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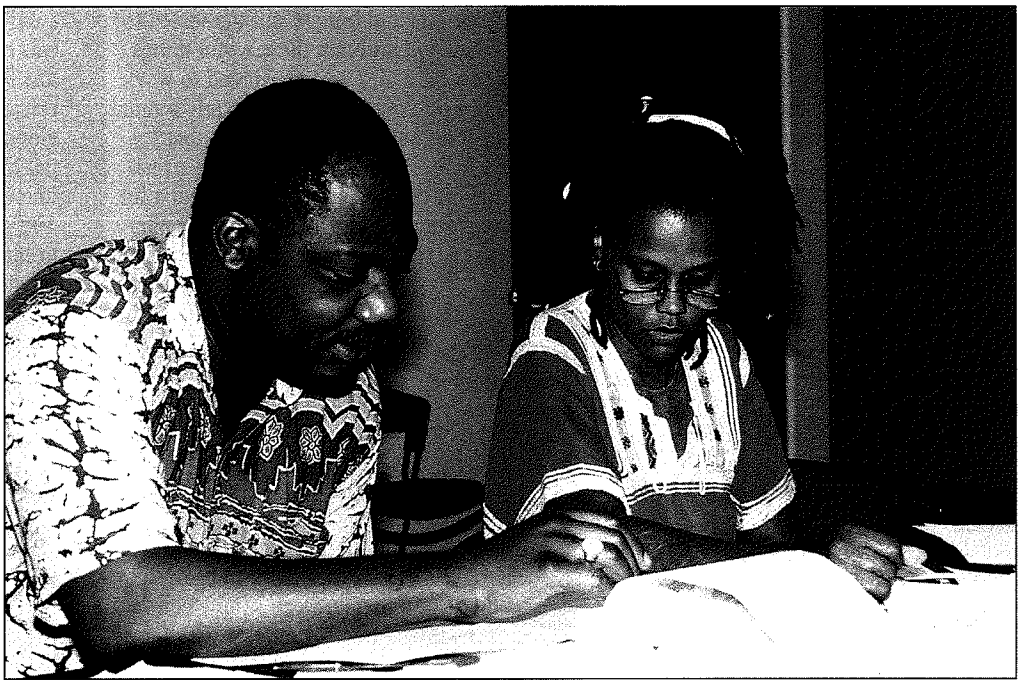
Liberian Lawyer "Always Knew" He Would Be Thrown in Jail

BY JAN ELVIN

After two years as an NPP senior law fellow, Mohamedu Jones was recently hired as an attorney for the NPP. JOURNAL editor Jan Elvin's profile of Mohamedu in this issue focuses on his life in his home country of Liberia, and his experiences with the devastating changes that have taken place there over the last two decades.



NPP Photo

Mohamedu Jones meets with former Prison Project attorney Adjoa Aiyetoro.

JE: The political situation in your country, Liberia, has affected the direction in which your life has gone. As a lawyer in Liberia, you did quite a bit of commercial work; yet today you find yourself at the Prison Project representing prisoners. How did you get from there to here? Maybe you should begin at the beginning and tell us about the political situation in Liberia.

MFJ: You could say that Liberia came of age in July 1971 when President [William V.S.] Tubman, who ruled the country for 27 years in a sort of fraternalistic, "benevolent" dictatorship, died in a clinic in London. Liberians of my generation had never known another president; so the country realized that something had changed. Vice President William R. Tolbert succeeded constitutionally, but the country was never the same. President Tolbert ruled from 1971 until the coup of 1980. During that time the country began to go through an evolution. Things that people had taken for granted—the lack of a really free press, a legislature that more or less did whatever the president wanted, a Supreme Court that was not as independent as the Constitution envisioned—people began to question these things and political action began. Liberia's founding fathers had several ideals when they returned from America: democracy, the education of the indigenous people of Liberia, and the introduction of Christianity. They failed on all three. They never instituted democracy, although they had all the facades. They had a Supreme Court. If you read some of the Supreme Court opinions of Liberia, there's citations to *Marbury v. Madison*, etc. They had a legislature, a senate, and representatives. But they did not institute a democracy. It was certainly a big mistake to totally dominate the indigenous people.

JE: Weren't the founders called "Americo-Liberians" at one time?

MFJ: Yes, and there was a time when that term was positive, at least in their own minds. After World War II, however, people began to resent the term. For one thing, it clearly showed an "elite" status. Gradually the designation "Americo-Liberian" has dwindled. There has also been a lot of—I hate to use the word—intermarriage, but there have been marriages of people who were descendants of the returnees with people who always were there, and their kids are Liberians.

INSIDE . . .

JE: Was Tolbert really interested in democracy?

MFJ: I believe he was. People around him slowed him down. Unfortunately, he was a bit indecisive. He was brutally murdered on the night of the coup, April 12, 1980.

JE: How did you hear about that?

MFJ: The radio simply said he had been assassinated. This is the modus operandi of coups in Africa. You hear gunfire during the night, the next morning the radio announces a new government, which will have "liberation" or "redemption" in its name—something it never lives up to, by the way. And after the coup I was arrested.

JE: How did they treat you when you were arrested?

MFJ: When you're arrested for political reasons the first thing they do to you is they take off all your clothes. This is the humiliation, public humiliation. There is no way you can walk with dignity without clothes. No way. Your shoulders droop and your head will hang. Even as I talk about it now I shudder because I remember very vividly the humiliation of that experience. I was taken to the military stockade. This guy sitting behind a desk said, "Where did you work?" I said, "The True Whig Party." He said, "What did you do there?" I disingenuously said, "Secretary." Well, I *was* an assistant secretary of political affairs. He said, "We don't want you, you're a little guy." I said "I don't have on any clothes." Somebody handed me some clothes and I put them on and went back home.

JE: So, it wasn't like they had a list.

MFJ: Well, they did, of the President's cabinet, his closest advisors. A week later, I was sitting home listening to the BBC, and a report comes over the air that 13 former government officials had been executed. I tell you, I was stunned. These people were of no threat whatsoever. I knew some of them personally.

JE: Were they cabinet people, legislators?

MFJ: They were both. The head of the Senate was executed, the Speaker of the House, whom my father had always considered his mentor. My wife's first cousin, who was the Minister of Commerce...he was a man of 35, the President of the Senate was 75—it covered the whole spectrum.

JE: Did you feel like it was getting a little close to you, too?

MFJ: Personally, no, but it made me realize that the country was in serious trouble. These 13 people were taken out on the beach and shot without any due process. I say that somewhat exaggeratedly—they did go through some kind of court martial. But eventually the military leaders tired of that and said it was wasting too much time.

JE: So they just started killing people?

MFJ: Yes, right. Two or three people who were executed never stood before this tribunal.

JE: What did that tell you about Samuel Doe [the coup leader]?

MFJ: What you saw was cold-blooded brutality. These were people who were not prepared to live by the law. Something was wrong, seriously flawed, about this thing. Eventually, however, a friend was able to convince me that it was perhaps the best opportunity we'd ever had to straighten up the country. He persuaded me that these "excesses," as they were termed, were flukes. And also that Doe and his council were serious and honest and dedicated to the country—and that these awful things had now passed. I was convinced to work for the new government. I certainly wanted to see it do better. So, persuaded that I could help, I began working in the presidential office. Another argument that a lot of people made was that if we didn't participate to try to get this thing on a rational course, then we would have abdicated our responsibility to the country and then, how could we blame these people?

JE: Then you'd be leaving it to them.

MFJ: And we all knew they didn't know better. They hadn't been exposed to the rest of the world. So I went to work in the presidential office for a year. After a year my skepticism returned in full.

JE: What was it that bothered you?

MFJ: Well, the corruption. I began to see that Doe's people were simply concerned with gaining personal wealth. Also, when you came to work you heard soldiers talking about what they did last night—tales of death, rape and other forms of inhumane treatment of citizens. I even began to get concerned about being around there. Looking to the future—if this thing collapses, I would not be able to convince anyone that I was trying to help my country. Later, I got an opportunity for a position with the Liberian Produce Marketing Corporation, and left.

JE: To go back to Doe for a moment—what was he like?

MFJ: He was certainly charismatic, and was a fast learner. For a man who had not completed high school (from all evidence, even though he claimed he did) he transformed himself pretty quickly. He understood power. He learned some of the nuances of diplomacy. He certainly learned to speak much, much better. So Doe did change—on the surface. One of the dangers of superficial education is that the philosophical grounding that would temper a very powerful person was absent. The moral compasses that a lot of us have as we're growing up, taught by parents, grandparents, reading history, learning about "great men" were all absent from his life. So he was never a well-rounded person. He literally could do anything he wanted to do in Liberia.

JE: Like what?

MFJ: He could take the entire treasury and put it in his briefcase if he wanted to.

JE: What kinds of things did he do?

MFJ: Well, he took a lot of the treasury and put it in his briefcase. He could cause the death of people, which he did, both legally and illegally.

JE: What was the political climate? Were people getting thrown in jail?

MFJ: There were times when the country was optimistic that we could get over this hurdle. Then there were times when the evil was so glaring that everybody became gloomy and pessimistic. I was thrown in jail myself by Doe, eventually. I always knew that might happen. In [February] 1985, I uttered criticisms which got back to him. He then had me brought to the presidential office and asked me exactly what had occurred, and I told him. Two days later the SSS, the Special Security

(con't. on page 15)

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Mandatory Minimum Sentences Open Up a Pandora's Box

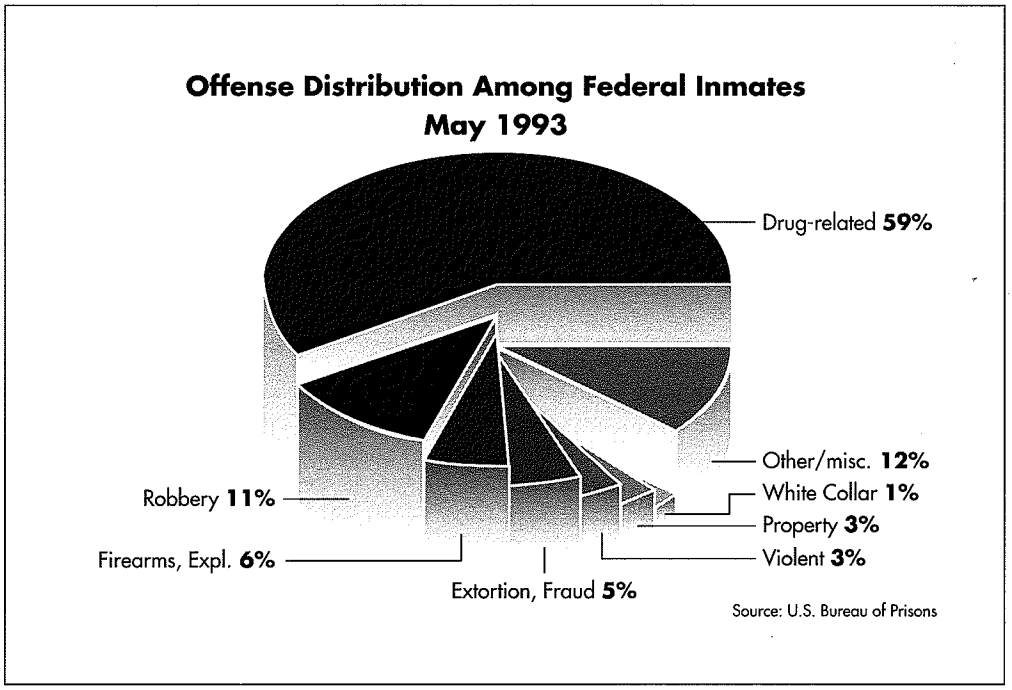
BY NKECHI TAIFA

The "war" on drugs has become an insidious metaphor for a militaristic approach to addressing social problems. In waging this "war," the sky is the limit in law enforcement's attempt to conquer the perceived enemy—primarily people of color and the poor.

The resultant disintegration of civil liberties is evidenced by the gutting of safeguards against unreasonable searches and seizures, the weakening of the presumption of innocence through preventive detention, the stepping up of disproportionate punishment through unwarranted civil forfeiture of assets, expansion of the use of entrapment, abusive treatment of public housing tenants, police brutality, and the growing militarization and federalization of law enforcement.

Mandatory sentencing laws are prime illustrations of the abuses this "war" mentality has generated. These laws have unleashed a virtual Pandora's box of evils onto society, which have manifested themselves in: (1) *the demolition of judicial discretion*, whereby mitigating factors are dismissed and judges are constrained to impose draconian sentences; (2) *blind adherence to sentencing*, which, ironically, results in low-level participants receiving more time than top level drug "kingpins"; (3) *racial disparity*, whereby Blacks and Hispanics are charged with and receive sentences at or above the mandatory minimum more often than Whites arrested on the same charges[1]; and (4) *prison overcrowding*, a result of the tripling of the federal prison population since 1980.

