member of the London-based Penal Reform International, and will engage in speaking and consulting activities. We asked Ira Glasser, executive director of the ACLU, to write up some of his thoughts on Al Bronstein's career for the JOURNAL.

BY IRA GLASSER

On a humid spring evening this past June in Jackson, Mississippi, Al Bronstein sat by himself at the side of a large dining room at Tougaloo College, an historical black college on the outskirts of town. His face was graced by a smile of deep contentment, mixed with intense pleasure and no little amount of pride. It is possible no one outside of his immediate family had ever before seen Bronstein look this way.

He had ample reason. For most readers of this journal, Al is justly known as the legal architect of the prisoners' rights movement in America. Until the early 1960s, prisons were a lawless enclave,

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beyond the reach of the Constitution, effectively immune from judicial review. The civil rights movement in the South became a model to challenge such enclaves, and by the late sixties, significant legal inroads had begun to be made. In 1972, the ACLU consolidated two of its local prisoners' rights projects in New York and Virginia and established the National Prison Project under Al's direction.

It is no exaggeration to say that what Al achieved over the next two decades was nothing less than a legal revolution. He brought the rule of law into state prisons, filing lawsuits in nearly 50 states, challenging the entire state prison system in more

Mrs. Annie Devine, executive committee member of the Mississippi Freedom Democratic Party and Al Bronstein in May 1967. The picture was taken after a meeting in Holmes County, Mississippi.

than a dozen of them and monitoring the implementation of the Project's legal victories for years until the reforms were institutionalized. Twenty-three years after he began, it is fair to say that the Constitution applies to prisons, certainly in principle and often in fact. But it would be a mistake to see Al only in terms of his prison reform work.

If the prisoners' rights movement was an outgrowth of the civil rights movement, it was no coincidence that its general was Al Bronstein. An ACLU cooperating lawyer in the late 1950s and early sixties, Al was also general counsel for Brooklyn CORE (Congress of Racial Equality), defending the First Amendment rights of protesters in New York in 1960 and of Freedom Riders in Mississippi in 1961. In early 1964, while setting up his own general practice in upstate New York, he saw a notice in the ACLU newsletter advertising for lawyers to go South to provide badly-needed legal assistance for embattled civil rights workers. In August 1964, somewhat apprehensively, Al enlisted with the Lawyers Constitutional Defense Committee (LCDC), arriving in St. Augustine, Florida. During his first night there, he was welcomed by a Klan-style ritual: local antagonists of the civil rights movement driving by the LCDC office, guns firing.

He was welcomed by a Klan-style ritual...guns firing.

But there were other moments, too. Al recalls, obviously still moved by the memory now 30 years old, of a sweltering, 110-degree night in St. Augustine, when he was reporting on LCDC's legal actions to his clients in the First Baptist Church:

"Almost every one of them came up and shook my hand at the end of the meeting. The meeting ended singing 'We Shall Overcome': black and white together, holding hands swaying. It was one of the most beautiful, exciting, moving, emotional moments of my life."

Later, in New York, when he thought LCDC might have to close down, he said to the ACLU Board:

"You can't just walk away. You've raised expectations and you can't just dump it... I'll go back. I'll go back."

And although he had three small children and couldn't afford to volunteer, he accepted a very small salary and went back.

In 1965, Al was named Chief Counsel of a new LCDC office in Jackson, Mississippi. During his first two weeks there, he worked on 18 separate cases. Before he left three years later, he was physically beaten at least once and sued for slander for calling the notorious Deputy Sheriff Cecil Price a murderer (Price was responsible for the deaths of James Chaney, Andrew Goodman and Mickey Schwerner in 1964). But he also argued nine civil rights cases before the Mississippi Supreme Court and won them all, a nearly unimaginable accomplishment at the time.

More important, he was the staff sergeant for a small army of civil rights lawyers, who were there to get protesters out of jail, help people register to vote, eliminate the legal roadblocks placed in the way of the civil rights movement and in countless ways provide legal resistance to

THE NATIONAL PRISON PROJECT JOURNAL

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The National Prison Project is a tax-exempt foundation-funded project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities by using existing administrative, legislative and judicial channels; and to develop alternatives to incarceration.

The reprinting of *JOURNAL* material is encouraged with the stipulation that the National Prison Project *JOURNAL* be credited with the reprint, and that a copy of the reprint be sent to the editor.

The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

The *NPP JOURNAL* is available on 16mm microfilm, 35mm microfilm and 105mm microfiche from University Microfilms International, 300 North Zeeb Rd., Ann Arbor, MI 48106-1346.

the harassment and intimidation that black people routinely faced in the lawless states of Mississippi, Alabama, and Louisiana.

On June 9-10 of this year, about 50 LCDC veterans gathered in Jackson, Mississippi, to remember that time and celebrate what they had accomplished. It was impossible to listen to them, lawyers, former clients, and activists, without realizing that for them all, Al Bronstein was the key figure. The affection, the gratitude, the respect was palpable.

Al knows how endless the struggle is...

On the evening of June 10, the meeting concluded with a banquet, and the showing of slides Al took in 1964-65, including some that revealed a black-haired, beardless, intense young man, at the center of it all. As the banquet was ending, and the last speakers were noting how revolutionary the changes had been, and how inalterably different a place Jackson was today, Al sat, smiling, almost beatific at the side of the room. The meeting ended, as it did that long-ago night in St. Augustine, with everyone joining hands, black and white together, swaying to the words of "We Shall Overcome."

Al knows, in his bones and by his experience, how endless the struggle is, how far we have yet to go, how rocky is the road ahead and how threatened many of our accomplishments are by the current political climate. But he also knows how astonishing the movement's accomplishments were and how victory was won, despite the overwhelming strength of the oppressors, by the courage and persistence of the resistance. And so he smiled, as well he should.

This country is a better and a more moral place because of Al Bronstein. He helped bring the rule of law and shine the light of liberty into some of the cruelest and most unjust corners of our land. He answered the call. He is a true American hero. ■

Ira Glasser is executive director of the American Civil Liberties Union.

From the Editor...

This issue of the *JOURNAL* brings news of big changes at the National Prison Project. As you read on the front page, Alvin J. Bronstein will be leaving the Project at the end of this year after providing leadership for so many years.

There are also changes coming for the *JOURNAL*. Beginning with the next issue, it will be downsized to 12 pages. The Case Law Report will continue as well as most of the other features, although in shorter form. Rest assured, however, that the *JOURNAL* will continue to bring you in-depth and accurate information about developments in prisoners' rights and corrections.

As *JOURNAL* subscribers, in addition to your quarterly *JOURNAL*, you will begin to receive occasional supplements or "bulletins" from our office on issues of vital interest to you, covered in greater detail.

And finally, after 16-1/2 years at the Prison Project, I will be leaving after this issue goes to press. While I am sad to leave, I am looking forward to the change. I will continue to write about the criminal justice system in a more independent way. As the crisis in the system deepens, we must all continue to struggle in our own way to bring justice and compassion to it.

Jenni Gainsborough, who has been my assistant on the *JOURNAL* for the past two years, will take over as editor. I hope she enjoys it as much as I have. Jenni has great talent and commitment—I know I leave it in very capable hands.

I must thank Al Bronstein for his encouragement and support for the *JOURNAL* since the beginning. To the many friends I have known along the way, I hope we'll keep in touch. And on a final, although sad note, I would like to dedicate my last issue of the *JOURNAL* to Willie Lloyd Turner, my friend for the past 15 years, recently executed by the Commonwealth of Virginia.

—Jan Elvin

U.S. Companies Expand Corrections Market to Overseas

BY STEPHEN NATHAN

U.S.-owned private corrections companies are engaged in tough competition to develop their international operations. The strategy since the early 1980s has been to identify potential markets and form joint ventures with well-connected and experienced local corporations to lobby governments and bid for contracts.

The market leaders claim that outside of the U.S., their prime targets are the United Kingdom and Australia, but the scope appears to be even wider. Contracts are also being pursued in Canada, New Zealand and Panama. One industry analyst claims that Corrections Corporation of America (CCA) has identified markets in Canada, Brazil, Mexico and China "which in the long term could represent the majority of (CCA's) earnings."[1]

(US companies): By far the most aggressive—and successful—is CCA.

By far the most aggressive—and successful—is CCA. Founded in 1983, by the mid 1980s it only had a handful of U.S. contracts and was unprofitable. But CCA had marketed both the concept and its own expertise enough to help set two European governments on the road to prison privatization and to form joint ventures in the U.K., France and Italy.

In 1987 CCA formed a consortium (UK Detention Services Ltd, UKDS) with two established U.K. construction companies, Sir Robert McAlpine & Sons Ltd and John Mowlem & Co. Both companies were also regular contributors to the Conservative Party. UKDS' stated aims included lobbying the government; it has since publicly admitted to "a leading role in explaining the benefits of private sector management of prisons and the advantages of introducing competition to the Prison Service."[2]

CCA also acted as a consultant to Mowlem and McAlpine in the building of Wolds prison in northeast England. Wolds became the first privately managed prison in the U.K.. UKDS' first U.K. contract came in 1992, to run the 649-bed Blakenhurst prison at Redditch, in the west Midlands.

However, early forays into other European countries were not so successful. In November and December 1986 joint agreements with French construction firm Spie Batignolles, contract services giant Lyonnaise des Eaux and Banque Worms (the consortium known as COGESIP) were signed to bid for proposed tenders to finance, design, build and operate French penitentiaries.

But a subsequent change in government led to a revised prisons privatization policy, with only non-custodial services in some 20 new prisons being contracted out. While CCA still has a French subsidiary, CCA France, company documents make no mention of any French contracts.

In February 1988, CCA signed an agreement in Italy with Iniziative Industriali S.p.A., part of the SASEA Group. The first paragraph stated: "CCA has developed considerable expertise in the design, financing, building and management of private and public penitentiary facilities and systems in the United States...and wishes to expand its business in Italy."[3] To date, the Italian government has not privatized any prisons.

CCA's first overseas contract to get up and running was not in Europe but at Ipswich in Queensland, Australia. In 1989 CCA, along with two Australian partners, formed Corrections Corporation of Australia and won the contract to run Borallon Correctional Centre, which opened in 1990.

Then in 1994 the government of Victoria awarded Corrections Corporation of Australia two contracts—a three year prisoner transportation and security contract and another to finance, design, build and run a new 125 bed women's prison, expected to open in June 1996.

But CCA's global aspirations were greatly enhanced in June 1994 when it formed an international joint venture to bid for corrections contracts with Sodexho SA, a French management services corporation with FY 1993 revenues of $1.8 billion from operations in 46 countries. Sodexho also provides non-custodial services to five French prisons.

