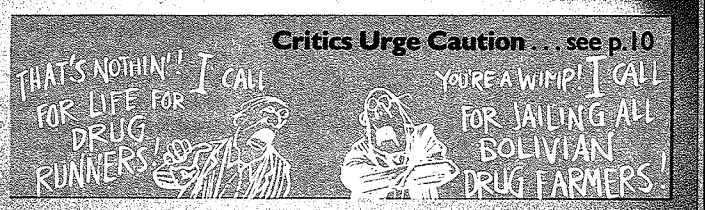
# JOURNAL

THE NATIONAL PRISON PROJECT


Critics Urge Caution . . . see p.10

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## INSIDE . . .



In this issue we continue our exploration of issues confronting women in prison, with a look at litigation and women's special health needs.

# The New Focus on Medical Care Issues in Women's Prison Cases

*Shelley Geballe and Martha Stone*[1]

The scope of women's prison litigation is rapidly expanding. Vigorous attacks on sex-based disparity in vocational, educational, and work programs—the hallmark of the initial cases[2]—continue. Recently, however,

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—continued from front page
claims addressed to inadequate mental health and medical care have been raised.[3] Forces driving this evolution include: 1) an increased population of female offenders, taxing existing medical service delivery systems and resulting in gross delays in medical care, care by inadequately and/or improperly trained people, and failure to provide care except in emergencies; 2) an increased awareness of women's special health needs, generally, and of the compromised health status of female offenders;[4] 3) a heightened sense of political empowerment among the female offender population, resulting in their demands for a change in the medical *status quo*; and 4) most recently, the AIDS epidemic which is claiming as its victims female IV drug users at alarming rates, many of whom are imprisoned at one time or another.

This article will examine four aspects of this new litigative focus: the types of medical care issues currently being addressed in litigation; the applicable legal standards; a review of several of the cases which have moved to judgment to analyze the type of relief currently being afforded; litigation strategy and some suggestions for new directions.

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[1]The authors gratefully acknowledge Yale law students Stephanie Cotsirilos and Kate Silverman for their assistance in background research.

[2]*E.g. Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979), 510 F.Supp. 1019 (E.D. Mich. 1981), *cert. denied* 106 S.Ct. 3334, *slip op.* April 21, 1987; *Bukhari v. Hutto*, 487 F.Supp. 1162, 1171 (E.D. Va. 1980) (characterizing equal protection challenges to sex-based disparity in prison conditions as "a relatively new phenomenon ... which has subjected to review some traditional notions of the purpose and resulting benefits of the confinement of women prisoners" and acknowledging that "[b]oth *de jure* and *de facto* sex-based disparity has existed within the criminal justice system from arrest and sentencing procedures to incarceration and classification within the prisons").

[3]These claims may be joined in a single lawsuit with sex discrimination and other claims, e.g. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Ky. 1982), 562 F.Supp. 106 (W.D. Ky. 1983), Order (W.D. Ky. Aug. 26, 1983), Memorandum Opinion (W.D. Ky. Aug. 23, 1984), 644 F.Supp. 738 (W.D. Ky. 1986); *West v. Manson*, No. N83-366 (D.Conn. filed May 9, 1983, two year Agreement of Settlement, June 14, 1984; Consent Judgment on mental health issues, June 1, 1987), or may be raised in separate litigation. For analysis of the advantages of each approach, see Section IV, *infra*.

[4]For example, at the Connecticut Correctional Institution at Niantic (CCIN), Connecticut's sole women's correctional facility which serves *both* sentenced and pretrial women, approximately 70% of the women report a history of recent substance abuse, many have a history of psychiatric care, and 96% are of childbearing age. *See generally* Resnik and Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women* in *Prisoners' Rights Sourcebook*.

## The Issues

**Mental Health Care.** Common to many women's jails and prisons is an inadequate or even nonexistent system of providing mental health care to inmates.

*Correctional officers administered psychotropic medications.*

Typical of patterns observed throughout the country was the situation in Connecticut prior to *West v. Manson, supra* note 3. Mentally ill female offenders were sent to Connecticut's sole correctional facility for pretrial and sentenced women; they were not admitted to a specialized facility operated by the state Department of Mental Health (restricted to male offenders). Virtually no mental health care was provided to these women. Rather, they were housed together with women in segregation or placed in the basement of one of the housing units—"The Dungeon"—where they were left unattended, often restrained and clothed only in a paper gown, and locked up for as many as 23 hours each day. Only four hours of psychiatric coverage was provided each week for the *entire* institution. Correctional officers administered psychotropic medications, which were frequently prescribed without first performing the requisite tests and physical examinations and which were poorly monitored once prescribed. Hard restraints (legirons, helmets, handcuffs) were used to restrain women unable to control their behavior. A severe shortage of staff competent to treat mentally ill women resulted in excessive reliance on the use of seclusion in "suicide" rooms and/or the use of restraints. Seclusion and restraints were often initiated without a physician's order and maintained without periodic psychiatric reassessments or nursing care to meet the women's basic medical needs. Psychiatric records were scanty, rendering continuity of care impossible, and records were kept together with institutional and medical records, eliminating confidentiality. Inmates with less severe mental health problems also were denied adequate care; psychotropic medications were often the sole "treatment" rendered, even for minor sleep disturbances.

This pattern of virtual total neglect of the mental health needs of women inmates is, unfortunately, not unique to Connecticut. Similar facts have prompted litigation on this issue in other states, including California,[5] Kentucky,[6] Pennsylvania,[7] Idaho,[8] New Mexico,[9] and Hawaii.[10]

[5]*Wright v. McCarthy*, No. OCV 33880 (Cal. Super. Ct., San Bernardino Cty., filed August 29, 1984) (California Institution for Women (CIW): double-celling of mentally ill inmates, failure to segregate mentally ill inmates from protective custody inmates, failure to screen incoming inmates for mental health problems, failure to provide and maintain statutorily-required operational plan for mental health programs, inadequate mental health staff, delays in or denials of care, sex-based disparity between care at CIW and care provided to male inmates).

[6]*Canterino v. Wilson, supra* note 3 (Kentucky Correctional Institution for Women: patchwork of "outside," very part-time professionals providing mental health care to a female population with higher levels of stress than their male counterparts, care provided only to those with acute problems, 33-50% of population taking psychotropic medications because of "stress, anxiety, tension and sleep disturbances").

[7]*Beehler v. Jeffes*, No. CVV-83-1024 (M.D. Pa., filed July 25, 1983) (State Correctional Institution at Muncy: inadequate treatment of women suffering from psychiatric or psychological problems, inappropriate or excessive levels of medication); *Inmates of Allegheny County Jail v. Wecht*, 565 F.Supp. 1278, 1285 (W.D. Pa. 1983) (Allegheny County Jail: use of restraints on women with mental health problems, seclusion of suicidal and violent women in glass faced cell where they were restrained, partially or totally stripped, to mattressless metal cot).

[8]*Witke v. Crowl*, C.A. No. 82-3078 (D. Ida., filed Sept. 9, 1982, Stipulated Settlement Agreement Jan. 22, 1985) (North Idaho Correctional Institution Women's Section: no psychiatric services except through outside appointments and appointments made only in emergencies, no access to psychological testing or counselling).

[9]*Klatt v. King*, Civ. No. 80-871-JB (D. N.M., Consent Order 1983) (Radium Spring Correctional Facility for Women: mental health care provided by

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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.

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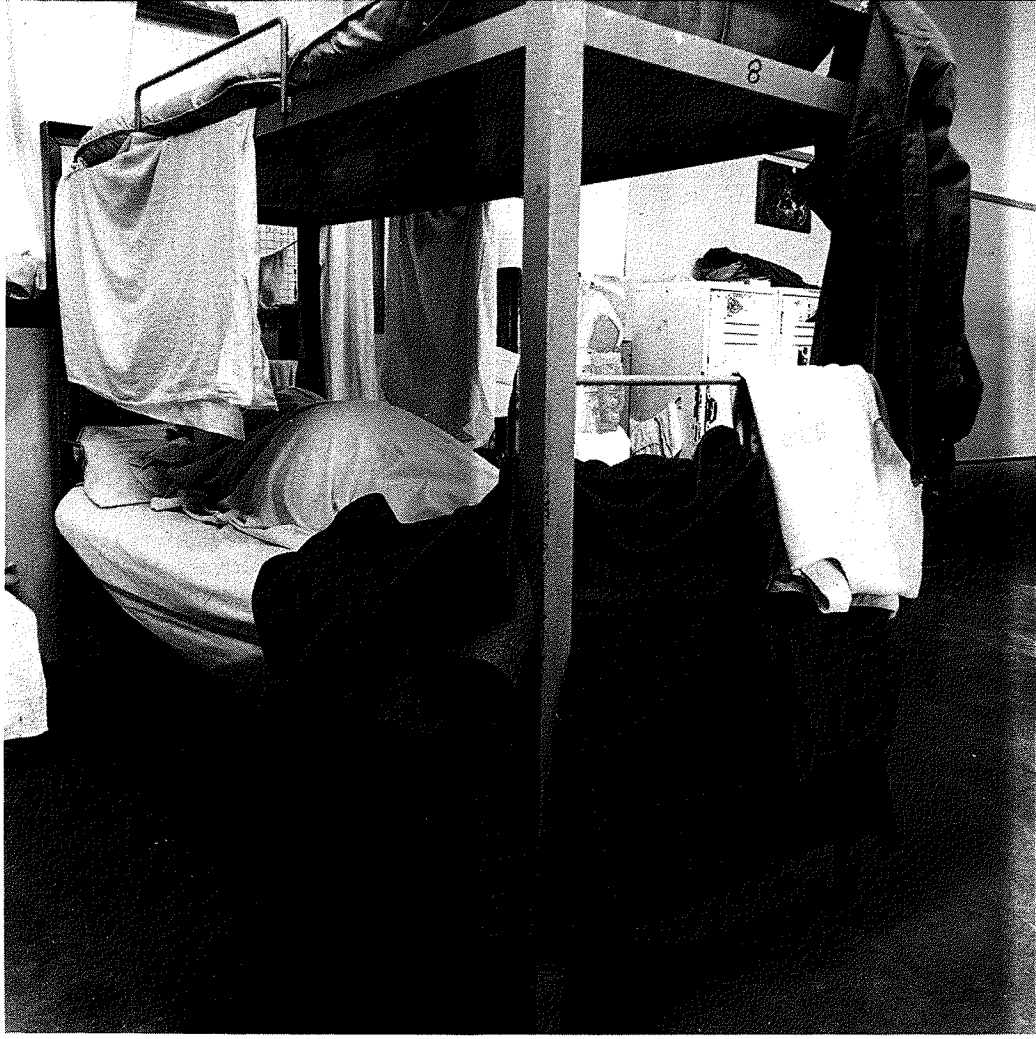
**Reproductive Health Care.** Litigation typically has focused on the delivery of two types of reproductive health care: 1) the medical care provided to prisoners who are pregnant or who have just given birth, and 2) abortion services. Because of the increased incidence of medical conditions in the inmate population which pose special risk to pregnant women, (i.e., hepatitis, drug addiction, AIDS), and because these conditions often are exacerbated by the nutritionally deficient diet and stress of prison, the relief sought in the former is comprehensive obstetrical care that can successfully manage the "high risk" pregnancies so prevalent in inmate populations.[11] Relief in the latter seeks abortion counselling services and the elimination of barriers to abortion services.

