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Billing Prisoners for Medical Care Blocks Access

BY MARK LOPEZ AND KARA CHAYRIQUES

In 1976, the Supreme Court established in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the government has an obligation to provide medical care for prisoners. This fundamental premise has been upheld in subsequent cases and establishes a prison's obligation to provide for prisoners' basic needs, which include medical care and treatment.

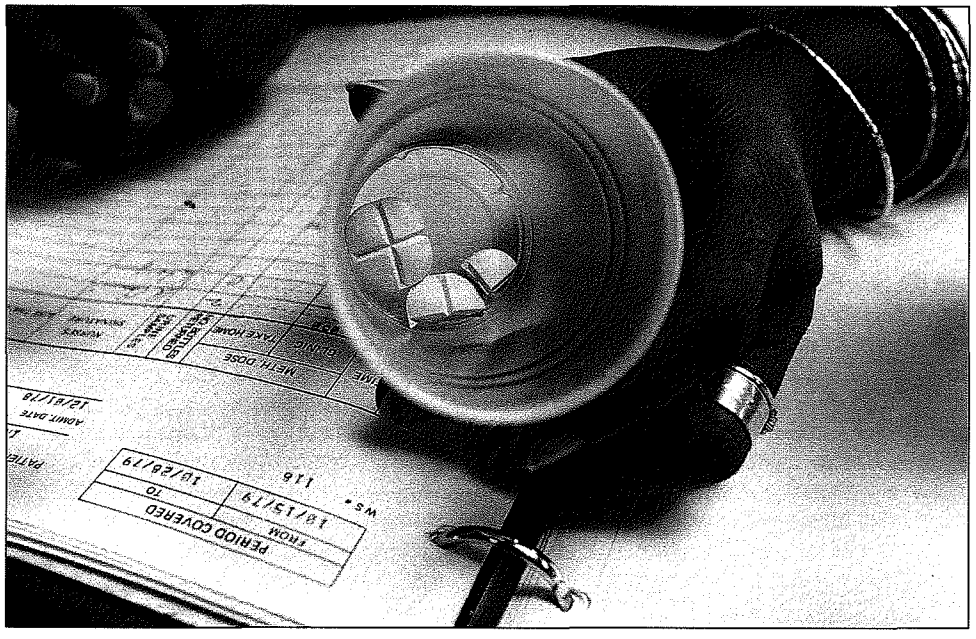
> *When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.*
> *DeShaney v. Winnebago County DSS, 489 U.S. 189, 199-200 (1989)* (emphasis added).

A money-saver or an obstruction to medical care?

However, a recent and disturbing trend in correctional health care threatens to undermine this fundamental constitutional principle. More and more prison officials across the country are beginning to charge prisoners for basic medical care. Payment is typically exacted by two methods: first, in several states, Nevada most notably, prisoners are charged $4 for attending sick call. The second method is to require prisoners to purchase all over-the-counter (OTC) medications and products at market prices. Thus, sick call requests are simply returned to the prisoner with instructions to purchase an OTC product without ever being seen by medical staff. While these practices may seem like beneficial cost-saving measures adopted by prison health care administrators, upon closer examination they interfere with access to health care services.

The policy of charging prisoners for medical services is widely hailed by corrections officials as a cost-cutting measure and a way to discourage those prisoners who abuse sick call. Administrators argue that by charging prisoners they instill a sense of fiscal responsibility and force prisoners to make mature choices regarding how they spend their money. They also stress that no prisoner is denied access to medical care because of indigency. Instead, their account will go into a negative balance. When money is deposited into the account it will be applied to the charges for the medical services. No prisoner is charged for emergency care or for services initiated by a physician.

Administrators argue that the fee policy has greatly reduced the number of prisoners who come to sick call. For example, in an article in the Fall 1992 issue of *CorrectCare*, "Fees For Medical Services: A Cost-Saving Program," health care providers in Mobile County, Alabama describe a 50% decrease in the number of prisoners who sign up for sick call since the fee policy was implemented. Yet such a



Bill Powers, FPG

Timely access to sick call is the touchstone of a functioning prison health care system.

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drastic drop suggests that the fee policy is excessive and forces prisoners to forego sick call in order to save money to spend on other essentials such as hygienic products or legal materials.

