THE NATIONAL PRISON PROJECT

JOURNAL

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Supreme Court Agrees to Hear Brutality Case

BY ALVIN J. BRONSTEIN

On April 15, 1991, the U.S. Supreme Court granted a *pro se* petition for writ of *certiorari* filed by Keith J. Hudson, a Louisiana state prisoner. On April 29, 1991, the Court appointed Alvin J. Bronstein, executive director of the American Civil Liberties Union's National Prison Project, to serve as counsel for Hudson.

Summary of the Lower Court Opinions

Hudson, a prisoner at the Louisiana State Penitentiary in Angola, Louisiana filed a *pro se* complaint in the U.S. District Court, Middle District of Louisiana, against corrections officers Jack McMillian, Marvin Woods and Authur Mezo. Hudson alleged that while in restraints, he was beaten about the face and body by officers McMillian and Woods. Hudson further alleged that officer Mezo, a lieutenant, stood by while the other two officers engaged in the beating.

On March 10, 1987, trial was held before a U.S. Magistrate who found that on October 30, 1983, Hudson was involved in an argument with officer McMillian and later beaten while in restraints. Specifically, the magistrate found that while Hudson was being transported in handcuffs and shackles, McMillian punched Hudson in the mouth, eyes, chest, and stomach while officer Woods held Hudson. Also, officer Woods kicked Hudson on his backside. Although Lieutenant Mezo did not strike Hudson, Mezo was present and in a position to stop Woods and McMillian, but instead observed the beating and merely cautioned the officers "not to have too much fun." The blows cracked Hudson's partial dental plate, loosened his teeth and split his lower lip. He was seen by a medical specialist two days later. The magistrate held that there was no need to use any force upon Hudson since he was already in restraints, and that Hudson's injuries resulted from the unnecessary use of force which was motivated by malice. The magistrate concluded that Hudson's rights under the Eighth Amendment to the Constitution were violated and awarded him $800 as compensatory damages.

The defendants' appealed the magistrate's decision to the United States Court of Appeals for the Fifth Circuit. The appeals court adopted the findings of fact by the magistrate and noted:

This court joins the magistrate in deploring the use of force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed.

The court went on to hold that "in light of the standards established by this court's intervening decision in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), and progeny, however, we must reverse." The court reaffirmed its holding in *Huguet* that the standard to be applied in excessive force claims made by prisoners under the Eighth Amendment, consists of a four element test, each of which must be proven. The four elements are as follows, according to the court:

1. a significant injury, which

2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was

3. objectively unreasonable, and

4. the action constituted an unnecessary and wanton infliction of pain.

The court of appeals stated that if any one of these elements fails, so too does the prisoner's claim. The court held that Hudson had proved three of the four elements, i.e., no force was required, therefore, the force used was objectively unreasonable; the conduct of McMillian and Woods qualified as clearly excessive; and occasioned unnecessary and wanton infliction of pain. The court held however, that Hudson's claim "founders on the significant injury prong." The court relied on the magistrate's characterization of Hudson's injuries as "minor" and "required no medical attention" to hold that the injuries did not constitute a significant injury and therefore were "insufficient" to base a federal civil rights claim. Accordingly, the court reversed the magistrate's judgment in favor of Hudson.

It will be argued that, if this decision is allowed to stand as the law, correctional officers will be free to torture prisoners without concern for the Constitution, provided that they do not inflict a "significant injury." For example, a prisoner could be hung by his or her thumbs for two weeks, naked in the prison yard, and there would be no violation of the cruel and unusual punishment clause because there was no significant injury—just pain, humiliation and suffering.

Various law enforcement and international human rights organizations have filed "friend of the court" briefs in this important case. ■

Alvin J. Bronstein is the Executive Director of the National Prison Project.

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Seven Alternative Punishment Programs That Work

BY MARIA MARTINO

Prisons and jails are becoming more costly to build and run, and more difficult to manage. In the meantime, relief and money are nowhere in sight. Public officials are realizing that the policy debate on criminal justice in this country has been short-sighted and irresponsible. With over one million Americans behind bars, the United States now has the highest incarceration rate in the world—426 per 100,000—carrying with it a $16 billion price tag.[1] According to the United States Department of Justice, the recidivism rate stands at 62% for state prisoners. Because of serious overcrowding, 41 states are now under court order to reduce crowding and improve conditions.[2]

The primary reason for these grim statistics is not the high rate of crime but the "get-tough" policies enacted by legislators who believe that mandatory minimum sentences, longer sentences, and the death of judicial discretion will somehow reduce crime. A national policy has emerged, without serious analysis of the reality and complexity of the causes of crime, debated within a panicked atmosphere of drug war hysteria, with no regard for the costs to the taxpayer, or the effect of prison overcrowding on the offender and the criminal justice system.[3] More people in this country are being sent to prison for less serious crimes for longer periods of time without any discernible effect on the crime rate. Under the draconian mandatory minimum laws, for example, first-time offenders are getting excessive, mandatory five- and ten-year sentences.[4]

Because prisons are capacity-driven, we cannot build our way out of the overcrowding crisis. The prison experience is likely to alienate the offender further, rendering him or her less capable of reintegration into society. Prisons should be reserved for the truly dangerous, while we reemphasize rehabilitation to combat the high recidivism rate.

The overcrowding statistics and high recidivism rates have led some states to consider eliminating proposals for stiffer sentences and reconsider alternative sentencing options and programs. Last year, for example, Illinois legislators voted to double the amount of good time credit a prisoner could earn in order to reduce his or her sentence. They also have announced they will defeat bills designed to toughen penalties.[5]

The tough-on-crime era and the inevitable corrections crisis that followed have caused legislators to look more closely at alternative punishments. Restitution, community service, intensive probation, and programs such as work release centers and drug and alcohol treatment centers are all options that have been successfully used and under terms that protect the public and punish the offender.

The National Prison Project often gets requests from federal, state and local legislators and staff for advice on specific programs out there and working. The following represent a few examples of the creative projects that are working throughout the country:

Community Services for Women Program

Community Services is an alternative sentencing project of the Social Justice for Women program in Massachusetts. Community Services designs and advocates alternative sentences specifically for women who appear to be candidates for prison. Annually they provide services to about 100 clients.

Since most of their clients have substance abuse problems, Community Services enrolls them in a residential or outpatient drug treatment program. In addition to the treatment, there is at least one face-to-face visit per week, individual and group counselling, and job training and/or GED classes. Since many of the clients are parents, there are additional counselling and assistance programs to help the parents deal specifically with matters involving their children.

Community Services guarantees the court that they will monitor the client throughout the program. They also are responsible for making sure that the offender attends court hearing dates. A study will be available soon which shows the program to have an 8% recidivism rate, as compared to a 25% recidivism rate for women reported by the Massachusetts Department of Corrections. Contact: Marianne Galvin, Ph.D., Social Justice for Women, 108 Lincoln St., Boston, Massachusetts, 02111, 617/482-0747.

Treatment Alternatives to Street Crime

The TASC program, initiated by the federal government over 15 years ago, examines the problems of drug abuse and criminal behavior. TASC tries to bridge the gap between the criminal justice system and community treatment providers. Under TASC supervision, community-based treatment is made available to drug dependent individuals who would otherwise be incarcerated.

TASC assesses and refers appropriate drug dependent offenders accused or convicted of nonviolent crimes to a community based substance abuse treatment center as an alternative (or supplement) to incarceration. The local community determines the program's eligibility and success-failure criteria. TASC monitors the offender's treatment, employment and personal well-being. Public safety is ensured through careful supervision.

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

Because TASC is a certified program, funding for new TASC sites may be available through Bureau of Justice Assistance formula grants to states under the Anti-Drug Abuse Act of 1986 and 1988. Contact Barbara Zugor, National Consortium of TASC Programs at 2234 North Seventh Street, Phoenix, Arizona, 85006, 602/254-7328. For information on funding and technical assistance, contact Ken Robertson at the National Association of State Alcohol and Drug Abuse Directors, 444 N. Capitol Street, NW, Washington D.C. 20001 at 202/783-6868.

Community Service Sentencing Project

In 1979, when overcrowding in New York City jails reached a crisis, the Vera Institute of Justice devised a community service sentencing program that was punitive enough so that judges and prosecutors would consider it a realistic and credible alternative to a jail sentence for repeat property crime offenders.

Community Service Sentencing representatives review court case folders of repeat, non-violent offenders to determine who is eligible for a community service sentence. With the consent of the defendant and defense counsel, the representative presents the alternative sentencing plan to the court. If the judge agrees, the defendant is sentenced to a conditional discharge and is put under CSS supervision.

Most participants are minority offenders who are unemployed and have substance abuse problems. CSS arranges for housing and drug treatment, and also helps with family care matters. Participants who complete the sentence receive additional help in job placement.

CSS has four offices which operate in the Bronx, Brooklyn, Manhattan, and Queens. For more information contact: Judith Greene, Vera Institute of Justice, 377 Broadway, 11th Floor, NY, NY, 10013, 212/334-1300 ext. 251.

THE PROGRAM for Female Offenders

THE PROGRAM for Female Offenders opened its doors in 1985 in response to overcrowded conditions in the women's section of the Allegheny County Jail in Pittsburgh, Pennsylvania. The Center is a 40-bed work release program that offers job training, employment, education classes and parenting classes. Day care service is provided while the women go to work. The women pay 20% of their earned income towards rent, 10% towards restitution, and 20% towards a mandatory savings plan. The sentences range in length from 6-8 months to five years. In 1988, Renewal, Inc., an agency serving male offenders, became affiliated with THE PROGRAM and now operates two male work release centers. Contact Charlotte Arnold, executive director of THE PROGRAM for Female Offenders, at Penn/Liberty Plaza, 1520 Penn Avenue, Pittsburgh, PA 15222, 412/281-7380.

North Carolina Community Penalties Program

The Community Penalties programs[6] operate on the Client Specific Planning (CSP) model designed by the National Center on Institutions and Alternatives. The idea of CSP is that an offender's personal circumstances must be considered in the designing of a sentencing alternative program. The Community Penalties programs, in utilizing the CSP model, recognize the importance of combining the rehabilitative needs of the offender with the court's interest in incorporating sanctions, such as restitution and community service.

TASC tries to bridge the gap between the criminal justice system and community treatment providers.

A case developer prepares a comprehensive package for an offender. The sentencing plan is then presented to the judge outlining the proposed conditions that can involve restitution, community service and other sanctions. An important feature of the program is its commitment to divert the prison-bound offender by working closely with defense attorneys and utilizing community resources.

There are 16 private, non-profit organizations that provide Community Penalties services to 20 judicial districts. The programs are funded and administered by the North Carolina Department of Crime Control and Public Safety. Contact Melvena Sams, Grants Administrator, 512 N. Salisbury St., Raleigh, N.C., 27611, 919/733-7974, or Alexis Ferrell, President, North Carolina Alternative Sentencing Association at 919/275-5285.

Neil J. Houston House

Very often a pregnant offender is placed in a stressful environment, an overcrowded cell, without a proper prenatal diet. The Houston House is a program of Social Justice for Women in Massachusetts for pregnant women who are incarcerated.

The program provides a structured environment to assist women in their recovery from substance abuse, provide comprehensive perinatal medical care, family counseling and community reintegration services for mothers and their babies.

For information on the Houston House, contact Marianne Galvin, Ph.D., at Social Justice for Women, 108 Lincoln St., 6th Floor, Boston, MA 02111, 617/482-0747.

Metropolitan Day Reporting Center

The Metropolitan Day Reporting Center was developed by the Crime and Justice Foundation in Boston to provide an option that would keep offenders in the community who would otherwise be incarcerated.

An offender who is placed in the Center lives at home while under the supervision of a correctional administrator. The client reports to the program daily and prepares an itinerary with a case manager. The itinerary outlines where and when the client will be for the following day.

In addition, the client must call the Center at least twice a day, either work or go to school, and participate in a treatment program. There are random drug and alcohol tests at least twice a week as well as a curfew and a community service assignment. Contact Liz Curtin, 95 Berkeley St., Boston, MA 02116, 617/426-9800.