**Prenatal and Postpartum Care.** Inadequate prenatal and postpartum medical care at the California Institute of Women (CIW) caused the named plaintiffs in *Harris v. McCarthy*, No. 85-6002 (C.D. Cal., filed Sept. 11, 1985) (Settlement Agreement April 1987) to suffer particularly egregious losses, including miscarriages, unnecessary hysterectomies, and the birth of a disabled child. *Harris* specifically challenged CIW's failure to: provide on-site OB-GYN care, regular and timely prenatal and postpartum medical exams, adequate medical records, appropriate responses to pregnancy complications, high-risk pregnancies, and medical emergencies; prescribe and provide appropriate drugs; comply with the medical orders issued by the community hospital which CIW had charged with providing care; and failure to provide adequate nutrition, prenatal vitamins and counselling, and the safe transport of pregnant and postpartum women.

Similar issues were raised in a second California case which characterized incarceration of a pregnant woman at the Santa Rita Rehabilitation Center as "a potential death sentence to her unborn child and . . . dangerous to the woman." *Jones v. Dyer, supra* note 11.[12] Specifically challenged in *Jones* are the jail's failure to provide a staff obstetrician or gynecologist and failure to have a physician screen new admissions (thereby allowing pregnancies and pregnancy-related complications to go undetected), delayed or denied prenatal and postnatal medical examinations, inadequate diet, failure to manage properly high-risk pregnancies and pregnancy complications, overcrowded housing, use of shackles while transporting pregnant women, and inappropriate medication of pregnant women.



Photos by Ruth Morgan

*Incarceration at the Santa Rita Rehabilitation Center [was characterized] as "a potential death sentence to her unborn child and . . . dangerous to the woman."*

*West v. Manson* also challenges the prenatal care provided to Connecticut's female offenders, specifically the inadequacies in diet, pregnancy monitoring and prenatal education, the housing of pregnant inmates in rooms without toilets and sinks, and barbaric restraint policies (including the use of legirons on a woman while she was giving birth). See *also Archer v. Dutcher*, 733 F.2d 14 (2nd Cir. 1984).

**Abortion Services.** Barriers to abortion services have been challenged in three cases. A county requirement that a court must order an inmate's release for an off-grounds abortion, the county's failure to pay for off-grounds abortions (whether elective or medically necessary), and its failure to provide on-site abortion services for those inmates for whom security concerns precluded release were challenged successfully in *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987). *Monmouth* enjoined the county policy which required pregnant inmates who seek to terminate a pregnancy to obtain a court ordered release in order to get the abortion. It also required the county to provide transportion to an appropriate medical facility for inmates seeking abortion and required the county to assume responsibility for insuring the availability of funding for all inmate abortions, even if elective, and, if alternative means of funding are nonexistent, the county itself must assume the full cost. *Reproductive Health Services v. Webster*, 655 F.Supp. 1300 (W.D. Mo. 1987) (final judgment on consent June 23, 1987),[13] invalidated

only two staff psychologists, one of whom "distrusted" by inmates because of breaches of confidentiality).

[10]*Spear v. Ariyoshi*, Civ. No. 84-1104 (D. Hawaii, Consent Decree June 12, 1985) (Hawaii Women's Correctional Facility).

[11]Far broader relief is urged in *Jones v. Dyer*, (Cal. Super. Ct. Alameda Cty., filed February 25, 1986), which seeks an injunction barring *any* woman in a state of advanced pregnancy from being incarcerated in a county jail.

[12]The infant mortality rate at the Santa Rita Jail is at least 50 times the state average, according to Ellen Barry of Legal Services for Prisoners with Children, San Francisco, CA (co-counsel for plaintiffs).

[13]*Lanzaro* and *Webster* also challenged the correctional facilities' failure to provide abortion counselling to inmates.

state statutory restrictions on the use of public funds and employees for abortions insofar as they could bar off-grounds abortion services for inmates who relied upon escorts and transportation by prison employees. Finally, a fee of $5,000 imposed by the state on inmates at CIW for abortions performed past twelve weeks gestation is being challenged in *Scrape v. McCarthy*, No. OCV-36620 (Cal. Super. Ct., San Bernadino Cty., filed Oct. 1985), a temporary restraining order ordering an abortion at state expense having been granted for the named plaintiff in October 1985.

**Substance Abuse Care.** Though many women enter the correctional system with substance abuse problems, to date there has been little focus on this medical need. The areas of general concern are two-fold: 1) medical management of women detoxifying from drugs and/or alcohol when first incarcerated and the unique problems of detoxifying pregnant women; and 2) counselling and treatment provided to assist substance abusing inmates in eliminating their dependencies.

Commonly, women withdraw from drug and/or alcohol addictions without direct medical supervision and outside of the medical unit. Persons other than physicians are allowed to "diagnose" the type and extent of addiction and to administer palliative medications. Pregnant inmates addicted to heroin or methadone may be detoxified during the first and third trimesters despite grave risk to the fetus. "Treatment" is often left to a small and poorly trained staff and portions of the population are excluded from "treatment" because of "security" concerns.

Conditions such as these are being challenged in *West v. Manson, supra* note 3. At least one death, and several "close calls," resulted from gross deficiencies in care.

*Klatt v. King, supra* note 9, also challenged New Mexico's failure to provide drug and alcohol counselling programs to its female offenders (though 50% of the population had drug-related problems and 90% had alcoholism problems) and its failure to manage alcohol withdrawal adequately. *Jones v. Dyer, supra* note 11, addresses a California jail's failure to provide a comprehensive drug program for pregnant addicted inmates, thereby forcing the inmates into immediate and total withdrawal (precipitating spasms, nausea, convulsions and, on occasion, miscarriages). *See also Beehler v. Jeffes, supra* note 7.

**General Medical Care.** General medical care in women's jails and prisons is too often characterized by lengthy delays, an exclusive focus on emergency care, a staff which is frequently underqualified and overworked, abysmal record-keeping, a failure to provide routine and preventive services (*e.g.*, screening of new admittees for contagious disease, pap smears), inadequate facilities and equipment, and an excessive reliance on outside medical consultants and treatment facilities, particularly in light of the difficulty most prisons have in transporting inmates to such care in a consistent and timely manner.

These gross systemic deficiencies, coupled with the denial of appropriate care to specific individuals, have been challenged as violative of the Eighth Amendment's ban on cruel and unusual punishment.[14] Claims addressed to sex-based disparities in care are sometimes joined because care provided in facilities housing women is characteristically poorer than that provided men.[15]

**Dental Care.** Like general medical care, dental care in women's jails and prisons is typically marked by staffing shortages, failure to perform initial exams, delays in emergency care, and delays in or total denials of routine, preventive, and restorative care. *E.g. Dean v. Coughlin*, 623 F.Supp. 392 (S.D.N.Y. 1985), 633 F.Supp. 308 (S.D.N.Y. 1986), *vacated and remanded*, 804 F.2d 207 (2nd Cir. 1986) (Bedford Hills Correctional Facility, New York); *Todaro v. Ward*, 431 F.Supp. 1129 (S.D.N.Y. 1979), *aff'd* 565 F.2d 48 (2d Cir. 1977); *Witke v. Crowl, supra* note 9; *West v. Manson, supra* note 3; *Mitchell v. Untreiner, supra* note 14.

## The Constitutional Standards[16]

**Eighth Amendment Challenges.** Successful Eighth Amendment[17] challenges to medical care require proof of "deliberate indifference" to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97 (1976). Deliberate indifference arises when a doctor refuses to treat, when an inmate's access to a physician for diagnosis and treatment is denied or unreasonably delayed, and/or when an inmate is not provided with the treatment prescribed by a physician. *Id.* at 104-05. It can be established not only by proof of a defendant's reckless disregard for the health needs of inmates, but also by proof of denial or unreasonable delay in treatment regardless of a particular defendant's mental state. *E.g. French v. Owens*, 777 F.2d 1250, 1254 (7th Cir. 1986), *cert. denied* 107 S.Ct. 77 (1986); *Whisenant v. Yuam*, 739 F.2d 160, 164 (4th Cir. 1984); *Dean v. Coughlin*, 623 F.Supp. at 402; *Harding v. Kulhman*, 588 F.Supp. 1315, 1316 (S.D.N.Y. 1984), *aff'd* 762 F.2d 990 (2nd Cir. 1985); *Todaro v. Ward, supra*. Indeed the Eighth Amendment imposes on government an affirmative obligation "to provide persons in its custody with a medical care system that meets minimal standards of adequacy." *Wellman v. Faulkner*, 715 F.2d 269, 271 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217.

Such deprivations can be established individually (by proof, for example, that an inmate made her serious medical needs known and waited in pain until delayed treatment was provided her) and/or institutionally (by proof of repeated instances of delay or denial of

[14] *E.g. West v. Manson, supra* note 3; *Canterino v. Wilson*, 546 F.Supp. at 214-15 (rejecting claim that systemic deficiencies in Kentucky's women's prison establish "deliberate indifference" in absence of proof of denial of medical care to specific individuals); *Mitchell v. Untreiner*, 421 F.Supp. 886 (N.D. Fla. 1976); *Wright v. McCarthy, supra* note 6 (comprehensive attack claiming not only cruel and unusual punishment, but also breach of statutory and regulatory duties, and denial of equal protection); *Witke v. Crowl, supra* note 9 (characterizing the deficiencies as "so severe ... that they constitute a life-threatening situation," e.g., no infirmary, no care except through outside appointments and no appointments except in emergencies, medications dispensed by non-professionals); *Klatt v. King, supra* note 10; *Beehler v. Jeffes, supra* note 8; *Spear v. Ariyoshi, supra* note 11.

[15] *E.g. Batton v. State Government of North Carolina*, 501 F.Supp. 1173, 1177 (E.D. N.C. 1980) (rejecting claim of lack of parity based on fact Department of Correction operated hospital for state's male inmates but relied on outside contracts for services to female inmates); *Wright v. McCarthy, supra; Beehler v. Jeffes, supra; West v. Manson, supra. See also Costello v. Wainwright*, Nos. 72-109-CIV-J-S, 72-94-Civ-J-S (M.D. Fla., Interim Medical Survey Team Report, December 14, 1984)(noting the formal objections by women inmates to the health care settlement in *Costello* as not addressing "their special health care needs," describing numerous deficiencies in medical care for women and characterizing the case as "inadequate and fail[ing] to meet minimal ... standards").

[16] Federal litigation characteristically is brought under the Eighth and Fourteenth Amendments. Litigation in state courts has been necessary since *Pennhurst* if state law violations are also alleged against state defendants. This article will not address these other claims. *E.g. Wright v. McCarthy, supra* note 6 (breach of statutory and regulatory duties); *Scrape v. McCarthy, supra* (Administrative Procedure Act violation); *Whisman v. McCarthy*, No. OCV-33860 (Cal. Super. Ct., San Bernardino County, filed Aug. 29, 1984) (pending motion for summary adjudication as to state's failure to require licensure of CIW's medical facility and failure to comply with state and department health care regulations; simliar issue successfully raised with regard to male prison in *Durggan v. McCarthy*, No. 326371 (Cal. Super. Ct., Sacramento, Order Aug. 13, 1987).