The agreement gave Sodexho a 20 percent stake in CCA and the joint venture will bid for and (if successful) manage projects outside of the U.S., the U.K., Belgium and Australia splitting profits 51/49 percent in English speaking countries where CCA will take the lead and 49/51 percent in the rest of the world where Sodexho will lead.

CCA's largest competitor both in the U.S. and abroad is Wackenhut Corrections Corporation (WCC), a subsidiary of the long established multinational security firm with ex-FBI agents and military personnel on its board. WCC was formed in 1984 specifically to enter the corrections market.

WCC's parent has security and investigative services operations in Canada, Central and South America, the Caribbean, Asia, Africa and Europe and thus is well placed to market its corrections expertise.

It has set up two joint ventures in Australia. In June 1991 Australasian Correctional Services PTY Ltd (ACS) (now 66.7 percent owned by Wackenhut) was chosen by the New South Wales government to design, build and run Junee Correctional Centre for 600 prisoners. In 1992, the Queensland government chose Wackenhut's Australasian Correctional Management (ACM, now 100 percent owned) to run the high security Arthur Gorrie Remand and Reception Center near Brisbane. On 31 May 1995 the Victoria government chose ACS to build and run a 600-bed prison at Sale.

In 1992 WCC formed Premier Prison Services Ltd., a joint venture with management services company Serco to bid for U.K. prison and court escort contracts. In 1993 it won a contract to run the 770-bed Doncaster prison in northern England.

The third U.S. competitor abroad is Corrections Partners Inc (CPI) which is bidding for contracts in Australia, Canada, New Zealand and the U.K.. A recent advertisement for staff described its Australian company CorrPac Pty Ltd as having "long range economic objectives throughout Australia and the Pacific region."[4] In the U.K. it has teamed up with construction firms Wimpey and AMEC but has no contracts as yet.

What About Performance?

The private sector claims it can do the job more cheaply, efficiently and creatively. In the U.K. and Australia these claims are yet to be independently substantiated. Both CCA and Wackenhut have experienced early difficulties.

In Australia, the Arthur Gorrie facility run by Wackenhut's ACM has had a

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Case Law Report

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VOL. 10, NO. 3, SUMMER 1995 • ISSN 1076-769X

Highlights of Most Important Cases

BY JOHN BOSTON

DISCIPLINARY DUE PROCESS

The Supreme Court's 5-4 decision in *Sandin v. Conner*, 1995 WL 360217 (June 19, 1995), represents a significant step backward in the protection of prisoners from arbitrary punishment. The question is how long a step it is.

The Court began by stating: "We granted *certiorari* to reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause." *Id.* at 2. By the end, it had purported to discard much of the "liberty interest" analysis that has governed due process jurisprudence since the late 1970s. Yet its rejection of the liberty interest theory is at least partly illusory, and the opinion leaves open many more questions than it resolves.

The plaintiff in *Sandin*, a Hawaii prisoner, had been sentenced to 30 days in punitive segregation for "high misconduct" for using physical interference to impair a correctional function (i.e., resisting a strip search). The Hawaii prison system ranks disciplinary violations in categories from "greatest misconduct" to "minor misconduct"; 30 days is the maximum punishment for the "high" category. After he had served his segregation time, the plaintiff's conviction was expunged. He then sued in federal court alleging that the refusal to permit him to call a witness had denied him due process.

Prison officials argued in the Supreme Court that the prisoner was not protected by due process because placement in punitive segregation did not deprive him of liberty. The Supreme Court had previously stated in dictum that "solitary confinement" is a "major change in conditions of confinement" that should be governed by the same procedures as deprivation of statutory good time, *Wolff v. McDonnell*, 418 U.S. 539, 571-72 n. 19 (1974), and the lower federal courts had almost universally adopted this view. The Supreme Court in *Sandin* rejected it.

Justice Rehnquist's majority opinion began by reviewing the Court's prior prison due process decisions. It noted that *Wolff v. McDonnell* held that state statutes governing good time credits that shortened a prisoner's sentence created a liberty interest, which it characterized as an interest of "real substance." Next, *Meachum v. Fano*, 427 U.S. 215 (1976), held that inter-prison transfers, even to higher-security prisons, were "within the normal limits or range of custody which the conviction has authorized the State to impose," and hence that such transfers did not constitute deprivations of liberty unless state law limited prison officials' discretion to transfer. *Id.* at 225.

Subsequent decisions, Justice Rehnquist stated, "laid ever greater emphasis on this somewhat mechanical dichotomy" between the discretionary acts of prison officials and those that were governed by mandatory criteria. *Sandin* at 4. This methodology came to "full fruition" in *Hewitt v. Helms*, 459 U.S. 460 (1983), which—in an opinion by Justice Rehnquist—held that state law might create liberty interests by the use of mandatory language and "substantive predicates" for official action. *Hewitt* led the courts farther away from the question whether the plaintiff had suffered a "grievous loss." Instead, they turned to the close analysis of regulations to determine whether their language was sufficiently mandatory to create a liberty interest.

The results of the state-created liberty interest analysis have been undesirable, according to the Court—at least in the prison context. The Court acknowledged that the results of liberty interest analysis "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public." *Sandin* at 5. In prisons, however, it has created "disincentives for States to codify prison management procedures in the interest of uniform treatment," since such regulations may saddle the State with additional procedural requirements. It has also "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin* at 5. Justice Rehnquist cited cases in which prisoners asserted liberty interests in participation in "shock incarceration" programs, tray lunches rather than sack lunches, and cells with outlets for televisions.

Therefore, Justice Rehnquist concluded, it is time to return to the principles of *Wolff* and *Meachum*. Acknowledging that states may create liberty interests protected by due process, these "will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, ... nevertheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin* at 6. (The Court summarily rejected the plaintiff's argument that the punitive character of a sanction invokes due process protections.)

As Justice Breyer's dissent points out, the majority's approach results in a three-tiered due process analysis. There are deprivations that are "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty," regardless of the terms of state law. At the other end of the spectrum are "minor matters." In between is "a broad middle category of imposed restraints or deprivations that, considered by themselves, are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection." *Sandin* at 13-14.

Under the new "atypical and significant hardship" standard, the Court held that the plaintiff had not been deprived of liberty.

> *...[D]isciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.... Thus, Conner's confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction. Indeed, the conditions at Halawa involve significant amounts of 'lockdown time'*

even for inmates in the general population. Based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment.

Sandin at 7.

The Court also rejected the argument that the effect of discipline on parole opportunities brought it within the ambit of due process protections; since the parole board was not required by law to deny parole based on disciplinary record, and since Hawaii law provides a separate hearing in connection with parole release, the relationship between discipline and parole opportunities is "too attenuated" to call for due process protections. *Sandin* at 7.

The Court cited two additional factors the weight of which is difficult to assess. In the discussion of conditions in and out of disciplinary segregation, the Court "note[d] also that the State expunged Conner's disciplinary record with respect to the 'high misconduct' charge 9 months after Conner served time in segregation." *Sandin* at 7. It is hard to see what significance this fact could have in the Court's analysis, since the liberty deprivation was long since completed by the time of the expungement *See Sandin* at 15-16 (Breyer, J., dissenting). In a 5-4 decision, its presence suggests the need to hold together a wavering majority by providing a basis to distinguish future, more sympathetic cases. Justice Rehnquist and several of his colleagues would no doubt be happy to read disciplinary segregation out of due process analysis entirely, but it is doubtful that there are five votes presently on the Court for that proposition.

The same comments apply to the opinion's concluding sentence, stating that Conner's segregation "was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life." *Sandin* at 7. The length of the prisoner's sentence has no discernible connection with the Court's analysis or any issue in the case, except possibly the comfort level of one or more members of the majority.

At first glance, it may look like the Court has come full circle, reinstating the grievous loss analysis that was displaced in the 1970s by the liberty interest theory. It would be more accurate to describe this decision as raising a new hurdle. The "atypical and significant hardship" standard comes into play only if state law establishes a liberty interest. Moreover, it appears that the existence of liberty interests will continue to be determined by the use of mandatory language and substantive predicates. The case the Court cites in this connection, *Board of Pardons v. Allen*, 482 U.S. 369 (1987), is an example of this methodology, and the Court suggests no alternative way of determining whether state law has created a liberty interest. The Court also reaffirms that proper due process principles "were correctly established and applied" in *Wolff v. McDonnell*, which applied the substance of liberty interest analysis—if not the later-developed terminology of substantive predicates and mandatory language—to the Nebraska good time statute. 418 U.S. at 556-57.

Thus, Justice Rehnquist's asserted "abandonment of *Hewitt's* methodology," *Sandin* at 8 n.5, appears to be no such thing. Rather, that analysis remains, but restricted to the narrower field of "atypical and significant hardships." Either the lack of such a hardship, or the lack of a state-created liberty interest, will defeat a prison due process claim.

The practical meaning of "atypical and significant hardship" is far from clear, as the two dissenting opinions emphasized. Justice Ginsburg asked: "What design lies beneath these key words? The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' ... and yet not trigger protection under the Due Process Clause directly." *Sandin* at 10 n.2. Similarly, Justice Breyer stated:

I am not certain whether or not the Court means this standard to change prior law radically. If so, its generality threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain "atypical" hardships that pre-existing law would not have covered.

Sandin at 13.

However, it does appear that "atypical and significant hardship" is intended to be a more difficult standard to meet than "grievous loss." It is to be applied "in relation to the ordinary incidents of prison life," and the Court's discussion of these "ordinary incidents" is calculated to blur and to trivialize distinctions among the degrees of closeness of confinement. Thus, the opinion notes both that punitive segregation conditions "with insignificant exceptions, mirrored" conditions in administrative segregation and protective custody, and that there were "significant amounts" of lockdown time even for general population inmates at the prison in question. *Sandin* at 7.

The latter point illustrates the Court's attitude to—or detachment from—the realities of prison life. General population prisoners at this maximum security institution were confined to cells for 12 to 16 hours a day, compared to the 23-hour lock-in in punitive segregation. *Sandin* at 8 n.8. Since lock-in time includes sleeping hours, these figures mean that general population prisoners were locked in for one-fourth to one-half of normal waking hours, while segregation prisoners were locked in for 94% of waking hours—in addition to the exclusion from work, education, and contact with others that segregation entails. This distinction has obvious quantitative significance, as well as immense practical significance to prisoners.

Thus, dissenting Justice Breyer's assertion of a "broad middle category," encompassing restrictions severe enough to require due process under the pre-existing liberty interest analysis, is probably not consistent with Justice Rehnquist's approach, which seems designed to narrow the middle ground by pushing as many issues as possible into the category of "minor matters" that are now completely excluded from the reach of the Due Process Clause. But whether Justice Rehnquist's approach would command a majority on a different set of facts is open to question.