A mandatory minimum sentence is a prison term predetermined by Congress and automatically levied for a crime primarily involving drugs and firearms. These laws prohibit judges from considering any of the facts of a case when sentencing other than the type of drug and its weight, or the presence of a firearm. The judge simply looks at a grid to find the predetermined sentence, and cannot depart from that sentence. In most cases, the sentence is at least five years and often it is 10, 15, 20 years or more, for nonviolent, first offenders. Because parole has been abolished in the federal system, the offender will serve the full length of the sentence. Under the federal system, there are approximately 100 mandatory sentencing provisions contained within 60 statutes, with 94% of the cases attributed to just four statutes, largely involving drugs or weapons offenses.[2]



Julie Stewart, president of Families Against Mandatory Minimums (FAMM), began mobilizing on this issue when her brother, convicted on marijuana charges, was sentenced to a five-year mandatory prison term. "It just floored me that he was getting that kind of sentence for marijuana," Stewart protested. "I'm not saying he's innocent. I'm saying it's not appropriate."[3]

Because judges are barred from considering mitigating factors under mandatory minimum provisions, they are often forced to impose lengthy sentences which are unreasonably harsh. Such sentences apply regardless of the role of the defendant in the offense and of other factors traditionally found relevant to sentencing.

Although the use of mandatory sentences in the United States dates back to the 18th century, it was not until the early 1950s that they began to be used with any sort of frequency. The Boggs Acts of the 1950s started the trend toward harsher mandatory sentences.[4] Following the lead of federal legislators, some states enacted what became known as "Little Boggs Acts." Judges handed down mandatory prison sentences of up to 40 years in some instances.[5]

The justifications given for the enactment of mandatory sentences during earlier periods were almost identical to the justifications offered (and discredited) today: deterrence and reduction of sentencing disparities.[6] It is poignantly evident today that the mandatory sentences of the past failed to produce a reduction in crimes involving drugs.[7] Thus, in 1970, Congress enacted the Comprehensive Drug Abuse and Control Act which repealed most mandatory minimums containing drug violations.

In his testimony against mandatory minimums at that time, Dr. Stanley Yolles, then director of the National Institute of Mental Health, explained, "I feel that judges have to be free to deal with violators of drug laws as individuals, not as a class of criminals. In my field, treatment is always tailored to the individual's needs."[8]

The repeal of mandatory sentences, however, was short-lived. Growing public frustration with crime and the heroin epidemic of the 70s fueled the government's

"war on drugs" and gave legislators the excuse to re-energize mandatory minimum sentences. By 1983, 49 of the 50 states had passed mandatory minimum provisions. The following year Congress, through the Comprehensive Crime Control Act of 1984, began reenacting compulsory sentencing laws. Since then, on the average of every two years, mandatory minimums are being enacted on the federal level.

The Anti-Drug Abuse Act of 1986 allows the length of the sentence to be tied to the amount of drugs involved in the case. This creates what has been characterized as "cliffs" in sentencing based on small differences in the weight of drugs, which result in sharp rises in sentences despite the fact that the defendants are similarly situated. For example, a first offender convicted of simple possession of 5 grams of crack cannot be sentenced for longer than one year, whereas a first offender convicted of simple possession of 5.01 grams of crack *must* receive a sentence of *at least* five years.

Tying the length of the sentence to the amount of drugs also permits the weight to include the carrier and any substance used to dilute the drug. The sentencing results of this policy have been catastrophic. The Supreme Court, which upheld the validity of the practice, acknowledged that the sentences for selling a specific quantity of LSD could differ by over 2,000%, based solely on the method of marketing.[9] For example, a person convicted of selling LSD in liquid form — the purest form — would be sentenced to 10-16 months. However, since the drug is more widely distributed in a diluted form using a blotter paper carrier or on sugar cubes, the weight of the substance significantly increases, and the sentence skyrockets. With blotter paper, the weight of the substance triples and the sentence would increase to 63-78 months; with sugar cubes, the weight would spiral and the penalty would leap to 188-235 months.

"I'm not saying he's innocent. I'm saying it's inappropriate."

The extreme disparity of such sentences primarily affects players at the lower end of the distribution chain. The U.S. Sentencing Commission recently recommended that Congress amend the Sentencing Guidelines to correct this unwarranted disparity.[10]

Equally egregious, the Omnibus Anti-Drug Abuse Act of 1988 provides a mandatory sentence of five years for the possession of more than five grams of crack cocaine.[11] The sentence for crack, however, is 100 times greater than for powder cocaine. No scientific distinction exists to suggest that crack is more addictive than powder, and there is no medical/scientific distinction between these forms of cocaine.[12] The fact that *has* been recognized, however, is that crack cocaine is used principally by African Americans, while powder cocaine is used primarily by Caucasians.[13]

The substantially higher term for possession of a form of cocaine more likely to be used by Blacks than the form more likely to be used by Whites discriminates on the basis of race in violation of the equal protection clause of the Fourteenth Amendment.[14] Barbara Piggee, vice presi-

Mandatory Minimum Sentences: Case Studies

Allen and Sharon Gehring, serving 7 years and 5 years respectively, for growing 100 marijuana plants. First offense for both.

Allen is 27 years old and Sharon is 25. Allen was a real estate investor who owned 30 small houses purchased legitimately, which the government didn't dispute. Three of his tenants were growing marijuana in his rental houses with his knowledge. When they were arrested they turned him in and received no punishment for their involvement, even though they were actually growing the marijuana and two of the three have prior felony records. Sharon, who has spina bifida, was convicted on the same charges. At their sentencing the judge and the assistant prosecutor pleaded with the prosecutor for leniency. The prosecutor refused. In addition to prison sentences, Sharon and Allen lost their primary residence and 15 of their properties that had the most equity.

Timothy Evans, serving a 10-year sentence for conspiracy to manufacture methamphetamine and possession of a gun. First offense.

Timothy is a 23-year old trucking company employee and college student from Houston, Texas. He went to a chemical store to purchase a student chemistry set and was solicited by undercover DEA agents who owned the store. They told him he could make a lot of money by manufacturing methamphetamine. He declined, but the DEA agents continued to call him at work and after three months he agreed to participate. They suggested he bring a gun with him for protection. He also took a friend with him because he was scared of the undercover agents. When he got to the lab site, the DEA showed him how to make the methamphetamine step by step. After some chemicals were mixed, Timothy was arrested. He received an additional five years for possessing the gun.

A Houston attorney whose clients were similarly solicited went to the chemical store with a hidden tape recorder and recorded the DEA's tactics to encourage people to engage in an illegal activity. Their conversation was printed in the Houston Chronicle.

Christian Martensen, soon to be serving a 10-year sentence for conspiracy to possess LSD. First offense.

Christian is a 22-year-old "Dead Head" from San Francisco. For two years undercover DEA agents sought him out at Grateful Dead concerts and asked to buy LSD. Christian eventually introduced the agents to someone who could sell them the LSD and was arrested. At his sentencing the judge refused to include the weight of the paper containing the LSD in determining his sentence and sentenced him to

dent of Families Against Discriminatory Crack Laws, feels insulted by the disparity. "We just want to be treated fairly," she asserts, "the same as our White counterparts."

The Omnibus Anti-Drug Abuse Act of 1988 also extended mandatory penalties to "conspiracy" to commit drug offenses. This provision has had the paradoxical effect of pulling in first-time low-level players, sometimes referred to as "mules," to the mandatory sentencing scheme. At the same time it allows the major participants to serve little, if any, time, because they are in a better position to provide valuable information on other prosecutions. The only way a mandatory sentence can be avoided is by providing substantial information to the prosecution in exchange for a reduced sentence. The high-level participant can meet this burden, but the ordinary "Joe Blow" seldom has information that can be used as a bargaining chip.

In 1984 Congress passed the Sentencing Reform Act to reduce unwarranted disparity in sentencing, increase certainty and uniformity, and root out inordinate leniency. The U.S. Sentencing Commission was created the following year to help accomplish these goals. However, before the Commission could develop and provide its recommendations for sentencing, Congress, spurred by public concern about drugs and violence, leaped at the chance to pass astronomical sentences to demonstrate its toughness on crime.

The Sentencing Commission thus drafted its guidelines to accommodate these mandatory minimum provisions by anchoring the guidelines to them. In 1991, the Commission completed a study in response to questions by Congress concerning the effect and compatibility between the guidelines and mandatory sentences. The Commission found that many of the problems associated with mandatory minimums in the past have resurfaced with them today:

- *Mandatory sentences are disparately applied, with non-Whites being more likely to receive them.*
- *The uneven application of mandatories has obstructed the deterrent value of mandatory sentences.*
- *Mandatory minimums create "unwarranted sentencing uniformity" by not allowing consideration of mitigating circumstances.*
- *Because the power to place charges lies with prosecutors, mandatory minimums usurp the sentencing power of the court and gives it to the prosecution.*

Within the last two years, opposition to mandatory minimum sentences has mounted. Overwhelmingly, federal judges surveyed as part of the 1991 Sentencing Commission report perceived mandatory minimum sentencing requirements as too harsh. Federal District Judge J. Lawrence Irving of San Diego, a Reagan appointee who had sentenced more than 1,500 felons, resigned in protest against the mandatory sentencing laws, saying: "I can't continue to give out sentences that I feel in some instances are unconscionable." [15]

Senior U.S. District Judges Whitman Knapp of Manhattan and Jack Weinstein of Brooklyn recently announced their intention to boycott drug cases because of the high sentences they are forced to impose. In an impassioned presentation at the Cardozo School of Law, Judge Weinstein

five years. His decision was appealed by the prosecutor, and Christian is currently awaiting resentening.

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Kenneth Harrison, serving an 11-year sentence for conspiracy to sell 1000 pounds of marijuana. First offense.

Ken is a 36-year-old father of two, married for 12 years. He is a karate instructor and has taught hundreds of children over the years. He was convicted on the testimony of two people who were caught with 1200-1400 pounds of marijuana, large amounts of cash, nice homes, cars and boats. The two informants testified that they heard someone else mention Ken's name in connection with a drug deal. No drugs were ever found on Ken's person or home. The two informants were given sentences of 2 years each.

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Bobby Joe Ward, serving 6 1/2 years for manufacturing 776 marijuana plants. First offense.

Bobby Joe is a 60-year-old retired coal miner with black lung disease from Kentucky. Last year he accompanied his son to his son's marijuana patch where police were waiting. He said he was only there to keep his son company. He plead guilty on the recommendation of his lawyer. At sentencing the judge said he would like to consider Bobby Joe's disability and clean record in his sentence, but the guidelines prevented him from considering anything but the drug and its weight.

Roberto Urquiza, serving a 15-year sentence for conspiracy to possess cocaine. First offense.

Roberto is a father of two who was out of a job when a neighbor approached him offering help. The neighbor first invited him to participate in a stolen credit card scam. Roberto turned him down. Next the neighbor offered Roberto stolen checks. Roberto turned him down. Then the neighbor showed Roberto $42,000 and told him he had an uncle in New York who wanted to buy cocaine. Roberto found someone to sell the uncle cocaine. Unknown to Roberto, the "neighbor" was a government paid informer and the "uncle" was a DEA agent.

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Byron Wray, serving a 12-year sentence for conspiracy to possess and distribute cocaine. First offense.

Byron is a 36-year-old father of three. He has been a barber for 16 years and the sole supporter of his wife and children. He was charged with conspiracy even though no codefendants were named and no cocaine was ever possessed. At sentencing, the judge told the District Attorney that Byron's case was not even a case and should never have gone to trial. The judge said the witnesses (convicted drug dealers) were testifying to get their time reduced and he advised the Assistant D.A. never to bring anyone to his court again without evidence.

Source: Families Against Mandatory Minimums

complained that he was forced to sentence a poor immigrant woman from West Africa to 46 months in a drug case and that the effect of this mandatory sentence on her young children will be "devastating."[16] That same day he was compelled to sentence a man to 30 years because it was his second drug offense. Citing depression at "being a party to the cruelty connected with the war on drugs," he stressed:

I need...a rest from the oppressive sense of futility that these drug cases leave....I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade.[17]

The sentence for crack, however, is 100 times greater than for powder cocaine.