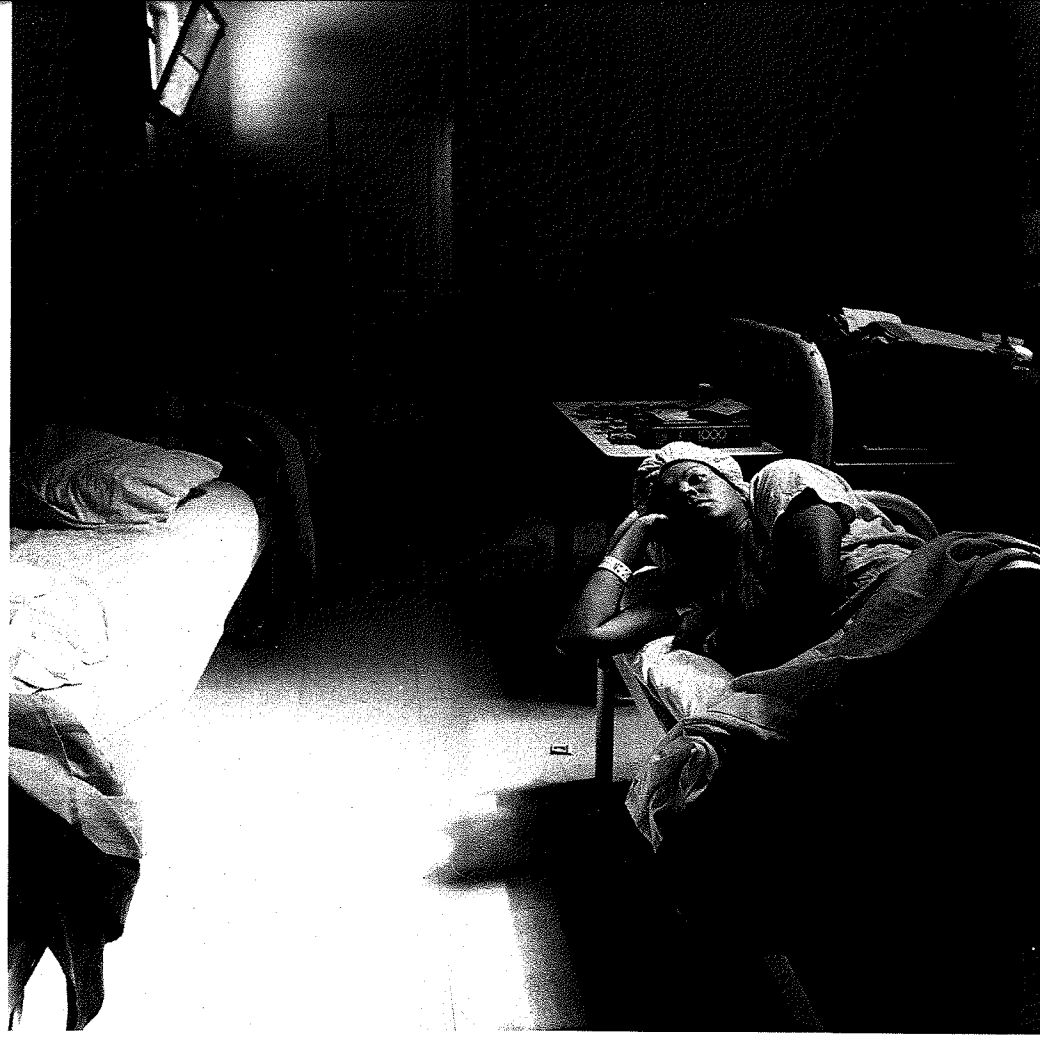
[17] Pretrial detainees have substantive rights to be free from punishment under the Due Process Clause of Fourteenth Amendment, *Bell v. Wolfish*, 441 U.S. 520, 535 and n.16 (1979), which are at least as great as the protections of the Eighth Amendment. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). Thus, Eighth Amendment standards can be used by analogy to determine the *minimum* substantive rights of a pretrial detainee under the Fourteenth Amendment. *E.g. Madden v. City of Meriden*, 602 F.Supp. 1160, 1163-64 (D.Conn. 1985).

medical care). Among the institutional failures which have been characterized as "deliberate indifference" are failures to perform initial exams, a collapse of the system for requesting routine care or "sick call," a backlog in emergency requests, a failure to keep followup appointments, a failure to provide care if inmates could not pay, entrusting care to an unqualified attending physician or staff person, dispensing of medication by unqualified personnel, inadequate numbers of professional staff, and providing care "so cursory as to amount to no treatment at all." *E.g. Ancata v. Prison Health Services*, 769 F.2d, 700, 704 (11th Cir. 1985); *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1186 (7th Cir. 1985); *French v. Owens*, 777 F.2d at 1254-55; *Wellman v. Faulkner*, 715 F.2d at 272-74; *Todaro v. Ward*, 565 F.2d at 52; *Duran v. Anaya*, 642 F.Supp. 510, 523 (D.N.M. 1986); *Medcalf v. State of Kansas*, 626 F.Supp. 1179, 1186 (D.Kan. 1986).

"Serious medical needs" are not limited to those which are life-threatening, but encompass conditions which cause or perpetuate pain, provided that the prison authorities have reason to know of such needs. *E.g. Dean v. Coughlin*, 623 F.Supp. at 401; *Todaro v. Ward*, 565 F.2d at 52. The requisite knowledge is established if the need for treatment has been determined by a physician, if the need is apparent or obvious even to a lay observer, and/or if the inmate has repeatedly notified and complained of the condition. *E.g. Ancata v. Prison Health Services*, 769 F.2d at 704; *Laaman v. Helgemoe*, 437 F.Supp. 269, 311 (D.N.H. 1977).

**Equal Protection Challenges.** Equal protection challenges to the medical care provided women prisoners have been judged by a "parity of treatment" standard. *E.g. Batton v. State Government of North Carolina*, 501 F.Supp. at 1177. The smaller size of the female inmate population which results in a greater *per capita* cost in providing medical care has been held *not* to justify disparities in that care. *E.g. Glover v. Johnson*, 478 F.Supp. at 1078; *Cantèrino v. Wilson*, 546 F.Supp. at 207, 211.

**Relief.** In those cases which have resulted in consent judgments, expansive, detailed remedial orders have been common. Typically, these orders impose the norms and principles of medical care which have been developed in non-correctional settings onto correctional facilities. Professional standards, such as those of the American Correctional Association, the National Commission on Correctional Health Care[18] and American Public Health Association, though not admitted or adjudged to be "constitutionalized," are used as guidelines for care. Treatment plans, health care teams, peer review, staffing ratios and training requirements, and formal and comprehensive protocols for examinations, treatments, recordkeeping, seclusion, restraint and the prescription, administration and monitoring of medication are among the components of care mandated.



*. . . winning is but the first, and possibly the easiest, of the hurdles to improvement in conditions.*

The *Harris v. McCarthy* settlement agreement, for example, adopted the standards of the American College of Obstetricians and Gynecologists as a working guide, adapting the ACOG guidelines to the special circumstances of a correctional setting. It established a coordinated "pregnancy-related health care" team, headed by a qualified obstetrician, to create and insure compliance with a "plan of care" for the duration of each inmate's pregnancy. Also mandated were detailed protocols for emergency response (mandating response times and responsible medical personnel), schedules for prenatal and postpartum examinations, and new policies for medical recordkeeping, laboratory tests, medical transport (requiring the least restrictive restraint consistent with security concerns), and nutrition.

The consent judgment in *West v. Manson* pertaining to mental health care[19] sets out, in 41 pages, detailed requirements as to the use of seclusion and restraint, the administration, prescription and monitoring of psychotropic medications, medical recordkeeping, transfers to state mental health facilities, and recreation for prisoners with mental health problems. In addition, it mandates a significant increase in the professional mental health staff in the in-patient mental health unit and increased coverage by psychiatrists and psychologists for the entire facility. A three-member panel of psychiatrists—all from outside the Department of Correction—is empowered to monitor compliance indefinitely.[20]

*—continued on next page*

[18]The NCCHC recently published new standards for health care services in prisons and jails to revise those originally developed by the AMA and last published in 1979 (prisons) and 1981 (jails).

[19]*West v. Manson*, No. H83-366 (D.Conn. Consent Judgment, June 1, 1987).

[20]An earlier, two year Agreement of Settlement in *West* (entered in June 1984, and now being negotiated), mandated changes in general medical and dental care and in the care of pregnant and substance abusing inmates.

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The portion of the consent order in *Klatt v. King, supra* note 10, pertaining to health care specifies in elaborate detail the requirements of initial health assessments, the policies and procedures for management of pharmaceuticals, the review of medical and dental records of incoming inmates to assure continuity of care, the sick call procedure, a prohibition on correctional officers distributing medications, the requirements for periodic review of prescriptions and treatment plans, staffing ratios, the supervision of the medical unit, components of mental health care and the duties and powers of the autonomous panel of experts (dentist, dietician, two physicians, psychologist) impaneled to make findings and additional recommendations about health care at the institution.

By comparison, the stipulated settlement agreement in *Witke v. Crowl, supra* note 8, mandates simply that medical, dental, psychiatric and psychological services be provided "in accordance with ACA standards" and that "women be provided services equal to those provided to men." The consent decree in *Spear v. Ariyoshi, supra* note 10, established a medical/mental health panel which, with representatives of Hawaii's professional medical societies, was to evaluate the medical and mental health needs at Hawaii's women's prison and develop a specific plan to address these needs, which was to be implemented by the defendants by a certain date.

In those cases which have gone to trial, courts—quite appropriately—have refused to afford prison administrators the same broad deference as is accorded in matters of prison security. While the remedy in successful litigation is often an order directing defendants to propose a remedial plan, the specificity of these plans is often, ultimately, comparable to that of the consent judgments.[21]

## Strategy and New Directions

**Experts.** In few cases are expert witnesses more essential than those challenging health care. Just as physicians cannot be expected to identify all legal issues in a legal transaction, so too lawyers must defer to physicians to evaluate the inadequacies of a health care delivery system. This fundamental fact counsels early identification of one's expert witnesses: to help identify issues prior to drafting the complaint, to help frame and respond to discovery, to be involved in trial preparation and, of course, to testify at trial. Moreover, should settlement negotiations commence, experts are invaluable. The mental health consent judgment in *West v. Manson* was negotiated in the first instance by a panel of three psychiatric experts, all of whom were paid by defendants—one appointed by plaintiffs, one by defendants, and a third (mutually agreed to by plaintiffs and defendants) appointed by the judge. The product of these three psychiatrists' efforts was an immensely detailed proposed consent judgment to which counsel for the parties needed only to add "legalese."[22] Medical school faculties and state mental health facility staffs are fertile grounds for locating eminently qualified and eager physicians and psychiatrists.

**Omnibus Case v. Multiple Cases.** When confronted by a correctional facility with multiple deficiencies—in health care, in inmate access to court, in overcrowding, in sex-based disparities in programming—one has essentially two courses for litigation: 1) bring an omnibus case addressing all issues, or 2) bring multiple cases. The former is less costly, appears on its face to be more efficient, and permits the joining of weaker claims with claims which are strong, enhancing the potential for favorable settlement of the former. This approach, however, is not without its disadvantages, especially if the case appears likely to settle. The cost- and time-based efficiencies of an omnibus case are less significant if the case ends up in settlement talks. Also, at such a point, defendants are better able to play issues off against each other in their efforts to reduce the overall cost of settlement (e.g., a medical staff person is offered at the expense of additional educational staff). Finally, the slowest common denominator dictates the pace of resolution: issues requiring immediate resolution (such as the care of substance abusing inmates and most other health care claims) are not addressed as expeditiously as they might be were they not joined with others.