In any case, it is predictable that certain aspects of prison life that have been subject to due process scrutiny based on state law and regulations will now escape review because they do not meet the "atypical and significant" standard. Classification decisions and job or program assignments probably fall into this category, since almost every prisoner receives them and they are changed with some frequency. Visiting probably will stand on the same footing—at least for short-term or limited deprivations. One member of the *Sandin* majority has previously expressed the view that "permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause" even if "precise and individualized restrictions" do not. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 465 (1989) (Kennedy, J., concurring).

Parole release is a closer question. Denial of parole, while certainly "significant," is hardly "atypical." The Supreme Court's holding in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), that state parole statutes can create liberty interests, is described in *Sandin* as "foreshadowing" the methodology of *Hewitt v. Helms* that the *Sandin* Court purports to reject. However, as noted above, the *Hewitt* methodology appears to survive only in cases that involve "atypical and significant hardship," and nothing in *Sandin* indicates a view on whether parole release decisions are now to be viewed as "minor matters" exempt from due process scrutiny.

The *Greenholtz* holding concerning liberty interests can be dismissed as *dictum* without

overruling, since the Court ultimately held that the state's procedures met process requirements. (This is what *Sandin* Court said about *Hewitt v.* *Sandin* at n.5.) The same is not however, for *Board of Pardons v.* , 482 U.S. 369 (198), in which the held that a parole release statute ed a liberty interest; since no other question was presented, *Allen's* conclusion cannot be dismissed as *dictum*. Moreover, the *Sandin* Court cited *Allen* along with *Wolff* in "recogniz[ing] that States may under certain circumstances create liberty interests which are protected by the Due Process Clause," *Sandin* at 5—which makes it hard to argue that *Sandin* implicitly overrules *Allen*.

The most significant open questions after *Sandin* pertain to disciplinary proceedings themselves. Given the Court's reaffirmation of *Wolff v. McDonnell* as a correct application of due process principles, it appears that any case involving deprivation of good time will meet the "atypical and significant" standard as long as the governing statutes or rules create a liberty interest. And in disciplinary

Dear Prison Project...

Dear Prison Project:

I am in a county jail in the South, and have been harassed by a correctional officer. He flirts with me, makes sexual comments, and has touched me. He asks some of the women to pose nude for him or have sex with him in exchange for cigarettes or contraband. I don't want to participate and am afraid. What are my rights?

Harassed

Dear Harassed:

State actors, including prison officials, are liable for depriving an individual of constitutional rights, such as those conferred on prisoners by the Eighth Amendment, under 42 U.S.C. § 1983. Prison conditions violate the Eighth Amendment's prohibition against cruel and unusual punishment if they result in the "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294 (1991). This standard requires that: 1) the pain suffered be "sufficiently serious" such that it violates contemporary standards of decency, and 2) the prison officials acted with a culpable state of mind amounting to "deliberate indifference" to inmate health or safety. *Farmer v. Brennan*, 114 S.Ct. 1970, 1977 (1994).

Sexual harassment in the form of inappropriate sexual comments, sexual advances or propositions, touching, exposure of body parts, requests for sexual favors, and forced sexual activity, meets both of these requirements and violates the Eighth Amendment. See *Hovater v. Robinson*, 1 F.3d 1063, 1066 (10th Cir. 1993); *Women Prisoners v. District of Columbia*, 877 F.Supp. 634 (D.D.C. 1994).

Sexual harassment may take the form of routine invasions of privacy, such as men peering into women's cells or showers, or failing to announce their presence in female dorms. Infrequent and casual observation of opposite sex prisoners, or observation at a distance, reasonably related to prison needs, is constitutional. However, regular viewing of prisoners while undressing, showering, or using the toilet by opposite sex officers violates privacy rights, contributes to the creation of a sexualized environment, and amounts to an unnecessary and wanton infliction of pain. *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982); *see also Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993).

Sexual harassment has serious physical and psychological effects on prisoners. It can cause depression, anxiety, guilt, frustration and hopelessness, and it hinders rehabilitation. This is particularly so for female prisoners since many female prisoners have histories being the victims of rape, sexual abuse or sexual assault. Sexual harassment and the physical and psychological distress caused by it violate contemporary standards of decency and satisfy the "sufficiently serious" prong of the above test for unnecessary and wanton infliction of pain. *Id.* at 665.

To satisfy the "deliberate indifference" prong, an individual must prove that a prison official "knows of and disregards an excessive risk to inmate health and safety." *Farmer* at 1979. Actual knowledge is necessary, although a court may assume that prison officials knew of the risk if it was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the ... [official] 'must have known' about it." *Id.*

A woman need not wait until there is a sexual assault; there may still be an Eighth Amendment violation if conditions are "sure or very likely to cause serious illness and needless suffering." *Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993). Both an individual subjected to sexual harassment and other women in a pervasive environment of harassment may therefore seek protection.

To protect your rights, it is important that the prison officials are informed of the harassment. You should file a grievance or complaint. If this is not possible, you may be able to tell a prison employee and request that they report it. Prison administrators will only be held liable for a guard's sexual harassment if they were given notice of the conduct and failed to take actions to prevent it or protect you from it. In the face of complaints, a prison's lack of a sexual harassment policy or appropriate training of correctional officers about sexual harassment all contribute to a prison administrator's liability for sexual harassment.

If the harassment is pervasive, or if the prison fails to respond appropriately to an individual occurrence, you should file a § 1983 civil rights suit in federal court. You need not have a lawyer to file these suits; complaint forms may be obtained from your legal advisor or from the district court upon request.

Finally, many states have made it criminal for a guard to engage in any sexual activity with an incarcerated person, regardless of whether that person voluntarily participates. Consider notifying state prosecutors about the sexual activity. ■

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cases, courts have held that it is the disciplinary rules themselves that constitute the limit on official discretion that is necessary to give rise to a liberty interest. See *Gilbert v. Frazier*, 931 F.2d 1581, 1582 (7th Cir. 1991); *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986); *Sher v. Coughlin*, 739 F.2d 77, 81 (2nd Cir. 1984). Thus, all deprivations of good time should continue to invoke the protections of *Wolff*.

As to punitive segregation, all we know after *Sandin* is that thirty days of it, under conditions similar to administrative segregation, is not atypical and significant. Beyond that, it is unclear to what extent either the duration or the conditions of segregation make a difference. The Court makes much of the similarity of disciplinary segregation to administrative segregation; but if administrative segregation had been less restrictive, would the result have been different for disciplinary segregation? The opinion provides no answer to that question.

The same question presents itself as to the duration of confinement: since administrative segregation can last indefinitely and in some cases does last for years, it is arguable that the duration of disciplinary segregation makes no difference for due process cases. But that conclusion is hard to square with the explicitly limited holding that "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing [the plaintiff] there for 30 days did not work a major disruption in his environment." *Sandin* at 7. Moreover, unlimited punitive segregation could hardly escape the characterization of "atypical, significant deprivation" if those words are applied honestly.

This ambiguity is most likely purposeful. Leaving the question of duration open was probably necessary to hold the slim majority together.

But this question will by necessity be central to the large amount of lower court litigation that will result from *Sandin*. Without more specific guidance from the Supreme Court, lower courts will probably look for some objective—or at least external—-standard to avoid the entirely subjective line-drawing called for by the phrase "atypical and significant."

The most obvious place to look is in the disciplinary system itself. Like Hawaii's prisons, many systems divide disciplinary proceedings into "tiers" or "levels" reflecting the seriousness of the charges, the sanctions available, and the degree of procedural protections provided. Hawaii's distinction between "high" misconduct and "greatest" misconduct—i.e., between the possibility of 30 days' disciplinary segregation and a longer terms—provides the kind of bright line that courts will probably look for. New York State provides an even sharper line, between disciplinary hearings (also known as Tier II), with an upper limit of 30 days of punitive confinement, and superintendent's proceedings (Tier III), which may impose longer terms of confinement and may also recommend the loss of good time. Adopting the state's own categorizations would be consistent with lower court authority holding that due process rights must be determined with respect to the potential penalty rather than retroactively based on the penalty imposed in a particular case. *See, e.g., Alexander v. Ware*, 714 F.2d 416, 419 (5th Cir. 1983); *McKinnon v. Patterson*, 568 F.2d 930, 939 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

However, these internal distinctions within disciplinary systems may be of limited utility even if the courts accept their relevance. Increasingly, prison systems use punitive segregation only for short periods of time, such as 30 days or less; prisoners are then placed in administrative segregation if their misconduct was serious. (Hawaii limits even "greatest" misconduct convictions to 60 days in punitive segregation; the fact that a prisoner "has committed ... a serious infraction," without more, is a basis for placement in administrative segregation.) If 30 (or 60) days of punitive segregation is insufficient to invoke due process protections, but if the disciplinary conviction later becomes the basis of protracted administrative segregation, then disciplinary proceedings that *de facto* result in years of segregation may escape due process scrutiny.

One way to approach this problem is directly, by holding that a disciplinary charge that results in protracted segregation requires *Wolff's* procedural protections, even if part of the segregation is labelled administrative. Such a standard poses practical problems, since it makes the prisoner's entitlement to a hearing turn on events that occur weeks later.

Administrative segregation also poses its own problem, completely separate from its relationship to disciplinary proceedings. *Sandin* purports to reject the reasoning of *Hewitt v. Helms* with respect to its method for determining whether there is a state-created liberty interest in avoiding administrative segregation. *Sandin* at 5 and n.5. But, as noted above, the Court reaffirmed that liberty interest analysis remains alive and well for those deprivations that meet the "atypical and significant" standard. One of two conclusions follows. Either administrative segregation is never atypical and significant and never requires due process; or there is some threshold of duration or of conditions (or both) at which administrative segregation becomes sufficiently atypical and significant to require due process protections. This is, of course, the same question that was left unanswered for disciplinary segregation after *Sandin*.

This question is made harder to answer by the fundamental sophistry underlying the decision in *Hewitt*. In that case, Justice Rehnquist stated that administrative segregation

> *appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer....Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.*

459 U.S. at 468.

That conclusion follows only if one fails to separate the very different types of segregation at issue. It is certainly true that every inmate should reasonably anticipate confinement for short periods pending classification or transfer. The same is not true for placement in protective custody or for segregation as an aggressor or a member of a "potentially disruptive group." Such placements remain the exception and not the rule in most prison systems. They also tend to last much longer than pre-transfer or pre-classification placement. Thus, these types of segregation are literally "atypical and significant," and for due process purposes they must be analyzed separately from more routine and short-term uses of administrative segregation. Whether the courts will be willing to acknowledge this reality may determine their decisions in future administrative segregation cases.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Use of Force/Summary Judgment/ Grievances and Complaints about Prison

Burgess v. Moore, 39 F.3d 216 (8th Cir. 1994). A complaint and affidavit signed under penalty of perjury were sufficiently verified for purposes of resisting summary judgment.