These programs are only a few examples of the many creative projects that are out in the states and working. Other examples of alternative sentencing programs are available from a variety of sources.[7]

Support for alternative programs appears to be growing. More studies and surveys reveal that the public is more likely to support alternative sanctions when they are properly informed on the negative implications of overcrowding on the offender and on society.[8]

For example, by using in-depth focus groups around the country, the Public Agenda Foundation, in a report published by the Edna McConnell Clark Foundation, found that Americans are more inclined to support alternatives when they realize that rehabilitation is less likely to happen in an overcrowded system.[9]

Support also increases when the public learns more about the enormous costs of incarceration. A report on the compara-

tive costs of corrections in Delaware cited a 1988 Harris poll which found that 81% of the public preferred spending money to correct the causes of crime, while 10% preferred spending more money on prisons.[10] The report also suggested that the money required to house a prisoner convicted of an average burglary offense in Delaware could fund seven children in a Head Start Program, or four juveniles in an employment and training program, or six families in a Parent Outreach support program.[11]

These surveys also show that both public and political leaders seem receptive to alternatives in certain cases. Unfortunately, though, legislators often oppose alternative programs because they inaccurately perceive public opinion to be more punitive than it really is.

At a time when inmate populations are soaring and budgets are tightening, alternative punishments must be recognized as effective and available. Furthermore, they have public support. Imprisonment is outmoded as a knee-jerk method of punishment and should be used as a scarce resource when all other options have failed. ■

Maria Martino is a staff associate with the National Prison Project.

[1]The Sentencing Project, "Americans Behind Bars: A Comparison of International Rates of Incarceration" (Washington, D.C.: 1991).

[2]The National Prison Project of the ACLU, "Status Report:The Courts and the Prisons," (Washington, D.C.: 1990).

[3]Michael Isikoff and T. Thompson, "Getting Too Tough on Drugs," *Washington Post* (November 4, 1990).

[4]Stuart Taylor, Jr.,"Ten Years for Two Ounces: Congress is Packing Prisons With Bit Players in Small-Time Drug Deals," *American Lawyer* (March 1990).

[5]Sharon LaFraniere,"Influx of Inmates Floods California, Other States," *Washington Post* (April 27, 1991).

[6]Mark Mauer, "The North Carolina Community Penalties Act: A Serious Approach to Diverting Offenders from Prison," *Federal Probation* (March 1988).

[7]*A Survey of Intermediate Sanctions*, Office of Justice Programs, U.S. Department of Justice (September 1990).

[8]Russ Immarigeon, "Surveys Reveal Broad Support for Alternative Sentencing,"*NPP JOURNAL*, No. 9, Fall 1986.

[9]John Doble, *Crime and Punishment: The Public's View-A Qualitative Analysis of Public Opinion*, The Edna McConnell Clark Foundation (1987).

[10]Kay Pranis, *Options in Criminal Corrections: A Study of Costs and Opportunities in Delaware*, Minnesota Citizens Council on Crime and Justice (1989). This report also has an excellent listing of representative crime prevention programs operating around the country, as well as an appendix listing model alternative program information sources.

[11]*Ibid.*, p. 18.

U.S. Policies Create Prison Human Rights Violations

BY ALVIN J. BRONSTEIN

This article originated as a paper prepared for presentation at the International Symposium on the Future of Corrections, held June 14, 1991, in Ottawa, Canada.

Under a law enacted in July 1988, certain living beings were guaranteed new rights. They could no longer be shackled, they had to be released from their cramped cages, and they could be administered no drugs except for the treatment of disease. This was not, unfortunately, a law enacted by the United States Congress or any state legislature for the protection of prisoners. It was an act of the Swedish parliament to protect the rights of farm animals.[1]

My invitation letter to this symposium describes the session on Offender Rights as falling under "that portion of the symposium which deals with the development of responsive strategies in keeping with the purpose of Corrections, and its core values and principles."[2] As a matter of fact, the American Correctional Association, together with the Association of State Correctional Administrators, is developing a responsive strategy to cope with prison overcrowding and the attendant political and financial pressures. That strategy is to abandon principle and compromise professional judgment. The corrections leadership in the United States is, at this moment, attempting to water down professional standards by abandoning or diluting prohibitions against double-celling and multiple-occupancy housing for anyone other than minimum custody prisoners.[3]

The United States and Human Rights

We in the United States have always considered ourselves the standard bearers for human rights. Our country was founded on a belief in individual freedoms. The last war fought on U.S. soil was not over territory or trade routes but the most fundamental human right, the right to be free, not a slave. We are so certain of our superiority in the human rights arena that we hold ourselves up as an example to the world and regularly condemn foreign governments which tread on their citizens' rights. United States' citizens celebrate the changes in Eastern Europe, the struggles of the Chinese students, the slow but steady crumbling of apartheid in South Africa, and the efforts of any country moving toward a more democratic way of life. We feel a bit smug that they are becoming "more like us." Yet, at a time when the rest of the world is becoming more liberal and more concerned about human rights, the United States is becoming more repressive.

> *We have lost the capacity for collective moral discourse.*

I believe that we have lost the capacity for collective moral discourse. We lack moral vision. We ignore the hunger, disease and misery of a majority of the world's population. We debase our politics, suppress dissent, indulge in panic-driven, ineffective but costly policies to deal with drugs while reducing commitments to health care, housing subsidies, child care and decent schools, labeling them "liberal elitism."

The Development of Public Policy

Public policy in this country is no longer formulated in the gutters; it is developed in the filthiest and slimiest of sewers. During George Bush's 1988 presidential campaign, every corrections official in the country should have stood up and said loudly, clearly and publicly: "No, sir, you are wrong to use the Willie Horton furlough issue as you are doing. It is dangerous and irresponsible to use an anecdotal approach in examining the serious crime problems in our society. You are preaching racism by your repeated use of that picture."

No one did that. The only lesson

learned from that campaign was an ugly one of success at any cost. Political campaigns at every level—local, state and national—run by either party, spend much of their time trying to out-"Willie Horton" the other side. Today, you win elections by calling for greater use of imprisonment and the death penalty, by calling for more repression of individual rights and by encouraging more fear and hostility than the opposition does.

Politicians have behaved outrageously with respect to the very serious drug problem in this country: by pandering to public anxiety; by denying police adequate resources to prevent criminal activity; by pursuing policies that tolerate and make profitable the flow of drugs into this country; and by adopting policies and laws that send more people into custody, for longer periods of time and without adequate resources to cope with the growing body count in already seriously overcrowded prisons.

Lucian Perkins—The Washington Post

Imprisonment in the United States often includes brutal conditions and massive overcrowding.

The Result of Policy Development

Let us look at the result of these policies. The United States now has the highest recorded rate of imprisonment of any nation in the world—over one million men and women in prison and our incarceration rate is 426 per 100,000 of population. That is higher than the Soviet Union or South Africa and more than four times the rate of almost every European country. Our incarceration rate for Black males is four times that of South Africa.[4]

In California, one in every three Black males between the ages of 20 and 29 is either in prison or on probation or parole. For white males, the comparable figure is one in 19.[5] None of this correlates to crime rates.

We are spending over $16 billion a year just to operate prisons, which net a weekly increase of over 2,000 men and women. We need to build four new prisons each week to accommodate the increase at a capital cost of over $2 billion a month. California spent $6.2 billion on new prison construction in the past decade and the state's prisons are much more overcrowded today than 10 years ago.

The United States is locking up its future. A recent study at the Brookings Institution found that if we continue at our current rate of prison population increase, more than half of America will be in prison by 2053, just 60 years from now.[6]

Prison Conditions and Human Rights Violations

Forty-one states are operating their prisons under court orders because they house prisoners in overcrowded and unconstitutional conditions.[7] Hundreds of local jails are under similar orders. We are the only country in the world that uses incarceration as its primary crime control mechanism. And yet, all this imprisonment has no positive impact on crime rates. Violent crime gets worse.

Conditions in some prisons are so shocking that people are more dangerous when they come out. With the exception of the barbaric death penalty, imprisonment is the largest power that a democratic government exercises on a regular basis over its citizens. Prisons are total institutions that have a massive impact on the persons they confine. They control every moment of the prisoner's day and night and eliminate almost any possibility of free choice. That should be punishment enough. Instead, punishment in the United States often includes brutal conditions and massive crowding.[8]

Overcrowding, and the resulting inhumane conditions, show no sign of abatement. We appear willing, as a matter of choice, to warehouse more and more prisoners while we are incapable of building enough cages to house them. Prison and jail overcrowding will soon be exacerbated by the following factors that have surfaced recently: an aging prison population and the prospect of large numbers of geriatric prisoners with serious medical needs; the prevalence of AIDS, hepatitis and tuberculosis in our prison population; an increase in the number of mentally ill and physically disabled prisoners; the growing inability of corrections systems to provide minimally adequate medical and mental health care; and the diminishing resources available to corrections systems.

Repeating Past Failures

Re-inventing the wheel, we ignore the past failures of "control units" and "super-max" prisons and are now building a new generation of high-tech dungeons throughout the United States. In Oklahoma, a new 200-cell facility is effectively built underground. Prisoners who will spend 23 hours a day in their cells may never again set foot out of doors. The deputy warden is proud that the new prison will "limit the convicts' contact with one another and with corrections officers."[9] Last year, California opened the new 3,000-bed Pelican Bay State Prison, which contains a security housing unit of 1,056 windowless cells of concrete and stainless steel. Prisoners have virtually no face-to-face contact with officers or other inmates. In discussing Pelican Bay, Craig Haney, a penologist and psychology professor at the University of California, Santa Cruz, said: "This kind of isolation goes back to the mid-19th Century when American prisoners weren't allowed to have any interaction at all. But that was eventually done away with because it was regarded as too punitive and, in fact, was driving people crazy."[10] The pattern is being repeated throughout the country. We impose more and more oppressive control and wonder why the subjects become more angry and more dangerous when they come out.

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Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

In *Wilson v. Seiter*, 59 U.S. Law Week 4671 (U.S., June 17, 1991), the Supreme Court reviewed its first prison "conditions of confinement" case in a decade, and held that in cases alleging cruel and unusual punishment, "inquiry into a prison official's state of mind" is required. *Id.* at 4672. The plaintiff had argued that if prisoners are deprived of "the minimal civilized measure of life's necessities," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), the Eighth Amendment is violated regardless of anyone's intent. The Court, however, held that proof of this "objective component" must be accompanied by proof of a "subjective component" or "culpable state of mind." *Id.* at 4672.

The Court rejected the lower court's view that prisoners must show that prison officials have acted with "persistent malicious cruelty" to be found liable. Although a malice standard has been applied when prisoners challenge officials' emergency responses during a prison disturbance, *Whitley v. Albers*, 475 U.S. 312 (1986), plaintiffs in an ordinary conditions of confinement case need only prove "deliberate indifference" to prevail. In all cases, *Seiter* explains, "wanton" conduct must be shown, but whether conduct is wanton "depends upon the constraints facing the official." 59 U.S. Law Week at 4673 (emphasis omitted).

Some commentators were quick to label the decision as a setback for prisoner litigants. For example, the *New York Times* reported it under a front-page headline reading "Justices Toughen Rule for Lawsuits on Prison Cruelty."

This view is misleading, and stems from reading the *Seiter* opinion in isolation, without reference to existing practice in the lower federal courts. There, the deliberate indifference standard is already well established, particularly in litigation concerning medical care, inmate-inmate violence, and other threats to prisoners' health and safety—areas in which prisoner litigants have enjoyed their most consistent success. In cases involving other conditions of confinement, something like the deliberate indifference standard has been routinely applied, though often without using the term.

As the standard is applied, deliberate indifference is generally established by examining the facts of prison officials' behavior rather than actual evidence of their state of mind. In cases seeking injunctive relief against ongoing conditions, deliberate indifference has been construed to include the collective defaults of state and local governments, including their failure to provide adequate staffing and funding, with no requirement that personal fault be traced to a particular wrong-headed perpetrator. In damage cases, the requirement that such personal culpability be fixed has long been applied, not just in Eighth Amendment cases, but in all cases brought under 42 U.S.C. § 1983; but even in these cases, the focus is on the defendants' actual behavior.

Even though *Seiter* describes deliberate indifference as a "state of mind" and a "subjective component," it explicitly relies on this body of lower court law focusing on evidence of behavior rather than mind-set. In short, the effect of *Seiter* is chiefly to ratify the long-standing *status quo* in the lower federal courts.

Deliberate Indifference in the Supreme Court

The Supreme Court initially defined deliberate indifference in terms of what it is not. In *Estelle v. Gamble*, 429 U.S. 97 (1976), it held that deliberate indifference to prisoners' serious medical needs constituted cruel and unusual punishment, but that malpractice, negligence, or inadvertent failure to provide adequate care do not. *Estelle* cited examples of deliberate indifference from lower court cases but gave no general definition of the term. In *Whitley v. Albers*, 475 U.S. 312 (1986), at the other end of the intent scale, the Court distinguished deliberate indifference from actions taken "maliciously and sadistically for the very purpose of causing harm," holding that the latter must be provided in challenges to actions taken to control prison disturbances. Again, there was no general definition.