U.S. District Judge Stanley S. Harris had to send Sylvia Jenkins, a Washington, D.C. secretary, to jail for five years because her son had hidden 120 grams of crack cocaine in her house. Judge Harris complained, "It's killing me that I'm sending so many low-level offenders away for all of this time."[18] Circuit Court Judge Audrey Melbourne of Maryland says, "The legislature has usurped the function of the judicial branch of the government. This is about politicians trying to show that they're tough on drugs so they can get elected again."[19]

The United States Judicial Conference and all 12 Circuit Courts of Appeal have passed resolutions in opposition to the concept of mandatory minimum sentences. The Judicial Conference's resolution urges Congress to "reconsider the wisdom of mandatory minimum sentence statutes."[20] The Sentencing Uniformity Act introduced by Representative Don Edwards (D-CA), does just that by abolishing mandatory minimums throughout the federal system.[21] Attorney General Janet Reno has also criticized the wisdom of mandatory minimum sentences and contends that filling up prison cells with nonviolent offenders is not the best use of prison cells because she claims it causes violent criminals who are not subject to mandatory penalties to be released early.[22]

In a recent congressional hearing on prison overcrowding, Kathleen M. Hawk, director of the Federal Bureau of Prisons, estimated that 90% of the growth in the Bureau's prison population during the last seven years is directly attributable to the combined effect of mandatory minimums and the sentencing guidelines — statutory changes which have led to a reduction in the use of probation and an increase in prison time.[23] In addition to the social and moral costs that result from the warehousing of young people of color, the financial cost of imprisonment increased by mandatory penalties, and these costs are passed on to the taxpayer. The average cost of incarcerating one federal prisoner is $20,072 per year, about $55 per day.[24]

In response to a request by Attorney General Reno for an examination of policies that would both decrease the prison population and benefit the public, FBOP director Hawk testified as follows:

A...hypothetical strategy under study that would limit the growth of our future inmate population is to shorten sentences, especially for non-violent drug offenders. Under this scenario, we recognize that at least three significant changes to the current system should be considered: there would have to be a change to mandatory minimum sentences; the U.S. Sentencing Commission would have to revise its drug guidelines; and some kind of provision would have to be made to affect the sentences of offenders already adjudicated and in custody, for example a re-sentencing procedure. This last provision would be to insure equity, so that sentence reductions would be applied retroactively.

The "war on drugs" is no solution to social problems; it only compounds them. At this point, the best way to begin solving the problems of prison overcrowding, irrational sentencing, racial disparities, exorbitant costs, and other injustices unleashed by the Pandora's box of mandatory minimums is to repeal them. ■

Nkechi Taifa is legislative counsel for the American Civil Liberties Union's Washington office. Fredericka Poindexter and Sameer Ashar assisted with research for this article.

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[1] *See* Special Report to the Congress: United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, (Aug. 1991), at 76. [hereinafter, "U.S. Sentencing Commission Report."] This report is referred to throughout the article.

[2] 21 U.S.C. §841 (manufacture and distribution of controlled substances), 21 U.S.C. §844 (possession of controlled substances), 21 U.S.C. §960 (importation/exportation of controlled substances), and 18 U.S.C. §924(c) (enhancements for carrying a firearm during the commission of a crime involving drugs or violence).

[3] "Let the Punishment Fit the Crime," FAMM-Gram, Issue No. 5, (March/April 1992).

[4] Pub. L. No. 82-255, 65 Stat. 767, 1951.

[5] *Id.* at 1.

[6] *See* U.S. Sentencing Commission Report, *supra* note 4, at i.

[7] Dan Baum, "The Drug War On Civil Liberties", *The Nation*, (June 29, 1992), at 886.

[8] Gertrude Samuels, "Pot, Hard Drugs and the Law", *New York Times Magazine*, (February 15, 1970), at 14-16.

[9] *See Chapman v. United States*, 111 S.Ct. 1919 (1991).

[10] *See Federal Register* (Vol. 58, No. 86, Part V) Amendment 14, May 6, 1993.

[11] *See* Pub L. No. 100-690, 6470(a), 102 Stat. 4377 (1988).

[12] *See* Proffer of Dr. George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. § 844(a) Unconstitutional, *U.S. v. Maske*, Cr. No. 92-0132-01 (TFH) (D.D.C.).

[13] A 1992 U.S. Sentencing Commission representative sample of all drug cases received for FY 1992 revealed that of all defendants sentenced for crack cocaine, 92.6% were Black, as compared with 4.7% of White defendants. On the other hand, 45.2% of defendants sentenced for powder cocaine were White, as compared with 20.7% of Black defendants. With respect to simple possession only, 100% of the defendants sentenced for crack were Black. *See* U.S. Sentencing Commission, Monitoring Data Files, (April 1-July 31, 1992).

[14] *See* generally, *State v. Russell*, 477 N.W. 886 (Minn. 1991). The Minnesota Supreme Court upheld the lower court's decision which invalidated the disproportionate treatment between crack and powder cocaine under the equal protection provisions of the State constitution. *See also*, *United States v. Simmons*, 964 F.2d 763, 767 (8th Cir. 1992), whereby the court stated that it was "bound by precedent" to reject arguments that the sentencing scheme was constitutionally disproportionate. The court advised, however, that were it writing from a "clean slate," it might have accepted as valid that the 100:1 ratio between crack and powder cocaine constituted disproportionate punishment.

[15] Drug Policy Foundation, *The Drug Policy Letter*, (March/April 1991), at 7.

[16] Address by Judge Jack B. Weinstein, "Humanizing Federal Guideline Sentencing by Departures," Symposium on Departure Advocacy Under the Federal Sentencing Guidelines," Cardozo School of Law, (April 14, 1993).

[17] *Id.*

[18] *The Drug Policy Letter*, *supra*, note 54, at 7.

[19] Debbie M. Price, "Raising the Ante on Crime," *The Washington Post*, (April 12, 1990), at A10.

[20] *See* U.S. Sentencing Commission Report, p. 90.

[21] *See* Sentencing Uniformity Act, H.R. 957.

[22] Michael Tackett, "Attorney General Signals Drug Policy of '80's is Taking A Turn," *Chicago Tribune* (May 5, 1993).

[23] Statement of Kathleen M. Hawk, Director, Federal Bureau of Prisons, before the Subcommittee on Intellectual Property and Judicial Administration, House Judiciary Committee, (May 12, 1993).

[24] *See* Bureau of Prisons, "State of the Bureau 1991," (Summer 1992).

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Case Law Report

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BY JOHN BOSTON

Cruel and Unusual Punishment

In *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), the Supreme Court held that all Eighth Amendment "conditions of confinement" claims require a showing of deliberate indifference as well as proof that the conditions deny prisoners "the minimal civilized measure of life's necessities." *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981). At the same time the Court made deliberate indifference central to Eighth Amendment analysis, it said nothing about its meaning.

The Ninth Circuit has placed a new and important gloss on this nebulous term in *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (*en banc*). In this decision, the *en banc* court superseded an earlier panel decision and affirmed the district court's judgment enjoining the performance of intrusive pat frisk searches of female inmates by male staff. It relied on a record showing that the vast majority of female inmates had a history of sexual abuse at the hands of men and on the testimony of ten expert witnesses, including staff members from the prison as well as social workers, psychologists, an anthropologist and a correctional expert. The district court had concluded that the searches, even if conducted properly, resulted in a "high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates."

Unlike most prison search cases, *Jordan* was decided on Eighth Amendment rather than Fourth Amendment grounds. The court reasoned that the privacy questions presented by the plaintiffs' claims were "difficult and novel," and that the gravamen of their complaint was the pain and suffering inflicted by the searches, making the Eighth Amendment a more appropriate ground for decision.

Jordan is important for more than its result. It presents a kind of Eighth Amendment claim that has not been much explored since *Wilson v. Seiter*: a challenge to a purposeful policy that prison officials have instituted to serve identifiable penological purposes.

Deliberate indifference is essentially a tort concept, described in *Wilson v. Seiter* as a "culpable state of mind" and equated by most lower courts with some degree of recklessness. *See, e.g., Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1988). It has been most frequently applied to constitutional torts, claims by individual inmates or other persons that they were injured by particular acts or omissions of prison staff or other government actors.

The courts have by fiat stretched deliberate indifference to address challenges to institutional conditions (most often medical care) by defining the term to include "systematic or gross deficiencies in staffing, facilities, equipment or procedures." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *accord, Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991). This language, however, speaks primarily to omissions and failures, and practices to which it is applied are seldom defended in terms of affirmative policy choices. Pre-*Wilson* Eighth Amendment challenges to purposeful prison practices did not address deliberate indifference or any other mental element, but simply balanced the severity of the resulting conditions against their penological justifications. *See, e.g., Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989).

The *Jordan* opinion rejects the view, asserted by the dissenting judges, "that the deliberate indifference standard should not be applied to the adoption of prison policies, because officials who institute policies generally do so after carefully examining the consequences." 986 F.2d at 1529. Careful consideration is only part of their obligation.

> Prison authorities are also required to afford sufficient weight to the constitutional rights of individuals. The failure to treat constitutional provisions with appropriate respect constitutes deliberate indifference to the rights the policy seeks to limit. If a prison administrator decides to ignore grave suffering because of irrelevant or unimportant concerns, that administrator demonstrates a deliberate indifference to the harm being done and to the constitutional principle at stake. *Id.*

Here, deliberate indifference analysis has turned into a form of interest balancing. As stated by the court, the balance appears heavily tilted in favor of prison officials; they lose if they "ignore great suffering because of irrelevant or unimportant concerns." But it is stated less categorically than the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires deference to officials if changing their practices "will have a significant 'ripple effect' on fellow inmates or on prison staff," and requires prisoners to "point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 89-91. Perhaps more importantly, the determination of what is "irrelevant or unimportant" imposes far less structure and constraint on the district court than does the four-factor test of *Turner*.

In this case, the court's task of interest balancing was advanced by the fact that the defendants had operated under the preliminary injunction for three years, after only one day of the cross-gender searches. The majority notes, "At trial, the prison officials' own witnesses testified that not a single bid had been refused, promotion denied, nor guard replaced as a result of the ban on routine cross-gender clothed body searches." 986 F.2d at 1527. Although security concerns had been voiced earlier, "these concerns have been met by the establishment of random and routine searches by female guards." *Id.* Thus, in the majority's view, the defendants in effect argued "that it is proper to inflict serious psychological pain on the inmates because otherwise it may be necessary to interrupt the lunch periods of female guards, periods during which they are on duty." *Id.* at 1530.

This construction of the record was vigorously disputed by the dissenting judges, whose arguments both of fact and of law would have presented tempting grounds for review by the Supreme Court. However, no petition for *certiorari* was filed, and the judgment is now final.

PLEADING

A recent Supreme Court decision about pleading requirements in civil rights cases has an importance beyond its rather dry surface. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993), the Court rejected the "heightened pleading standard" imposed on civil rights cases by the Fifth Circuit, at least in connection with claims of municipal liability. This standard, initially stated in connection with claims against individual government defendants, required complaints to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." 113 S.Ct. at 1163, *quoting Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985).

The Court stated that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules [of Civil Procedure]," which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*, *quoting* Rule 8(a)(2), Fed.R.Civ.P. While the Rules do require some matters to be pleaded with particularity, *see* Rule 9(b), Fed.R.Civ.P., municipal liability is not one of them, and any stricter requirement for claims of municipal liability "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.*

This decision should have considerable practical impact on the strategic balance in some jail and police misconduct litigation. The conventional wisdom among civil rights litigators stresses the importance of having a solvent institutional defendant in the case, not only to ensure the collection of any judgment that is recovered, but more importantly, to place before the jury a defendant who is less sympathetic than the feckless and poorly paid municipal employees who are often the direct perpetrators of constitutional torts. However, getting a municipal liability claim past the summary judgment stage generally requires considerable discovery. A heightened pleading requirement creates a "Catch-22" for the litigator: the plaintiff with a reason to believe there is a municipal policy cannot sufficiently plead the case without discovery, but cannot obtain discovery without a sufficient pleading.

The question that is not reached in *Leatherman* is whether the result will be different in cases involving individual defendants. There, the heightened pleading standard has been justified by the existence of official immunity defenses and by the Supreme Court's holding that such defenses are immunities from trial and discovery and not just from liability. *Elliott v. Perez*, 751 F.2d at 1473; *see Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687-89 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 526-30, 105 S.Ct. 2806 (1985). However, it is difficult to see how the reasoning of *Leatherman* can be restricted to municipal liability cases, since it turns on the language of the Federal Rules of Civil Procedure, and the Court explicitly disavows the power to impose its preferred result by judicial interpretation. The structure of immunities applied under §1983 is also a matter of judicial interpretation—several layers of it, in fact: the Supreme Court's interpretation of Congress's unstated intent with respect to the immunities recognized by common law courts at the time §1983 was enacted. *See Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). If the Federal Rules' "short and plain statement" requirement prevails over judicial interpretation in one context, surely the same is true in connection with §1983 immunities.