The plaintiff alleged that he disrupted a disciplinary hearing and staff then tried to choke him with a towel around his neck. This allegation could support a jury finding of a malicious and sadistic desire to inflict harm. At 218: "A choking that produces virtual

unconsciousness and great pain is not trifling for Eighth Amendment purposes." These allegations made out a claim against a bystander officer who did not intervene.

The plaintiff's claim that he was assaulted in retaliation for using prison grievance procedures made out a First Amendment claim regardless of the absence of a distinct injury. At 218: "...[A] threat of retaliation is sufficient injury if made in retaliation for an inmate's use of prison grievance procedures."

Transportation to Courts

Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264 (10th Cir. 1994). The prisoner plaintiff hired a law firm to represent him in a workers' compensation case against his former employers. Twice the court granted a writ of ***habeas corpus ad testificandum*** and twice a county assistant district attorney intervened to prevent its execution. The plaintiff sued the law firm and the district attorney.

The court dismisses the claim against the law firm because it does not act under color of state law.

The prosecutor's action was not protected by absolute immunity because it was not a prosecutorial function (the prosecution having been completed months earlier), but an administrative one. Qualified immunity was not pled and in any case would not bar injunctive relief.

Although a prisoner generally has no right to attend a civil trial, the writ granted by the Workers Compensation Court "in and of itself gave Mr. Lemmons the legal right to appear in court." (267) His claim that interference with it denied him meaningful access to court was not frivolous.

Law Libraries and Law Books/ Exercise and Recreation

Allen v. City & County of Honolulu, 39 F.3d 936 (9th Cir. 1994). A prisoner in segregation had a constitutional right to outdoor exercise because he was held "under highly restrictive conditions of confinement on an open-ended and potentially long-term basis." (939) He also had the right to use the law library. At 939:

> *...Allen's Fourteenth Amendment right to court access and his Eighth Amendment right to outdoor exercise are not "either/or" rights. An inmate should not have to forego outdoor recreation to which he would otherwise be entitled simply because he exercises his clearly established constitutional right of access to the courts.*

Both these rights were clearly established. The defendants are not entitled to qualified immunity "simply because Allen cannot produce a case stating that an inmate is entitled to both his constitutional right to use the law library and his right to have outdoor exercise."

AIDS/Disabled

Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994). The defendants' blanket exclusion of HIV-positive inmates from food service positions did not violate the Rehabilitation Act, although HIV-positive people are disabled for purposes of the statute. At 1446-47:

> *The issue is how the Act is to be applied in a prison setting. It is clear that HIV-seropositive prisoners have certain statutory rights; but, just as constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration, so must statutory rights applicable to the nation's general population be considered in light of effective prison administration. The Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the considerations of the reasonable requirements of effective prison administration. It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights. Thus, we deem the applicable standard for the review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting, as outlined by the Supreme Court in* Turner v. Safley...

The defendants admitted that the risk of HIV transmission through food service was "slight," but argued that inmates' incorrect perceptions of risk and the "particular sensitivity of prisoners to food service" justified their policy (1447). (After all, inmates may think that HIV-positive food service workers "will bleed into the food, spit into the food, or even worse.") The plaintiffs argued that prisoners should be educated about HIV transmission. At 1448: "The prison authorities point out that many members of the general prison population are not necessarily motivated by rational thought and frequently have irrational suspicions or phobias that education will not modify."

Clothing/Use of Force

Wilkins v. Moore, 40 F.3d 954 (8th Cir. 1994). The plaintiff alleged that he was kept naked for over 22 hours in a detention cell with unclean bedding, unclean floors, poor lighting, and no blankets after he refused to write a statement exonerating prison guards for a use of force he had witnessed. He alleged that he was repeatedly physically abused by various officers.

The court distinguishes the Eighth Circuit's appalling precedents on the deprivation of clothing by treating it as part of a "course of mistreatment" that included physical abuse as well as strip cell confinement. The deprivation of clothing must be considered along with the physical abuse under the "malicious and sadistic" standard.

Recreation and Exercise

Allen v. Sakai, 40 F.3d 1001 (9th Cir. 1994). The plaintiff alleged that while in segregation he was permitted only 45 minutes a week of outdoor recreation. The defendants had a "goal" of five hours a week but said they didn't meet it because of the "logistical difficulties" of taking one inmate at a time to the yard. Since the plaintiff was subject to harsh conditions and indefinite and potentially long-term segregation, in light of *Spain v. Procunier* the defendants were not entitled to qualified immunity. *LeMaire v. Maass* did not benefit them because in that case the plaintiff had been deprived of outdoor exercise because of his misconduct in segregation.

Medical Care

Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176 (11th Cir. 1994). The court adopts the definition that a serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention." (1187) Although it has previously been employed only in other circuits, the court uses it in evaluating claims of qualified immunity.

Delay in medical care can violate the Eighth Amendment. At 1187: "Cases stating a constitutional claim for immediate or emergency medical attention have concerned medical needs that are obvious even to a layperson because they involve life-threatening conditions or situations where it is apparent that delay would detrimentally exacerbate the medical problem." (Footnote omitted).

Procedural Due Process— Disciplinary Proceedings/Immunity— Judicial and Prosecutorial

Young v. Selsky, 41 F.3d 47 (2nd Cir. 1994). A state prison system's disciplinary review officer, who worked in the central office and decided administrative appeals of disciplinary convictions, is not entitled to absolute quasi-judicial immunity.

The defendant is not sufficiently independent to justify absolute immunity, since he serves at the pleasure of superiors within the prison system, to whom complaints from other personnel are likely to be directed. It is also very likely the defendant will be called on to rule on policies instituted by his superiors.

At 53:

...[N]either the disciplinary hearing nor the administrative appeal is truly adversarial in nature. Prisoners have no right to counsel in either proceeding. Furthermore, their rights to cross-examine and challenge witnesses and evidence are limited... The disciplinary hearings 'rely heavily on hearsay, including unverifiable information from prison guards and informants.'...As noted above, the procedural laxity of the disciplinary hearing is not cured on administrative appeal....

Recreation and Exercise/Law Libraries and Law Books/Qualified Immunity

Housley v. Dodson, 41 F.3d 597 (10th Cir. 1994). An allegation that the plaintiff was denied all access to legal materials for six months stated a constitutional claim, as did the allegation that he received only 30 minutes of out-of-cell exercise in three months. At 599: "...[W]hat constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates."

The sheriff and jailer should not have been dismissed on grounds of qualified immunity. At 600: "A reasonable sheriff and jailer must remain apprised of major constitutional developments concerning inmates' rights."

Summary Judgment/Special Diets

Sellers v. Henman, 41 F.3d 1100 (7th Cir. 1994). *Pro se* prisoners must receive notice that failure to file counter-affidavits to a summary judgment motion may result in dismissal of their suits.

An allegation that the diabetic plaintiff was taken off his special diet in retaliation for his

For the Record

■ **Legislative Update**—The STOP legislation discussed in previous editions of the *JOURNAL* is still waiting for action by the Senate. The bill (S.400) may become part of the new crime bill that Senator Orrin G. Hatch (R-Utah) is currently working on, or it may be introduced directly on the floor of the Senate. A large number of groups and individuals who oppose the legislation have formed the "Coalition Against STOP" and are continuing their efforts to educate senators on the many practical and constitutional problems with the bill. Current and former correctional staff, youth and disabilities rights' organization, religious organizations and traditional civil rights groups have joined prisoners' rights organizations in opposition to STOP. For more information contact the Coalition's Coordinator, Kathi Westcott, at 202/234-4830.

■ The **Campaign for an Effective Crime Policy** issued a report in March 1995 concluding that prison has no significant impact on violent crime and, at most, a modest impact on property crime. The report, "What Every Policymaker Should Know About Imprisonment and the Crime Rate," was authored by Professor Walter Dickey of the University of Wisconsin Law School in conjunction with the Advisory Committee of the Campaign. Looking at the states of California and Texas, the report found that during the 1980s the prison population in Texas rose by only 14% while in California it increased by 192%. Despite these large disparities, violent crime rose in both states by about 21%. Imprisonment rates have little impact on crime for various reasons including: demographics — crime rates fluctuate with the proportion of the population in the 15-24 "high crime" years; the criminal justice system deals with only a small fraction of crime — 90% of crimes are never reported to police or solved; most violent crime is committed impulsively, often under the influence of drugs or alcohol, so that threats of punishment have little deterrent value. Copies of the report can be obtained from the CECP, 918 F Street, NW, Suite 505, Washington, DC 20004, (202) 628-1903.

■ Three friends of the Prison Project received well-deserved recognition for their work recently — **John Boston,** Director of the Prisoners' Rights Project at the Legal Aid Society of New York and author of Case Law for the *JOURNAL*, was awarded the 1995 Osborne Medal by the Osborne and Correctional Associations of New York. **Dr. Kim Thorburn,** medical director for the Hawaii Department of Public Safety and expert witness on medical issues in prison conditions cases, received the American Correctional Health Services Association's 1995 Distinguished Service Award. Dr. Thorburn was honored for her "unceasing campaign for the rights of prisoners not only in the United States, but also world wide through her activities as a member of the board of directors of Amnesty International." **Bryan Stevenson** of the Alabama Capital Representation Resource Center was recently awarded a MacArthur Fellowship for his untiring work in fighting the death penalty.

■ ***Manual de Pautas de la Comision Federal de Sentencias,*** the Spanish translation of the Federal Sentencing guidelines edited by David S. Zapp, Esq., is available at cost to government agencies and groups who are interested in purchasing in bulk for the purpose of educating Hispanic offenders. Individual copies are $29.50 each from Publicaciones Legales en Español, PO Box 623, Palisades Park, NJ 07650, 800/432-0004. There will be no shipping charge for those who mention the National Prison Project. All funds raised from the distribution of *Manual de Pautas* will be used for the translation of other legal materials, including the Federal Rules of Criminal and Appellate Procedure, the Federal Rules of Evidence and the Sections 2255 and 2254 post-conviction motions.

■ The NPP will hold a party in Washington in December to say thank you to **Alvin Bronstein** for all his work with the National Prison Project and in other areas of civil and human rights. We hope that many of you will be able to join us in person. However, if that is not possible, and you have a particular memory or tribute to Al that you would like to share with his friends and colleagues, please send it to us here at the Project. We will put together everything we receive and present it to him in December. Send any material you would like included to Jenni Gainsborough at the NPP (address on page 2).

complaints and that the diet he was put on has too few calories and too much saturated fat is "substantial." (1102)

Summary Judgment/Transfers/ Procedural Due Process—Transfers

Schroeder v. McDonald, 41 F.3d 1272 (9th Cir. 1994). The plaintiff alleged that his return from a minimum security prison to the medium security prison from which he had been transferred was motivated by retaliation for his complaints and litigation.