Estelle and *Whitley* thus established that deliberate indifference occupies a middle ground between negligence and malice or intentional misconduct. Later, for the first and only time, the Court gave some affirmative content to the phrase in *Canton v. Harris*, 489 U.S. 378 (1989), a jail suicide case. There, the Court held that a municipality could be held liable for inadequate police training if the inadequacy amounted to a policy of deliberate indifference. It observed that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 389-90.

Wilson v. Seiter thus adds almost nothing to the Court's previous deliberate indifference cases, and does so purposefully and explicitly, stating only that in all prison conditions cases, "it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." 59 U.S. Law Week at 4673. Even this holding is stated in borrowed language, quoted from a lower court opinion by retired Justice Powell. *LeFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987).

The Tort Context of Deliberate Indifference

Though the Supreme Court has never acknowledged it, deliberate indifference is derived from well established tort principles. The middle ground between negligence and malicious intent has long been described as "willful," "wanton" or "reckless" conduct, meaning "that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by conscious indiffer-

ence to the consequences." Prosser and Keeton, *The Law of Torts,* Sec. 34 at 212-13 (5th ed. 1984).

The Supreme Court's language in *Canton v. Harris,* quoted above, closely parallels this "conscious indifference" formulation, and similar language has often been used by lower courts. Thus, in a recent inmate-inmate assault case, which *Seiter* cites as an example of the standard, a federal appeals court held that deliberate indifference is shown "if there is an obvious unreasonable risk of violent harm to a prisoner or a group of prisoners which is known to be present or should have been known, and [the defendants] were outrageously insensitive or flagrantly indifferent to the situation and took no significant actin to correct or avoid the risk of harm...." *Morgan v. District of Columbia,* 824 F.2d 1049, 1058 (D.C. Cir. 1987); *accord, Berry v. City of Muskogee,* 900 F.2d 1489, 1496 (10th Cir. 1990). Many lower courts have routinely treated deliberate (or "callous") indifference as substantially equivalent to recklessness. *See, e.g., Thomas v. Booker,* 784 F.2d 299, 305 (8th Cir. 1986) *(en banc); see also Shaw by Strain v. Strackhouse,* 920 F.2d 1135, 1145 (3d Cir. 1990) (non-prison case equating reckless indifference, deliberate indifference, and gross negligence); *Richardson v. Penfold,* 839 F.2d 392, 395 (7th Cir. 1988) (deliberate indifference is established by proof of recklessness). *But see Canton v. Harris,* 489 U.S. 378, 388 n.7 (1989) (suggesting a distinction between gross negligence and deliberate indifference); *Walsh v. Mellas,* 837 F.2d 789, 794-96 (7th Cir. 1988) distinguishing among gross negligence, deliberate indifference, and degrees of recklessness).

State of Mind or State of Facts?

The central point about this supposed intent requirement is that it is not really about state of mind. As Prosser and Keeton put it:

Since [conscious indifference] is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. The "willful" requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, *has proceeded in disregard of a high and excessive degree of danger,* either known to him or apparent to a reasonable person in his position.

Prosser and Keeton, *The Law of Torts,* § 34 at 213-14 (emphasis supplied).

This is as true in constitutional tort cases as in common-law tort cases. *See, e.g., Cortes-Quinones v. Jiminez-Nettleship,* 842 F.2d 556, 559-60 (1st Cir. 1988), *cited in Seiter,* 59 U.S. Law Week at 4673 (jury could have "inferred" or "found" deliberate indifference from prison officials' actions in inmate-inmate murder case); *see also Miltier v. Beorn,* 896 F.2d 848, 852-54 (4th Cir. 1990); *LeFaut v. Smith,* 834 F.2d 389, 393-94 (4th Cir. 1987); *Bass v. Lewis v. Wallenstein,* 769 F.2d 1173, 1184-86 (7th Cir. 1985) (medical care cases focusing on actions and omissions of medical and correctional personnel, not their mental states).

Injunctive cases should yield similar results. In Prosser and Keeton's terms, conditions so serious as to deprive prisoners of "the minimal civilized measure of life's necessities" can hardly occur for any substantial period without being known to prison officials, or at least being apparent to reasonable officials—i.e., those who are doing their jobs. *Cf. Seiter,* 59 U.S. Law Week at 4672 ("The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent") (emphasis omitted). Certainly, once a suit has been filed, prison officials are on notice of the alleged conditions, and their failure to take action at that point would strongly support a finding of deliberate indifference to prisoners' basic needs. *See Duckworth v. Franzen,* 780 F.2d 645, 655-56 (7th Cir. 1985), *cert. denied,* 479 U.S. 816 (1986).

Thus, plaintiffs need not psychoanalyze prison officials to prove their Eighth Amendment claims. If prison officials know, or *should* know, of deprivations of basic human needs in their institutions, and have not remedied them, deliberate indifference is presumptively established.

Whose Difference? Institutional Practices

The dissenting Justices in *Seiter* expressed concern that the deliberate indifference standard will often be "impossible to apply" because "intent simply is not very meaningful when considering a challenge to an institution...." 59 U.S. Law Week at 4675. In the abstract, they are correct. But in practice, the lower courts have addressed this "institutional intent" problem, holding that deliberate indifference may be established by showing "'repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' or by showing systematic or gross deficiencies in staffing, facilities, equipment or procedures.'" *French v. Owens,* 777 F.2d 1250, 1254 (7th Cir. 1985), *cert. denied,* 479 U.S. 817 (1986), *quoting Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981); *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir. 1977) (medical care); *accord, Eng v. Smith,* 849 F.2d 80, 82-83 (2d Cir. 1988) (mental health care); *Fisher v. Koehler,* 692 F.Supp. 1519, 1561-62 (S.D.N.Y. 1988), *aff'd,* 902 F.2d 2 (2d Cir. 1990) (protection from violence). As in other constitutional deliberate indifference cases, the courts have applied an objective standard, and one that is explicitly tailored for institutional cases.

The "systematic deficiencies" approach also addresses the situation alleged in *Seiter* in which the officials claimed to have taken remedial actions, but the plaintiffs alleged that these actions failed to remedy the unconstitutional conditions. Such ineffectual reforms, while they might protect defendants from damage awards in the short run, would in the long run be revealed as further systematic deficiencies, and the failure to take more effective measures would come to constitute deliberate indifference as their inadequacy became obvious.

Nothing in *Wilson v. Seiter* purports to overturn the systematic deficiencies approach. Indeed, the *Seiter* opinion, in observing (at n.1) that the lower courts have "routinely applied" the deliberate indifference standard in cases about prison-wide deprivation of medical care, cited as an example the passage in *French v. Owens* from which the "systematic or gross deficiencies" language was quoted.

Whose Indifference? "Cumulative Actions and Inactions"

Sorting out "cumulative actions and inactions by numerous officials" is nothing new to federal courts. *All* actions brought under 42 U.S.C. § 1983 require proof of "personal involvement," by act or omission, regardless of the constitutional provision relied upon.

In damage actions, this inquiry has virtually been reduced to a formula. *See, e.g., Williams v. Smith,* 781 F.2d 319, 323-34 (2d Cir. 1986) (describing bases for supervisory liability under § 1983). Moreover, a deliberate indifference standard has routinely been applied to all sorts of claims of supervisory liability in civil rights cases. *See, e.g., Bordanaro v. McLeod,* 871 F.2d 1151, 1163 (1st Cir. 1989); *Jones v. City of Chicago,* 856 F.2d 985, 992 (7th Cir. 1988); *McCann v. Coughlin,* 698 F.2d 112, 125 (2d Cir. 1983). These principles are applied in *Cortes-Quinones v. Jiminez-Nettleship,* 842 F.2d 556 (1st Cir. 1988), a prison murder case cited in *Seiter,* in which the court acknowledges that many factors were beyond defendants' control, but held that each defendant could be found deliberately indifferent based on their own actions and omissions in putting a known psychotic prisoner in general population with no psychiatric care.

In injunctive cases, the "personal involvement" inquiry is "broader and more generalized" than in damage cases and the focus is

on "the *combined* acts or omissions" of the officials responsible for operating prisons. *Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir. 1988) (emphasis supplied); *accord, Williams v. Bennett,* 689 F.2d 1370, 1383-84 (11th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983); *see also Fisher v. Koehler,* 692 F.Supp. 1519, 1562 (S.D.N.Y. 1988), *aff'd,* 902 F.2d 2 (2d Cir. 1990) (finding deliberate indifference to inmate safety in City's "institutional failures" such as overcrowding while praising the "obvious sincerity and competence" of warden and commissioner).

This approach is consistent with the developing jurisprudence of "capacity." Injunctive actions are generally regarded as "official capacity" actions, which are treated as identical to suits against the governmental body involved. *Kentucky v. Graham,* 473 U.S. 159, 166-67 (1985). In such cases, the notion of "systematic deficiencies" is most useful and has been most widely applied.

The "Cost Defense" Issue

The *Seiter* majority rejected the criticism that a state of mind requirement would permit prison officials to escape liability on the ground that "fiscal constraints beyond their control prevent the elimination of inhumane conditions." The Court first held that such policy considerations could not affect the decision whether an intent requirement is implicit in the word "punishment." It then added that no "cost" defense was before it and it was aware of no case in which such a defense had been raised in prison medical care litigation. 46 U.S. Law Week at 4673.

The lower courts have explicitly addressed this question, and the answer is different in damage cases than in injunctive cases. Personal damage liability may not be imposed on a defendant for matters outside his or her control, and the unavailability of funding may fall into this category. *Williams v. Bennett,* 689 F.2d at 1387-88; *see also Birrell v. Brown,* 867 F.2d 956, 959-60 (6th Cir. 1989) (where unconstitutional conditions resulted from budgetary constraints, prison officials were entitled to qualified immunity). But courts will not assume the validity of such a defense; an official who does have power over the allocation of funds may be held liable. *See, e.g., Boswell v. Sherburne County,* 849 F.2d 1117, 1123 (10th Cir. 1988) (chief jailer and sheriff could be held liable based on evidence that "inadequately trained jailers were directed to use their own judgment about the seriousness of prisoners' medical needs" and that medical care was restricted in order to save money); *Jones v. Johnson,* 781 F.2d 769, 771-72 (9th Cir. 1986) (supervisory officials could be liable for budgetary restrictions on medical care); *Ancata v. Prison Health Services, Inc.,* 769 F.2d 700, 705-06 (11th Cir. 1985) (sheriff could be held liable for requiring court orders for outside medical care).

Damage actions against the local governments are treated differently. Since the governmental unit itself does have the power to obtain and provide additional funds, a cost defense is simply not available to it. The failure to afford sufficient resources to provide for prisoners' serious medical needs or other necessities of life is clearly a policy of deliberate indifference sufficient to support damage liability. *Jones v. Johnson, id.*; *Ancata v. Prison Health Services, Inc., id.* Damage actions against state governments as such are, of course, precluded by the Eleventh Amendment.

Injunctive actions are not subject to a cost defense. As noted above, such actions are treated as actions against the state itself, so there is no argument that funding is beyond the defendants' control. Accordingly, it is a commonplace in injunctive actions that lack of funds is not a defense to claims of constitutional deprivation. *Seiter,* 59 U.S. Law Week at 4675 n.2 and cases cited; *Monmouth County Correctional Institution Inmates v. Lanzaro,* 834 F.2d 326, 336-37 (3d Cir. 1987), *cert. denied,* 486 U.S. 1066 (1987); *Tyler v. Black,* 811 F.2d 424, 435 (8th Cir. 1987), *modified on other grounds,* 865 F.2d 181 (8th Cir. 1989) (*en banc*); *Duran v. Anaya,* 642 F.Supp. 510, 525 (D.N.M. 1986); *see Toussaint v. McCarthy,* 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied,* 481 U.S. 1069 (1987) ("The fact that a remedy is costly does not preclude a court from ordering the remedy.").

Other Cases Worth Noting

U.S. COURT OF APPEALS

Religion—Practices

Friend v. Kolodzieczak, 923 F.2d 126 (9th Cir. 1991). Catholic inmates could be prohibited from possessing rosaries and scapulars in their cells. The rule, which barred all property not supplied or approved by the jail administration, served the interest of contraband control, and its application to Catholic religious items served to avoid the impression of favoritism. The inmates were permitted to attend services and exercise other religious rights. The alternative of inspecting the religious items, while it might serve the contraband control interest, would not serve the interest of avoiding favoritism.

Procedural Due Process—Administrative Segregation

Kellas v. Lane, 923 F.2d 492 (7th Cir. 1990). Regulations that listed factors that "among other factors, may" be considered in making recommendations for involuntary protective custody placement do not create a liberty interest because they do not place substantive limitations on prison officials' discretion. Mandatory language in procedural guidelines does not by itself create a liberty interest. At 495: "[T]hese guidelines are directed toward the prison officials and, thus, do not create a due process claim of entitlement on the inmates' behalf."