On balance, one should be cautious about joining health care claims with other claims, such as claims addressed to sex-based disparities in educational and job programming and overcrowding (recognizing that some proof of medical claims will be necessarily involved in the proof of an overcrowding claim). Separate litigation is preferable in such instances.

**Monitoring and Compliance.** It has become an axiom of prison litigation that winning is but the first, and possibly the easiest, of the hurdles to improvement in conditions. Enforcement of judgments—whether they are court orders or judgments by consent—is an immense task.[23] The most effective way to insure compliance and decrease the attorney time necessary to monitor a judgment is to incorporate into the judgment the appointment of a monitoring panel or a special master, with the cost to be borne by defendants.[24] The powers and duties of this oversight body should also be specified: allowing access to *all* institutional records, all staff, and all facilities, mediating disputes as to compliance, etc. No member of the oversight body should be employed by the defendants, though the formation of wholly internal Quality Assurance Committees to monitor the day-to-day provision of health care services should also be encouraged. (Non-correctional health care facilities, of course, rely on both internal and external quality control bodies to monitor their health care services.) The task of enforcing compliance also is eased somewhat if one demands specificity in the remedial order, placing all parties on clearer notice of what is and is not required.

**New Directions.** Because many women enter the correctional system in poor health and have greater medical needs, as a rule, than male offenders, health care delivery in women's prisons and jails must become a focus for litigation in the next decade. Moreover, as the incidence of AIDS grows within the female IV drug using population, the impact on women's prisons will be dramatic. Medical care delivery systems, which are currently being stressed by a rapidly increasing population of female

[21]For example, though the Second Circuit in *Dean v. Coughlin, supra*, criticized a district court for rejecting the defendants' plan for dental care at the Bedford Hills facility in New York in favor of a more specific plan proposed by the plaintiffs, the defendants' plan, as modified and embraced by the Second Circuit, was extremely comprehensive. It required defendants to contract with a private provider of professional dental services for all of the dental care at Bedford Hills. The contract was to provide for a detailed "Plan of Care" (which included increased professional staff and operations, specific procedures to identify dental needs, methods of establishing treatment priorities, assessment examinations, a sick call system, a follow-up appointment system, an enlarged dental clinic and maintenance of detailed individual dental records for each inmate). The contractor was also to create and provide a "Policy and Procedures Manual" for Bedford Hills and to meet a set timetable for commencement of operations. 804 F.2d at 209.

[22]See *also* Janger, "Expert Negotiation Brings New Approach to Prison Litigation in Hawaii," *NPP JOURNAL*, No. 6, Winter, 1985, pp. 6-8.

[23]Perhaps the most graphic example in the women's prison context is *Glover v. Johnson*. Filed in May 1977, the initial judgment upholding plaintiffs' claims of sex-based disparity in programming was granted in 1979. 478 F.Supp. 1075 (E.D. Mich. 1979). Full compliance is still not forthcoming. The district court recently ordered the appointment of an Administrator with "full power, subject to the supervision of the Court, to contract for educational services with educational institutions necessary to achieve parity." (*slip. op.*, April 21, 1987).

[24]See *also* Sturm, "Special Masters Aid in Compliance Efforts," *NPP JOURNAL*, No. 6, Winter, 1985, pp. 9-11.

# Prisoners With AIDS in New York Live Half As Long As Those on Outside

*Julia Cade and Jan Elvin*

*AIDS is now the leading cause of death among prisoners in New York State. New York, along with New Jersey and Pennsylvania, has surpassed the rest of the country in numbers of reported AIDS cases: as of December 1987, there have been 597 cases of AIDS inside its prisons since 1981, 346 of whom have died. One hundred fifty-two have left the system, and 99 are still in custody.*

*The high numbers in New York are attributable to the large number of intravenous (IV) drug users—an estimated 250,000 people within the state. IV drug users are at high risk for the disease, and corrections officials estimate that over 60% of those incarcerated in New York prisons, and at least 40% of those in New York City jails, have IV drug use histories.*

A recently released report by the New York State Commission of Correction on prison mortality rates reveals that prisoners with AIDS in New York State live only half as long as free world persons with AIDS.[1] On closer examination, it appears that the reason for this shocking disparity may be deficiencies in the provision of medical care to prisoners. With 34% of all AIDS cases within the United States arising out of the state of New York, the state's correctional health care system has been severely taxed by the AIDS crisis.

> *"... one would not expect to find inmate survival rates to be less than half that of the general population sample and declining annually."*

"Even given the differences in the demographic profiles [of inmates versus those on the outside with the disease]," the report states, "one would not expect to find inmate survival rates to be less than half that of the general population sample and declining annually." The authors then ask, "Are these findings in any way related to the identified deficits in inmate health care resources and patient management practices found in this study?

"Current research indicates that early detection and aggressive therapy in a medical center setting followed by close monitoring by medical center-based infectious disease departments extends both the duration and quality of life for AIDS victims. What remains lacking is convincing evidence that each confirmed inmate patient receives vigorous monitoring and aggressive therapy in an appropriate setting."

The magnitude of the AIDS crisis in New York has not been matched by increased staffing or resources. This suggests that "the increased strain on limited Department of Correctional Services (DOCS) health care resources, both facility and community-based, is having a negative impact on DOCS' ability to achieve nominal results in its management of AIDS."

The average length of survival was arrived at by noting the first date that symptoms were recognized by medical and correctional personnel at the facility. It is known, however, that within a prison setting appropriate medical diagnosis and treatment often lag behind that which would be offered in the free world. Thus, this date may not accurately reflect the actual onset of the disease, partially accounting for the shorter reported survival rate of prisoners.

The results of the study would seem to indicate as well that the lives of AIDS patients who receive adequate medical care can be prolonged beyond the time in which they would die without that care.

Alvin J. Bronstein, Executive Director of the National Prison Project of the ACLU, pointed out in recent testimony before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, that the provision of medical care is a serious problem for prisoners with AIDS and an

*—continued on next page*

PROFILE OF A PRISONER WITH AIDS: According to the report, the typical AIDS inmate mortality in the New York State correctional system was an Hispanic or black, single male, 34 years of age, with a history of intravenous drug use prior to incarceration. He was born in the New York City metropolitan area, having lived in the area prior to entering the system. He was likely to have been convicted of robbery, burglary or drug-related offenses, and had been in the system an average of 19 months prior to death. He died after an average final hospital stay of 28 days.

The typical New York State female AIDS inmate mortality is also single, black or Hispanic, with a history of intravenous drug use prior to incarceration. She is 31 years of age, sentenced for homicide-related offenses, robbery, or offenses related to drugs. She served an average of 15.8 months of her sentence prior to death. She also died after an average final hospital stay of 28 days. She had an average of two children and her median number of years of education was 10. Fifty-seven percent of the cases showed evidence of tattoos at the time of autopsy. ■

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[1] *Acquired Immune Deficiency Syndrome: A Demographic Profile of New York State Inmate Mortalities, 1981-1986*, September 1987 Update, New York State Commission of Correction.

offenders, will be additionally stressed by a greatly increased demand for medical services by persons with AIDS and other immune system deficiencies. In addition, because of overcrowding, the increased space required for adequate medical and mental health care will become more difficult, but no less essential, to secure.

All areas of gross deficiencies of medical care must be challenged, particularly any lack of medical oversight for detoxifying inmates, inadequate prenatal and postpartum care, and *de jure* or *de facto* barriers to family planning and abortion services. Litigation about AIDS must focus not only on the actual medical care provided (including whether "experimental" therapies such as AZT therapy are offered) but also on the mental health care provided to women who test positive for the virus, those who have full-blown AIDS, and those who have ARC. Support groups for prisoners and their families should be urged as an essential component of necessary mental health care. Confidentiality is particularly important in this area of medical care.

Finally, there must be an increased focus on the very real disparities in the health care provided to incarcerated women as compared with that provided to men. Actual disparities—e.g., in size and competency of staff, in physical plant—are rendered more egregious because of the greater needs of women for medical care, particularly when they are in their childbearing years. ■

# Decisions in *Safley* and *O'Lone* Undo Years of Progress

*Mark J. Lopez*

Since the Supreme Court decided *Procunier v. Martinez*[1] in 1974, it has been assumed that the question of a prisoner's First Amendment rights was governed by an intermediate standard of review, requiring prison authorities to justify any restriction on the exercise of those rights. Although this standard of review was somewhat less protective than that applied in the free world, its application in the ensuing years provided significant protection to inmates in their cause for First Amendment freedom. In *Martinez*, prison officials unsuccessfully defended their policy of screening all prisoners' mail, censoring that which they found unacceptable. The First Amendment permits such restraints, held the Court, only when they "further an important or substantial governmental interest unrelated to the suppression of expression" and are "no greater than is necessary or essential to the protection of the particular governmental interest involved."[2] In what can now be considered a fateful turn of events, the Court, ruling in favor of the prisoners, did not determine to what degree the Constitution protected prisoners *per se*, but based its decision on the "consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners."[3] Thirteen years later, the Court's failure to squarely address the issue of prisoners' rights has been used by the current Supreme Court as an occasion to eviscerate the protections thought to be provided by *Martinez*, striking a terrible blow to the struggle for religious and expressive freedom for prisoners. *Turner v. Safley*.[4]

*No longer can prisoners expect the federal courts to show the sensitivity and respect for their rights that has been demonstrated in the past.*

Last term the Court visited the question of a prisoner's First Amendment rights in *Safley*, assessing those rights by a rational relation test, and clearly rejecting the higher standard announced in *Martinez* previously thought to govern prisoners' claims. Answering the question it had sidestepped in *Martinez*, the Court wrote, "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[5] Prison officials could establish a regulation's reasonableness by proving that: (1) there is a rational connection between the policy and some legitimate, content-neutral governmental interest; (2) alternative avenues allow the prisoner to exercise the right; (3) accommodation of the prisoner request does not impact significantly on prison resources, prison guards or other inmates; and (4) no obvious alternatives to the regulations exist.[6]

Applying this four-factor analysis, the Court in *Safley* held that limiting correspondence between plaintiff inmates and those at other prisons was logically connected to the state's interest in the prevention of criminal activity; thus, the content-neutral ban survived constitutional scrutiny.[7] But the same prison officials failed to prove any rational link between a restriction on inmate marriages and legitimate security and rehabilitation concerns.[8]

Only days after deciding *Safley*, the Court relied on the analysis established there in upholding a restraint on inmates' free exercise of religion. In *O'Lone v. Estate of Shabazz*,[9] the Court upheld a prison regulation that precluded prisoners who were part of a work gang detailed on assignments outside the prison from coming back at midday for Jumu'ah; these prisoners were thus denied the opportunity to attend Jumu'ah.[10] In applying the *Safley* factors, the Court gave credence to the tenuous security and rehabilitative concerns the restrictions purportedly furthered,[11] and found that, although there were no alternative means for these prisoners to attend Jumu'ah, the prisoners "retain[ed] the ability to participate in other Muslim religious ceremonies."[12]

The Court's opinions in *Safley* and *O'Lone* mark the end of an era for the supremacy of prisoners' rights over what are often arbitrary and callous restric-

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[1]416 U.S. 396 (1974).
[2]*Id.* at 413.
[3]*Id.* at 409.
[4]107 U.S. 2254 (1987).
[5]*Id.* at 2261.
[6]*Id.* at 2262.
[7]*Id.* at 2263-64.
[8]*Id.* at 2266.
[9]107 S.Ct. 2400 (1987).
[10]Jumu'ah is the Muslim religion's central and only obligatory and congregational service, which is held on Friday, the Muslim Sabbath, in the early afternoon.
[11]*Id.* at 2405-06.
[12]*Id.* at 2406.