The plaintiff's verified complaint based on his personal knowledge of admissible evidence was a sufficient response to a summary judgment motion.

It is clearly established that the defendants cannot transfer a prisoner to punish him for filing litigation. However, the defendants could have believed that their transfer was lawful because the plaintiff committed seven rule violations in his first 16 days at the new prison and because his demands for law library access and legal materials overburdened the prison's limited staff. He had also previously used or threatened force against a staff member at the medium facility, which the defendants did not know at the time of the initial transfer.

The transfer denied due process. A prison policy stating that an inmate must be classified according to the level or risk he presents, which "[speaks] in mandatory terms about how the classification of prisoners should be conducted," created a liberty interest. The transfer violated clearly established law "that defendants must follow mandatory prison regulations," since the plaintiff's score was 9 and 21 was required to justify the transfer.

Ex Post Facto Laws/Procedural Due Process—Temporary Release/Crowding

Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995). The petitioner was made ineligible for "control release" (release to keep prison population within capacity limits) based on his criminal conviction by a statute passed after he had committed the crime. The statute is "procedural" and does not affect the "quantum of punishment" and therefore its retroactive application does not violate the Ex Post Facto Clause. It is different from good time statutes, which have been subjected to Ex Post Facto analysis, because it operates for the convenience of the Department of Correction. Since it is "arbitrary and unpredictable" from the inmate's standpoint, the inmate has no reasonable expectation that he will be able to use it to reduce his sentence.

The statute also does not create an expectation enforceable under the Due Process Clause.

Color of Law/Medical Care

Conner v. Donnelly, 42 F.3d 220 (4th Cir. 1994). A private physician who provides medical services to a state prisoner acts under color of state law even if he does not have a contractual relationship with the prison. (He did get paid.) At 225:

> *Regardless of whether the private physician has a contractual duty or simply treats a prisoner without a formal arrangement with the prison, the physician's function within the state system is the same: the state authorizes the physician to provide medical care to the prisoner, and the prisoner has no choice but to accept the treatment offered by the physician. Even where a physician does not have a contractual relationship with the state, the physician can treat a prisoner only with the state's authorization....[T]he physician acts under color of state law because the state has incarcerated the prisoner and denied him the possibility of obtaining adequate medical care on his own.*

Statutes of Limitations/Hazardous Conditions and Substances

Nasim v. Warden, Md. House of Correction, 42 F.3d 1472 (4th Cir. 1995). The plaintiff's *pro se* complaint should not have been dismissed as frivolous. He alleged that he was exposed to a toxic substance—asbestos—that endangered his health and made specific allegations as to "how and why" his rights were violated, i.e., by permitting asbestos to fall from the ceiling into his cell. While these allegations are "unlikely," they are not "nonsensical." At 1475: "...[A] claim that prison officials have purposely or with deliberate indifference exposed a prisoner to a toxic substance...does have a constitutional basis, i.e., the Eighth Amendment."

A district court should only dismiss a complaint as frivolous on limitations grounds when the time bar is clear from the face of the complaint. Although the actions complained of occurred outside the limitations period, the claim did not accrue until the plaintiff knew or had reason to know of the injury, and it is not clear that the plaintiff knew of the possible causal connection between asbestos and his health problems until much later.

Use of Force/State Officials and Agencies

Pelfrey v. Chambers, 43 F.3d 1034 (6th Cir. 1995). The allegation that correctional officers forcibly cut off the plaintiff's hair with a knife stated an Eighth Amendment claim.

The district court incorrectly held that a "spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment" and that action must "be imposed for a penal or disciplinary purpose" to constitute punishment. Authority to this effect, such as *Johnson v. Glick*, is no longer good law.

At 1037:

> *...[I]t would certainly appear that defendants' actions (assuming* arguendo *that defendants committed the acts alleged in plaintiff's complaint) were designed to frighten and degrade Pelfrey by reinforcing the fact that his continued well-being was entirely dependent on the good humor of his armed guards. To us, given the closed nature of the prison environment, this constitutes a totally unwarranted, malicious and sadistic use of force to cause harm.*
>
> *We categorically reject defendants' argument that "an unprovoked attack is not punishment." To hold otherwise would ignore the power arrangements that exist within the prison environment and lead to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cellmate who is assaulted for* absolutely no reason *is afforded only that relief permitted by state law.* [Emphasis in original]

Disabled/Qualified Immunity

Lue v. Moore, 43 F.3d 1203 (8th Cir. 1994). Both damages and affirmative relief are available under the Rehabilitation Act. Qualified immunity is also available. At 1205: "The broad language of *Harlow v. Fitzgerald* ... suggests qualified immunity should normally be available in civil damages lawsuits unless Congress has stated otherwise."

The blind plaintiff's claim did not establish a Rehabilitation Act violation; after he was told that there were no vocational programs for blind inmates, he did not apply for them anyway or request that a program be provided for him. At 1206: "...[T]he Rehabilitation Act also does not require the invention of new programs designed for handicapped individuals." Nor were prison officials required to send him out of the prison for training.

Law Libraries and Law Books/Inmate Legal Assistance/Access to Courts—Services and Materials/Telephones/ Attorney Consultation

Casey v. Lewis, 43 F.3d 1261 (9th Cir. 1994). At 1266: "The importance of this right

[court access] cannot be overstated. It is the right upon which all other rights depend." The state has the burden of showing that it has provided meaningful court access, and the district court correctly concluded that it had not. The text of its remedial order is appended.

The district court correctly concluded that the contents of the law library were inadequate. Some reporter volumes and pocket parts of secondary sources were missing. At 1266: "Updated inventories are unquestionably an essential element of an adequate library system." Also, some libraries did not have self-help manuals. *Id.*: "The complexities of legal research at the very least require these aids to enable inmates to use the books effectively." At 1270: The district court reasonably required the provision of Pacific Reporters and Digests.

Inmates may be denied physical access to the law library only when it would threaten institutional security. At 1267: "...[U]nless [defendants] can demonstrate actual security risks, an inmate should be allowed access to the law library. The district court correctly concluded that [defendants] may not routinely prohibit lockdown inmates from physically using the law library." (Footnote omitted) At 1271: This does not mean that defendants can't bar a prisoner until harm has occurred; a rational justification would be sufficient.

At 1267: "Sufficient numbers of trained legal assistants also must be provided to prisoners who are functionally illiterate or whose primary language is not English." The failure to provide bilingual assistants or clerks denies meaningful access and is not remedied by reliance on other, untrained inmates. The defendants argued that providing a law library removed the barriers to court access erected by imprisonment. At 1268: "This argument is without merit because [the defendants] overlook[] the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents [sic] the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." At 1270: The district court has discretion to require both law library services and legal assistance in its remedy. At 1271: The requirement of a "training videotape" does not constitute legal assistance to all prisoners; the court merely concluded that it would help make the law library accessible to all prisoners.

The district court correctly concluded that staffing the libraries only with security officers was inadequate. At 1268: "Library staff should at least have some basic knowledge of legal research." At 1271: The district court properly required that each library have a librarian with a law degree, a library science degree, or a paralegal degree.

At 1269:

> *Because an inmate's access to his attorney is inextricably tied to his meaningful access to the courts, we reject Defendant's argument that to state a claim, Plaintiffs need to allege an actual instance in which their access to the courts has been impeded.* [Footnote omitted.]

The district court correctly concluded that restrictions such as limitation of calls to issues relating to a prisoner's sentence, the granting of calls according to institutional risk score rather than need, and the requirement that a prisoner divulge the nature of the call unjustifiably interfered with court access. At 1271: An order requiring at least three twenty-minute attorney calls a week at the inmate's expense is affirmed.

The district court defined the standard for indigency for purpose of providing free supplies as $46. Although the evidence supports that standard, the district court did not make an explicit finding to that effect, and the court remands for a proper finding. The court notes in passing that evidence that the $22 existing standard prevented prisoners from purchasing adequate supplies met the "actual injury" standard.

The defendants' photocopying policy denied meaningful access to the courts because plaintiffs had to give their materials to staff to be copied, breaching their confidentiality. (The district court found that some documents had been read by staff.) These allegations also met the "actual injury" standard. The defendants' petition for *certiorari* has been granted.

Procedural Due Process—Disciplinary Proceedings/ Pro Se Litigation

Janke v. Price, 43 F.3d 1390 (10th Cir. 1994). The plaintiff complained that he was not allowed to present witnesses at his disciplinary hearing. The magistrate judge held a *Martinez* hearing and improperly resolved facts concerning the hearing against the plaintiff, resulting in dismissal. A *Martinez* hearing is "a tool to sort and clarify issues raised in a pro se complaint," not a means of resolving factual disputes. Also, it was error to consider matters outside the pleadings in deciding whether the complaint stated a claim.

Suicide Prevention

Frey v. City of Herculaneum, 44 F.3d 667 (8th Cir. 1995), *vacating* 37 F.3d 1290 (8th Cir. 1994). Here's yet another case of an intoxicated person who was arrested and hanged himself in jail.

The decedent's father has standing to assert a § 1983 claim for his son's injury and death, either in his own name, or as administrator. However, the right to recover is governed by the state's law of survival of actions, and the district court must determine whether the plaintiff can bring both a wrongful death and a personal injury action under § 1983 applying Missouri law.

Rehabilitation/Procedural Due Process—Temporary Release

Browning v. Vernon, 44 F.3d 818 (9th Cir. 1995). The plaintiffs are assigned to Idaho's "Rider Program," under which courts may retain jurisdiction of persons convicted of felonies and place them in prison initially for purposes of being evaluated for potential release on probation. Under the relevant procedures, prison staff prepare and notify the inmates of the initial recommendation and permit them to read (but not keep) all evaluations; anybody with a negative recommendation is immediately placed in segregation. About 24 hours later, the inmate is given a hearing and allowed to rebut any information or recommendation, calling members of the staff and other inmates as witnesses. A final report is then sent to the sentencing court.

The plaintiffs alleged that these procedures violate due process because 24 hours is not sufficient notice, they are not given copies of the relevant documents to help them prepare for the hearing, and their placement in segregation means they cannot speak to their attorneys, contact witnesses, or have access to the law library.

The plaintiffs have a liberty interest in an "objective and reliable rehabilitation report" under state law; the Idaho Supreme Court said so. The state court went on to place "clear limits on official discretion" by requiring minimum due process protections, holding that state officials "have a duty to supply the sentencing court with a fair assessment of the inmate's rehabilitative potential and [specifying] the due process requirements needed to ensure the report's accuracy." (821) The federal court says it agrees with the state court.