A heightened pleading requirement may make less difference to claims against individual defendants than in municipal liability cases, but it is not inconsequential. Claims of supervisory liability or other kinds of indirect liability sometimes turn on issues of administrative practice and organization similar to those involved in proving a municipal policy. In addition, any pleading requirement more stringent than the "short and plain statement" rule may be beyond the capacities of many *pro se* litigants to meet.

In this context, one may suspect a strategy in this opinion by Chief Justice Rehnquist, rarely a friend of civil rights plaintiffs. He observes, "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under §1983 might be subjected to the added specificity requirement of Rule 9(b)." 113 S.Ct. at 1163. The *Leatherman* opinion may be intended to shift the debate from the courts to the Judicial Conference of the United States. The civil rights bar should be alert to the possibility of proposals to revise the Federal Rules' pleading requirements to the advantage of official agencies and defendants, and should be prepared to take the fight to Congress, which has ultimate authority over proposed revisions of the rules.

REMEDIES/STATE-FEDERAL COMITY

It has become a commonplace among institutional litigators that perpetual federal court oversight of state and local institutions is a losing proposition in the long run. Genuine success, on this theory, consists of bringing state and local governments to the point where they can police themselves and maintain decent conditions through their own institutions and standards. This philosophy has run into an ironic dead end in a recent New York State court decision.

The Nassau County Correctional Center on Long Island has been the subject of protracted federal court litigation, much of it consisting of the federal appellate court's efforts to make the district court enforce a long-standing population cap. *See Badgley v. Santacroce*, 853 F.2d 50 (2nd Cir. 1988); *Badgley v. Santacroce*, 815 F.2d 888 (2nd Cir. 1987); *Badgley v. Santacroce*, 800 F.2d 33 (2nd Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984). The current consent decrees in that case permit limited double-celling pending the completion of an 832-cell construction project.

The state Commission of Correction, a statutorily mandated watchdog agency with jurisdiction over county jails, had in 1986 and 1988 directed the Nassau County Correctional Center to eliminate double-celling, pursuant to Commission regulations requiring a minimum of 60 square feet of space per inmate in jail cells. When it attempted to enforce this direction in state court, its petition was dismissed on the ground that the federal court action had pre-empted the state regulation.

The Appellate Division did not adopt the pre-emption theory, but it affirmed the result below, holding that the federal district court retained jurisdiction over its decree and questions concerning its implementation or interpretation. The agency's claim "clearly implicates" the consent decree and therefore, the appellate court held, "amounts to an impermissible collateral attack on the consent decree." *New York State Commission of Correction v. Gulotta*, 1993 WL 187077, ___ A.D.2d ___, ___ N.Y.S.2d ___ (N.Y.App.Div. 1993).

Thus, the state administrative agency having statutory jurisdiction over enforcement of state regulations governing a county facility is required to apply to the federal court for permission to enforce a state law standard that is probably higher than any standard directly enforceable in federal court and that, if enforced, would probably obviate the need for further federal court intervention in the correctional affairs of Nassau County. This result, which might be described as "Alphonse-Gaston" federalism, may be a short-term victory for Nassau County officials, but can only be a long-term defeat for the overall goal of state and local officials to be relieved from federal court supervision of their institutions.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Pre-Trial Detainees/Use of Force

Valencia v. Wiggins, 981 F.2d 1440 (5th Cir. 1993). At 1444: A use of force against a pre-trial detainee "*after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention awaiting trial for a significant period of time" (emphasis in original) is not governed by the Fourth Amendment but by the Due Process Clause.

The *Bell v. Wolfish* definition of punishment, which focuses on the existence of an alternative purpose for a jail restriction and whether it is excessive in relation to that purpose, "works well for claims of improper conditions or restrictions, [but] it does not lend itself to analysis of claims of excessive use of force in controlling prison disturbances." (1446) *Wolfish* noted that there is no reason to distinguish between detainees and convicts in reviewing security practices. Therefore detainee use-of-force cases are governed by the *Whitley/Hudson* standard that requires proof of malicious and sadistic intent. At 1446: "Often, of course, there will be no evidence of the detention facility official's subjective intent, and the trier of fact must base its determination on objective factors suggestive of intent." (Footnote omitted)

The trial court credited the plaintiff's testimony that the officer hit his head against the bars and placed him in a chokehold and that he later struck the plaintiff while he was handcuffed and on his knees. The court awarded $2,500 in damages for scratches, cuts, and bruises that "were serious, but did not require medical attention" (1443), and the appeals court affirms the judgment.

Medical Care—Denial of Ordered Care/Transfers/Service of Process

Hamilton v. Endell, 981 F.2d 1063 (9th Cir. 1992). The plaintiff had ear surgery and was subsequently transferred by air from Alaska to Oklahoma, despite the recommendation of his surgeon but consistent with a second opinion obtained from a prison contract physician who did not consult with the surgeon. The plaintiff alleged that he sustained severe ear damage as a result.

The defendants are not entitled to qualified immunity on these facts. At 1066:

> ...The defendants may be correct insofar as prison officials are shielded from liability to the extent their actions are made in good faith reliance on a medical opinion....That, however, is not the question presented by this case. This case is more akin to cases finding deliberate indifference where prison officials and doctors deliberately ignored the express orders of a prisoner's prior physician for reasons unrelated to the medical needs of the prisoner...

Pre-Trial Detainees

Pembroke v. Wood County, Tex., 981 F.2d 225 (5th Cir. 1993). The plaintiffs challenged jail conditions, most of which had been remedied by the time the case came to trial. One named plaintiff's damage claims were tried to a verdict for the defendants, and the court then decided the class claims for the defendants.

Procedural Due Process—Disciplinary Proceedings (229): "The use of punitive isolation without affording due process is unacceptable and violates the 14th Amendment."

Law Libraries and Law Books (229): A seven-month deprivation of any access to a law library was unconstitutional.

Classification (229): A classification system that "was not fully utilized...in that pretrial detainees were not segregated from convicted felons" was unconstitutional. "....[F]ailure to adequately classify inmates is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment."

Publications (229): "...[T]he arbitrary restriction of reading materials to one bible without showing a need for such a restriction based on prison security is an unacceptable infringement on the prisoners [sic] First Amendment rights."

Medical Care—Access to Medical Personnel/Municipalities

Colle v. Brazos County, Texas, 981 F.2d 237 (5th Cir. 1993). The decedent was arrested, then slipped and fell in the jail; a doctor advised jail personnel to monitor his condition because of his alcoholism, cirrhosis, and possible DT's. He was observed unable to take his medication or communicate coherently; the midnight shift supervisor was told to contact the day shift supervisor. That morning he was observed hitting his fist and face on the floor, and he died shortly thereafter.

A claim for municipal liability was stated by an allegation that the Sheriff, the municipal policy-maker, had a policy of maintaining an on-duty jail supervisory staff that did not include anyone with authority to transfer an inmate to a medical facility. A claim was also stated by an allegation of a policy of inadequate monitoring of pre-trial detainees amounting to a denial of medical care (245). These allegations created a jury question whether the county "adopted policies creating an obvious risk that pretrial detainees' constitutional rights would be violated." (246)

At 246: "We are persuaded that Sheriff Miller knew of or should have known that if he staffed the jail with persons having no authority to transfer a seriously ill detainee to a hospital, and if he pursued a policy of failing to monitor the critical medical condition of a detainee, these actions would be constitutionally impermissible."

Use of Force—Beating

United States v. Newman, 982 F.2d 665 (1st Cir. 1992). The defendant jail officer was convicted of violating the civil rights of a pre-trial detainee by beating him while he was handcuffed in his cell. A sentence of 60 months' imprisonment and two years' supervised release was within the federal sentencing guidelines. The injury to the victim's inner ear and the fact that he was hospitalized for six days as a result of severe headaches, facial bruising, and hemorrhaging around the eyes and under the scalp supported a finding of "serious bodily injury" for purposes of the guidelines.

Personal Integrity—Appearance

Quinn v. Nix, 983 F.2d 115 (8th Cir. 1993). The black plaintiffs were compelled to cut their "shag" haircuts. Several white inmates were permitted to keep them. Prison officials claimed that they acted because the haircuts appeared to be gang-related, but the district court disbelieved this explanation because the plaintiffs were not told initially (or in some cases ever) that this was the reason for the order; because prison officials did not receive drawings of supposedly gang-related haircuts from the Iowa Division of Criminal Investigation until after the order was given; and because the plaintiffs' haircuts did not look like those drawings anyway. The district court found that there was no penological justification for the defendants' actions, awarded damages of $750 to two plaintiffs and $300 to two others (117), and granted declaratory relief that the plaintiffs could wear shag haircuts so long as there was no legitimate penological reason to prevent them (118).

The court observes that the Supreme Court has assumed without deciding that there is a liberty interest in one's personal appearance. At 118: "It also appears that ISP, in establishing guidelines for determining what are and are not acceptable hairstyles, has created a liberty interest in the inmates' hairstyles." The district court's finding that prison officials' legitimate penological interest in curtailing gang activity was not their actual motivation was not clear error (118).

Use of Force/Personal Involvement and Supervisory Liability/ Negligence, Deliberate Indifference and Intent

Buckner v. Hollins, 983 F.2d 119 (8th Cir. 1993). The plaintiff alleged that he was beaten in the state prison reception center by one officer after a second officer admitted the first officer to his holding cell. The second officer allegedly witnessed but did not intervene in the beating. The plaintiff was in the process of being admitted to state prison after being delivered from a county jail; the first officer was from the jail and the second was a state officer.

The state officer was not entitled to qualified immunity based on his claim that the plaintiff was not yet in his legal custody. The plaintiff was in state custody since he had been delivered there even if the paperwork was not finished. In addition, the state officer had the only key to the plaintiff's cell. "Given the practical reality of the situation, as well [as] the indications of the relevant Missouri statutes," the state had at least joint custody, and the state officer had a duty to intervene.

The officer's duty to intervene was governed by the deliberate indifference standard, which "has been the test applied in numerous cases in which a prisoner claims injury (or aggravation of injury) due to a prison official's failure to act." The allegation that the defendant failed to intervene while the plaintiff was being beaten, "particularly when [he] was naked, hand-cuffed, and defenseless," presents a jury question as to deliberate indifference.

The defendant was not entitled to qualified immunity. Prison officials' "duty to restore control in a tumultuous situation," their liability for deliberate indifference to prisoners' serious illness or injury, and their liability for "failure to protect a prisoner from foreseeable attack or otherwise to guarantee his or her safety" were sufficiently "fact-specific" to defeat the immunity claim.

Pro Se Litigation/Appointment of Counsel

Kilgo v. Ricks, 983 F.2d 189 (11th Cir. 1993). The plaintiff was transferred after he filed suit; he used his new address on subsequent correspondence. The court dismissed for failure to inform it of his change of address despite the fact that the plaintiff did so inform it. The dismissal was erroneous. Nor was the dismissal justified by the plaintiff's failure to complete a pre-trial order form, since he filled it out as best he could and sent it back to the court stating that he did not understand it and renewing his motion for the appointment of counsel (193).

The district court should reconsider the plaintiff's request for counsel. Civil litigants, including those raising civil rights claims, "have no absolute constitutional right to counsel....The key is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court." (193) Though this plaintiff's factual and legal claims were straightforward, other factors limited his ability to present his claims—"most daunting,...the district court's insistence that Kilgo prepare a lengthy pre-trial order and comply with instructions which assume familiarity with litigation procedures." (193) At 194:

> Unless the court is willing to guide *pro se* litigants through the obstacle course it has set up, or to allow them to skip some of the less substantive obstacles, it should not erect unnecessary procedural barriers which many *pro se* litigants will have great difficulty surmounting without the assistance of counsel.

Disabled/Qualified Immunity/ Damages

Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993). The plaintiff was paralyzed from the waist down as a result of a conversion reaction. The defendant doctor refused to admit him to the infirmary, though the accepted practice was to keep paralyzed prisoners there, and it was the only place where wheelchairs were permitted. As a result, the plaintiff could not utilize his out-of-cell time, shower himself, care for his person or clean his cell. The district court granted summary judgment for the plaintiff, found his damages to be $50,000, and reduced them by 90%.