Pregnancy, Childbirth and Abortion/ Medical Care—Standards of Liability

Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991). The plaintiff asked for an abortion on admission to jail; she appeared to be 21 weeks pregnant; her request was marked "emergency"; she continued to make almost daily requests. She was sent for the abortion after three weeks, but her sonogram had been wrong and it was too late for an abortion under New York law. There had been a six-day delay in the delivery of her request to the jail doctor; this is "inefficient, to say the least," but not unconstitutional. The doctor's scheduling an abortion near the end of the legal limit, based on a sonogram that proved to be wrong, was no more than negligence.

The constitutional standard for pre-trial detainees' medical care remains unsettled. In this case, no more than simple negligence was alleged, and the Constitution was not violated.

Protection from Inmate Assault

Hobbs v. Evans, 924 F.2d 774 (8th Cir. 1991). The plaintiff was assaulted three times by other inmates after an officer told other inmates that he was an informant. The plaintiff notified the Director after the first incident and filed grievances after the first and second incidents. He was later transferred to a second prison, where a plot to kill him was thwarted.

The district court found that the Director was liable for failing to protect the plaintiff at the second prison. This finding is reversed because there was no proof that the plaintiff was faced with a pervasive risk of harm there and that the Director failed to respond reasonably to it.

Testimony that an inmate labelled as an informant is at "high risk of harm" supported a finding that the officer acted with reckless disregard in conveying that information to other inmates.

Crowding/Modification of Judgments

Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991). At 1324:

Prison reform litigation, and consent decrees settling such litigation, present particularly sensitive problems for courts asked by prison officials to modify decrees because of material changes in the "complex, ongoing fact situation" that inevitably underlies such decrees. For in this area there comes into play, as a counterweight to the general principle of restraint in modifying any judicial decree, the Supreme Court's admonition of cautious deference to the judgment of government officials charged with the sensitive task of prison administration.... In this particular realm of institutional reform, therefore, the general need for flexibility in considering requests for modification of complex decrees may be particularly acute.

...In general, modification should be granted only when the change of circumstances urged by the movant was largely beyond that party's control, and when compliance has been put beyond effective reach despite a good faith effort by the movant to comply.... And in the end, the question whether equity requires modification is one committed to the district court's discretion to be exercised through the familiar process of balancing the interests of the opposing parties and the public in light of relevant substantive principles. [Citations omitted.]

The appeals court had previously held that the relevant plaintiffs' interest was "not entitlement to the specific benefit of every term of the decree, but only the attainment of overall constitutional conditions of confinement—that being the 'essence of their bargain.'" (1325) But that does not mean the court must redetermine constitutionality every time the defendants move for modification. It means that "in assessing the risk, and degree, of harm to the plaintiff class from the modification..., attention should not be confined to the indisputable fact that modification would necessarily abrogate a specific benefit conferred by the decree. It must also take into account the extent to which the benefits still retained insured that the 'broad public-policy objectives' of the decree were not at risk from the proposed modification." (1327) Later, the court describes that objective as "relieving overcrowding." (1329)

The district court's finding of a lack of good faith in its efforts to comply with the judgment is precluded by the finding on a previous appeal, now law of the case, that the state had acted in good faith in trying to comply with population limits in the face of an unanticipated population increase.

The district court is directed to "set its hand to devising that form of relief which will best insure continued progress toward achievement of the broad public policy objective of relieving overcrowding that underlies the cell-space requirements of the decree, while accommodating the present impossibility of achieving that objective by the originally intended means of constructing additional facilities on a specific timetable." (1329) The release of inmates "must be considered the accommodation of last resort, in view of the essentially unmeasurable but profound public interests which it implicates." (1329) The court suggests that this "draconian last alternative" might be ordered based on "newly arisen bad faith" by defendants.

Hazardous Conditions and Substances

McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991). The plaintiff alleged that he was a non-smoker but was almost constantly exposed to environmental tobacco smoke because he was housed with a heavy smoker and there were no smoking restrictions in the prison.

At 1504: "compelled exposure to ETS is...cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health." The issue is not the right to a smoke-free environment but the health risks to which the plaintiff is exposed. At 1507: "...[A] finding that ETS endangers human health is sufficient to show an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency." At 1507: "If making inmates breathe stagnant air is cruel and unusual punishment, it must be even more so to force inmates to breathe air containing levels of known human carcinogens sufficient to pose an unreasonable risk of harm to human health." In addressing claims of poor lighting, broken-down plumbing, unsanitary food handling and polluted water, "[w]e have not waited until these conditions actually caused illness, but have mandated relief based on the risk these conditions entail." (1508)

Federal Officials and Prisons/Correspondence—Legal and Official

United States v. Stotts, 925 F.2d 83 (4th Cir. 1991). Federal regulations requiring that mail from attorneys and others be marked "Special Mail—Open Only in the Presence of the Inmate," or similar language, and bear the name of an individual sender, were not unconstitutional under *Turner*. The requirement that the precise quoted phrase appear on the envelope, in effect at the time of filing and prescribed by the regulation, was qualified by a 1988 Operations Memorandum that permitted the use of "similar language indicating that [the letter] qualified for special treatment and was to be opened only in the presence of the prisoner." The court does not rule on the original, unmodified regulation.

Pre-Trial Detainees/Use of Force/Summary Judgment

Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991). The plaintiff alleged that he was beaten by police officers during two custodial interrogations while he was held in the county jail on pending charges.

Injury is not an essential element of a § 1983 use of force claim; it comes into play only in balancing the nature of the force against its proffered justification, and not at all when there is no justification. At 93:

The suggestion that an interrogee's constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental misconception of the fifth and fourteenth amendments, indeed, if not our system of criminal justice.... The extent of an interrogee's physical injuries is relevant in assessing the amount of actual damages; it is not a prerequisite to suit.

The purported incredibility of the plaintiff's account, supported only by another prisoner of dubious credibility, cannot be the basis for summary judgment.

Judicial Disengagement/Modification of Judgments/Consent Judgments

E.E.O.C. v. Local 580, International Assn. of Bridge, Structural and Ornamental Ironworkers, 925 F.2d 588 (2d Cir. 1991). At 593:

...[T]hough a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad.

Where equitable remedies which exceed the confines of the consent judgment are reasonably imposed in order to secure compliance of the parties, the court has not overstepped its bounds, and its orders must be obeyed.

A consent judgment that permitted the parties to return to court "at any time" for further orders and provided that jurisdiction was retained for enforcement purposes gave the court jurisdiction of "indeterminate duration" to oversee compliance. The fact that some provisions were time-limited did not mean that the entire judgment was time-limited. At 593:

In addition, the court has inherent power to enforce consent judgments, beyond the remedial "contractual" terms agreed upon by the parties. Unlike a private agreement, a consent judgment contemplates judicial

interests apart from those of the litigants. Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interests—to ensure compliance.

Use of Force/Qualified Immunity/ Medical Care—Standards of Liability—Deliberate Indifference

Al-Jundi v. Mancusi, 926 F.2d 235 (2d Cir. 1991). Prison officials were not automatically entitled to qualified immunity for uses of force taking place before *Whitley v. Albers*; that case did not newly declare a constitutional right but narrowed a right that had previously been recognized.

The *Whitley* standard applies to all aspects of the decision to use force in retaking Attica during the 1971 disturbances. This "does not mean that a prison riot affords prison administrators limitless authority to employ any means, no matter how brutal, to restore order." (238) "However, this heightened standard, framed to assure prompt and effective action to use necessary force to restore order, does not apply to actions of prison officials unrelated to the decisions about whether and how to use force for that purpose." (238)

The Attica Superintendent was entitled to qualified immunity for the retaking: the absence of a pre-attack ultimatum, the large number of armed men sent into the prison after the tear gas attack, and the use of correction officers as a back-up force might amount to negligence or deliberate indifference, but were not shown to have been wantonly done for the purpose of inflicting pain.

The failure to plan for medical care stands on a different footing. At 239:

Once it was decided to retake the prison by force, the duty to make adequate provision for medical needs arose to at least the same extent as it does with respect to the normal operation of a prison. The Albers *standard applies to the decision to use force and the means selected for implementing that decision, but not to the normal obligations of prison officials to meet the minimal needs of those in their custody.*

Thus, the deliberate indifference standard applies, and there is a jury question as to the Superintendent's liability for lack of attention to planning for medical needs.

Allegations that defendants condoned brutal reprisals after the prison was retaken are not governed by the *Whitley* standard. At 240: "The latitude accorded prison officials in deciding when and how to use force to retake a prison from rioting inmates has no application to the summary infliction of brutal punishment once the riot is quelled." Allegations that the Superintendent received reports of brutality and must either have observed it or deliberately avoided seeing it were sufficient to create a jury question as to his liability.

At 240:

...[T]here is considerable irony in the argument of prison officials who have in their custody scores of prisoners convicted on the testimony of disreputable criminals, that the testimony of criminals is incredible as a matter of law when it accuses them of unconstitutional conduct.

Pro Se Litigation

Wilson v. Barrientos, 926 F.2d 480 (5th Cir. 1991). In a *Spears* hearing (a device used in the Fifth Circuit to clarify *pro se* cases and determine whether *in forma pauperis* status is appropriate), the court

must ascertain what the plaintiff is claiming and may make limited assessments of the plaintiff's credibility. In doing so, the judge must take care that the evidence considered is authentic and reliable. Witnesses should be sworn; appropriate cross-examination should be allowed; and documents should be properly identified and authenticated.

Here, the lower court improperly dismissed two use of force cases, relying on testimony from an internal affairs officer and a doctor relying on unauthenticated medical records.

Religion—Services Within Institution/Religion—Practices—Diet

Al-Alamin v. Gramley, 926 F.2d 680 (7th Cir. 1991). Prison officials must be "even-handed" in providing opportunities for religious practice. At 686:

The rights of inmates belonging to minority or non- traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations. Of course, economic and, at times, security constraints may require that the needs of inmates adhering to one faith be accommodated differently from those adhering to another. Nevertheless, the treatment of all inmates must be qualitatively comparable.

The prison was not required to employ a full-time imam even though it employed a full-time staff chaplain (presumably Christian) for the entire inmate population. Where the outside imam was paid for four hours of services a week, plus travel expenses, the defendants had made "reasonable efforts" to accommodate Muslim inmates' religious needs. There was no allegation that the "totality" of treatment of Muslims was less favorable than that of other religious groups.

It was conceded that there was no constitutional violation in defendants' ban on non-commercially prepared Halal food for Ramadan, since defendants would permit plaintiffs to receive commercially prepared food. The usual food policy was to identify food containing pork and provide a pork substitute for Muslim inmates.

Procedural Due Process—Administrative Segregation/ Monitoring/Law Libraries and Law Books

Toussaint v. McCarthy, 926 F.2d 800 (9th Cir. 1990). The district court should not have reappointed a monitor to review assignments to administrative segregation where there was no showing that due process violations continued or that voluntary compliance was so unlikely that a monitor was necessary.

Prison administrative segregation procedure permitted the prisoner to speak to the Institutional Classification Committee, but the actual decision was made by the Criminal Activities Coordinator, "an official who is in contact with counterparts at other prisons as to gang activities." Under *Hewitt*, the district court correctly required the actual decision-maker to hear the segregated inmate.

Periodic review every 120 days satisfied due process; the district court should not have required review every 90 days.

The question of law library access for administrative segregation was mooted by the creation of a separate library for segregation. (I.e., the district court's requirement to provide legal assistance is vacated.) At 804 "...[A]s long as one prisoner is unjustly detained or one prisoner maltreated a lifeline to the courts is precious. In the context of this case the segregated prisoners' library is part of the lifeline." This amended opinion omits dicta suggesting that the right of court access encompasses the right to file a complaint or petition, then stops.

Religion—Services Within Institution/Religion—Practices—Diet/ Publications/Access to Courts

Johnson v. Moore, 926 F.2d 921 (9th Cir. 1991). Denial of a hearing before placement in "cell lockdown" did not deny due process; this treatment was meted out to all inmates not working or attending classes and was not punitive. Transfer from federal to state prison did not require procedural protections in the absence of statutory or regulatory limits on prison official's discretion.

The absence of a paid chaplain of the plaintiff's Unitarian Universalist faith did not deny the plaintiff a "reasonable opportunity" to practice his religion. The failure to provide a vegetarian diet did not violate the First Amendment absent proof that the plaintiff's vegetarianism is "rooted in his religious beliefs." (923)

A "publisher only" rule was not constitutional as a matter of law where there was nothing in the record concerning the extent and availability of reading material in the prison library and no support for prison officials' conclusory security arguments. This court construes the *Wolfish* holding approving a modified publisher only rule as turning on the availability of softcover books from any source, hardcovers from book clubs and bookstores, and publications of all sorts from the prison library.