Trial/Restraints

Davidson v. Riley, 44 F.3d 1118 (2d Cir. 1995). The district court required the *pro se* plaintiff to wear handcuffs and leg irons during his civil trial, stating that he "should be treated as those people in charge of you think you should be treated." (1120) The correction officers justified keeping him restrained because he was an escape risk. However, escape charges had been expunged in two prior state court decisions, and an Attica Deputy Superintendent had determined that he would no longer be considered an escape risk.

Physical restraints are to be used as a last resort in civil as well as criminal trials. They may be used "when the court has found those restraints to be necessary to maintain safety or security, but the court must impose no greater restraints than are necessary, and it must take steps to minimize the prejudice resulting from the presence of the restraints." (1122-23) The court must exercise its discretion and not defer entirely to those guarding the prisoner.

If the court has exercised its discretion, review will be for abuse of discretion. If the court has failed to exercise its discretion, harmless error analysis will apply, and the court should consider "the strength of the case in favor of the prevailing party and what effect the restraints might have had given the nature of the issues and evidence involved in the trial." (1124)

Here, the court abdicated its discretion to the officers; it failed to hold a hearing although one was clearly needed; and it made no substantial effort to minimize the prejudicial effect of restraints. A new trial is ordered.

DISTRICT COURTS

Religion—Practices/Federal Prisons and Officials

Howard v. United States, 864 F.Supp. 1019 (D.Colo. 1994). The plaintiff, a Satanist, is granted a preliminary injunction requiring prison officials to provide time and space for his Satanic rituals, and barring the defendants from restricting the plaintiff's access to candles, candle holders, incense, a gong or bell, a black robe, a chalice, and an object suitable for pointing to any greater degree than any other religious group's.

This case was decided under the *Turner* test and not the Religious Freedom Restoration Act. The court notes that many of the supposed security risks involved in the plaintiff's practices (e.g., use of hooded robes) also apply to practices that other groups are permitted. The court concludes that they are pretextual. Other arguments are completely speculative—e.g., that the plaintiff's beliefs would place him in jeopardy (he read Satanic literature in public and wore Satanic medallions). The court does not credit the claim that Satanism is opposed to the rehabilitative goals of prison, since the plaintiff's version of Satanism does not include drinking blood and eating flesh.

Use of Force/Classification—Race

Burton v. Kuchel, 865 F.Supp. 456 (N.D.Ill. 1994). Evidence that an officer shoved the plaintiff against a wall did not support an Eighth Amendment claim in the absence of injury. However, a "gratuitous punch in the stomach is of sufficient gravity" to go to a jury, regardless of lack of injury. An alleged retaliatory motive goes to "knowing willingness that harm occur," so its presence means that a lesser showing of injury is needed to establish wantonness.

Evidence that an officer read the plaintiff's legal mail supported a constitutional claim.

Evidence that the plaintiff was subjected to daily strip searches was sufficient to "justify an inference of calculated harassment" and avert summary judgment.

Evidence of gratuitous physical attacks and repeated abusive strip searches and destruction of property support a claim for retaliation for filing a grievance. However, the plaintiff did not provide sufficient evidence of racial animus on the part of any defendant except for the one who called him "nigger."

Use of Force/Standing

Fierro v. Gomez, 865 F.Supp. 1387 (N.D.Cal. 1994). Execution by lethal gas constitutes cruel and unusual punishment. Prisoners had standing to challenge this form of execution even though they were given the option to select lethal injection. (Many capital defendants refused to make an election.)

Procedural Due Process—Visiting

Gavin v. McGinnis, 866 F.Supp. 1107 (N.D.Ill. 1994). A prison regulation that provides that prisons "shall permit every committed person to receive visitors, except in case of abuse of the visiting privilege or when the chief administrative officer determines that such visiting would be harmful or dangerous to the security, safety, or morale of the institution or facility" creates a liberty interest protected by due process. However, the defendant Assistant Warden was not shown to be personally responsible for the denial of the plaintiff's visit or to have failed to respond to widespread abuses. The defendant was also entitled to qualified immunity despite the prior existence of one reported and two unreported cases in the same district holding that the regulation created a liberty interest.

Procedural Due Process—Disciplinary Proceedings

Gilbert v. Selsky, 867 F.Supp. 159 (S.D.N.Y. 1994). An official who reviews disciplinary determinations is not entitled to absolute quasi-judicial immunity.

There was no evidence to support the plaintiff's conviction for theft. Facility records showed that he had not been in the relevant area during the preceding ten days, he was not found with any of the stolen property, and many other people had access to the area. Hearsay from an informant whose reliability was unknown could not meet the "some evidence" standard.

The refusal to call the officer who allegedly permitted the plaintiff into the area of the theft, other officers who could vouch for the plaintiff's whereabouts during the relevant time period, and inmate clerks who had access to the stolen materials, denied due process; the claim that they were irrelevant was bogus. No security issue was raised.

Searches—Visitors and Staff

Varrone v. Bilotti, 867 F.Supp. 1145 (E.D.N.Y. 1994). Prison visitors retain a Fourth Amendment right to be free from unreasonable searches and seizures, although their expectation of privacy is diminished relative to that outside prison. Courts have adopted a "reasonable suspicion" standard to govern strip searches of visitors. When authorities rely on information from a confidential informant, the tip must have some indicia of reliability, i.e., linkage to other objective facts. Generalized suspicions of drug smuggling do not justify the strip search of a particular visitor unless there is information about that person.

The visitor's supposed consent to the search did not waive his Fourth Amendment rights because the result would have been to waive the visit. Nor does the posting of a general warning sign about searches mean that anyone who visits can be strip searched. An officer who performed the search cannot escape liability on the ground that he was not involved in making the decision to search.

The defendant is not entitled to qualified immunity because the law of the Supreme Court, Second Circuit, and other appeals courts "collectively" established the reasonable suspicion standard. The court cites the general balancing test of *Bell v. Wolfish*, the Second Circuit's application of a reasonable suspicion standard to prison staff by analogy to visitors, and the unanimity of circuits that had addressed the question directly. Departmental rules "bolster the conclusion that the rights asserted by plaintiff were delineated clearly at the time of the March 1989 search." (1153)

The plaintiffs are entitled to add defendants after the expiration of the limitations period because the claims relate back to the filing of the initial complaint. The defendants in question either are or would be represented by the Attorney General, who represents all the existing defendants, and those attorneys knew or should have known that additional defendants would be added. The court weighs the fact that the plaintiff was proceeding *pro se* and was not in a position to identify all defendants before suing.

Use of Force/Medical Care—Standards of Liability/Pro Se Litigation

Guidry v. Jefferson County Detention Center, 868 F.Supp. 189 (E.D.Tex. 1994). The Jefferson County Detention Center is not a proper defendant. The plaintiff is given the opportunity to amend his complaint to include the county itself, which has notice of the suit through commonality of representation. At 191: "Where a lay person confronts with [sic] the morass attorneys and judges call civil procedure, mistakes may occur for which dismissal or other disposition may work an injustice."

The plaintiff alleged that he was in a fight with another inmate and that an officer, rather than trying to stop the fight, punched him in the face. The defendants' answer alone did not entitle them to summary judgment.

The plaintiff alleged inadequate medical care. The defendants' allegation that he received medical attention on three dates did not entitle them to summary judgment. At 198:

> *The quantity of the plaintiff's treatment is not dispositive issue [sic] in an Eighth Amendment medical care claim. Instead, such a claim may rest on omissions or acts, that is, the quality of the care. The defendant could assert that plaintiff saw a doctor every day for an entire month, but if the doctor did not treat a known and serious medical need, or rendered malicious treatment, then a cause of action would still lie. [Emphasis in original.]*

Medical Care—Standards of Liability

Sappington v. Ulrich, 868 F.Supp. 194 (E.D.Tex. 1994). The plaintiff broke his foot and was not sent to a hospital for five months. He also did not receive a splint as prescribed by the jail doctor. These allegations are sufficient to withstand summary judgment against the doctor and the prison's health administrator, who had actual knowledge of the injury. The fact that the plaintiff received some treatment did not negate the defendants' liability.

The plaintiff's submission of complaint forms to the health administrator was sufficient to establish that defendant's personal responsibility at this stage.

Medical Care

Flood v. Hardy, 868 F.Supp. 809 (E.D.N.C. 1994). The decedent was observed diving off the upper cell bunk and talking to himself incessantly. The sheriff allegedly got a judge to authorize by telephone releasing the decedent from his seven-day sentence and taking him to the hospital with instructions that he was responsible for his own bill. However, there is no evidence that he called the decedent's health problems to the judge's attention. Since the sheriff and deputy knew that the decedent was in "a state of mental and physical peril" and "in no condition to be turned out on his own," they were not entitled to qualified immunity.

Publications

Kalasho v. Kapture, 868 F.Supp. 882 (E.D.Mich. 1994). The plaintiff was not permitted to receive a catalog because of a prison regulation forbidding prisoners to receive third class/bulk rate mail. (The regulations permitted the receipt of catalogs "subject to the limitations of this rule.")

The policy is not unconstitutional under the *Turner* standard. It serves to avoid a "tremendous influx" of incoming mail that would present problems of smuggling contraband, hiding contraband and complicating searches, fire hazards, and accumulation of excess property. The regulation is neutral. The plaintiff has alternatives; the catalog is available in the prison store and the plaintiff had ordered items from the company in the past. Accommodating prisoners might overwhelm prison staff and it would tax prison resources at the expense of first class mail. The plaintiff showed no easy alternative to the policy. (This decision is in conflict with an unreported decision from another Michigan district.)

Medical Care—Standards of Liability—Deliberate Indifference

Taylor v. Anderson, 868 F.Supp. 1024 (N.D.Ill. 1994). The plaintiff alleged that after the prison contracted with the Service America Corporation he did not receive a diet that he could eat consistently with his diabetes. His claim that he had informed prison officials of his condition and complained to them about his meals sufficiently stated a deliberate indifference claim. The allegation that the defendant has threatened his health and endangered his life by failing to provide him with the required diet sufficiently alleges a serious medical need; more detailed pleading is not necessary. (The defendants had argued that since diabetes can vary from person to person, more specific allegations were necessary.)

Use of Force/Pre-Trial Detainees/Disabled

Telfair v. Gilberg, 868 F.Supp. 1396 (S.D.Ga. 1994). Under both the Eighth Amendment and the Due Process Clause, the law is clear enough that "choking a physically handicapped detainee and knocking him over might constitute a constitutional tort." (1403) The defendant is not immune from the state law assault and battery claim, since the plaintiff's allegations may establish "malicious or corrupt" action defeating state law official immunity.