The court of appeals rejects the argument that a conversion reaction is a psychiatric disorder and cannot constitute a medical need. At 187: "Paralysis is a medical disorder whether induced by physical injury or emotional or mental problems. Mental illness is no less real than other illness." At 188: "We agree that the squalor in which Weeks was forced to live as a result of being denied a wheelchair was clearly foreseeable by Dr. Chaboudy."

The defendant was not entitled to qualified immunity. A decision from another circuit may clearly establish the law if it "point[s] unmistakably to the unconstitutionality of the conduct complained of" and is "clearly foreshadowed" by applicable direct authority, in this case *Estelle v. Gamble*.

The district court improperly reduced the plaintiff's damages by apportioning them between the defendant and other unidentified prison personnel who were not defendants, i.e., the security personnel who observed the plaintiff's condition daily. Federal law applicable under §1983 provides for joint and several liability for indivisible injuries (189).

Publications

Thompson v. Patteson, 985 F.2d 202 (5th Cir. 1993). The plaintiff's claims concerning publication censorship rules were mostly precluded by the prior decision in *Guajardo v. Estelle*, which concluded that prison officials could limit access to "sexually explicit" material that is not obscene. The rule in question, modified by a later settlement, provides: "Publications that contain graphic descriptions of homosexuality, sodo-masochism [sic], bestiality, incest or sex with children will ordinarily be denied. Publications that are primarily covering the activities of any sexual or political rights groups or organizations will normally be admitted."

Protection from Inmate Assault/ Immunity—Judicial and Prosecutorial

Latimore v. Widseth, 986 F.2d 292 (8th Cir. 1993). The prosecutor told the press that the plaintiff had been treated leniently for a prior crime because he had agreed to testify in another unrelated case. Two months later the plaintiff was assaulted in his cell by persons allegedly associated with the case in which he was to testify.

The prosecutor was not entitled to qualified immunity. He was an experienced prosecutor who knew the propensities of gangs, the plaintiff's plea bargain called for his cooperation to remain confidential, and the prosecutor knew that the plaintiff would soon be incarcerated; in addition, there had already been retaliation against one witness to the murder. This evidence was also sufficient to withstand summary judgment on the question of proximate cause.

DISTRICT COURTS

Use of Force/Pre-Trial Detainees

Cohen v. Coahoma County, Miss., 805 F.Supp. 398 (N.D.Miss. 1992). Coahoma County and its Sheriff are herein enjoined "from inflicting physical pain upon prisoners in the custody of the sheriff for the purpose of coercing information from such prisoners." (400)

After an escape attempt, the Sheriff and his deputy beat five inmates with a length of coaxial cable in an effort to find out where a metal bar was hidden in the jail. At least one inmate was hit "with sufficient force to cause significant pain and visible marks." (402) There was no ongoing disturbance or security threat at the time.

At 403-04:

> Official coercion by fear of physical abuse, i.e. torture, has long been recognized as a denial of due process.... Indeed, any physical violence against one being interrogated who poses no threat to the safety of the officers or

others is a constitutional violation.... While it is true that physical force may be used by prison officials to restore or preserve order,...that is not the case before this court, and even that prerogative is not unlimited. The amount of force required to effect the purpose must be weighed against the risk of injury to inmates.

Medical Care—Standards of Liability —Deliberate Indifference/Medical Care—Denial of Ordered Care

Williams v. O'Leary, 805 F.Supp. 634 (N.D.Ill. 1992). The plaintiff was diagnosed with osteomyelitis before entering prison, and his doctor advised prison officials that he required daily antibiotic medication, daily temperature readings, and white blood count readings, all of which they disregarded.

Two doctors who disregarded the plaintiff's primary physician's instructions to give a particular antibiotic, and who also failed to give any of the four medications that are effective against the plaintiff's infection, over a period of 28 months could be found deliberately indifferent even under the Seventh Circuit's "criminal recklessness" standard, even though the plaintiff was seen by physicians 42 times and received 29 prescriptions. Even if their conduct was only negligence or malpractice, "the duration of this negligent treatment is sufficient for this court to infer 'criminal recklessness,' or 'deliberate indifference.'" (638) "Mere volume of medical attention is insufficient to defeat an Eighth Amendment claim." *Id.*

Pre-Trial Detainees/Law Libraries and Law Books

Datz v. Hutson, 806 F.Supp. 982 (N.D.Ga. 1992). The court holds the plaintiff's claim of denial of law library access moot because the jail opened a law library after the complaint was filed. The plaintiff's amended complaint alleged that this library is "for the use of criminal proceedings and not civil proceedings." The court states (987 at n.5) that such a limitation "would not comply with this circuit's access to the court's standard...."

Use of Force—Beating/Damages—Assault and Injury

Giroux v. Sherman, 807 F.Supp. 1182 (E.D.Pa. 1992). The court finds that the plaintiff was maliciously beaten by one officer, citing as evidence of malice that the officer had previously refused to permit the plaintiff to enter the kitchen area to do his job (1187). The court finds that in a subsequent incident the officer's brother made the plaintiff walk from a medical facility back to his housing unit, beating him along the way, despite the fact that he was being treated for heart disease and had been brought to the infirmary in a van. The court concludes that a slap to the face by a supervisory officer was not hard enough to violate the Eighth Amendment (1188). In a third incident, the court finds that the plaintiff was beaten wantonly and without provocation by another officer (1189). The court makes the same finding about a fourth incident, although the plaintiff was not injured in that one (1189-90). In all cases, the court's conclusions turn on credibility judgments.

Damages from the first incident are set at $10,000, including a component for the subsequent misconduct of other officers against the plaintiff, which the court terms "a natural and probable consequence" of the false disciplinary infraction the officer wrote (1190).

Damages for the second incident are set at $10,000 compensatory and $10,000 punitive to reflect the "outrageous" as well as "sadistic" character of the defendant's conduct.

Damages of $5,000 are awarded for the third incident.

Damages of $1,000 are awarded for the fourth incident, which resulted in no serious physical injury; the award is for pain, humiliation and mental anguish (1191).

Crowding/Protection from Inmate Assault/Classification

Jensen v. Gunter, 807 F.Supp. 1463 (D.Neb. 1992). Double-celling in a prison that has reached 64% over its single cell capacity does not violate the Constitution. The plaintiffs' evidence does not show that the prison's facilities are unconstitutionally overtaxed or that conditions, alone or in combination, are unconstitutional. The court also notes that the population is still growing and that given these changing circumstances, future inmates, though members of the class, could not be collaterally estopped by this decision from future challenges (1468 at n.5).

The plaintiff failed to show that double-celling is the cause of an increase in institutional violence, but they did show deliberate indifference in the defendants' failure to develop adequate policies to protect inmates from assault. At 1482: "The claim is systemic in nature as opposed to an assertion that defendants have failed to respond to a particular risk to a particular plaintiff." The number of violent incidents exceeds an "unavoidable" level and carries over into the double cells "where tensions are increased by the limited cell size, noise, lack of privacy, restricted surveillance of the inmates confined therein, deterrents to the reporting of assaults and other violations of prison rules by a cellmate, suspicions about the presence of contraband, and the large amount of time spent confined on a lockdown status with a cellmate." (1483) These factors establish a pervasive risk of harm sufficiently large to put the defendants on notice of its existence.

Deliberate indifference is established by the failure to utilize classification information in making assignments to double cells. At 1484: "To randomly place newly arriving inmates into double cells under the volatile conditions that exist in the four main housing units is not a reasonable response to the pervasive risk of harm."

Testimony showed that about four inmates a year required treatment at an outside hospital as a result of assaults; two to three a week had less serious injuries requiring medical treatment; about six a year involved suspected assaults that the inmate claims happened otherwise. The most recent figures showed 179 findings of guilt in six months for assaults and threats of bodily harm. The average population of the cellhouses in question was 523.4 in 1991.

Communication with Media

Mujahid v. Sumner, 807 F.Supp. 1505 (D.Haw. 1992). A prison regulation barring visits from members of the press or correspondence with identified members of the press unless the inmate had a prior friendship with the press member is unconstitutional on its face.

The court applies the standard of *Procunier v. Martinez* "with the understanding that the *Martinez* test is not an entirely different standard, but rather an application of the general requirement of reasonableness to the particular context of outgoing correspondence...." (1509) It grants summary judgment to the plaintiff in the absence of any evidence (as opposed to argument) supporting the reasonableness of the policy (1509-10). It also notes that the regulations choke off all avenues of media communication rather than allowing alternatives as in *Pell v. Procunier*. The decision seems to suggest that a regulation that restricted visits but not correspondence might be upheld (1511 at n.3).

Law Libraries and Law Books/Mental Health Care

Hatch v. Yamauchi, 809 F.Supp. 59 (E.D.Ark. 1992). The failure of officials in a state hospital forensic unit to provide access to a law library or legal materials or assistance from trained legal personnel violates the right of access to courts (61). In the absence of evidence of injury, the court awards $10 in nominal damages as well as an injunction that the defendants "formulate and implement a legal services program which will safeguard the right of access to the courts" of the patients.

Hazardous Conditions and Substances/Pre-Trial Detainees/Equal Protection/Personal Property

Washington v. Tinsley, 809 F.Supp. 504 (S.D.Tex. 1992). An ordinance prohibiting smoking in public buildings is not unconstitutional as applied to the county jail. It is not "punishment" because it is reasonably related to legitimate governmental objectives including protecting the health of workers and visitors, eliminating a fire hazard, reducing litter and ash, and permitting guards to smell other types of contraband (506-07).

Since most people suffer only moderate discomfort from nicotine withdrawal, the ban on smoking is not disproportionate to the governmental interest achieved, especially in view of the other impositions of pre-trial detention (507).

The failure to provide medical care and counselling to prisoners, even though they are provided to jail employees affected by the ban, is not unconstitutional. There is no allegation that anyone suffering "an actual medical necessity, rather than an adjustment assistance need," has been denied medical treatment. The distinction between prisoners and staff is "solidly rational" since some of the staff might otherwise resign and others' job performance might decline (508).

Federal Officials and Prisons/Pre-Trial Detainees/Physical Conditions

Young v. Keohane, 809 F.Supp. 1185 (M.D.Pa. 1992). The court finds "objectively unreasonable in light of both existing precedent and plain common sense" confinement (imposed on all pre-trial detainees at Lewisburg) in a "fishtank," a converted gymnasium, with eleven other inmates with no wash basin, toilet, tables or chairs, television or drinking fountain, where the prisoners slept on folding cots and were forced to lie on them at times to avoid the water that seeped in from the adjacent shower area. "Particularly distressing is Young's unrefuted allegations that limited access to an outside toilet regularly required detainees to urinate in cups inside the fishtank." (1195) The plaintiff was confined under these conditions for almost six months, "a duration that strongly contributes to the unreasonable nature of the defendants' conduct." The conditions were far more restrictive than those of the maximum security convict population. At 1194: "The practice of housing detainees in conditions more severe than convicted inmates has been considered unconstitutional in the Third Circuit for quite some time." The defendants were not entitled to qualified immunity.

Publications

Nichols v. Nix, 810 F.Supp. 1448 (S.D.Iowa 1993). The plaintiff was denied publications from the Church of Jesus Christ Christian under a regulation barring publications "likely to be disruptive or produce violence." The prison barred all materials sent from the CJCC.

The regulation is constitutional on its face. It is unconstitutional as applied to these publications. There is no evidence that the plaintiff has caused any problems as a result of religious publications and no evidence that religious publications (including these, which other inmates had received) had resulted in problems. At 1463:

> Although it is not necessary for an actual prison disruption to occur before correctional officials' security concerns will be deemed reasonable, mere declarations and incantations that a practice might be harmful to prison order, in the absence of a rational and reasonably articulable basis, cannot justify government suppression....

Other publications advocating racial separatism are permitted into the prison. There is no ban on discussing such subjects and no evidence that discussion of them has ever resulted in violence or disruption. The court notes that two of the three committee members voted to ban the publications without reading them. The defendant is enjoined from denying the publications.

Classification—Race/Class Actions—Settlement of Actions/Religion

White v. Morris, 811 F.Supp. 341 (S.D.Ohio 1992). The plaintiff challenged a policy of racial segregation in double-celling; a class was certified of "all inmates at the Southern Ohio Correctional Facility now or in the future who have been or will be placed in general population." (342) The court approves a settlement calling for random cell assignments except where the warden certifies that there is a risk of violence. (This is the settlement that was protested during the recent riot and takeover of part of the prison.)

At 343: "Racial segregation in prisons is prohibited." A prior case in the district permitted it only when the Superintendent personally found it necessary and documented that finding. Although some class members objected to racial integration on religious grounds, their right to religious freedom did not outweigh the plaintiffs' right to a desegregated environment (344).