Federal Officials and Prisons/ Classification—Race/Work Assignments/Access to Courts—Punishment and Retaliation

Williams v. Meese, 926 F.2d 994 (10th Cir. 1991). A prisoner is not an "employee" of the Federal Bureau of Prisons for purposes of an employment discrimination claim under Title VII, the Age Discrimination in Employment Act, the Rehabilitation Act or the Equal Pay Act. The Bureau of Prisons is also not a "program or activity" under the Rehabilitation Act.

Allegations that the plaintiff was assigned jobs inconsistent with his prior work experience and physical abilities did not state an Eighth Amendment claim.

The plaintiff stated a *Bivens* claim under the Fifth Amendment for racial discrimination in prison employment.

An allegation that the plaintiff was transferred from one job to another or denied particular job assignments in retaliation for administrative grievances or lawsuits stated a First Amendment claim.

Procedural Due Process—Administrative Segregation

Chandler v. Baird, 926 F.2d 1057 (11th Cir. 1991). Florida regulations do not create a liberty interest in staying out of administrative segregation. This conclusion is based on the absence of mandatory *procedural* language; the "substantive predicates" are very similar to those in *Hewitt v. Helms*.

Refusal over 16 days to permit the plaintiff to call his attorney, to provide writing materials and legal materials, and to take him to the law library did not deny access to courts where there was no evidence of a legal proceeding that could have been affected by the refusals. At 1063:

We resist making any sweeping declaration concerning the need for a prison inmate to establish prejudice arising out of alleged restrictions of his access to courts. In some cases, the prejudice inheres in the specific facts.... In many class actions the challenge is systemic, embracing the basic adequacy of materials and legal assistance made available to all or subgroups of the prison population. In still other cases the conditions challenged obviously go to the heart of any meaningful access to libraries, counsel, or courts. But the instant case is of the genre at the minimal end of the deprivation spectrum. That is to say that the alleged deprivations are of a minor and short-lived nature and do not implicate general policies. In such a case, prejudice must be shown.

An allegation of confinement without bedding or clothing other than undershorts in a cold and filthy cell, without toilet paper, running water, soap, and toothpaste for several days of his confinement, stated a claim under the Eighth Amendment whether or not it caused injury or illness. The plaintiff's description of the conditions and his question during his testimony, "What kind of effect would that have on you?" were "sufficient to preserve the issue of harm." (1066)

Pre-Trial Detainees/Qualified Immunity/Crowding/Emergency/ Class Actions—Effect of Judgments and Pending Litigation

Brogsdale v. Barry, 926 F.2d 1184 (D.C.Cir. 1991). The district court found that a riot and fire in which the plaintiffs were injured was a predictable consequence of illegal overcrowding, and that jail officials could be held liable in their personal capacities for violating court orders limiting crowding.

The court expresses "grave doubts" about the finding of liability, since the district court expressed uncertainty as to whether the overcrowded conditions at the jail were unconstitutional. A finding that overcrowding "had created an environment ripe for a violent explosion" could support a finding of unconstitutionality. But the district court's view that damages may be awarded for crowding where the inmates were "legitimately but nevertheless subjectively frustrated by the crowded conditions" regardless of unconstitutionality has no support in the law.

The defendants were entitled to qualified immunity despite their violation of court orders because the court orders were limited to restricting the conditions under which inmates could be double celled and, more importantly, it is not clear whether the defendants were actually in violation as of the date of the riot and fire. The court's findings only covered a period ending three days before the riot and defendants claimed double celling had ended by then. As of 1983, the constitutional law of crowding was largely "uncharted territory, in which very general rules had been articulated but in which fact-specific applications of those rules were few." (1190)

Procedural Due Process—Disciplinary Proceedings/Federal Officials and Prisons

Young v. Kann, 926 F.2d 1396 (3d Cir. 1991). The plaintiff was disciplined in part for writing a threatening letter. The hearing officer refused to produce the letter for his inspection (and did not read it himself, relying instead on an investigator's description of it). The letter in fact contained no threatening remarks.

Prisoners have a right to "produce evidence" that is "limited only by the demands of prisoner safety and institutional order, as determined by the sound discretion of the prison authorities." (1400) Where there was no apparent security reason for failing to produce the letter, due process was violated by refusing to produce it. The fact that there was "some evidence" other than the letter to support the charge did not excuse this denial of due process. (1403)

The court also suggests that reliance, without corroboration, on an oral summary of the letter by a prison staff member may itself deny due process; the court analogizes these facts to the use of unverified confidential informant information.

The hearing officer's refusal to let him hear or respond to the investigator's testimony concerning the letter and other aspects of the case also denied the plaintiff due process (whether independently or only in connection with the other facts is not clear from the opinion). If testimony is not to be presented directly by witnesses, it must still be disclosed in enough detail for the inmate to rebut it intelligently.

A federal regulation providing for the prisoner's presence during witness testimony may establish a due process right regardless of the regulation's constitutional basis or lack of it.

Due process was not violated in a second disciplinary hearing by failure to present the plaintiff with a copy of the investigator's report, since he had waived his right to have a staff representative present. Federal regulations provide that this material is provided to the staff representative.

DISTRICT COURTS

Pre-Trial Detainees/Unsentenced Prisoners and Convicts Held in Jails

Carver v. Knox County, Tenn., 753 F.Supp. 1370 (E.D.Tenn. 1989), *aff'd in part and rev'd in part*, 887 F.2d 1287 (6th Cir. 1989). On appeal from this belatedly reported decision, the Sixth Circuit affirmed the district court's "findings of historical fact" but reversed the relief it granted against state prison officials for backing up inmates in the jail, holding that it should have transferred a portion of

the action to the district court with jurisdiction over the state-wide prison crowding litigation. It also remanded for reconsideration of the findings of unconstitutionality based on its rejection of the "totality of the circumstances" approach in detainee as well as Eighth Amendment cases. The district court then reaffirmed all of its conclusions of law, denying that it utilized a "totality" approach or held crowding *per se* unconstitutional. Cite the merits holdings in this opinion *remanded for reconsideration*, 887 F.2d 1287 (6th Cir. 1989), *adhered to on remand*, 753 F.Supp. 1398 (E.D.Tenn. 1990).

Crowding (1386-87): The Tennessee Corrections Institute, applying a space standard of 25 square feet of free floor space per inmate, rated the jail's capacity at 228; a population reaching 260-270, resulting in many inmates sleeping on dayroom and drunk tank floors, was unconstitutional for both convicted and pre-trial prisoners. The court cites the length of stay, the lack of fresh air and opportunity for outdoor exercise, and the failure promptly to provide "basic necessities such as mattresses, sheets and towels" and "personal hygiene items such as toothpaste, toothbrushes, and toilet paper." Conditions in the drunk tank were "particularly deplorable"; it was designed to hold 12 people for up to 48 hours but regularly housed 30 to 50 people for periods exceeding a month. The court adheres to its oral ruling at trial that no more than 16 persons can be held in the drunk tank. At 1392-93: The court reaches similar conclusions with respect to the Intake Center, which has held up to 143 inmates and has a TCI-rated capacity of 127, and to its drunk tank.

Crowding, Protection from Inmate Assault (1387-88): There is a pervasive risk of harm in the drunk tank when it contains 30 to 50 inmates. With respect to the whole jail, what was once "occasional violence" (one violent incident a week) had because of crowding become a "pattern of violence" (one incident a day with two or three inmates a week going to the hospital), but the court finds that the plaintiffs have not proved there is an "atmosphere of violence" in the jail. (The violence figures, taken from a captain's testimony rather than records, include "altercation by words" [1379]). At 1392: The same conclusion is reached as to the Intake Center.

Crowding, Classification (1388): Crowding has caused a breakdown of the jail classification system. "It is well settled that courts have ordered prison administrators to institute, at the very least, minimal classification systems which separate inmates by 'age, offense, physical aggressiveness, or other criteria which would warrant separate housing arrangements.'" [Citation omitted] Defendants are therefore directed to reinstitute their classification system or start a new one.

Crowding, Exercise and Recreation (1389): The failure to provide any opportunity for outdoor exercise was not *per se* unconstitutional except for inmates held for more than a year. The failure to provide any meaningful exercise at all, resulting from the use of dayrooms for housing prisoners, was unconstitutional; the court will hear proof concerning the usability of dayrooms for exercise and the feasibility of exercise programs and equipment. In this jail, lock-in time was limited to seven hours a day.

Pre-Trial Detainees/Crowding/Unsentenced Prisoners and Convicts Held in Jails

Carver v. Knox County, Tenn., 753 F.Supp. 1394 (E.D.Tenn. 1989), *rev'd in pertinent part*, 887 F.2d 1287 (6th Cir. 1989). The court finds that the overcrowding that it previously found was largely caused by a backup of inmates from the state prison system, and requires the state to remove enough inmates to bring the county jail down to its capacity as rated by the Tennessee Corrections Institute. This order has been reversed and the district court directed to transfer this portion of the case to the district court with jurisdiction over the population limit on the state prison system.

In Forma Pauperis

Wiideman v. Harper, 754 F.Supp. 808 (D.Nev. 1990). A trial court may require a prisoner bringing a civil rights action *in forma pauperis* to pay fees and costs if the prisoner acquires some money during the pendency of the case. However, § 1915 does not require the prisoner to choose between paying the filing fee and supporting himself or his family. The district court should not have revoked the plaintiff's *in forma pauperis* status based on his receipt of $1000, which he said he had used to help support his mother, without considering the validity of his claim, his financial status between filing and receiving the $1000, and the possibility of a partial filing fee. The law concerning partial filing fees is reviewed at length.

Crowding/Contempt/Modification of Judgments

Morales Feliciano v. Hernandez Colon, 754 F.Supp. 942 (D.P.R. 1991). The court granted a temporary injunction halting all admissions to one prison until the population had been reduced to the previously court-ordered capacity and until running water was available in all areas of the institution.

The defendants were not entitled to modification of a 55-square-foot crowding standard based on their stated intention to implement an "emergency temporary housing project," which the court describes as "a last minute effort by defendants, reflecting the exigencies of litigation," (946) and which they could have undertaken long before. (They had previously relied on an unwritten "comprehensive compliance plan," now apparently abandoned.) The defendants did not show that the proposed modification would advance the provision of minimally adequate living and sleeping space and were not entitled to modification under any standard. At 948: "Defendants are entitled to implement any 'comprehensive compliance plan' they wish, so long as that plan comports with existing orders in this case."

Defendants are found in contempt of the 55-foot standard, as they were previously found in contempt of the 35-foot standard. The court imposes prospective fines of $10.00 per prisoner per day in excess of the maximum capacity, to be increased by $5.00 per prisoner each month for continuing violations.

Transfers/Federal Prisons and Officials/Exhaustion of Remedies

Miller v. Thornburgh, 755 F.Supp. 980 (D.Kan. 1991). A District of Columbia prisoner challenging his confinement in a federal prison need not exhaust administrative remedies. The agreement between the federal government and the District of Columbia is not subject to the Compact Clause of the Constitution; it is sufficiently authorized by federal statute and D.C. law.

Correspondence—Legal and Official

Weaver v. Toombs, 756 F.Supp. 335 (W.D.Mich. 1989), *aff'd*, 915 F.2d 1574 (6th Cir. 1990). Two plaintiffs sent legal materials to the third plaintiff so he could help them with their legal problems. They alleged that the materials were confiscated and not returned.

The opening and reading of inmate-inmate correspondence is reasonable under the *Turner* standard. The confiscation of their legal materials pursuant to policy was reasonable. The policy of permitting inmates to render legal assistance to each other only after agreeing in writing to the terms of assistance and obtaining prior written approval from the prison administration, which approval was to be granted except under specified conditions, was reasonable in light of defendants' interest in avoiding exploitation by prisoners providing legal services. ■

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

(cont'd from page 5)

New Developments in International Human Rights

At the same time, there are exciting new developments in the international human rights field. The world is getting smaller every day. The barriers are coming down in Eastern Europe. In 1992, member states in Western Europe will come together as the European Community. In May of 1990, I met with a delegation from the Soviet Union that is developing structures to protect human rights in their juvenile institutions and prisons.[11] One year ago, the Council of Europe conducted an International Conference in Scandinavia.[12] The program examined the current application of international standards to the human rights of persons deprived of their liberty. It also looked at inequality and discrimination against people because of poverty, social exclusion, ethnic minority status and race, and diseases such as AIDS.