Eighth Amendment standards do not govern the use of force against pre-trial detainees. The *Bell v. Wolfish* standard is not designed for use of force cases. The court develops the following standard (at 1412):

> *... First, search for evidence that the use of force was intended to punish the detainee.... This intent inquiry is not substantially different than the current Eighth Amendment requirement, although intentionally easier for a plaintiff to meet. Second, if there is no direct evidence of intent, determine (1) whether a legitimate interest in the use of force is evident from the circumstances, and (2) if so, whether the force used was necessary to further that interest.... As in* Hudson v. McMillian, *the detainee would not be required to show severe injuries.... If the jail official fails either prong, his conduct violated the pretrial detainee's due process rights under the Fourteenth Amendment.*

Procedural Due Process—Administrative Segregation/Res Judicata and Collateral Estoppel

Giano v. Kelly, 869 F.Supp. 143 (W.D.N.Y. 1994). The plaintiff was released from punitive segregation after an escape attempt and then was placed in administrative segregation after he was stabbed.

There is a liberty interest under state regulations in remaining free from administrative segregation.

The plaintiff received the same justification for his retention in segregation on 70 separate review forms, which cited events that happened at another prison, including his stabbing, which had not been explained. However, the court noted that another inmate had provided information about the stabbing that had apparently never been investigated. At 150: "In order to justify an inmate's continuing confinement in administrative segregation, prison officials must be prepared to offer evidence that the periodic reviews held are substantive and legitimate, not merely a 'sham.'" The defendants are not entitled to summary judgment on these facts. Nor are they entitled to qualified immunity, since the right to "meaningful" review was clearly established.

Crowding

Tabech v. Gunter, 869 F.Supp. 1446 (D.Neb. 1994). The court's prior injunction against random double celling of new admissions was not affected by the Helms Amendment to the Violent Crime Control and Law Enforcement Act of 1994. The statute does not apply to these cases because they are not "crowding" cases. Also, the statute by its terms refers only to cases involving an "individual plaintiff inmate" and not to class actions. In addition, there was sufficient evidence in the record to support relief as to each plaintiff, named or unnamed. The court refers to evidence showing that "violent cellmate confrontations are routine" and that double celling is "the primary factor leading to violent attacks" between cellmates, among other points. At 1452: "There is nothing in the Act which prohibits a court from concluding that the trial evidence is sufficient to establish an Eighth Amendment violation regarding every member of a class even though the court may not (and probably would not) know the name of each class member." Finally, the relief sought does not employ a population ceiling and does not extend further than necessary to remove the unconstitutional conditions.

NON-PRISON CASES

Consent Judgments/Contempt/ Modification of Judgments

Barcia v. Sitkin, 865 F.Supp. 1015 (S.D.N.Y. 1994). A consent decree provided for various substantive obligations as well as a "Monitoring Period." The substantive obligations continued for the life of the decree and did not end with the expiration of the Monitoring Period.

The court finds the defendants in violation of various provisions of the decree and orders them to clean up their act. In some cases it prescribes future actions which appear to amount to modification of the judgment without discussion of the modification standards.

The court holds the defendants in contempt but declines to order sanctions, though they may be imposed based on further noncompliance. The court extends the monitoring period for two years.

Contempt

New York State National Organization for Women v. Terry, 41 F.3d 794 (2d Cir. 1994). Noncompensatory fines totalling $500,000 imposed for civil contempt without the protections of the criminal process must be vacated under *Bagwell*.

Pleading

Wicks v. Mississippi State Employment Service, 41 F.3d 991 (5th Cir. 1995). When a defendant is entitled to a qualified immunity defense, discovery must not proceed until the court finds that the plaintiff has asserted facts sufficient to overcome the defense. This "heightened pleading" requirement requires "more than bald allegations and conclusionary statements. [The plaintiff] must allege facts specifically focusing on the conduct of [the defendant] which caused his injury." (995, footnote omitted) The seeming unfairness of this policy "is tempered by this circuit's directives to allow a plaintiff initially failing to state a claim the opportunity to amend or supplement the pleadings freely, so that he may state his best case." (997, footnote omitted)

Attorneys' Fees and Costs

Lunday v. City of Albany, 42 F.3d 131 (2d Cir. 1994). The plaintiff recovered $35,000 for excessive force against one officer in a case where he had sought damages against other officers and the City for excessive force, unlawful arrest and malicious prosecution. The district court was not required to reduce the lodestar to reflect the unsuccessful claims because these were not "wholly unrelated" to the successful claims. A fee award of $118,000 on a $35,000 verdict is upheld.

Attorneys' Fees

Wilcox v. City of Reno, 42 F.3d 550 (9th Cir. 1994). The plaintiff was awarded $1.00 in a use of force case against the municipality. The district court award of $66,535 in fees is upheld. At 554: "Nothing in *Farrar* ... suggests that district courts may never award fees to a party who recovers only nominal damages." However, to justify an award, there must be some other way in which the litigation succeeded. Here, the fact that a jury found a municipal policy of excessive force that caused the plaintiff's injuries, which may collaterally estop the defendant in other cases, is significant. In addition, the district court held (at 556): "Exposing an unconstitutional policy of this sort within the city police department does a great deal more than a finding that a plaintiff's rights have been infringed upon in some unspecified way. The police department itself, and the community at large benefit from a finding of this sort." Moreover, the City admitted that there had been a change of policy, i.e., a prohibition on fist strikes to the face, though they claimed it had nothing to do with the litigation. Also, the officer was disciplined, and his misconduct might not have come to light without the lawsuit.

Class Actions—Certification of Classes

Baby Neal for and by Kanter v. Casey, 43 F.3d 48 (3d Cir. 1994). At 56-57:

> *The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class....Because the requirement may be satisfied by a single common issue, it is easily met....Furthermore, class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice....*
>
> * * *
>
> *...[Rule 23](b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct....*
>
> * * *
>
> *Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded. Classes can be certified for certain particularized issues, and, under well-established principles of modern case management, actions are frequently bifurcated.*

With respect to typicality, even "relatively pronounced factual differences" do not preclude meeting the requirement where there is a strong similarity of legal theories. At 58: "Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, as long as all the injuries are shown to result from the practice."

In this challenge to provision of statutorily mandated child care services, "[t]he district court will ... not need to make individual, case-by-case determinations in order to assess liability or order relief. Rather, the court can fashion precise orders to address specific, system-wide deficiencies and then monitor compliance relative to those orders." (64) ■

John Boston is the director of the Prisoners' Rights Project, Legal Aid Society of New York. He regularly contributes this column to the NPP JOURNAL.

Index to Articles

KEY

The NPP JOURNAL is published quarterly, each Winter, Spring, Summer and Fall. The following key identifies the quarter and year of publication by issue number.

Issue#:	
#1-2	Fall-Winter 1984
#3-6	SpringSpring-Winter 1985
#7-10	Spring-Winter 1986
#11-14	Spring-Winter 1987
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Vol.10, No.1-3	Winter-Summer 1995

Note: In Spring 1990, the NPP JOURNAL began using a volume-numbering system. In the index below, articles from issues prior to Spring 1990 list issue and page number followed by the year of publication (e.g., 3/21-1985). Articles from the Spring 1990 issue onward list volume, issue, page number and year of publication (e.g., Vol.5/2/6-1990). Please note that this Index includes only select listings from the Case Law Report section. Those listings are identified by a "CL" at the end of the issue reference, i.e., Vol.7/2/6CL-1992.

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"difficult history."[5] Within a year of opening the company's management team had to be changed and an international consultant enlisted to implement a suicide prevention strategy. Since November 1992 there have been five deaths in custody, as well as riots, fires, a drug overdose and allegations of rapes and serious assaults. Tear gas has been used to quell riots, explained by a Wackenhut director as "a humane way to obtain order quickly rather than a lot of staff with batons striking people."[6]

Junee, also run by ACM was, according to reports, "plagued by problems since it opened..."[7] including a comparatively high rate of prisoner on prisoner assaults. In August 1994 however, the prison received high marks in its annual performance review from the Queensland Department of Corrective Services. But in October 1994, the New South Wales Government Ombudsman reported Junee's staff turnover "at a rate which puts it above most NSW gaols and rising" and "already the prison is having problems recruiting

Following two suicides, a Member of Parliament called for a public inquiry into the running of the prison.

specialists, particularly psychologists and other non-custodial staff...the second full year of operation for Junee will be a very testing one indeed."[8]

Following a host of other problems, CCA's joint U.K. venture, UKDS, became the first private operator to be penalized by the government when it was fined £41,000 (U.S. $59,000) after losing control of Blakenhurst during a disturbance in February 1994.

In February 1995, Her Majesty's Chief Inspector of Prisons, Judge Stephen Tumim, published a report of his team's inspection of Blakenhurst eight months earlier. Acknowledging that 12 months is a "relatively short time for any establishment to develop a balanced culture," he said that "the most impressive feature was the quality, enthusiasm and potential of staff: the most disappointing feature was the comparative shortage of innovation." His 109-page report also included over 100 recommendations for improvement.[9]

The Chief Inspector has yet to visit Premier Prison Service's Doncaster prison but alleged incidents of bullying and drug taking among prisoners and a number of other incidents caused early concern among probation officers, the police and social services. Following two suicides a Member Of Parliament called for a public inquiry into the running of the prison.

The U.K.'s current prison services privatization program includes 13 prisons, (one tenth of the total) with six contracts let to date; five new secure training centers for young offenders (contracts yet to be awarded) and the country's entire prisoner transportation service. The latter is being hived off by regions and no U.S.-owned companies have so far won a contract.

While the U.K. and Australia have proved willing privatizers, two years ago there appeared to be little scope for a wider European corrections market. But the privatization programs currently developing across western and eastern Europe might well prove fertile ground for further U.S. expansion in the future. ■

Stephen Nathan researches privatization for the Prison Reform Trust in England.

[1]JC Bradford & Co, Equity Research, p.11, January 1995.
[2]UKDS Briefing Paper, May 1993.
[3]Agreement between CCA International Inc. and Iniziative Industriali S.p.A., p.1, February 1988.
[4]The Australian, April 22, 1995.
[5]Burgess, M. "The Queensland Experience," Socio Legal Bulletin, p.24, Autumn 1994.
[6]Private Prisons in Australia: Cause For Concern, Prison Reform Trust, p.6, October 1994.
[7]The Wagga Advertiser, July 22, 1994.
[8]Report of NSW Ombudsman 1993-94.
[9]HM Prison Blakenhurst, Report by MJ Chief Inspector of Prisons, Home Office, pp.86-97, May 1995.