The prospect of increased violence did not justify rejecting the settlement. At 344: "Otherwise, minorities in this country would have few rights, in light of the violence involved in this nation's struggle for racial equality." Also, the racial integration program already begun by the warden had not resulted in increased violence.

Medical Care—Standards of Liability—Deliberate Indifference

Rosen v. Chang, 811 F.Supp. 754 (D.R.I. 1993). The plaintiff's decedent allegedly died of untreated appendicitis. The allegation that a prison doctor acted with deliberate indifference is sufficient to state a constitutional claim. At 760:

> Grossly incompetent and recklessly inadequate examination by a licensed physician is a deliberately indifferent examination. This is ineluctably so when the manifested symptoms scream of a diagnosis that virtually lies within the knowledge of a lay person.
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> • • •
>
> Courts are reluctant to raise a misdiagnosis to the level of a constitutional [761] violation, but will do so when the failings in the process or outcome of such a misdiagnosis are particularly glaring. This is not a case where the evidence demonstrates a carefully thought-out medical decision.

Protective Custody/Summary Judgment

Gray v. Faulkner, 811 F.Supp. 1343 (N.D.Ind. 1992). Restrictions on protective custody inmates that were not applied to general population inmates raised an equal-protection question, and the defendants were not entitled to summary judgment. These restrictions on property, recreation facilities, law library access, dining facilities, and access to religious services are of the same type that has been repeatedly upheld in other jurisdictions, but the defendants presented no facts supporting a rational basis for them.

NON-PRISON CASES

Discovery

Greenway v. International Paper Co., 144 F.R.D. 322 (W.D.La. 1992). The plaintiff is denied the right to make 64 corrections in a 200-page deposition, many of which alter the meaning of the original answer. At 325: "The Rule cannot be interpreted to allow one to alter what was said under oath.... A deposition is not a take home examination."

Discovery

Murphy v. Williams, 145 F.R.D. 76 (E.D.Mich. 1992). The City of Detroit is sanctioned for fees and costs resulting from its failure to cooperate in discovery of material concerning police training. (They pointed to file cabinets, refused to make copies, and failed to explain why some 500 documents

were missing from the files.) The court set a deadline date for compliance on pain of default on the question of the existence of a city policy of inadequate police training and supervision.

Modification of Judgments

Wyatt by and through Rawlins v. King, 811 F.Supp. 1533 (M.D.Ala. 1993). The defendants moved to vacate a portion of a consent decree requiring that the defendants provide adequate transitional treatment and care for patients released from state mental health facilities.

In a 1986 consent decree, the plaintiffs in effect traded off the degree of court supervision of the defendants' operations for the right to have the validity of the 1972 *Wyatt v. Stickney* substantive requirements placed beyond challenge. The standard they now seek to modify is "one of the most fundamental." *DeShaney* did not require modification because consent decrees need not be modified to conform to the constitutional floor and because it did not alter the law that the parties relied on. Rather, they knew in 1986 that the *Wyatt* standards exceeded constitutional minima. In addition, *DeShaney* deals with the state's lack of obligation to persons whom it has not restrained, while the standard deals with its obligation to people whom it has previously restrained.

A recent decision that the defendants cannot keep class members hospitalized indefinitely pending space in a community program does not constitute a change in fact justifying modification. The decision merely reaffirmed existing obligations in the 1972 standards and provided a procedural framework to enforce them. Defendants' speculation about how onerous the obligation may become in the future does not justify modification.

The court declines to "clarify" the decree to limit the defendants' obligation to one year of post-release care. This is a modification, and not a clarification; the obligation to provide "adequate" care requires individualized determinations. ■

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

For the Record

■ New from the National Prison Project: **AIDS and Prisons: The Facts for Inmates and Officers** has been updated and expanded. The 48-page booklet answers common questions about AIDS in an easy-to-read question and answer format. It explains what AIDS is, how the virus is transmitted, and how to avoid infection.

TB and Prisons: The Facts for Inmates and Officers, discusses tuberculosis (TB) in a simple question and answer format. The 18-page booklet explains what tuberculosis is, how it is contracted, what its symptoms are, its treatment and medication, how HIV infection affects TB, and how multi-drug resistant tuberculosis differs from "ordinary" TB.

Single copies of the AIDS and TB booklets are free from the NPP, 1875 Connecticut Ave., N.W., Washington, D.C. 20009. Bulk copies are as follows: $25/100 copies; $100/500 copies; $150/1000 copies, prepayment requested.

■ **Double Justice** is a new video on race and capital punishment, produced as a joint project of the American Civil Liberties Union's Capital Punishment Project and the NAACP Legal Defense and Education Fund, Inc.

Double Justice links historical information about the racially biased use of the death penalty with contemporary research which shows that race continues to determine which crimes are punished by death.

For more information on race and the death penalty and/or to order the 19-minute video, contact Diann Rust-Tierney at the ACLU, 122 Maryland Avenue, NE, Washington DC, 20002, (202) 675-2321. Cost $20 prepaid.

■ Minnesota Corrections Commissioner Orville Pung, calling prison **"the ultimate welfare state,"** called for abolition of the terms "probation" and "treatment," in the April 1993 issue of "Overcrowded Times." Pung says that these two terms are often misunderstood by the public. " 'Treatment' is unfortunately a medical term," says Pung, "that is not appropriate in the corrections system. 'Treatment' implies an illness, and consequently a cure....We need to rethink our use of the term 'treatment' and cast it aside, replacing it with 'risk reduction,' a more realistic objective of corrections programs." And he states that the term "probation" connotes "getting off easy" to the public. "If we are to educate the public that there are legitimate alternatives to prison, the advocates cannot continue to be seen as mushy-thinking do-gooders," he continued. "Only when the public understands that prison is the ultimate welfare state and that community surveillance and supervision for appropriate offenders make economic and social sense will we slow the momentum toward ever greater dependence on prisons."

■ **The Human Rights Watch Global Reports on Prisons** summarizes six years of work by the Human Rights Watch's Prison Project and divisions in investigating prison conditions in Brazil, China, Cuba, Egypt, India, Indonesia, Israel and the occupied territories, Jamaica, Mexico, Peru, Poland, Romania, Russia and Azerbaijan, South Africa, Spain, Turkey, United Kingdom, United States and Zaire. Their findings should not surprise us. The routine cruelty of imprisonment is tolerated even in countries that are more or less respectful of human rights because prisons, by their nature, are out of sight and because prisoners, by definition, are outcasts. By any accepted standards, whether the often vague United Nations Standard Minimum Rules for the Treatment of Prisoners or any other criteria, prison conditions, policies and practices usually fall below the level of decency. From torture in a police lockup to degrading conditions and abuse by guards or other inmates in a long-term prison, prisoners all over the world are abused in gross violation of their rights under international and domestic law, almost invariably without recourse or remedy.

In publishing this report, Human Rights Watch calls upon the international human rights movement to widen its concern with political prisoners to strive for the rights of all prisoners victimized by the denials of human rights recorded here.

Copies of the report are available at $20 each (plus $4 postage and packing) from: Human Rights Watch, Publications Department, 485 Fifth Avenue, New York, NY 10017-6104, Tel. (212) 972-8400, Fax. (212) 972-0905.

Reflections on Lucasville: Have We Learned Anything Yet?

BY JAN ELVIN

"Four dead in Ohio..." The Crosby, Stills & Nash song about the 1970 killings of four Kent State students by Ohio National Guard troops kept running through my mind as I waited to hear news of the hostages and prisoners at Lucasville. How many more dead in Ohio this time?

Nine prisoners and one correctional officer were ultimately killed at the Southern Ohio Correctional Facility near the Village of Lucasville, Ohio early this May.

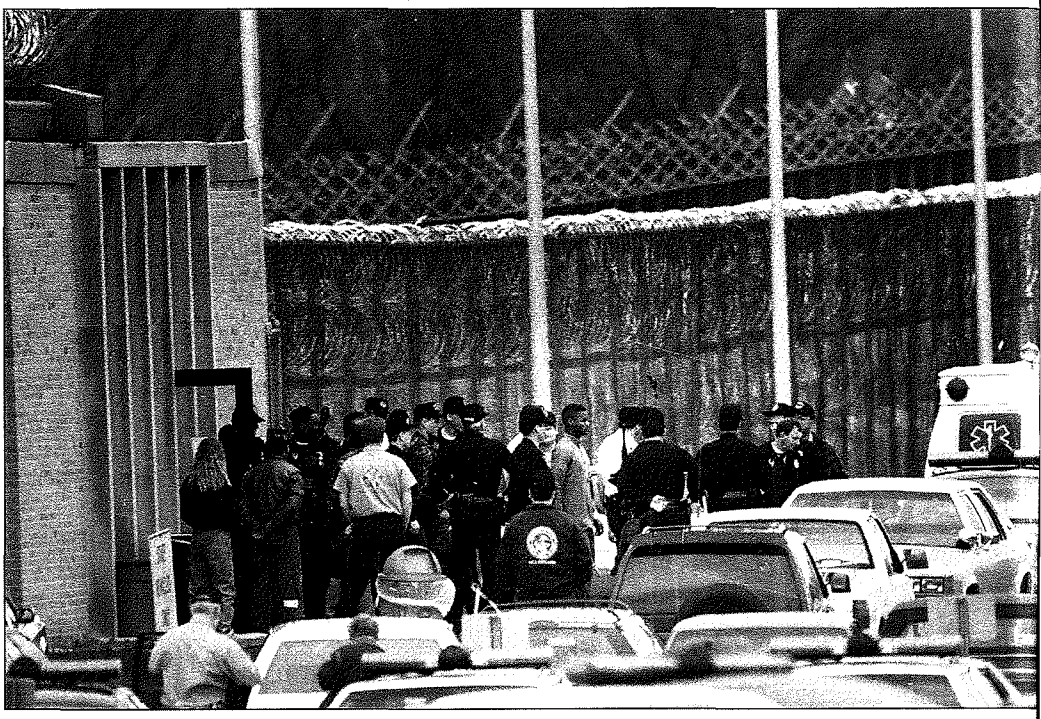
While to many people the Lucasville situation may seem like a simple problem with a simple solution (lock 'em up and keep 'em there), it bears a closer look.

Riots, hostage-taking, and killing are deplorable and cannot be condoned. But many incidents like the one at Lucasville come about because of the dangerous conditions created by neglect and overcrowding. Prison conditions in many parts of the country are even worse today than those which inflamed the 1971 Attica uprising and the 1980 New Mexico riot, both of which resulted in dozens of deaths.

Research shows absolutely no relation between crime rates and prison population. If the national prison population's 500% increase over the last 20 years is not due to rising crime, then what *are* the reasons for it?

• *Mandatory sentences*. Overcrowding has come about partly because of the flood of mandatory sentences in the last 15 years. The elimination of much judicial discretion in assessing prison terms has resulted in longer sentences.

• *Racism*. People of color are treated differently throughout the criminal justice system and often receive longer sentences for the same offense than do white offenders. (See the 1982 report by the National Minority Advisory Council on Criminal Justice to the Department of Justice which shows the system favors whites over people of color; a 1992 Federal Judicial Center study which found that federal sentences for blacks for drug trafficking and firearms were 49% higher than for whites; and the San Jose *Mercury News* investigation which found that whites more easily obtained plea bargains than blacks.)



AP/Wide World Photos

James Demons, a correctional officer at the Southern Ohio Correctional Facility, in grey clothing at center, as he was released by prisoners on the fifth day of the riot.

• *The drug war*. Misguided Reagan-Bush drug policies have not alleviated the serious problems of drug addiction and related crime; they have succeeded only in locking up many nonviolent offenders for ridiculously long prison terms, swelling prison populations, and exposing first-time offenders to prison life.

• *Jailing of parole violators*. Use of probation is way down and parole violators are jailed more quickly. At least 35% of the more than 100,000 prisoners in California are technical parole violators. A parolee may, for example, be returned to prison for having failed to report a job change to a parole officer. California has spent over 14 billion dollars for new prisons in the last decade! Can this be justified in a state whose public schools are closing for lack of state funds?

In 1981 the question of the constitutionality of prison overcrowding came before the U.S. Supreme Court in *Rhodes v. Chapman*. The Court was asked to rule on whether placing two inmates in cells designed for one at this same Lucasville prison amounted to cruel and unusual punishment. The Court said no, because a specific finding of harm to basic health and safety was needed before a prison would be deemed unconstitutional.