Adopting a "Less is Better" Response

It will be difficult, if not impossible, to deal with the human rights violations that result from prison conditions and practices without first addressing the problem of overcrowding. Some distinguished penologists and sociologists argue that prisons should be abolished or, indeed, that the criminal justice system in our society should be abolished. M. Kay Harris, Professor of Criminal Justice at Temple University, has made a convincing case for the proposition that if we were to replace our male dominated system of social control with a model based upon feminist views of gender, racial and economic equality, we would necessarily abolish our system of imprisonment.[13]

I would like to agree with the abolitionists but I have not yet come up with an acceptable alternative to prison. I do not see abolition happening in the next 100 years.

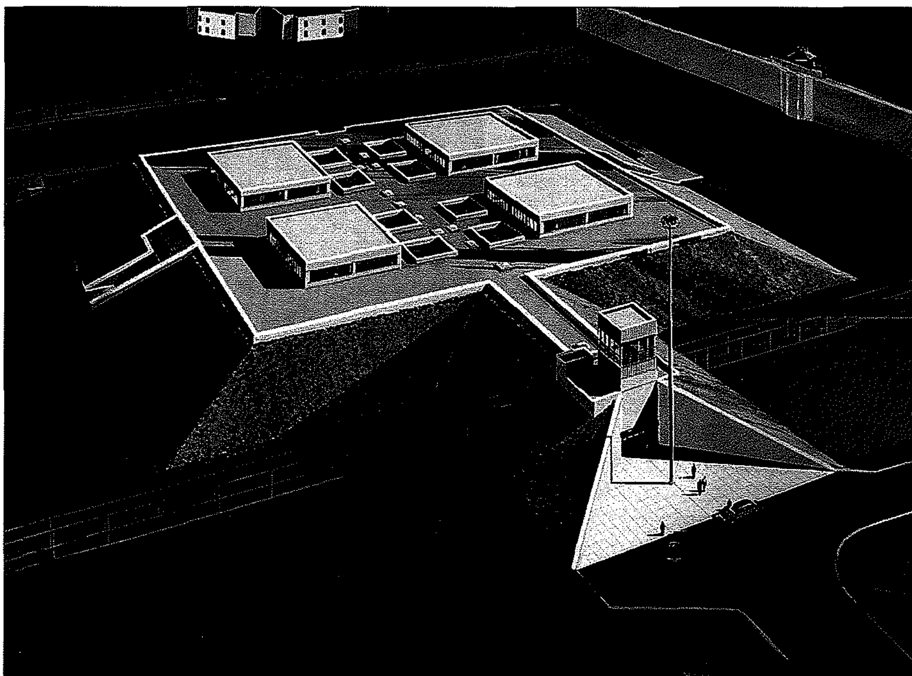
The United States is locking up its future.

To do nothing about prison overcrowding is immoral, yet quite often it is the deliberate policy choice of elected officials. They can brag about being tough on criminals while saving taxpayer dollars and then scapegoat federal judges who intervene when the overcrowding results in unconstitutional conditions of confinement.

We have to try to do more with less, to consider prison space a scarce resource, reserving it in the main for short prison terms for those offenders who must be punished by incarceration. We must begin to tell the public the truth: that prisons have nothing to do with crime control.

We should eliminate most mandatory minimum sentences, eliminate most repeat offender enhanced sentences and shorten our sentences to lengths comparable to other industrial democracies. If we have one prison bed for the next three years, I would rather use it to sentence 12 burglars to three months each than one burglar for all 36 months.

Our current drug policies are proving to be as costly, ineffective and counterproductive as the prohibition of alcohol was 60 years ago. We can make a huge impact on prison overcrowding by adopting rational new drug policies. We must remove most drug issues from the criminal justice system and deal with drug abuse, as with alcohol and tobacco abuse, as a public health problem. We should divert the huge amounts of money now going into ineffective law enforcement programs into education, treatment and other social welfare programs.



Bruton, Knowles & Love, Inc.

At Oklahoma's new maximum security facility, built largely underground, prisoners will spend 23 hours a day in their cells.

A Human Rights Proposal

The current international human rights movement offers a chance to bring the problems of prisoners out of the darkness. We have an opportunity to change the inhumanity that too often exists in prisons.

We must devote our efforts toward the goal of a uniform acceptance by all governments, as well as the media and the public, of the principle that prisoners must be afforded certain fundamental rights if we are to regard ourselves as a civilized society.[14] Those must include:

1. The right to personal safety. Large, overcrowded prisons are dangerous places and a person in custody is generally helpless to protect himself. The obligation of the state to provide safe custody is imperative.

2. The right to care. Decent, clean housing, adequate diet, enough clothing, and medical care are basic needs of all citizens and they must be provided for prisoners who cannot provide for themselves.

3. The right to personal dignity. Self-respect is hard to come by among the poor and racially oppressed persons who fill our prisons, and a prisoner's sense of worth must not be further damaged by the humiliations of confinement.

4. The right to work. Idleness is a disease of United States prisons. A prisoner should be provided work if he or she wants it and should be paid on the same basis as in the free labor market. Responsibilities for housing and dependents should be met by the prisoner, just like the rest of us.

5. The right to self-improvement. A range of educational, vocational, recreational, and artistic programs

should be available to every prisoner so that we do not perpetuate the lack of opportunity which drives so many poor people to criminality in the free world.

6. The right to vote. Electoral disability, unique to the United States in the free world, protects no one and serves as a pointless humiliation to the prisoner. Participation in the democratic process should be encouraged in the interest of making citizenship a real and vital feature of the prisoner's future life.

7. The right to a future. A person who is isolated from the outside world can hardly plan for or even conceive of a future. Existing barriers should be removed and contact with families, friends, and the general outside community should be encouraged.

We must move our current system from one that is based upon vengeance and punishment to one rooted in principles of justice and equity. ■

Alvin J. Bronstein is the executive director of the National Prison Project.

[1]"Swedish Farm Animals Get a Bill of Rights," *New York Times* (October 25, 1988).

[2]Letter from Ole Ingstrup, February 14, 1991.

[3]See proposed revisions to standards 3-4128, 3-4128-1 and 3-4128-2 of the ACA standards for adult correctional facilities dated January 1, 1991, to be considered at the August 1991 meeting of the ACA Standards Committee in Minneapolis.

[4]The Sentencing Project, "Americans Behind Bars: A Comparison of International Rates of Incarceration" (Washington, D.C.: 1991).

[5]National Center on Institutions and Alternatives, "Young African-American Men and the Criminal Justice System in California" (San Francisco, CA: 1990).

[6]"Lockup," *U.S. News & World Report* (October 22, 1990).

[7]National Prison Project of the ACLU, "Status Report: The Courts and the Prisons" (Washington, D.C.: 1990).

[8]I am not suggesting that conditions in U.S. prisons are worse than elsewhere. Although some countries have a greater regard for the human rights of prisoners (e.g., the Scandinavians), many have worse conditions than those that exist today in America.

[9]"New Prison Cellhouse Sets Pace For Security," *The Sunday Oklahoman* (February 24, 1991).

[10]"High-Tech Facility Ushers in New Era of State Prisons," *Los Angeles Times* (May 1, 1990).

[11]Consultation on Projects concerning prison conditions in the USSR, The Human Rights Project Group.

[12]Seventh International Colloquy on the European Convention on Human Rights, May 30-June 2, 1990.

[13]"Exploring the Connections Between Feminism and Justice," The *NPP JOURNAL*, No. 13, Fall 1987.

[14]These rights were first enumerated as essential elements of his "citizenship model of corrections" by the distinguished penologist, John Conrad, and adapted by this author in *Our Endangered Rights*, N. Dorsen, Ed. (Pantheon Books, 1984).

ASCA Proposes Watering Down of Single-Celling Standards

BY WILLIAM C. HARRELL

The Association of State Corrections Administrators (ASCA) has proposed a troubling revision to the current American Correctional Association's Adult Correctional Institution Standard 3-4128. This standard addresses the conditions under which multiple occupancy housing for medium custody prisoners is acceptable. Opponents of this proposed revision posit that it would seriously aggravate an already abysmal corrections system. The ACA Standards Committee will consider the proposal at its August 1991 convention in Minneapolis. ASCA President Tom Coughlin has asked the ASCA Policy and Resolution Committee to gather input nationally and to formulate a statement on the multiple occupancy policy consideration. The ACLU National Prison Project and a considerable number of practitioners and scholars in the field of corrections emphatically oppose the revision. If it is approved by the Standards Committee, Judge David Bazelon's statement made upon his resignation from the Commission on Accreditation for Corrections that the "noble promises" of the accreditation process have become meaningless will have found contemporary affirmation.[1]

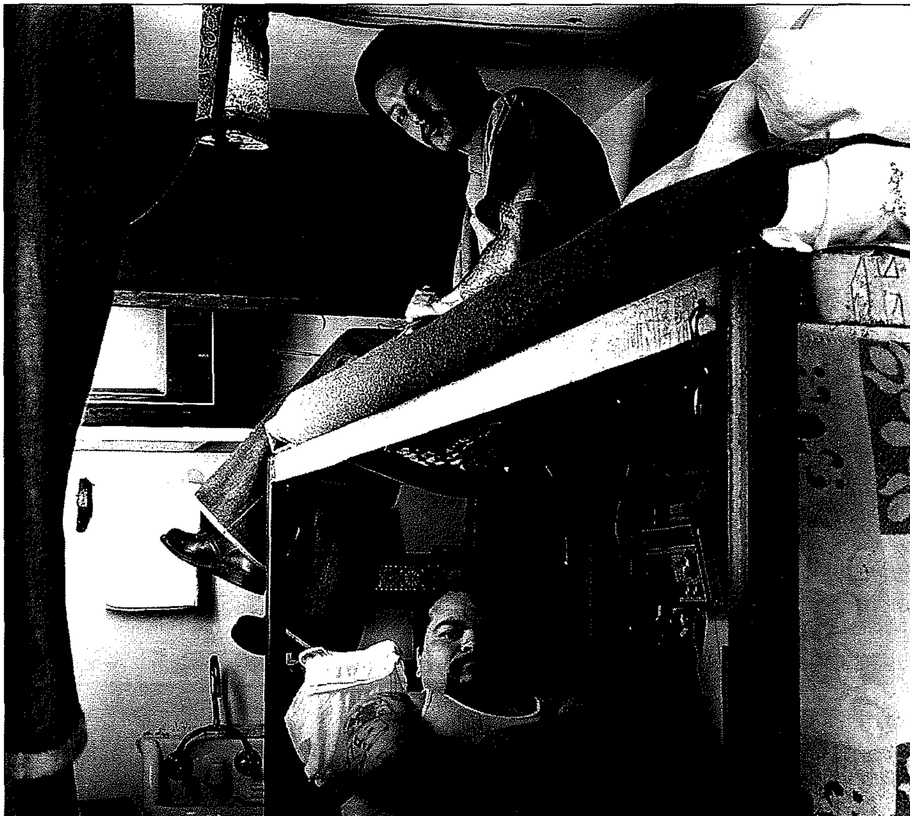
The Proposal

The critical policy change would permit housing of medium security prisoners in a multiple occupancy or dormitory facility with up to 50 other inmates, whereas currently, under no circumstances can such inmates be housed in that manner. It would also reduce the space from 35 square feet per prisoner (as established by the 3rd Edition of the standard) for prisoners who cohabit with two to 50 others, to 25 "unencumbered"[2] square feet. This is a decrease from 50 square feet per prisoner set out by the 2nd Edition.

The proposal also requires compliance with other current housing standards before compliance with the revised standard is achieved. Certain cell furnishings, and access to toilets and washing facilities are referred to. Also, "direct supervision" is required as a condition-precedent to compliance with the revised standard. These restrictions, if concurrently implemented, could stand to protect prisoners and staff from the dangers of multiple occupancy cells or rooms. However, it ignores several critical factors. Adequate ventilation to accommodate the increased population, a proportional increase in the number of staff patrolling these facilities, and adequate expansion of programming and services such as mental health and medical care appear not to have been contemplated in light of the proposed revision, though clearly they will be affected. Prisoner and staff health and safety interests are too important to be left unaddressed and unprotected.