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issue of great concern to the Prison Project.

"Despite the fact that there are established guidelines for health workers to follow to protect themselves," said Bronstein, "reports abound of prison medical staff refusing to treat ailments in which there is virtually no risk of transmission. Another frequent problem is the placement of AIDS patients in the same room or ward with prisoners who have infectious diseases.

"Disagreements in the medical establishment over proper treatment coupled with the high cost of some medications such as AZT have led to inconsistent and inadequate care for prisoners. At the same time, because there is no cure for AIDS, many prisoners seek the right to voluntarily experiment with non-FDA-approved medications and other therapies, as people with AIDS in the free world can, which raises a difficult policy question for prison officials."

Key findings of the New York State study include:

- Over half of all DOCS deaths between 1984 and 1986 have been due to AIDS;
- AIDS in New York State's correctional system is predominately a disease of males. Ninety-six percent of decedents were male;
- Ninety-five percent of inmates in the sample had a history of intravenous drug use;
- Forty-five percent of the cases were Hispanic, 43% black and 12% white. Compared to their ratio in the correctional population, Hispanics were disproportionately represented in death cases;
- Fifty-seven percent of mortalities had been in the correctional system 1-18 months; 27% for 19-36 months; 12% for 37-54 months; and 3% 4½ to six years. Two inmates had served 6½ to seven years at the time of death;
- The most prevalent opportunistic infection at time of death was Pneumoscystis Carinii Pneumonia (PCP). Fifty-four percent of cases were PCP or PCP in combination with some other opportunistic infection;
- The majority of deaths occurred at maximum security facilities. ■

tions placed on the exercise of those rights. No longer can prisoners expect the federal courts to show the sensitivity and respect for their rights that has been demonstrated in the past. Constrained by the Supreme Court's admonition to keep hands off the day-to-day operations of prisons, lower courts are now obliged to defer—except in the most abusive cases—to the judgment of prison administrators in these matters. One hopes that prison officials have gained a sensitivity to the rights of prisoners in the years between *Martinez* in 1974 and *Safley* and *O'Lone* in 1987. While this can be expected of many prison administrators, others will surely see these recent cases as an opportunity to return to the ways of the past. Proof of this is already apparent, as the cases decided in the months following *Safley* and *O'Lone* have shown.

## *The fallout from* Safley *and* O'Lone *was almost immediate.*

The fallout from *Safley* and *O'Lone* was felt almost immediately. While those decisions were pending, both the Second and Third Circuit Courts of Appeals had decided cases in favor of prisoners' rights. In *Higgins v. Burroughs*,[13] the court struck down a regulation that had prohibited an inmate from carrying his rosary beads into the prison visiting area on the grounds that it violated the prisoner's religious rights and could not be sustained as a valid security regulation. In the aftermath of *Safley* and *O'Lone*, *certiorari* was granted and the case was summarily reversed and remanded for further consideration in light of those decisions.[14] A similar fate was bestowed on the plaintiff in *Fromer v. Scully*,[15] a case involving a successful challenge by an Orthodox Jewish inmate to the "no beard" rule of the New York Department of Corrections as a violation of his right to the free exercise of religion. These cases are pending and their disposition should provide a clear indication on how those courts of appeals will attempt to balance competing individual and institutional interests in future cases involving prisoners' claims. Because of the prominence of these two courts of appeals, their decisions will unquestionably have significant ramifications for prisoners throughout the country.[16]

Several other courts of appeals have already had occasion to apply *Safley* and *O'Lone* while these cases are pending. To date the Ninth Circuit has been the most prolific. The reviews thus far are mixed, ranging from disastrous to promising. Perhaps the most distressing decision as yet is *Standing Deer v. Carlson*,[17] a case brought by Native American prisoners challenging a prison regulation that prohibited the wearing of headgear, including religious headbands, in the dining hall. A conservative panel of the Ninth Circuit Court of Appeals held that the regulation did not unconstitutionally interfere with the free exercise rights of the Native American inmates; the ban was logically connected to the legitimate penological interests of the prison in maintaining security. To justify the regulation, prison officials argued that they were responding to complaints from inmates about dirty headgear being worn into the dining facility and to threats from prisoners about taking matters into their own hands. Plaintiffs countered that the defendants had not proved that allowing inmates to wear their headbands during meals would prove disruptive and that, as a less restrictive alternative, prison officials could inspect the headbands for cleanliness. In affirming the grant of summary judgment in favor of defendants, the court totally deferred to the judgment of the prison authorities both with respect to the perceived "threat" posed by the wearing of headgear and the "burden" of inspecting them as an alternative to a total ban.[18] In the process, the court demonstrated a gross insensitivity to the rights of Native Americans and gave a clear indication of the response prisoners can expect in the Circuit when pressing First Amendment claims in the future.[19]

The Ninth Circuit is not alone in broadly interpreting *Safley* and *O'Lone*. In *Hadi v. Horn*,[20] the Seventh Circuit Court of Appeals held that cancellation of Muslim services when a Muslim chaplain was unavailable did not violate the prisoners' First Amendment rights. To add salt to the wound, the court also held that the occasional cancellation of Muslim services, even when a chaplain was available, did not violate the prisoners' rights when the chapel was needed for recreational activities. Addressing the chaplain claim first, the court was persuaded by the testimony of the prison officials that security would be jeopardized by granting inmates positions of authority as religious leaders over other inmates, and that conflicts might arise because inmates lacked the requisite religious expertise to resolve issues that arose during the meetings. The court also based its position on the concern expressed by the officials that the services might be used for gang meetings. In reaching this conclusion, the court brushed aside plaintiffs' argument that these concerns were based on pure conjecture, and in any event, could be minimized by assigning a correctional officer to supervise the meeting.[21] Addressing next the cancellation of services due to scheduling conflicts in the chapel, here again the court deferred to the authority of the prison officials: meeting the recreational needs of prisoners, with the concomitant boost to morale and resultant enhancement of security, was a legitimate governmental interest served by the practice.[22] In response to the inmates' plea that the defendants made no efforts to reschedule the services or find an alternative location, the court opined that the plaintiffs failed to show that

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[13]816 F.2d 119 (3rd Cir. 1987).

[14]108 S.Ct. 54 (1987). On remand from the Supreme Court, the Court of Appeals sent the case back to the district court for further findings. 834 F.2d 76 (3rd Cir. 1987). Significantly, the Court stated in dictum plaintiffs' "view" that "no difference in result w[ill] obtain" under the new standard. *Id.* at 77.

[15]108 S.Ct. 254 (1987), reversing 817 F.2d 227 (2nd Cir. 1987).

[16]Relying on *Safley v. Turner*, the Second Circuit has sustained a prison directive that allowed the inspection of inmates' outgoing mail on the grounds that it furthered a legitimate governmental interest in preventing inmates from committing fraud on business and from obligating funds beyond their needs. *Rodriguez v. James*, 823 F.2d 8 (2nd Cir. 1987). Although it would seem from the court's discussion that it gave short shrift to the inmates' claims and too easily accepted the prison officials' rationale for the regulation, in fact, this case provides little guidance as to how the Second Circuit will rule in cases involving more fundamental First Amendment rights such as that in issue in *Fromer v. Scully*, currently pending on remand from the Supreme Court. 817 F.2d 227. In upholding the regulation in *James* the Court applied the *Safley* factors woodenly and intimated that the case might be different if the content of the letter was either "personal" or "political," as opposed to "commercial." 823 F.2d at 11.

[17]831 F.2d 1525 (9th Cir. 1987).

[18]*Id.* at 1528-29.

[19]*See also, Allen v. Toombs*, 827 F.2d 563 (9th Cir. 1987): Policy prohibiting "close-custody" inmates from having access to a sweat lodge is upheld as reasonably related to the security concerns of prison authorities. The court also upheld regulation prohibiting inmate "pipe bearers" (spiritual leader) from conducting ceremony for inmates in segregation when no outside "pipe bearer" was available. *Accord, McCabe v. Arave*, 827 F.2d 634 (9th Cir. 1987): Idaho prison regulation prohibiting group workshop and study by "close custody prisoners held constitutional." But the same prison officials failed to justify its refusal to allow religious literature advocating racial purity to be stored in the chapel library where other religious literature was permitted to be stored. *See also, McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987), noting in reversal of grant of summary judgment in favor of defendants in challenge to prison officials' refusal to provide Kosher diet, that inmates have "the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *Id.* at 198.

[20]830 F.2d 779 (7th Cir. 1987).

[21]*Id.* at 784-86.

[22]*Id.* at 787-88.

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these were reasonable alternatives.[23]

The deference shown by the courts to prison officials in these cases seriously threatens the existence of individual rights in prison. This is cause for earnest concern. Fortunately, not all the post-*Safley* decisions have taken such a narrow view of its application to prisoner rights. The most notable of these cases involve censorship of prisoner mail. The Courts of Appeals for the Third, Eighth and District of Columbia Circuits have declined invitations to extend the rational relation test established in *Safley* to attempts by prison officials to censor inmate mail and publications. The leading case in this respect is *Abbott v. Meese*.[24]

In *Abbott*, federal prisoners, represented by the National Prison Project, challenged the Bureau of Prison's regulations governing censorship of inmate publications. Distinguishing *Safley* on the grounds that the regulation there was content-neutral and did not affect the rights of a non-prisoner, the court held that the more permissive *Martinez* standard,[25] and not the rational basis test established in *Safley*, applied to the censorship of inmate publications. Since the district court did not apply the *Martinez* test, the decision was reversed and remanded for application of the correct legal standard. A similar regulation enforced by Missouri correctional officials has also been held subject to the rigors of the *Martinez* standard. *Valiant-Bey v. Morris*.[26] Finally, in *Brooks v. Adolina*,[27] a case involving a somewhat different kind of censorship, the court held that prison officials may not punish inmates for derogatory statements about prison officials made in a letter to an outsider even if the same statements made orally to prison staff would be grounds for punishment. Here as in *Abbott*, the court expressly rejected defendants' argument that the case was governed by *Safley*, and not *Martinez*.[28]

In spite of these developments in the area of prison censorship, it would seem that in one blow the Supreme Court's decisions in *Safley* and *O'Lone* have laid the groundwork for undoing years of progress in the struggle for prisoners' rights. The Court has cleared the way for lower courts to close their doors to prisoners. Many would applaud this as a long time in coming. Others, especially prisoners, brace for the imminent assault on the few constitutional freedoms they are allowed. In the end, we can only hope that the blow does not strike so heavily that it crushes what we believe are the last vestiges of dignity and self-respect in prison.[29] ■

[23]*Id.* at 788. *But compare, Jackson v. Elrod*, 671 F.Supp. 1508 (N.D. Ill. 1987) (applying *Safley* factors, finding that county jail officials failed to justify total ban on receipt of hardcover books).
[24]*Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987).
[25]*Id.* at 1170, *quoting Procunier v. Martinez*, 416 U.S. at 413 (discussed at the outset of this article).
[26]829 F.2d 1441, 1443 (8th Cir. 1987).
[27]826 F.2d 1266 (3rd Cir. 1977).
[28]*Id.* at 1268.