U.S. Corrections Companies Abroad

1. CCA
- U.S.: Corrections Corporation of America (CCA) CCA International Inc (100 percent owned)
- U.K.: CCA + John Mowlem + Sir Robert McAlpine = U.K. Detention Services (one third owned).
- Australia: CCA + Chubb Security Holdings = Corrections Corporation of Australia (50 percent owned).
- Outside of the U.K., Belgium, Australia: CCA + Sodexho SA (51/49 percent in favor of CCA or 49/51 percent share).

2. Wackenhut
- U.S.: Wackenhut Corporation Wackenhut Corrections Corporation (WCC) (100 percent owned)
- U.K.:WCC + Serco = Premier Prison Services Ltd (50 percent owned) WCC + Trafalger House + Serco = Premier Custodial Developments Ltd (one third owned).
- Australia: Wackenhut Corrections Corporation Australia Pty Ltd (100 percent owned).

WCC = Australasian Correctional Management Pty Ltd (now 100 percent owned, formerly 50/50 with Thiess Contractors).
WCC + National Australia Bank = Australasian Correctional Services Pty Ltd (now 66.7 percent owned, formerly also included Thiess).

3. Corrections Partners Inc.
- U.S.: Founded in 1991 by merger of Correctional Services Group Inc + Correction Management Affiliates.
- Australia: CPI + Skilled Engineering + Multiplex Construction + BZW Australia = CorrPac Pty Ltd
- U.K.: CPI + Wimpey + AMEC + fourth company = consortium.

BY JACKIE WALKER

National Conference Looks At Women Prisoners Living with HIV/AIDS

The National HIV Infection in Women Conference was held in Washington, D.C. from February 22 to 24, 1995. It included workshops and sessions highlighting women prisoners living with HIV/AIDS. Workshop topics ranged from the clinical needs of women prisoners living with HIV/AIDS to HIV/AIDS among female arrestees in New York City. One session included a statement from an HIV-positive prisoner in Massachusetts. The prisoner described the impact of sexual abuse on the lives of women and condemned the lack of condoms and clean needles to combat HIV/AIDS within prison.

Two interesting presentations were a paper on how Rhode Island's Prison Release Program has reduced recidivism among women living with HIV/AIDS and a workshop which explored the impact of sexual abuse on HIV/AIDS infection among women at the Massachusetts Correctional Institute-Framingham.

Rhode Island's Prison Release Program

Thirty-nine percent of all HIV-infected women in Rhode Island are diagnosed at the Adult Correctional Institution (ACI). This figure is compounded by a high recidivism rate among women prisoners with HIV/AIDS. A Prison Release Program was developed to address concerns expressed by HIV/ AIDS education specialists such as Lenore Normandy, R.N., that there is no followup or medical treatment for former prisoners.

The Rhode Island Departments of Health and Corrections and the Brown University AIDS Program collaborate during the six months prior to the prisoner's release date to plan for post-release treatment and followup. All women are required to establish medical follow-up with three HIV clinics in Rhode Island. Referrals for financial support, substance abuse treatment, and housing are provided based on a woman's needs, and follow-up is then conducted three and six months after release.

Data collected on women prisoners with HIV/AIDS who participated in the program from June 1992 through July 1993 revealed a number of accomplishments. Women who participated had a recidivism rate of 12% within six months and 17% within 12 months. This compared favorably to an identical population of HIV-negative women who had recidivism rates of 22% within six months and 37% within 12 months. The program has also succeeded in other areas. Seventy-nine percent of women in the program were able to receive some form of financial assistance and 68% received support from substance abuse programs. Over 70% chose to continue receiving medical care from the same medical provider. One of the reasons for the high follow-up is Dr. Timothy Flanigan, Director of the HIV Care Program at the ACI. According to Dr. Flanigan, "Most prisoners have never had primary care. And being part of a minority group often means having difficulty in being treated. We offer the opportunity to be treated in a humane manner and follow-up with the same medical provider."

One graduate of the program is now working as an outreach counselor; others have successfully reunited with their children. The program has received national attention. Representatives from a number of state correctional departments have reviewed the program as a blueprint for reorganizing their own release planning efforts.

MCI-Framingham's Infectious Disease Clinic

At the Massachusetts Correctional Institute for Women in Framingham, prisoners living with HIV/AIDS have access to a weekly infectious disease clinic, a rarity in prison. For the past three years Dr. Anne De Groot has operated the clinic with the assistance of a nurse and case manager. Dr. De Groot initiated a study on childhood sexual abuse among prisoners living with HIV/AIDS. She had become frustrated with her inability to get women to participate in their own health care; a colleague suggested a survey of women attending the clinic on childhood sexual abuse. Dr. De Groot formulated a basic questionnaire and incorporated it into her physician intake form. Her findings from the 1993-1994 period were first published in the *Journal of Correctional Health Care.*

Of the 88 women interviewed, 42% had histories of childhood sexual abuse. HIV infection was 2.8 times more prevalent among survivors of childhood sexual abuse than among women with no history of childhood sexual abuse. Survivors of childhood sexual abuse were also 1.8 times more likely to have unprotected sex and 2.1 times more likely to have used injection drugs. The impact of these surveys has gone beyond the realm of data collection. Within the prison women have begun to request more services directed towards sexual abuse recovery. A former prisoner has begun to speak about her own history of childhood sexual abuse to youth groups.

In addition, Dr. De Groot has researched seroconversion (when a person converts from HIV negative to positive) rates among women at MCI-Framingham. A small study of seroconversion rates within prison found a rate of 16% among reincarcerated women. These statistics have become the motivating force in developing Project Zero, a program designed to reduce the seroconversion rates of recently incarcerated women. In reflecting on her work Dr. De Groot believes, "We need to overcome this attitude that criminals are genetically deformed. I see the women I work with as wonderful individuals who've had horrible lives." ■

Jackie Walker is the Project's AIDS Information Coordinator.

THE NATIONAL PRISON PROJECT

Publications

_____ **The National Prison Project JOURNAL,** $30/yr. $2/yr. to prisoners.

_____ **The Prisoners' Assistance Directory,** the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, AIDS, family support, and ex-offender aid. 10th Edition, published January 1993. Paperback, $30 prepaid from NPP.

_____ **The National Prison Project Status Report** lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1993. $5 prepaid from NPP.

QTY. COST

_____ **Bibliography of Material on Women in Prison** lists information on this subject available from the National Prison Project and other sources concerning health care, drug treatment, incarcerated mothers, juveniles, legislation, parole, the death penalty, sex discrimination, race and more. 35 pages. $5 prepaid from NPP.

_____ **A Primer for Jail Litigators** is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations and correctional standards. 1st Edition, February 1984. 180 pages, paperback. (Note: This is not a "jailhouse lawyers" manual.) $20 prepaid from NPP.

_____ **TB: The Facts for Inmates and Officers** answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free. Bulk orders: 100 copies/ $25. 500 copies/$100. 1,000 copies/$150 prepaid.

QTY COST

_____ **1990 AIDS in Prison Bibliography** lists resources on AIDS in prison that are available from the National Prison Project and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $5 prepaid from NPP.

_____ **AIDS in Prisons: The Facts for Inmates and Officers** is a simply written educational tool for prisoners, corrections staff, and AIDS service providers. The booklet answers in an easy-to-read format commonly asked questions concerning the meaning of AIDS, the medical treatment available, legal rights and responsibilities. Also available in Spanish. Sample copies free. Bulk orders: 100 copies/$25. 500 copies/$100. 1,000 copies/$150 prepaid.

(order from ACLU)

ACLU Handbook, The Rights of Prisoners. Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. $7.95; $5 for prisoners. ACLU Dept. L, P.O. Box 794, Medford, NY 11763.

QTY. COST

Fill out and send with check payable to:

The National Prison Project
1875 Connecticut Ave., NW #410
Washington, D.C. 20009

Name _____

Address _____

City, State, ZIP _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project's litigation program since March 31, 1995. Further details of any of the listed cases may be obtained by writing the Project.

Casey v. Lewis–In May 1995, the Supreme Court granted *certiorari* to the defendants for review of the trial court's ruling that the Arizona department of Corrections' policies unconstitutionally restrict prisoners' access to the courts. The trial court's ruling was made in November 1992. Following oral argument in November 1994, the Ninth Circuit Court of Appeals, in a unanimous decision, upheld the trial court's ruling, affirming virtually all of the trial court's order which applies to all 15,000 prisoners in the Arizona system. The order, however, has not been implemented because in May 1994 the Supreme Court, with four Justices dissenting, granted a stay of the trial court decision.

Dulany v. Carnahan–At the request and with the assistance of the local ACLU affiliate, the NPP began investigating conditions in the Missouri prison system several months ago. Agreement was reached on a number of issues. However, no agreement was reached to improve the medical, mental health and dental care provided to women at the Chillico the Correctional Center and the Renz Correctional Center. On June 7, the NPP, together with the local ACLU affiliate, filed a class action suit on behalf of the women prisoners alleging inadequacies in the medical care delivery system, including inadequate emergency care and treatment for women with chronic health problems. The complaint alleges that among this latter group are a paraplegic woman confined to a wheelchair who receives no physical therapy, severely mentally ill patients who do not receive medication regularly and are not seen by a psychiatrist, and women with HIV/AIDS who are denied appropriate medical care. Medical care at all Missouri prisons is provided by Correctional Medical Systems (CMS) under contract to the state's Department of Corrections.

Sandin v. Conner–The NPP filed an *amicus curiae* brief on behalf of the respondent in this case before the Supreme Court. Conner, a Hawaii state prisoner, claimed that he was punished with 30 days of solitary confinement without an adequate due process hearing after allegedly resisting a strip-search. The Ninth Circuit Court of Appeals, overturning the trial court's ruling in favor of prison officials, held that the prisoner had a right not to be arbitrarily subjected to punitive segregation. In an opinion issued this June 19, the Supreme Court overturned the Ninth Circuit's ruling. The 5-4 opinion held that the prisoner had no "liberty interest," that might entitle him to a range of procedural protections, because the punishment he received did not impose any unusual or significant hardship beyond his normal conditions of confinement.

Schumate v. Wilson–The NPP was asked by local lawyers and activists to assist with a challenge to medical care at the Central California Women's Facility at Chowchilla and the California Institution for Women at Frontera. Together, these prisons house approximately 5,600 prisoners. Prisoners allege that they receive systemically inadequate treatment for a number of chronic diseases, including HIV, and that the facility suffers from inadequate staffing, specialty services, and emergency care. Women who test positive for HIV have their medical status disclosed, in part by the location of their housing. The NPP, together with the Northern and Southern California ACLU affiliates, Legal Services for Prisoners with Children, Central California Legal Services, and the law firm of Heller, Ehrman, White & McAuliffe in San Francisco, filed suit in April. ■

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