The proposed revision also conditions double-celling on a proper classification scheme to identify medium security prisoners. However, the reference fails to add any meaningful safeguards. One cannot ignore the fact that in today's prison environment, proper classification is among the first principles to be jettisoned under the pressure of the enormous numbers entering the system. Due to increasing prison populations, it is not unusual to find maximum or close security prisoners housed in medium security facilities, including dormitories. Another reality of today's prison system

To many of us, thinking of space requirements in square footage terminology brings to mind no visual image. Consider that the average space per cadaver within a coffin is 19.5 square feet, merely 5.5 square feet less than the proposed allotment for prisoners. It is important to keep in mind that the cadaver rests peacefully in the privacy of its own secluded space, separated by a wall of earth from foreign intrusions. Under the proposed revision, prisoners will share dormitory space with up to 50 other living, breathing, coughing, and sneezing prisoners. While increased violence and the deterioration of mental and physical health associated with multiple occupancy are of no consequence to a cadaver, these are matters of life and death to the prisoner housed in a dormitory, regardless of how much space he or she is allotted.



Ruth Morgan

A proposal being considered by the ACA to allow double-celling puts inmate health and safety at risk.

and economy is that the states simply cannot hire the staff needed to fulfill the classification requirement of the proposal. Nor can the institutions maintain the qualified and experienced staffing necessary to sustain a rigorous screening plan due to this resource inadequacy.

The revision proposed by the ASCA would further impair the environment in which medium security prisoners live. "There can be little denying that the context in which one lives and works impinges upon and shapes the individual's behavior both then and in the future....Nowhere else may the importance of the environmental context be so significant as in prisons."[3] As a product of this environment, some prisoners deteriorate, others improve, and still others show little or no change.[4]

As the literature emphasizes, crowding is a matter of perception. That perception is affected by a number of sub-aspects other than sheer space per prisoner (i.e. structural characteristics, social density, privacy, etc.). Research findings suggest that "social density" rather than "spatial density" determines the level of prisoners' coping ability or pathological reactions to their condition.[5] The proposal, if adopted, would affect both conceptual aspects of crowding.

A 1963 American Foundation Institute of Corrections evaluation determined that prisoners, staff, and prison administrators preferred single cells to dormitories.[6] Moreover, suicide, nonviolent and violent deaths, psychiatric commitments, assaults, disciplinary infractions, attempted suicides, self-mutilations, illness complaints, and high blood pressure were found to occur more frequently among prisoners housed in multiple-occupancy units.[7]

Social Upheaval

The increased stress, tension, fear, anxiety and hostility created by crowding will find an outlet in several ways. Some prisoners will try to "escape" from a stressful and constantly intrusive situation by emotional withdrawal, apathy, and resignation. Others will try to stake out personal territory in a more aggressive manner and may form protective groups or cliques to defend their "turf," leading to group as well as one-on-one confrontations. These signs of increased pathology appear to be associated with several factors: "presence of other residents, low space per person, double-bunking, and lack of privacy".[8] As noted above, some research suggests a correlation between multiple-occupant dwelling and violence; the amount of personal space may be a greater determinant of disruptive behavior and violence than the total number of prisoners in a given institution.[9] The correlation is particularly acute where youth offenders are in the sample observed.[10] Similarly, prisoners with a greater need for interpersonal distance engaged in violent and aggressive behavior more frequently.[11]

Physiological Ramifications

The high density and close confinement necessitated by dormitory housing also appear to be related to physiological measures of stress such as pulse rate, diastolic and systolic blood pressure, and palmar sweat[12], to the increased danger of the spread of acute infectious diseases, and to have a deleterious effect on inmate mental health.[13] As a result of research into the causes of and distribution of disease, it is now known that the common respiratory diseases—influenza, the streptococcal diseases, and the pneumonias—are spread through interpersonal contact, or by articles soiled by discharges from the nose and mouth, or discharges into the air by breathing, coughing, sneezing, spitting, or even talking.[14] Prison crowding has been linked to an increased incidence of communicable disease[15] such as meningococcal disease,[16] and also to the development and spread of such potentially fatal diseases as pulmonary tuberculosis.[17] The proposed revision provides no mechanism whereby the essential adjustments to the ventilation at a facility may be adopted to accommodate large numbers of closely confined prisoners.

Psychological Deterioration

Among the harmful effects on mental health associated with crowded habitation and exacerbated by close living revealed in the research literature are increased psychiatric symptoms, nervous breakdowns, alienation, and low self-esteem.[18] Such conditions also cause stress-related disease.[19] These stress-related conditions are evidenced physiologically by elevated blood pressure,[20] and increased sweating.[21]

Legal Consequences

The proponents of the standard change argue that its adoption will reduce the states' susceptibility to constitutional challenge and judicial intervention. However, experience teaches that the more likely impact is further deterioration of conditions and reduction of services, thus bringing the likelihood of more rather than less litigation. Legal assistance organizations like the National

Prison Project of the ACLU will increase their efforts while prisoners are likely to increase their *pro se* filings. Moreover, to the extent that these worsening prison conditions can be shown to be "egregious" under the 1980 Civil Rights of Institutionalized Persons Act (CRIPA)[22] they will come under increasing scrutiny by the Civil Rights Division of the U.S. Department of Justice.

A widely held misconception is that compliance with the ACA standards or accreditation will immunize the state or at least make less likely judicial intervention by way of lawsuits brought by prisoners or on behalf of prisoners. In reality courts apply their own standards when scrutinizing conditions in light of the Eighth Amendment to the U.S. Constitution. The Court in *Rhodes v. Chapman*, the seminal case concerning conditions of confinement, plainly held that compliance or lack of compliance with professional standards (such as the ACA's) simply does not establish or refute an alleged violation of the Eighth Amendment.[23] Looking at the broader totality of conditions in a prison or jail, a court must find "unquestioned and serious deprivations of basic human needs" or "(deprivation) of the minimal civilized measure of life's necessities" which include food, clothing, shelter, medical care and personal safety.[24]

Cited below are a few examples of recent cases where overcrowding contributed to a prison disturbance:

- 14 correctional officers and 44 prisoners at a Maryland state facility were injured in May of this year when a fight in the dining hall erupted in a general melee. The institution, in Hagerstown, stands 60% over its rated capacity.
- About 120 people were injured in the October 25, 1989 riot at the state prison in Camp Hill, Pennsylvania. At the time of the uprising, 2,600 prisoners were housed in an institution with a capacity of approximately 1,800. Since 1984, double-celling of state prisoners has become common practice in Pennsylvania. The uprising occurred as word spread of further cutbacks to already diminished medical, legal and programmatic services.
- Approximately 40 prisoners were injured when violence broke out in a seventh floor cellblock of the El Cajon maximum security detention facility in California in 1988. The cellblock, designed to hold 24 felony and misdemeanor inmates, was jammed with 175 men when the fighting started.

Compare the scope of this inquiry to the inquiry necessary to determine compliance with the space now proposed. Indeed, courts have determined that facilities were unconstitutional despite the fact that the Commission on Accreditation for Corrections (CAC) had approved accreditation. Moreover, since the space standards are not mandatory, a candidate for accreditation need not comply with them in order to be awarded such accreditation by the Commission.[25]

Political Reality

These proposals, if approved, will drastically undermine the efforts of corrections commissioners who have used the ACA standards as a lever to pry additional resources for improvements in conditions and services out of recalcitrant legislators and governors. Upon passage of these proposals, legislators and governors will seize the opportunity provided to cut high construction and operating expenses at the cost of prisoner and staff health and safety. Indeed, this process has already begun. The General Accounting Office recently suggested to Congress that substantial operating and construction costs for federal prisons could be substantially reduced if the Bureau of Prisons would change its policies to permit more double-bunking in its new and existing facilities which are not high security.[26]

The proposal submitted to the ACA by the Association of State Corrections Administrators, if adopted, would adversely affect the physical and mental well being of the incarcerated. The proposals do not reflect an attempt to advance the system of corrections in America. Rather, they represent an abandonment of principle motivated by political and financial considerations. As Judge Bazelon noted before, this is merely an "attempt to paper over the crises in corrections."[27] Clearly, the dilution of spatial and social density standards is fueled by a swelling sector of our population more readily sentenced to longer terms of incarceration in a time when many states and localities are saddled with serious financial problems. The ACLU National Prison Project rejects the notion that this is a necessary, much less humane solution to a fundamental problem in the American criminal justice system. ■

William C. Harrell, a National Prison Project Fellow, was recently admitted to the New York Bar.

[1]David Bazelon, "The Case Against Accreditation," *Prisoners and the Law*, ed. Ira Robbins (Clark Boardman Co., Ltd., 1985).

[2]"Unencumbered square footage" is a novel approach to density calculation. It is determined by multiplying the length and width of the cell and subtracting from that figure the total number of square feet encumbered by fixed equipment or furnishings.

[3]Lynne Goodstein and Kevin Wright, "Inmate Adjustment to Prison," *The American Prison: Issues in Research and Policy*, ed. Lynne Goodstein and Doris Layton MacKenzie (Plenum Press, 1989), pp. 229-246.

[4]L.H. Bukstel and P.R. Kilmann, "Psychological Effects of Imprisonment on Confined Inmates," *Psychological Bulletin* 88 (1980), pp. 469-493.

[5]P.B. Paulus, V. Cox, G. McCain and J. Chandler, "Some Effects of Crowding in a Prison Environment," *Journal of Applied Social Psychology*, 5 (1975), pp. 86-91.

[6]Wright and Goodstein *supra*. n.3.

[7]*Id.*

[8]U.C. Cox, P.B. Paulus, and G. McCain, "Prison Crowding Research; The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena," *American Psychologist*, 39 (1984), pp. 1148-1160.

[9]D.A. D'Atri, "Psychophysiological Responses to Crowding," *Environment and Behavior*, 7 (1975), pp. 237-252. *See also* Edwin I. Megargee, "The Association of Population Density, Reduced Space, and Uncomfortable Temperatures with Misconduct in a Prison Community," *American Journal of Community Psychology*, 5 (1977), pp. 289-298.

[10]Derek Ellis, "Crowding and Prison Violence: Integration of Research and Theory," *Criminal Justice and Behavior*, 11 (1984), pp. 277-308.

[11]*Id.*

[12]D.A. D'Atri and A.M. Ostfeld, "Crowding: Its Effects on the Elevation of Blood Pressure in a Prison Setting," *Preventative Medicine* (1975). *See also* D.A. D'Atri and E.F. Fitzgerald, S.V. Kasi, and A.M. Ostfeld, "Crowding in Prison: The Relationship Between Changes in Housing Mode and Blood Pressure," *Psychosomatic Medicine*, 43 (1981), pp. 95-105.

[13]Bailus Walker, Jr. and Theodore Gordon, "Health and High Density Confinement in Jails and Prisons," *Federal Probation* (March 1980).

[14]Richard L. Riley, "Airborne Infection," 57 *The American Journal of Medicine* 466-75 (1974).

[15]Annual Report, Commission on Acute Respiratory Disease. Armed Forces Epidemiological Board (1951-1952).

[16]J.W. Millar and C.E. Alexander, "Epidemiology of Meningococcal Disease," *Proceedings of the First Symposium on Aerobiology* (1963).

[17]L. King and G. Geis, "Tuberculosis Transmission in a Large Urban Jail," 237 *Journal of the American Medical Association* (1977), pp. 790-93.

[18]W.R. Gove, M. Hughes and O.R. Galle, "Overcrowding in the Home: An Empirical Investigation of its Possible Pathological Consequences," 44 *American Sociological Review* 59, 74 (1979).

[19]*Id.*

[20]D'Atri and Ostfeld (1975), *supra.*

[21]Cox, *et al.* (1979), *supra.*

[22]42 U.S.C. 1997.

[23]452 U.S. 337, 343 n. 13 (1981).

[24]*Rhodes*, 452 U.S. at 347.

[25]See ACA *Standards for Adult Correctional Institutions*, 3rd Edition at Foreword vii-xv.

[26]GAO Report, *Federal Prisons: Revised Design Standards Could Save Expansion Funds*, GGD 91-54 (March 1991).

[27]Bazelon (1982), *supra.*

Modification of Consent Decrees Goes to High Court

BY DAVID FATHI

"Who will make a binding agreement with a party that is free to walk away from an agreement whenever it begins to pinch?"[1] This question now faces the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*,[2] a case with potentially enormous consequences for prison conditions litigation.

Many large and complex cases—such as school desegregation, employment discrimination, and prison conditions cases—are resolved by entry of a consent decree, a settlement agreement between the parties that is approved by the court. The advantage of settlement by consent decree is that all parties are spared the expense and uncertainty of a trial, and the remedy is chosen by the parties, rather than imposed by the court. If one side later violates the consent decree, the court can enforce the agreement by the imposition of fines or other sanctions.