[29]The National Prison Project has recently filed a lawsuit challenging the policy of the Idaho Department of Corrections prohibiting the growing of beards. The plaintiff, an Orthodox Jew, contends that the prohibition interferes with the free exercise of his religion and is not supported by a legitimate penological justification. The defendants contend that the policy furthers its interest in being able to easily identify inmates in the event of their escape. The case is styled *Carberry v. Murphy*, Civ. No. 87-1249, and is currently pending in the federal district court in Boise, Idaho.

# Critics Urge Caution in Interpreting Justice Department Study

*Russ Immarigeon*

*In polls, you have to know what questions are asked and how they're being asked.*
Ronald Reagan
President, The United States of America[1]

*If people do not understand a process to an adequate degree, their advice is not likely to be of value.*
Leslie T. Wilkins
Research Professor Emeritus
State University of New York, Albany[2]

The U.S. Bureau of Justice Statistics (BJS) released a controversial report this past November that ostensibly shows strong public support for increased levels of incarceration in the United States. As part of an apparent effort to make the study's findings part of criminal justice lore, BJS also convened a two-day conference, held in Ann Arbor, Michigan, to disseminate the results of this study to policymakers and practitioners across the land.

However, several criminal justice practitioners and researchers argue that different methods of measuring public opinion about the use of imprisonment would produce different results. Significantly, they suggest, in the words of one researcher, that "it's too premature to use (the study) as a basis for policy."[3]

The BJS-funded study ignores recent advances in assessing public opinion about crime and punishment issues that increasingly assume people may change or shift their answers to survey questions if they are given information which provided them with a stronger empirical basis for making their decision. In fact, the study's principle investigators, constricted by contractual arrangements with BJS and by limitations characteristic of telephone interviewing techniques, made what one of them called a "hard choice" to *not* provide respondents with additional information about alternative penalties or sanction costs.

Recent changes in public opinion polling hold significant potential for reducing the misuse of survey data for myopic political ends. In particular, educating the general public about the comparative costs and potential advantages of various alternative criminal sentencing options, provides an opportunity for alternatives to imprisonment to emerge as the widely accepted penalty of first choice, especially for property and nonviolent offenders.[4]

Criminologists Douglas R. Thomson and Anthony J. Ragona recently identified serious flaws in traditional opinion surveys that find public dissatisfaction with perceived judicial leniency in criminal sentencing. "Conventional assessments of public attitudes toward sentencing are deficient in two respects," Thomson and Ragona argue. "First, they do not simulate the decision-making task facing judges. Second, they do not allow citizens to consider the relative fiscal

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[1]Associated Press, "Transcript of Interview with President Reagan," *The Washington Post*, December 4, 1987, p.A12.
[2]Leslie T. Wilkins, *Consumerist Criminology*, Totowa, NJ: Barnes & Noble Books, 1984, p.8.

[3]Telephone interview with Dr. Alfred Blumstein, Dean of the School of Urban and Public Affairs, Carnegie-Mellon University, February 8, 1988.
[4]Some significant movement is already being made in this regard. An editorial in *The Fayetteville Observer* this past December urged North Carolina policymakers to take "a hard look at the whole notion of imprisonment as a punishment of first resort for nonviolent criminals." Faced with federal court intervention because of prison overcrowding, the paper argued that North Carolina "should not have to adopt statutes mandating the release of nonviolent criminals to relieve overcrowding; they shouldn't be there in the first place." As a final note, the paper further argued that "alternative sentencing should not be regarded as an experiment; it should be the norm."

*Perceptions of judicial leniency ... may belie the fact that judges are handing out increasingly stiffer sentences.*

costs of current and alternative sentencing practices."[5]

Other arguments can also be made against conventional surveys. Perceptions of judicial leniency, for example, may belie the fact that judges are handing out increasingly stiffer sentences. Moreover, public perceptions of judicial leniency may be based on a misunderstanding of how legislation determines the imposition and nature of criminal sentences. The "truth in sentencing" debate, for instance, suggests that the public is being deceived because an offender sentenced to a long prison term is released after a comparatively short stay in "stir." Generally omitted from this debate is discussion of how indeterminate and determinate sentences are structured, the purpose and process of parole decision-making, and operational realities of court, defense, prosecutorial, probation, parole and correctional agencies. Deception rarely has anything to do with it.

### The Bowling Green Study

On November 8, 1987, a BJS news release announced that "Americans overwhelmingly support incarceration as the most appropriate punishment for criminals." Moreover, BJS further claimed that "the public wants long prison sentences for most crimes, with other sanctions for minor infractions of the new law or as add-ons to imprisonment."

BJS' announcement was based on a study of a representative sample of 1,920 adults who were interviewed about their attitudes toward punishment for criminal offenders in a national telephone survey conducted between August and October 1987 by interviewers at Bowling Green State University's Population and Society Research Center. Eight crime vignettes were read to each person interviewed. Each vignette included information about crime type, amount of harm or injury, and offender and victim characteristics. Each person interviewed was then asked his or her opinion about offense seriousness, the type and amount of punishment the offender should receive, and the reasons why they selected particular punishments.

Joseph E. Jacoby and Christopher S. Dunn, the study's principal investigators, found that 71% of those surveyed said that imprisonment was part of an appropriate punishment, and only 17% of the respondents mentioned probation as the most severe sanction. Fines and restitution were included even less often. Respondents' sanction or choice varied widely according to the type of offense and amount of harm resulting from the offense. "No alternative to imprisonment was favored over imprisonment as the most severe penalty for any offense," the study found.

While respondents connected length of imprisonment with crime severity, they disagreed about the appropriate length of incarceration for specific offenses. Moreover, and perhaps most significantly, Jacoby and Dunn found that retribution wasn't the predominant justification given for punishment. "Our respondents claim," they say, "that many other purposes of punishment—deterrence, boundary setting, rehabilitation, incapacitation, morality—are more important than retribution."[6]

### What's Wrong with the Bowling Green Study

Interviews with research criminologists and criminal justice practitioners suggest a number of significant problems with the Bowling Green study. Foremost among the study's problems are: a peculiar sense that its findings are surprising; its failure to ask respondents an adequate range of questions or provide them with sufficient information to make well-grounded judgments; its failure to place their analysis of the study's findings in the context of related research; its failure to consider the policy and fiscal implications of the study's findings; and the potential for incomplete interpretation or premature application of the study's findings for immediate policy purposes.

*Few studies have assessed a firm picture of public opinion, or how it influences public policy.*

### Are the Results Surprising?

Few studies have assessed a firm picture of public opinion, or how it influences public policy. Public interest in increasing criminal penalties, for instance, may result from the general impression that courts have been lenient with criminal offenders. If given the opportunity to learn about actual court practices, would public opinion change? And how do policymakers respond to findings from either of these situations?

The findings of the Bowling Green study fit well with a knee-jerk, "get tough" approach toward criminal sanctions, but these results are not themselves surprising, especially when one considers what questions respondents were asked.

Francis T. Cullen, a University of Cincinnati criminologist who has written widely on crime, punishment and public opinion, observes that "the public's clear tendency to favor prison terms reflects their understanding that prison equals punishment, whereas probation or fines mean that offenders escape punishment." He further suggests that politicians—liberals as well as conservatives—promote the prison equals punishment equation.

In this context, Cullen says "it is to be anticipated that the first reaction of most citizens is to favor throwing offenders in jail." Thus, one wonders why the study's authors claim so boldly that "a major finding of the survey is the degree to which respondents favor imprisonment as a punishment relative to its actual use by the criminal justice system."[7]

### Consider the Questions Asked

"The way questions are asked," David L. Bazelon, the former chief judge of the United States Court of Appeals for the District of Columbia, recently wrote, "frequently has a lot to do with how they are answered."[8] The Bowling Green study appears to have placed more emphasis on developing different crime scenarios than on designing questions to get a more consistent picture of respondents' feelings about how the

[5]Douglas R. Thomson and Anthony J. Ragona, "Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions," *Crime & Delinquency*, 33(3): July 1987, p.337.

[6]Joseph E. Jacoby and Christopher S. Dunn, National Survey on Punishment for Criminal Offenders: Executive Summary, Bowling Green, OH: Bowling Green State University, November 1987. A copy of this report can be obtained from the National Criminal Justice Reference Service (NCJRS), P.O. Box 6000, Rockville, MD 20850, 301/251-5500 or 800/732-3277 (for places other than Alaska, Maryland or Washington, D.C.). Other publications may result from this study. Jacoby and Dunn are, as this article is being written in early February, negotiating with BJS for a contract to produce three additional products stemming from their study: a brief statistical bulletin covering the main findings of the study, an edited volume of the papers and proceedings of the Ann Arbor conference, and a monograph consisting of a vastly expanded version of the earlier statistical bulletin which would include a history of public opinion research on crime and punishment issues.

[7]Christopher S. Dunn and Stephen A. Cernovich, "National Survey on Punishment for Criminal Offenses: Comparisons with Other Punishment Indicators," Bowling Green, OH: Bowling Green State University, November 1987, p.2.

[8]David L. Bazelon, *Questioning Authority: Justice and Criminal Law*, New York, NY: Alfred A. Knopf, 1988, p.213.

*"The way questions are asked frequently has a lot to do with how they are answered," says former Chief Judge David L. Bazelon.*

criminal justice system should respond to criminal offending. Apparently, interviewers only asked respondents their general thoughts about how serious particular offenses were, the type and amount of punishment specific offenders should receive, and why they chose particular penalties. No more detailed descriptions of what questions were asked is given, and no information is provided offering respondents a range of sanction possibilities from which to choose.