The case began when a prisoner named Kelly Chapman filed a lawsuit to halt double-celling at Lucasville. He cited state veterinarian regulations requiring 43 square feet of space for a calf once it became five weeks old. "I went around measuring the cell," said Chapman, "or my half of it. I have 32 square feet. I couldn't accept that a calf is entitled to more living space than a man."

Imagine living in half of 63 square feet: the space has to include two bunkbeds, a toilet, a small table shelf, a chair, and a sink. Take out space for these "furniture" items, give half of the space to your cellmate, and you take what is left. As Columbus Legal Aid attorney Jean Kamp, who represented prisoners in *Rhodes* said, "There is no human dignity in living in a 10-by-6 cell with another person."

Forty-one states and the District of Columbia are under court order to reduce prison overcrowding and/or remedy unconstitutional conditions. In each case, conditions of confinement and/or overcrowding in the prison were found to violate the ban against cruel and unusual punishment of the Eighth Amendment to the Constitution.

Thanks largely to the negotiating efforts of Ohio attorney Nikki Schwartz, there was no further loss of life at Lucasville. When we look at the number of states that are under court orders, we should not be surprised to hear of riots like the one at Lucasville. Rather, we should be surprised that we do not hear of them more often. ■

Jan Elvin is editor of the NPP Journal.

Service (like the Secret Service here in that they protect the President) came and arrested me, and I was taken to the military stockade.

JE: Were you as scared that day as you were the first time Doe arrested you after the coup in 1980?

MFJ: Actually, I was *more* scared, because the first time there was a crowd. This time I was alone.

JE: What happened to you when you got to the stockade?

MFJ: The head investigator turned out to be a friend of mine! He told me, "What I will do is write a letter to the commander of the prison indicating to him that under no circumstances are you to be bothered in any way, by presidential order." Traditionally, if you were sent down there by the President, you were liable to be whipped. You were liable to be interrogated all night. You could die. Because somebody would think they were doing the President a favor. So, my friend did the best thing he could do for me—at some risk to himself. When I got to the prison the commander called all of his guards and said, "This is the President's special prisoner. I don't want anything to happen to this man." As a result, I was placed in a tiny cell with a military officer, who generously gave me his blanket that first night. The next day my wife was able to bring me a blanket and food. The prison does provide food but you wouldn't want to eat it if you had a choice.

JE: What was the food like?

MFJ: It was horrendous, just rice cooked with palm oil, and that's it. Even though my wife would bring me real nice food, the kind I like, I just couldn't eat. I've always had a big appetite except for that period.

JE: They would let her bring in food?

MFJ: As long as she was prepared to eat some of it to make sure nobody was trying to poison anyone. She also had to pay some money to make sure the food got to me. You couldn't have any reading material except the Bible or the Koran. I've always been a Christian and went to church, but I'd never really read the Bible until I was in that place.

JE: How long were you there?

MFJ: Thirty days. When I look back it was really short, but I had no idea how long I'd be there. I met two people who had gone there under circumstances similar to mine (sent by the President), and had been there for three years. One was a preacher who had criticized the President.

JE: Is that where they put most people who had made negative statements about Doe?

MFJ: Yes, or who were actively against the government. The military also put short-term people in there. The "common criminals" went to the regular prison. The military prison was the one where they packed people in after the 1980 coup. My younger brother was unfortunate to go there within a month after the coup, and he was tortured. He still has marks on his back from beatings. They handcuffed him to a pole and somebody would whip him until they got tired, or until he collapsed. Fortunately I did not experience anything like that. The worst thing about it was the deprivation and just being locked up. There was no toilet in the cell; the Liberian Red Cross provided little buckets. In the morning people took the buckets out to the general bathroom and this smell...it was horrible.

JE: When your wife came to bring food did she get to chat with you?

MFJ: Yes, I saw her. I got many visitors. There were other civilians there but I was probably—for lack of a better word—the most prominent person in the prison at the time. I would usually come out first and see my people because they took up the whole visiting room. People from my church came all the time. My parents never came, because it was too emotional. My brothers absolutely refused to come because of their anger. My sisters didn't come because they would cry. There was a big sign on the wall: "No crying."

JE: How did you get out?

MFJ: My parents and my wife began to get people organized to try to get me released. We had relatives close to Doe, but people were so fearful of him. Finally my wife wrote a letter and had the entire extended family sign it. At 5 o'clock one evening I heard my name called. The President wanted to see me. I had no clothes except for shorts, bath slippers and a T-shirt. I got in a car with three security officers and drove straight up to the presidential palace.

JE: You in your outfit?

MFJ: In my shorts and T-shirt.

JE: Were you scared, or curious, or what?

MFJ: Not scared, but I *was* concerned. I figured if he wanted to do something to me he wouldn't have called me in to speak personally. I thought the worst thing that could happen was he would tell me some nonsense and then send me back to prison. I walked in and Doe was sitting on the balcony overlooking the beach. A nice, cool breeze is blowing—he's sipping something, and speaking on a cordless phone. He put the phone down and proceeded to lecture me for 15 minutes of crap about how they exposed their lives to free Liberia from tyranny.

JE: And you're taking it all in.

MFJ: Yes, of course. Finally he says to me, "I received a letter from your parents and your wife so I've decided you can go home. But if you ever do anything against this government again, I will send you to Belle Yalla." Belle Yalla is a notorious prison in the middle of nowhere. They fly you up there. They say that in the old days they used to throw people out of the plane. I don't know how true that is, but a lot of people who went there didn't come back. After he finished, I said, "Thank you, Mr. President. May I shake your hand, Excellency?" He looked at me, "Oh yes." I shook his hand and left.

JE: Why did you do that?

MFJ: A matter of pride. I was telling him, "I'm not afraid of you." I looked right in his eyes and shook his hand. Mano a mano. I was totally powerless but in a way my self respect and my dignity were maintained by having that parting handshake with him.

JE: What then?

MFJ: In October of that year (1985) we had elections in Liberia. The U.S. government supported Doe, who was one of Ronald Reagan's favorites for two reasons: the first, Doe made anti-communist noises, and the second, Qadaffi. You know how Ronald Reagan felt about Qadaffi, and Doe would make these glorious speeches against Qadaffi and indeed, during the Reagan years the government of Liberia received $500,000,000 in aid from the United States. There is nothing to show for that, absolutely nothing.

JE: Did it just go into Doe's pockets?

MFJ: As much of it that could, did.

JE: What about the rest?

MFJ: It was wasted. A lot of it was military aid. Liberia—we could never understand—Liberia had very minimal external threats, if any. This military aid was being used against *us*, the ordinary citizens of the country! Doe lost massively in the October 1985 election, he probably got one third of the vote.

JE: Who ran against him?

MFJ: A gentleman who was later killed during the civil war called Jackson F. Doe, no relation. (Samuel) Doe decided he wasn't going to accept the election results, so he rigged the election. One of the saddest statements that I've ever heard made by an American government official was by the Assistant Secretary for African Affairs, I think it was Chester Crocker,

who said, "Well, at least they had an election."

JE: Well, there's elections and then there's elections.

MFJ: Right, so Doe faked it and continued in power. In November 1985 one of his former councilmen, General Quiwonkpa, tried to overthrow the government, and failed. In retribution, Doe sent his army up to Nimba County, this man's part of the country, and they slaughtered, raped and burned. The orphans from that and the people who lost their brothers and sisters fled into the neighboring country. Four years later in 1989, these same people formed the crux of the invading army, the National Patriotic Front of Liberia.

JE: Was this [Charles McArthur] Taylor's group?

MFJ: Right. Charles Taylor's group that would come back on December 24, 1989 to remove Doe.

JE: This was like coming back around again.

MFJ: Yes, it came back around. Frankly, the civil war in Liberia *really* began in 1985 when Quiwonkpa tried to remove Doe and failed and Doe went and oppressed his part of the country. The seeds of the civil war were being planted.

JE: What were you doing in November of 1985?

MFJ: I was fired from my old job at the Liberian Produce Marketing Corporation in November 1985 (Doe's work, I believe). I went into private business, then to law school. After that I began working at the family law firm of Jones and Jones. I'm a third generation lawyer—my father and grandfather were lawyers. A friend of mine suggested that I apply for a Fulbright scholarship, especially since I was interested in the scholarship of law more than the practice. I came to Harvard in August 1989 to do my LLM (Masters in Law). I was actually here when the civil war started in December 1989. Like many Liberians, I dismissed it and thought, Doe will kill them all and we'll have to find another way to get rid of this man. Maybe Doe would do like a lot of leaders did—like Marcos or Duvalier—and flee. Well, this fool decides he's going to stay until the bitter end, and that led to the total destruction of Liberia. I thankfully didn't experience any of it but family members did. The stories are horrendous, beyond imagination.

JE: Taylor's rebels invaded Liberia in 1989...

MFJ: Yes, and they decided that whoever lived in Monrovia was a Doe supporter. Doe's army killed indiscriminately and also pointedly. There are so many stories of the brutality and the inhumane treatment...from news reports, from relatives and friends, you can tell that the people really suffered. Half the country left to go to neighboring countries. And of those who remained, half were out of their homes. Liberia went through a completely horrific time, and is still going through it. By March 1990, the entire system was broken down—there was really no more government, even though Doe claimed to be President. In September one of the rebel groups killed Doe. A lot of us believed this thing was over. The purpose was to get rid of Doe and Doe was gotten rid of. Unfortunately, the National Patriotic Leadership [Taylor] decided that they were going to continue this battle because they wanted to control the country. Neighboring countries decided to become involved, ostensibly as a peace force, and are still there. A cease-fire lasted from early 1991 until October 15 of 1992. Taylor had set up an entire infrastructure in the rest of the country—cabinet and government. He never got diplomatic recognition but he did have a government. The U.S. Ambassador used to go up and visit him once in a while but all of that has fallen apart since last October because the West African troops have launched an amazing military attack against Taylor. By this time Taylor controlled 90% of the country. The West Africans meanwhile have installed a government in Liberia under a Dr. Amos Sawyer called the Interim Government National Unity.

JE: So, Monrovia is controlled by a different group than the whole rest of the country?

MFJ: Yes, but in October of last year Taylor launched an attack on Monrovia.

JE: Was he successful?

MFJ: No, he failed, but for the first time the West African troops actually launched a major frontal assault against Taylor.

JE: The West African troops are not Liberians, then?

MFJ: No, they're Nigerians primarily; Ghanians, Sierra Leonians, Guineans.

JE: Are they some kind of federation?

MFJ: Yes, the Economic Community of West African States formed close to 20 years ago for the purpose of economic union. In 1990, with all these Liberian refugees, the heads of state of other countries decided that they needed to do something because the impact of the Liberian civil war was reverberating in their countries. They extended their role after this October attack on Monrovia to actually fighting against Taylor. The Nigerian Air Force bombed Taylor's positions in other parts of the country. But there are reports of hitting civilian targets—two reports of hospitals being hit and all of that. It is an extremely complicated situation.

JE: Is your family still in Monrovia?

MFJ: My brother has moved back to Liberia and reopened the family law firm. He says his life is slowly, slowly returning to normal.

JE: So who governs Monrovia? The mayor or something?

MFJ: (laughing) Taylor always called the gentleman, Dr. Sawyer, who's President of the interim government, "the Mayor of Monrovia." The Monrovia government is the one considered official by the United Nations and by the Organization of African Unity. By any definition of "government," I don't believe that Liberia has had a government since the Doe regime crumbled. Certain elements must be present that both sides always lacked. You certainly must control most of the country, which the Sawyer government never did. You must be considered a government by organizations like the UN, which the Taylor rebels never had. But for all intents and purposes, and more and more as the days go by, the Interim Government is recognized as the legitimate government of Liberia.

JE: What effect has the war had on the people of Liberia?

MFJ: A terrible effect—there are a lot of orphans, a lot people left homeless because their homes were destroyed. It is so sad that these people's lives have been completely disrupted for nothing. Everyone had agreed that Doe had to go; what turned people around and against Taylor were several things, but major among them was he lost control of his fighting force, and went on this murderous binge. The second thing was that on September 9, 1990 when Doe was killed, Taylor should have stopped and said. "Let's talk. Let's find a political solution to the problem."

JE: Do you think one could have been found?

MFJ: Well I'll put it this way, if Taylor had done that and they had elections shortly after, he would have won hands down. His decision to continue fighting was the biggest mistake he ever made.

JE: Why did he continue fighting?

MFJ: Because Taylor believes that he has the right, I guess, a birthright to be President of Liberia. This is a man who, before we heard he was leading a fighting force, was sitting in a prison in Massachusetts. Doe had asked that Taylor be extradited to Liberia for allegedly stealing government money and pocketing it. But he actually escaped from prison in Massachusetts.