The question now before the Court in *Suffolk County* is when such decrees can be modified at the request of prison officials, over the objection of the prisoners. The case involves the Suffolk County Jail in Boston, Massachusetts. In 1971, prisoners at the Suffolk County Jail sued the Sheriff in federal court, alleging that conditions at the jail violated their constitutional rights. After a trial, the district judge held that conditions did indeed violate the rights of pretrial detainees under the Fourteenth Amendment.[3] Because of the numerous dangerous and unhealthy conditions, the judge ordered that the jail be closed by June 30, 1976. One of the worst conditions, the judge found, was the regular practice of housing two prisoners in cells designed for one, creating severe crowding and presenting a serious threat of violence.

The 1976 deadline came and went, and the jail remained open. No progress was made on producing a plan for a replacement facility. Finally, in 1979, the parties reached agreement on a plan for a new jail, which was embodied in a consent decree approved by the court on May 7, 1979. A critical feature of this consent decree was the provision that prisoners would not be double-celled.

The pretrial detainee population in Suffolk County increased steadily. Thus, in 1985, the district court modified the consent decree to permit the Sheriff to increase the numbers of prisoners who could be held in the new jail by any amount, as long as single-celling was maintained. The total male capacity of the new jail is 419, an increase of 77 over the old facility.

On July 17, 1989, as the new jail neared completion, the Sheriff requested that the district court allow modification of the consent decree to permit the housing of two prisoners to a cell in the new jail. The Sheriff argued that changes in the law since entry of the consent decree made this change permissible, and increases in the pretrial detainee population made it necessary.

In opposition, lawyers for the prisoners introduced evidence that multiple occupancy would increase the risk of violence between detainees (the cells are 70 square feet in area, with approximately 40 square feet of available floorspace). In addition, because the cells were designed for single occupancy, the layout of the cells, the design of the cell door (solid with a small window, rather than barred) and the location of the guard station would make it extremely difficult to hear or see an altercation between two prisoners in a cell until it was too late. The prisoners' lawyers also proposed an alternative plan to increase the capacity of the jail without double celling.

The district court denied the Sheriff's motion for modification of the consent decree. The judge found that the relevant law had not changed since entry of the decree, and that the population increase was neither new nor unforeseen. In addition, he found that the proposed modification "would violate one of the primary purposes of the decree."[4] The United States Court of Appeals for the First Circuit affirmed.[5] The Sheriff petitioned for review in the Supreme Court; the petition was granted on February 19, 1991.

The issue before the Supreme Court is the standard to be applied to motions to modify consent decrees affecting prisons, jails, and other public institutions. More than half a century ago, the Supreme Court laid down a strict standard for modification of consent decrees: the party seeking modification had to show a "grievous wrong evoked by new and unforeseen conditions."[6] In recent years, some courts have applied a less demanding standard when government officials seek modification of a consent decree affecting a public institution.[7] However, it is clear that the Sheriff seeks an even more liberal standard—if a proposed modification would not result in conditions that are actually unconstitutional, it would be allowed.

There are several problems with this approach. A consent decree, like any agreement, is useful only if it is understood that both sides will be bound by it. If prison officials can easily be released from their responsibilities under a consent decree, prisoners' lawyers will no longer settle cases by consent decree, insisting instead on a full trial followed by relief ordered by the court. Moreover, since the constitutionality of a prison or jail must be evaluated by examining conditions in their totality,[8] each modification motion, even if it deals with only a single issue, will essentially require a retrial of the entire case.

The National Prison Project, along with the National ACLU and the Massachusetts CLU, has filed an *amicus* brief in support of the Suffolk County inmates, urging the Court to reject the liberal modification standard advocated by the Sheriff. A number of other *amicus* briefs have been filed on both sides of the issue. The stakes for prison litigation are high. If the Court significantly weakens the enforceability of consent decrees, prisoners and their lawyers can expect an avalanche of modification motions in all cases previously settled by consent decree. Victories thought to be won long ago will suddenly be jeopardized, as cases are thrown back to courts that are more hostile to prisoners' rights with every passing day. ■

David C. Fathi is a staff attorney with the National Prison Project.

[1] *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc).

[2] Nos. 90-954, 90-1004.

[3] *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1973).

[4] *Inmates of Suffolk County Jail v. Kearney*, 734 F.Supp. 561, 565 (D.Mass. 1990).

[5] 915 F.2d 1557 (1st Cir. 1990) (unpublished opinion).

[6] *United States v. Swift*, 286 U.S. 106, 119 (1932).

[7] *See, e.g., New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

[8] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

THE NATIONAL PRISON PROJECT

AIDS Update

BY JUDY GREENSPAN

"Are You Trying to Tell Me I Have AIDS?"

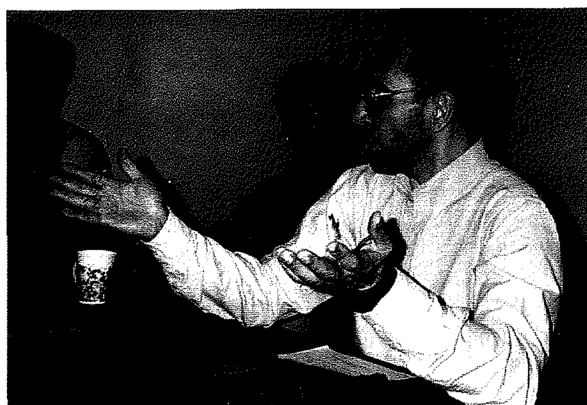
In March 1991, the National Commission on AIDS released its report, "HIV Disease in Correctional Facilities." Essential reading for everyone both in and out of prison, this report stresses the importance of allowing peer AIDS education programs.

Establishment of one of these programs often requires that the prisoner educators overcome the resistance of administrators. One such prisoner peer educator is Gilbert Serrano. Mr. Serrano spent 10 years behind bars in New York State. While in prison, Mr. Serrano discovered that he was HIV positive. He later founded a comprehensive HIV/AIDS information library at the prison and authored an excellent educational pamphlet, "Inmate to Inmate."

Recently released on parole, Serrano was the guest speaker at a program sponsored by the AIDS Project of the National Prison Project. Printed below are excerpts from his speech. (Copies of the National Commission on AIDS report and "Inmate to Inmate" are available from the NPP.)

I don't consider myself a radical—I really don't even consider myself an advocate. Maybe my Christian upbringing makes this my mission. Seven months after I graduated from college, my mother died and they told me my wife had cancer. I just fell apart and started using drugs. That led to crime and consequently a 10-20 year sentence in prison. In prison for 9-1/2 years, I had never been sick. Six months prior to seeing the parole board, I came down with an infection in my mouth. I went down to the infirmary and you could imagine, the nurse took one look, reared back and said, "Oh my god, what's that?" I was ushered in to see a physician's assistant and he started mumbling—I caught the words, "immune system." So I asked him, "Are you trying to tell me I have AIDS?" He said yes.

We often feel that this will not touch us. When it does, we are in a fog. This happened to me. It was a horrific experience. Here I had survived 10 years of prison, I had six months to the parole board and now I get told that I have the virus. I've read a lot of material through the ACLU, the Correctional Association of New York, and the Osborne Association, and I've learned that things are really bad all over. I wouldn't want to say that New York has the worst scenario. But the attitude overall is one that says we [the prison administrators] are not ready to deal with this because (1) the economic ramifications are too great (that's usually at the top of the list); and (2) we will be opening up a tremendous can of worms which people are not ready to deal with. This is one of the reasons why I am really glad that you all came. Maybe we'll create some motivation to say this is not just going to go away. Individuals like yourselves have to hang in there tenaciously, otherwise it [interest] will fade. We can't get any further back on the burner. Right now we're in the oven.



NPP Photo

Gilbert Serrano was a guest speaker at a recent program sponsored by the NPP AIDS Project.

The strategies that we develop must be geared toward the population we are actually trying to help. It took the governor of New York 10 years to give a pardon to one individual with AIDS. Every day inmates are dying. What we need in prison is immediate outreach intervention. We need community organizations to come in and provide the services that the system won't. We need comprehensive AIDS education programs in prison. But it takes a lot of guts to go before an administration and introduce something that will change the basic fabric of that prison. You are not going to change one atom of this atmosphere without outside support.

After the initial shock of being told that I was HIV positive, I said hey, I'm not giving up. I've always been a fighter. My motto became: get busy. The first thing was to find out what was trying to kill me. Once the word got out that I was involved in this—because I was so respected in the prison as a no-nonsense individual—inmates would come to me and ask to talk. Our so-called HIV counselors, who are really just correctional officers who have become counselors, don't have the time, and you know all the reasons and excuses. I thought about approaching the administration about our need to develop an HIV support group—not a gripe group—to come together to support one another but also to become educated in what is happening with us and how to help ourselves. It was very successful, so much so that the administration began to put obstacles in the way. I wound up with so much material that I developed the formal HIV/AIDS resource library for the Department of Correctional Services. This grew from a small seed and before long, I was giving talks on sex, drugs and AIDS to the pre-release center.

A prisoner who has been diagnosed or has some infection will have to wait until the infection gets so bad that even a blind person can see that something's wrong. Do you really think they're going to invest money in intervention and prevention? There is no continuity of care and it's getting worse.

Without the people here in this room and others around the country, people on the inside would have no support. Next time you are ready to speak up, please check with me first and I might be able to provide you with some insights you have overlooked. We have no voice in prison. You are our voice. You people are so very important to us. ■

Judy Greenspan is the AIDS information coordinator for the NPP.

THE NATIONAL PRISON PROJECT

Publications

QTY. COST

The National Prison Project JOURNAL, $25/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, AIDS, family support, and ex-offender aid. 9th Edition, published September 1990. Paperback, $30 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, $3 prepaid from NPP.

QTY. COST

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. (Note: This is not a "jailhouse lawyers" manual.) $15 prepaid from NPP.

QTY. COST

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

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

(order from ACLU) **ACLU Handbook, The Rights of Prisoners.** Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. $7.95 (free to prisoners) from ACLU, 132 West 43rd St., New York, NY 10036.

Fill out and send with check payable to:

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

Name ______________________________

Address ______________________________

City, State, Zip ______________________________

THE NATIONAL PRISON PROJECT Highlights

The following are major developments in the Prison Project's litigation program since March 1, 1991. Further details of any of the listed cases may be obtained by writing the Project.

Bates v. Lynn seeks to ensure adequate legal access for death row prisoners in Louisiana. In April the court approved a settlement which provides death row prisoners with contact legal visits, regular legal training, attorney supervision for law library legal assistants, and increased indigent mail privileges.

Brown v. McKernan challenges conditions in the special management units of the Maine State Prison. In March, parties reached an agreement ending double-celling in segregation and protective custody units and providing for enhanced program opportunities in those units where virtually none had existed before.

Duran v. King is a statewide New Mexico prison conditions case. After more than a year of intensive negotiations, the parties agreed in June to modify the consent decree entered into in 1980. Because the state is near substantial compliance with the decree, it has been agreed that the decree will be vacated after a finding by the Special Master of substantial compliance and a period of further reporting. In exchange, the state has agreed to a permanent, non-modifiable set of population controls including a prohibition against double-celling.

Hamilton v. Morial challenges conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans. In lieu of a trial scheduled for the week of May 1, defendants entered a stipulation in effect confessing their liability on the mental health care issues. The court has established a timetable for defendants to develop a remedial plan to cure the problems we identified.

Hudson v. McMillian On April 29, 1991, the United States Supreme Court appointed the National Prison Project to serve as counsel in this case filed *pro se* by Louisiana prisoner Keith Hudson. Hudson, while in shackles, was beaten by two prison guards while a supervisor looked on. The district court awarded Hudson damages. The Fifth Circuit overturned the decision because the case did not satisfy an element of a four-prong test for Eighth Amendment claims which requires there be significant injury. For further details, see story on page 1.

John A. v. Castle challenges conditions at two Delaware juvenile facilities. Parties reached agreement on new policies for control, grievance and disciplinary procedures as well as a plan for monitoring the implementation of these procedures. This agreement is interim in nature though parties expect some form of it will eventually be reduced to a consent decree.

Lecclier v. Bayh challenges conditions and practices at the Indiana Reception and Diagnostic Center. After conducting discovery, parties reached an agreement in May to correct the conditions under challenge, including crowding, inadequate services and programs, and environmental hazards. The agreement is now awaiting court approval.

Sheriff Robert C. Rufo v. Inmates of Suffolk County Jail—See page 17.

U.S. v. Michigan/Knop v. Johnson is a statewide Michigan prison conditions case. On May 29, following intensive negotiations, the parties agreed on a series of stipulations to address long-standing deficiencies in mental health services. Following the entry of the stipulation, the court returned $100,000 in accumulated contempt fines to the defendants to be used to address prisoners' mental health needs. The court also indicated that it will consider the disposition of the remaining approximately $750,000 in contempt fines in July when it has more information on Michigan's progress in carrying out the stipulation.

Wilson v. Seiter—See page 6 for discussion.

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