### What About Other Research Findings?

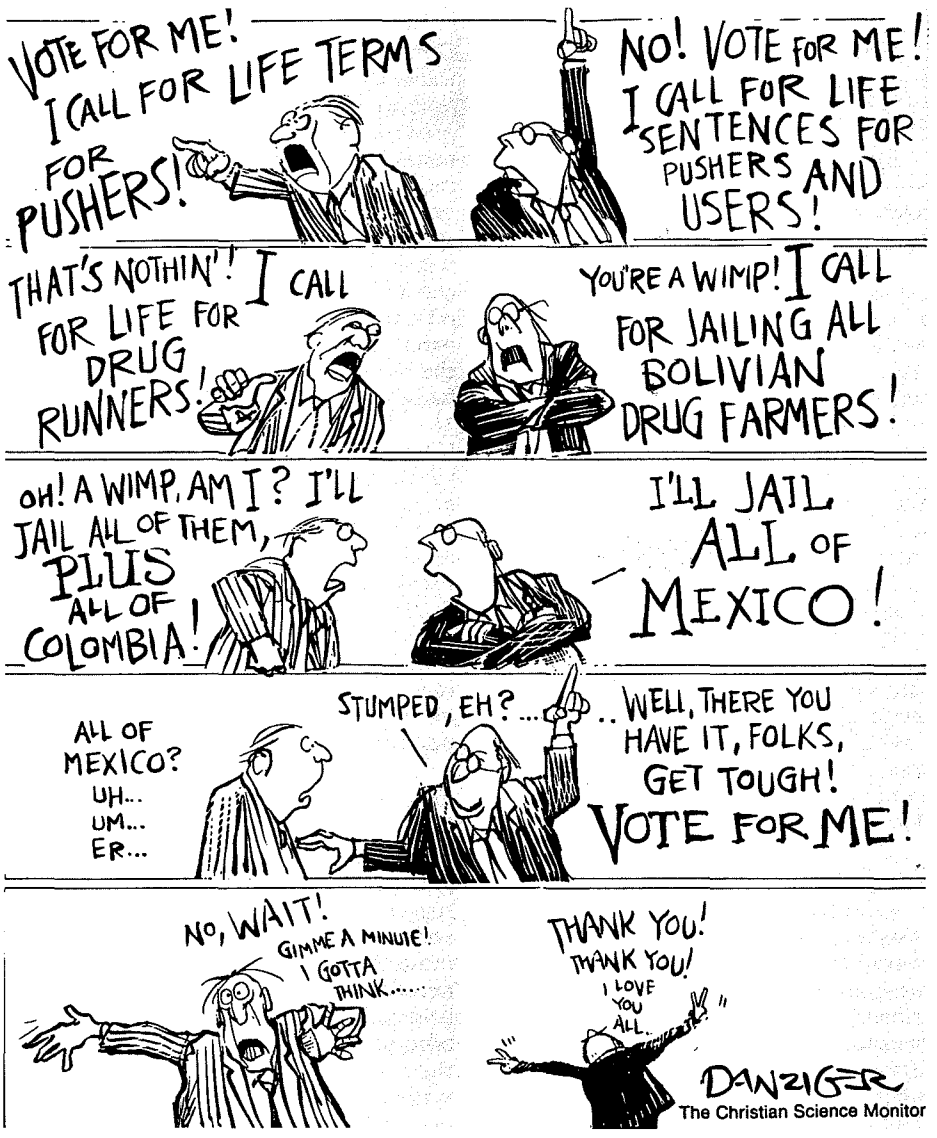
Overall, the study does offer some balance to its unnecessarily hard pronouncements about apparent public preference for imprisonment. In particular, the study observes a significant lack of desire for retribution by its respondents. Unfortunately, analysis of this data has so far failed to place this finding in the context of other public opinion research. Specifically, studies which probe more deeply into what the public wants from the criminal justice system suggest that citizens show strong support for alternatives to incarceration when they are informed about what these sanctions can do or what imprisonment costs because, underneath it all, they also show strong support for both rehabilitation and restitution.

### Failure to Examine Study's Implications

"Everyone agrees that you can't translate (the study's findings) directly into prison sentences," researcher Jacoby told the *NPP JOURNAL*. In fact, Jacoby wonders what can be done, as he put it, "without doubling, tripling or quadrupling the prison system."

Alfred Blumstein, Dean of the College of Urban and Public Affairs at Carnegie-Mellon University, argues that "policy shouldn't deal simply with public perceptions." Policymakers need to examine, he further maintains, constraints such as the availability of money and capacity to provide sufficient sanction resources.

Steve Gottfredson, a Temple University criminologist who conducted a public and policymaker opinion survey about correctional issues for the U.S. National Institute of Justice several years ago, is encouraged that the study's respondents suggested that retribution was




the least desirable goal of sentencing criminal offenders. However, he also observes that "the general public has a poor understanding of what prisons do, but they seem to have a good understanding of what they want them to do."

In such a context, wherein the survey's respondents are left uninformed about all available choices and the implications of choosing from a limited range of sanctions, to what extent can these findings accurately be applied to a reality-based policy debate?

### A Cautionary Note on Using the Study for Public Policy

At the Ann Arbor conference, Blumstein urged caution in the interpretation and use of the study's findings. "People don't have an anchor in reality," he argued, observing that when people are asked what they think is an appropriate punishment for a specific crime they generally give a response that is two to four times the length of what an offender would actually serve.[9]

People frequently form their opinions of appropriate punishments, Blumstein says, from the headlines or lead paragraphs in newspaper articles. Often these sources of information are wrong or misleading, especially when they emphasize the maximum sentence an offender *could* receive. Time served statistics consistently show that an offender rarely serves the maximum sentence possible for a given conviction.

"The basic problem is one of interpretation," Gottfredson adds. "I'm not yet convinced that the public knows what it truly means to be sentenced to prison for some time."

### Bowling Green Responds to Critics

Jacoby and Dunn, the Bowling

[9]For more information on this perspective, see Alfred Blumstein and Jacqueline Cohen, "Sentencing of Convicted Offenders: An Analysis of the Public's View," Law and Society Review, 14(2): 223-261, Winter 1980.

Green researchers, acknowledge some of the same shortcomings mentioned by the study's critics. "We are aware," Jacoby told the *NPP JOURNAL*, "that a large proportion of respondents would probably choose alternative scenarios if we presented them." The study, he says, is only a first step. "The primary thing we didn't do," he adds, "is offer some alternative scenarios, in particular intensive supervision."

While the study finds, in Jacoby's words, that the public is "not fond" of traditional probation, he also observes that the public is not aware of the studies showing the positive results of real-world alternatives to incarceration.

**Conclusion**

The Bowling Green study's impact on imprisonment policies is uncertain at this point, primarily because its findings have been in the public domain for only a short period of time. These same findings, however, could become the basis for inappropriate policy decisions, particularly in the absence of a proactive response to the findings and how they are used. While some attention should be directed toward inadequacies with the study's approach cited in this article, more energy must be centered on how BJS' interest in this study fits in with other Reagan administration criminal justice policies and initiatives.

Repressive components of the Reagan administration's approach toward criminal justice have included attacks on the exclusionary rule, nominations of Supreme Court candidates who support the death penalty, coordination of federal support for accelerating state prison construction, as well as support for private prisons as a method of assuring that more penal facilities be built. Reagan-inspired policies also include bail practices (under the Bail Reform Act of 1984) that, according to one observer, put the United States in the same punitive league as Chile and South Africa by allowing "the indeterminate detention of people not convicted of a crime."[10]

The administration's criminal justice policies have only recently reached full Orwellian overtones, however. In the past few years, for instance, agencies of the U.S. Department of Justice have claimed, in general, that: crime causes poverty; nearly everyone, in what is truly a land of opportunity, will become a victim; and imprisonment is the most economical method of handling criminal offenders. Each of these statements serves as a salvo for the broader administration emphasis on imprisonment as the primary response to criminal behavior. As things stand now, BJS' response to the Bowling Green study suggests that the administration sees apparent strong public support for imprisonment as the glue that holds these separate criminal justice initiatives together as a single, ideological package.

In the end, BJS and its critics agree that too little information is disseminated to the public about the criminal justice system's operations and procedures. They disagree, however, about what types of information should be emphasized and the relationship between public opinion and public policy.

Joseph M. Bessette, BJS' deputy director for data analysis, told the Ann Arbor conference attendees that "the multiplicity of decision-makers, the huge number of discrete cases, and the passage of time combine to generate enormous information costs that create barriers to public knowledge of and impact upon punishment policy." However, he also argued that "aggressive and public-spirited political leadership that draws upon reliable aggregate statistics on punishment and a detailed understanding of local practices and policies can do much to form an educated citizenry capable of directing crime and punishment policy in a responsible and just way."[11]

Bessette places the burden of blame on criminal justice leaders for not responding adequately to what he feels is an undisputed public preference for increased use of imprisonment as social policy. However, others, like Stephanie Bass, executive director of the North Carolina Center on Crime and Punishment, distrust studies which "leave unasked all the questions about what prisons actually do. The things," she says, "that people in the field may actually know they don't do.

"Alternatives to incarceration are burgeoning in America," Bass observes, "but the study doesn't operate in this reality. The study doesn't do a fair job of explaining what alternatives to prison actually are so that people can make an informed choice." She also shares Blumstein's concern that policy-relevant information about the costs of different policy approaches, especially in the context of scarce prison space, has not been included in the study.

In the end, the BJS-Bowling Green study must be placed in the larger context of actual sentencing and prison practices and the findings of other empirical investigations of public opinion.

"In terms of policy responses to public attitudes about punishment," British researcher Mike Hough told the Ann Arbor conference, "perhaps the clearest thing to emerge [from his review of public opinion research] is the Protean nature of opinion. People's views about the adequacy of sentencing differs across crime categories. When asked about specific sentences, their views shift with the amount of information they are provided about the crime. It is equally clear that there is widespread dissatisfaction with sentencing practice, and this threatens to erode popular confidence in the criminal justice system. It is far from clear, however, that the response entails adjustments to sentencing policy. Even, or especially, those who argue that the weight of public opinion is the best guide to the equity of sentencing must accept the need for public opinion to be informed before it can be trusted." ■

[10]Martin Garbus, "Detention U.S.A.," *The Nation*, January 30, 1988, p.113.

[11]Joseph M. Bessette, "Public Opinion, Politics, and Punishment," Washington, D.C.: U.S. Department of Justice, November 1987, p.26.

# Md. County Sued By NPP, Local ACLU, Agrees to Improve Jail

On January 25, two days before trial was scheduled to begin, the National Prison Project and the Maryland ACLU reached an interim agreement with Wicomico County Jail officials to relieve crowding and to improve fire safety, sanitation, plumbing, and medical care at the Maryland Eastern Shore facility.

The agreement provides that the county will reduce the jail population by establishing a pretrial release program designed to divert low-risk inmates from jail to various forms of bail release.

According to Claudia Wright, National Prison Project attorney handling the case, the ACLU and the NPP were appointed by the United States District Court in Baltimore to represent plaintiffs who had filed over 20 individual lawsuits complaining of the "atrocious conditions" at the jail.