JE: Supposedly he sawed his way through bars in the laundry room and lowered him-

self to the ground with a tied bed sheet.

MFJ: Taylor was always extremely flamboyant, he always wore nice, expensive suits, drove a Mercedes. He was always looked upon more as a social type than as a military type person, so people were surprised. Also, nobody expected Doe's Army to put up such a fight. The U.S. Government offered Doe a way out. When Bush sent 2,000 Marines off the coast of Liberia the Ambassador went to Doe and said, "We'll take you anywhere you want to go." Doe refused. He had probably become a hostage of his Army. They said, you're not going to leave us here. I believe that story. So you have a country now that's in as bad a situation, or worse, than any other country in this world. We thankfully did not reach, in terms of their starvation levels, Somalia. This is not to say that a lot of people didn't starve to death. I think all of the numbers that have been published are off. They have indicated 20,000 killed, I think that's off. I think it's probably two or three times that many that have died.

JE: Now you've started anew in this country. How did you discover the Prison Project?

MFJ: When I was at Harvard I noticed that the public interest law students had more life about them than the corporate law people. The people seemed more real. They had a heart and they smiled more and they had less pretentiousness about them. So, when I had to find a job the first place I decided to look was in public interest. I pulled the National Prison Project out of the Harvard Directory. It's been very interesting. It's not possible to survive practicing this kind of law exclusively in Liberia, but I think I've learned that people need this sort of thing, especially in a country like Liberia. What I'll try to do when I go back is combine both: have a practice that will make sure I earn a living, and do something like this. It may not be prison work, but it will certainly be a public interest kind of work. I've seen at the NPP that one can have an organized way of going about protecting the public interest and constitutional rights. I've been exposed to the level of commitment that one can bring to this. Certainly that's been inspiring. I've learned a lot, both personally and professionally. I used to think about human rights primarily in a political context—the torture of a prisoner who was arrested for political crimes. I didn't think about the ordinary person in prison who's being mistreated, not necessarily by torture but by not being given the proper medical care, etc. which in the final analysis presents the same result. He goes through pain. ■

"Dear Prison Project..."

The National Prison Project receives over 500 letters each week from prisoners. Many of those letters include legal questions which, unfortunately, we have neither the time nor the staff to answer individually. In order to give prisoners some of the information requested, we are continuing an "advice" column, a sort of "Dear Abby" for prisoners on legal questions. This issue's "Dear Abby" is Dan Manville.

Dear Prison Project:

Recently I filed a *pro se* complaint and requested that the U.S. Marshal serve the summons and complaint upon the different defendants. This request was granted by the court and I was required to provide the address at which the defendants could be served. The U.S. Marshals were not able to serve one of the defendants because he was on sick leave and the prison would not accept service for that person. The court has informed me that I am responsible for providing a proper address but when I wrote prison officials and asked for the home address of this defendant they refused to give it to me. How do I obtain this address since this is an important defendant?

Pro Se litigator

Dear *Pro Se*:

The problem that you are having is not something unique to you. To serve process, you have to know where the defendant is. Usually, the Marshals can arrange to serve process on a prison employee or official at the prison, and sometimes prison administrations will make this accommodation for other process servers too. However, if defendants are not actually at the prison—if they are on sick leave, or have retired or resigned, or transferred to another prison—they cannot be served at the prison. Prison staff are unlikely to accept service for them, and even if they do, such service may be legally questionable. This problem arises even when the U.S. Marshals are trying to serve process.

Prison officials are extremely reluctant to provide the home addresses of staff or former staff because they think it would be an invasion of privacy and a possible threat to security. The Marshals are obligated to try to locate and serve all defendants as long as you provide them with information to identify each defendants. However, the Marshals have no power to force prisons to provide staff addresses.

You should file a discovery request on the highest ranking defendant (warden or director of corrections) seeking the present or last known addresses of the unserved defendants, and make a motion to compel under Rule 37 if the information is not provided. The motion should state that you do not personally need this information but it is needed by the U.S. Marshal to complete service as ordered by the court, and that it is acceptable to have the addresses provided directly to the Marshals if prison officials prefer.

Another possible solution is to persuade prison staff or the attorney representing the defendants who have already been served to arrange to accept service for the unserved defendants. (They will have to contact each defendant to get authorization to do this.) You will probably have to agree that this procedure does not bind the state, city or county to represent these named defendants until the defendant makes a request for representation.

If defense counsel or the unserved defendants will not agree to this, you can suggest this method in your motion to compel as an alternative to providing you or the U.S. Marshal with the actual addresses. Courts are likely to find it an appropriate compromise between your need to effectuate service and the privacy of prison staff.

Dan Manville, an ex-prisoner, is a private attorney in Detroit. He is the author of the Revised Second Edition of the Prisoners' Self-Help Litigation Manual.

BY JACKIE WALKER

How Not to Implement a Medical Parole Law

Advocates and families of prisoners with HIV/AIDS were hopeful when New York passed its medical parole law in April 1992, despite the limitations incorporated within the law. Since that time a medical parole bill has been introduced into the Massachusetts legislature, and the District of Columbia is beginning to implement their Geriatric and Medical Parole Law. Sadly, problems have emerged since the laws were passed which have dissipated most of the early hope held by advocates and families. Many of the problems with New York's medical parole law revolve around stories similar to that of the Ocasio family.

It began in July 1992 when Bernard Ocasio, a New York State prisoner in the advanced stages of AIDS, was advised by his doctor to apply for release under the new law. After filing the application, Bernard's sister Marie received notice that a document was missing. Despite numerous calls to New York Department of Correctional Services (DOCS) chief medical officer Dr. Robert Greifinger's office, Ms. Ocasio was unable to find out which specific document was missing. Although unable to walk unassisted, in September Bernard Ocasio was abruptly moved from the Staten Island University Hospital in New York City to the Walsh Medical Center in Rome, New York, a six-hour drive away from family. At the Walsh Medical Center Mr. Ocasio's condition deteriorated steadily. Upon hearing of his transfer, Marie Ocasio immediately began calling city officials for help, and she learned from Dr. Greifinger's secretary that her brother's medical parole application was now ready to go before the Parole Board. On September 20, however, Bernard Ocasio died. A week later Marie Ocasio received a telephone call that her brother had been granted medical parole.

"I think," said Marie Ocasio later, "that the waiting period to process medical parole applications is too long and it's not fair to require prisoners to be almost dead before they're released. Another problem is prisoners not receiving proper medical treatment or being monitored. I know AIDS didn't kill my brother Bennie—it was the suffering and depression of being moved away from his family and the lack of proper medical care."

Three hundred and ten prisoners died during 1992 in the New York State correctional system—210 of AIDS. The Correctional Association of New York estimates that an average of 18 prisoners die of AIDS each month in the New York system.

According to New York DOCS statistics, 234 medical parole applications have been received. Of that number, only nine have been approved for release. Don't look for these figures to change anytime soon, since DOCS has estimated that only 25 prisoners will be released this year under the new law. It is that figure along with the frustrations encountered in preparing the applications that has most advocates steamed. They describe the difficulty in receiving information about the application once it is filed, the amount of time spent processing applications, and just how disorganized the process is.

The Legal Aid Society's Medical Parole Project, a division of the Parole Revocation Defense Unit, has experienced problems in assisting clients with medical parole applications. Project staffers have been denied entrance to New York State correctional facilities, have encountered prison doctors who are unwilling to provide medical information, and correctional staff who refuse to distribute pamphlets describing the project to prisoners. Their phone calls have gone unreturned by Dr. Greifinger's office. Despite these obstacles, they have managed to submit medical parole applications for 28 prisoners with AIDS and other terminal illnesses. Five prisoners have died so far waiting for their applications to be processed. Another prisoner, whose application was filed in February, is still awaiting an answer.

Raye Barbieri, a certified social worker at the Medical Parole Project, says, "The New York DOCS has made the process difficult by refusing to comply with us and give information when we're advocating for clients. The current law gives Corrections complete discretion in the medical parole process. There's nothing in writing that describes any guidelines. Another problem is the amount of complete control Dr. Greifinger has in selecting who moves on to the Parole Board."

The biggest rationale for denial by Dr. Greifinger is "insufficient disability," which means not being ill enough to qualify for medical parole, even when a doctor has certified the prisoner not to be a danger to society. DOCS also maintains that no one is entitled to an explanation of why their application was denied approval.

Under the law doctors are required to certify a prisoner's "dangerousness," and have no immunity in the event they are sued. Steve Machon of the Correctional Association says, "Doctors are not sure of the process, never know if their paperwork has been received and experience long delays in receiving information. Basically doctors have no idea of how the process works. DOCS has a directive on the internal process that has yet to be published." A proposed amendment to the medical parole law would provide doctors with limited immunity from damage claims and would change the language referring to "dangerousness" to a standard which more reflected their professional expertise. The measure would also extend the parole period from four to six months.

Unfortunately, medical parole has become another fixture for denying humane treatment of prisoners with AIDS, instead of what activists once saw as a means of restoring some dignity to prisoners in the last stages of AIDS. ■

Alex Velazquez, the first prisoner with AIDS released by Virginia Governor Douglas Wilder died on April 15. Gilbert Serrano, an ex-prisoner and advocate for prisoners living with AIDS/HIV died on May 25 from AIDS-related causes.

Jackie Walker is the Project's AIDS information coordinator.

THE NATIONAL PRISON PROJECT

Publications

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

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

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

QTY. COST

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

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

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

QTY. COST

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

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

(order from ACLU)

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

QTY. COST

Fill out and send with check payable to:

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

Name _____

Address _____

City, State, ZIP _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project's litigation program since March 15, 1993. Further details of any of the listed cases may be obtained by writing the Project.

Casey v. Lewis, filed on behalf of Arizona state prisoners, challenges legal access, health care and practices surrounding assignments to segregation. On March 19, the district court declared the mental health care system unconstitutional, rejecting the state's claim that budget constraints made deficiencies unavoidable. Periodic status reports on medical and dental care were required to ensure that they remained constitutional following recent improvements. On April 3, the court ruled that the state's failure to make facilities accessible to mobility-impaired prisoners violated the Constitution. The court declined to hold that discrimination by defendants against mobility-impaired prisoners violated Section 504 of the Rehabilitation Act. Plaintiffs filed a motion to modify this part of the decision which the court denied on May 27, 1993.

Doe v. Foti, et al. — In April 1993, the National Prison Project, with the Youth Law Center and two private attorneys, filed this class action lawsuit on behalf of juveniles held in the Conchetta Facility at the Orleans Parish Prison. The case alleges that conditions at the facility are unconstitutional and specifically challenges inadequate educational programs; lack of provision of basic supplies; inadequate medical, dental and mental health care; unsafe environmental conditions; abusive disciplinary practices; and inadequate visitation practices.

Hadix v. Johnson — The National Prison Project appears in the medical and mental health care portion of this conditions of confinement case at the State Prison of Southern Michigan in Jackson. Following evidentiary hearings in March, the court ordered relief in several areas, including staffing and tuberculosis control. The defendants have filed a notice of appeal from the orders.

Many Horses v. Racicot — On April 21, 1993, the National Prison Project and the ACLU of Montana filed this case against the Women's Correctional Center in Warm Springs, Montana, challenging unsafe environmental conditions, inadequate medical and mental health care, and inequitable vocational and educational programs as compared to those offered at the men's facility. The case was filed after the legislature reneged on its plan of two years' standing to construct a new women's facility.

Palmigiano v. Sundlun challenges overcrowding and conditions in the Rhode Island prisons. In February, the Governor's new Commission to Avoid Future Prison Overcrowding proposed legislation to hold the prisoner population at certain agreed-to limits. The package calls for use of alternatives such as intensive supervision, halfway houses and drug treatment programs, night and weekend court to expedite arraignments, and the creation of a committee to supervise population levels. As of early June, the legislation was moving through both houses of the legislature, and the parties to the lawsuit were moving closer to a final agreement that would conclude the litigation and end federal court active supervision.

U.S. v. Michigan/Knop v. Johnson — In this state-wide Michigan prison conditions case, the trial court ordered the defendants to submit a compliance plan for legal access by June 15, 1993.

Harris v. Thigpen challenges the treatment of prisoners with HIV infection in the Alabama prison system. Following an appeal by the plaintiffs, the Eleventh Circuit remanded to the district court for retrial on our statutory claim under Section 504 of the Rehabilitation Act and our legal access claim. After remand, the parties disagreed on the burden of proof allocation under the Rehabilitation Act. On June 21, the district court certified this question to the Eleventh Circuit.

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