"We found their complaints to be well-founded," said Wright. "Our experts were prepared to testify that the jail should be closed due to imminent health hazards. We believe this settlement will protect the prisoners by reducing population and improving conditions more quickly than the court processes could act, until the newly constructed jail is opened later this year. But we will be returning to the jail prior

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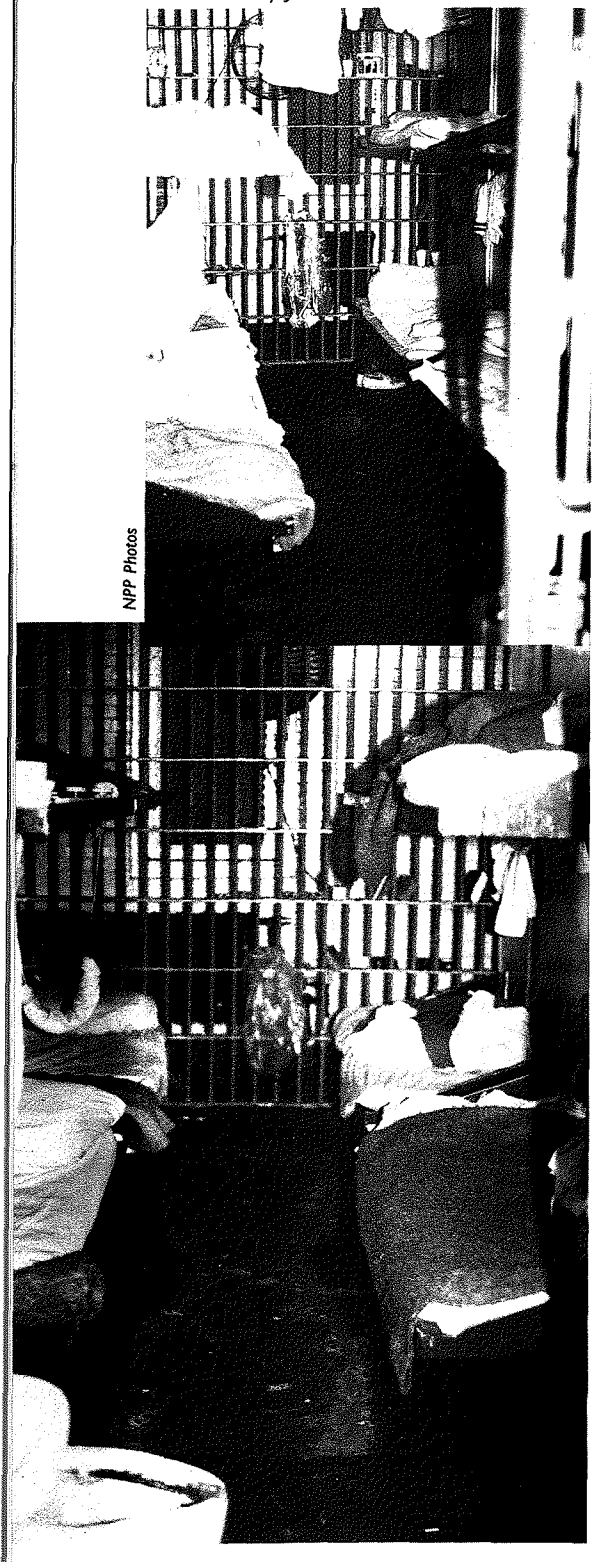
to March 1 to review the improvements to assure the safety of the prisoners."

The lawsuit claimed that the "unsafe, unsanitary and overcrowded conditions of this jail, as well as the risk of fire, demonstrated the likelihood of irreparable harm to the plaintiffs."

*The settlement agreement in* Hendrickson *provides for a reduction of population to ease overcrowded conditions such as these at the Wicomico County Jail.*



NPP Photos

The ACLU complaint alleged the following:

- Prisoners are housed at least eight men to a 10x20 foot cell. On the west side of the floor, three cells house prisoners who are never allowed out of their cells for recreation or exercise and who must eat all meals inside the cell. "Roaches and other unidentified bugs flourish in the filth";
- There is no light whatsoever in the cellblock at night, and light is dim and inadequate during the day;
- The "stench of human waste . . . is overwhelming. . . ." Bodies are crowded together in incredible filth, and noise is deafening;
- Guards are not stationed in the cellblock, but must be summoned by banging on the steel bars, adding to the noise;
- A "shocking" risk of fire exists in the jail. "The facility [is] a virtual tinderbox. . . . The design of the building which includes heavy, manually locked cell bars and steel doors, barriers to supervision of the prisoners, and the lack of feasible routes of egress ensures that if a fire occurs, all will surely perish."

The agreement calls for plaintiffs' lawyers to inspect the Detention Center prior to March 1, 1988 to insure compliance with the terms. A final agreement will be drafted at that point, provided compliance is acceptable. The case is being handled by Claudia Wright, ACLU National Prison Project Associate Director, and Susan Goering, Maryland ACLU Legal Director. ■

# For the Record

■ A National Conference on Private Corrections will be held May 22-24 in Lexington, Kentucky. Co-sponsored by the Council of State Government and the Department of Correctional Services at Eastern Kentucky University, the conference will address legal and ethical issues, the politics of privatization, contracting, and evaluation. Speakers include Edward I. Koren, a staff attorney with the National Prison Project, and Tom Beasley of the Corrections Corporation of America. For more information about the conference contact the Department of Correctional Services, Eastern Kentucky University, 202 Perkins, Richmond, KY 40475, 606/622-1497.

■ A recent report issued by the National Institute of Justice (NIJ) claiming that locking up more offenders in prison will save money is based on a "selective use of information," according to a new analysis by The Sentencing Project of Washington, D.C.

The Sentencing Project's analysis examines the claims of Edwin W. Zedlewski of NIJ that the societal costs saved through reduced crimes and criminal justice expenditures outweigh the massive costs of prison construction and operation. The analysis criticizes Zedlewski's use of a RAND Corporation study which contended that prisoners in three states committed an average of 187 crimes a year. According to The Sentencing Project, the use of the study is misleading because:

- Prisoners who report they committed 187 crimes a year are not typical of all offenders, since the ones who commit the most crimes are most likely to be caught and imprisoned. Therefore, there is no reason to assume, as Zedlewski does, that there is an endless pool of offenders committing 187 crimes a year who could be imprisoned;
- Incarcerating one offender who commits 187 crimes a year will not necessarily result in 187 fewer crimes being

committed since many crimes are committed by groups, and new potential offenders will be recruited to the group;

- Offenders who are imprisoned may become "hardened" by the prison experience or face societal prejudices upon release, and therefore commit more than their "average" number of crimes.

The Sentencing Project also questioned the crime control savings cited by Zedlewski, including such items as commercial security, individual firearms, and guard dogs. Even if crime rates do go down, societal spending on these items may not decrease, since spending on security devices often is a function of people's fear and "perception" of crime, rather than actual crime rates.

The Sentencing Project called for a "more comprehensive examination" of these issues, including alternative policies such as job creation or expanded substance abuse programs.

The Sentencing Project is a nonprofit organization which promotes the development of alternatives to incarceration.

For a copy of The Sentencing Project's analysis, "Does Building More Prisons Save Money?," contact The Sentencing Project, 1156 15th Street N.W., Suite 520, Washington, D.C. 20005; 202/463-8348.

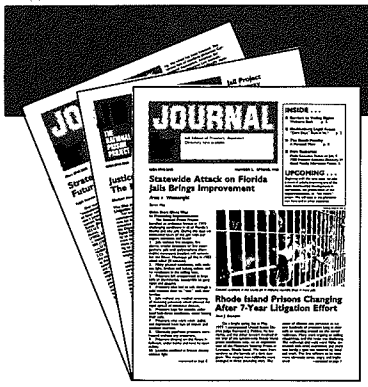
■ The National Sheriffs' Association has received a grant from the Bureau of Justice Assistance to develop a technical assistance program to aid county and local criminal justice agencies in developing and implementing stress management services for their departments.

NSA's project will result in the development of a monograph detailing all aspects of establishing and maintaining stress management programs as well as a model first-line supervisor's training curriculum addressing appropriate methods of identifying and relieving job-related stress.

A demonstration training workshop is scheduled for NSA's Annual Conference in Louisville, KY, June 19-24, to introduce the monograph and the training curriculum. These materials will be disseminated to state sheriffs' associations, police chiefs' associations, and criminal justice training academies at that time.

For further information on this project, please contact Anna Laszlo, Project Director, NSA, 703/836-7827 or 1-800-424-7827.

# PUBLICATIONS




**The National Prison Project *JOURNAL,*** $20/yr. $2/yr. to prisoners.

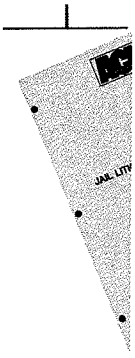
**The Prisoners' Assistance Directory,** the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

**Offender Rights Litigation: Historical and Future Developments.** A book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). Traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (many case citations). 24 pages, $2.50 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 only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia). Periodically updated. $3 prepaid from NPP.

**Bibliography of Women in Prison Issues.** A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $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, $15 prepaid from NPP.



The **Jail Litigation Status Report** gives a state-by-state listing of cases involving jail conditions in both federal and state courts. The **Report** covers unpublished opinions, consent decrees and cases in progress as well as published decisions. The **Report** is the first nation-wide compilation of litigation involving jails. It will be updated regularly by the National Jail Project. 1st Edition, published September 1985. $15 prepaid from NJP.

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# HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since October 1, 1987. Further details of any of the listed cases may be obtained by writing the Project.

**Abbott v. Meese**—This is the national class action which challenges the mail and literature policies of the Federal Bureau of Prisons. The court of appeals denied the government's petition for rehearing on the prisoner correspondence issue, and all proceedings were stayed by the district court until the Solicitor General determines whether or not a petition for *certiorari* will be filed. If a petition is filed, the district court will wait for the Supreme Court to take action.

**Cody v. Hillard**—This suit challenges conditions at the South Dakota State Penitentiary. In October, the Eighth Circuit Court reversed the trial court order against overcrowding, with three judges dissenting from the decision. The Prison Project filed a petition for *certiorari* on January 4.

**Epps v. Martin**—This case challenges conditions at North Carolina's Craggy State Prison. The district court issued approval of a settlement which provides for improvements in fire safety, ventilation, heating, medical and mental health care, and a reduction of triple-bunking and overall overcrowding. Plaintiffs are now monitoring overcrowding.

**Palmigiano v. DePrete**—This case challenges conditions in the Rhode Island State Prison system. In October a modified order was entered establishing new population limits for the Intake Center, with the limits going down on January 1, 1988 and April 1, 1988. At that time, defendants are required to produce a long-range plan for dealing with overcrowding.

**Phillips v. Bryan**—This is a conditions case at Nevada's maximum security prison. The consent decree on all issues which the parties agreed to in September was given to plaintiffs for review and granted preliminary approval by the court in October.

**U.S. v. Michigan/Knop v. Johnson**—This is a statewide Michigan prison conditions case. In *Knop*, plaintiffs filed an objection to defendants' remedial plan. Our motion for reconsideration on the issue of segregation in the dining halls was denied by the court. In *U.S. v. Michigan*, defendants filed an appeal from the litigating amicus ruling. Defendants' motion to modify the mental health requirements was defeated through the efforts of amicus.

**Carberry v. Murphy**—In this new case, we are challenging the "no beard" rule of the Idaho Department of Corrections as infringing upon the free exercise of the rights of those inmates whose religious beliefs forbid them to shave. In December, the district court denied plaintiffs' motion for preliminary injunction.

**Anderson v. Orr**—The National Prison Project became co-counsel in an on-going case challenging conditions at the Westville Correctional Center in Westville, Indiana. Our efforts will be directed primarily at improving the quality of medical and psychiatric care.

**Maryland Jails**—The Prison Project, along with the Maryland ACLU, filed suit against three jails in Maryland's Eastern Shore. *Hendrickson v. Welch* requests closure of the Wicomico County Jail and seeks alternative placement of inmates until a new jail, now under construction, is completed. *Macer v. DiNisio* seeks relief for overcrowding of and unconstitutional conditions at the Talbot County Jail, with families and friends of inmates joined as a second plaintiff class. *Dotson v. Satterfield* is a challenge to overcrowded and unconstitutional conditions at the Dorchester County Jail, with a special focus on First Amendment rights and receipt of publications. An interim agreement was reached in *Hendrickson* on January 25, two days before trial was to begin, which provides for a reduction of population by establishing a pretrial release program.

**Tillery v. Owens**—This new case entered against the old Western Penitentiary in Pittsburgh, Pennsylvania (now known as the State Correctional Institution at Pittsburgh, or SCIP) challenges double-celling practices, environmental conditions and improper housing of mentally ill inmates, among other issues. The original complaint was filed *pro se* and Legal Services lawyers were assigned to the case. We have since filed an amended complaint. ■

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