Prisoners and prisoner advocates take a different view. Whether the new payment schemes operate to discourage prisoners from attending sick call or *directly* obstruct access, the policies ignore the significance of full and unimpeded access

> *Sick call requests are simply returned to the prisoner...without [the prisoner] ever being seen by medical staff.*

to sick call and the importance of preventive care in correctional facilities. Because of the close quarters and crowding attendant to incarceration, effective measures must be taken to reduce the risk of infection and disease from spreading through the facility. The most basic of these measures is to operate daily sick-call clinics which prisoners are encouraged rather than discouraged to attend.

Early evaluation important

Timely access to sick call is the touchstone of a functioning prison health care system. Once the prisoner has entered the delivery system at the sick-call level and is seen by a clinically trained person who listens to the complaint and evaluates the need, an objective referral to a physician can be made or withheld. Through this method of triage, the relative few who choose to abuse sick call regularly will not impose profound monetary costs on the system, while legitimate users will have ready access to all appropriate levels of care.

For example, certain serious diseases with significant public health implications can present apparently benign symptoms at the outset, such as persistent cough, headache, or even a rash. However, these symptoms could signal the onset of something far more serious, such as tuberculosis or HIV disease. In a prison setting it is imperative that these medical conditions be identified and treated promptly.

Forced to choose?

Prison health care administrators argue that fee policies force prisoners to make a choice about how they will spend their money, but prisoners typically receive no state pay because of the unavailability of a prison job, or are not paid a standard market salary. Most earn only $20-$30 a month. The situation in jails is even worse. For example, at the New Orleans Jail where prisoners receive no pay and most have only a small amount of money in an account, a $3–$5 charge for an OTC product can be a substantial setback, especially if they have other things to buy.[1]

A prisoner in the New Orleans Jail, as in most prisons and jails, must pay for very basic hygienic supplies such as underwear, socks, sheets, shaving cream, shampoo, skin lotion, toothpaste, toothbrushes, sanitary napkins, etc. This is also true of reading and writing materials, postage and phone calls. Except for meals, a pair of slacks, a shirt, and a blanket, prisoners are entirely dependent on their families to sustain them. Prisoners are therefore forced by payment policies to make a choice between two necessities of life in the institution: medication or hygienic/personal supplies. Many may choose to forego the OTC medication and try to obtain the other supplies believing that they do not have money for both.

Finally, payment policies typically have no provision for indigence. Policies will note only that the prisoner's commissary account will be debited and if there is no money in the account a "negative balance" will be created. Often, prisoners will do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy the prison's charges.

Legal issues

Proponents of the various payment schemes claim that the courts have addressed the issue and determined the plan to be constitutional. Opponents take a different view of the courts' various interpretations of these practices. A decision from the Tenth Circuit Court of Appeals in *Collins v. Romer*, 962 F.2d 1508 (10th Cir. 1992) is the most instructive case. In that case the court, dealing with an attorney fees issue, thoroughly discusses the (unreported) district court opinion which found the Colorado Department of Corrections' payment scheme unconstitutional (prior to its amendment). The original policy required a $3 payment whenever a prisoner was seen by a physician, dentist, or optometrist. The court observed that this requirement was much too harsh considering the meager level of prisoner pay and the state's corresponding duty to provide medical care. The amended policy, which imposed payment only if the prisoner sought a second opinion, was subsequently upheld. On these facts, the court of appeals found that plaintiffs were responsible for the repeal of the original policy and were entitled to fees. Thus *Collins*, although mainly dealing with attorneys' fees, acknowledges the unconstitutionality of the Colorado medical payment policy.

The only other reported decisions addressing this subject are inconclusive on the fundamental Eighth Amendment question. In *Shapley v. Nevada Bd. of State Prison Com'rs*, 766 F.2d 404 (9th Cir. 1985), a *pro se* prisoner argued that the imposition of a $3 charge for each medical visit was unconstitutional. The district court dismissed the complaint as frivolous; the court of appeals agreed, stating that the prisoner failed to allege "facts revealing how the $3 fee affected him." Shapley did not claim he was denied medical treatment because he was unable to pay the $3

(cont'd on page 17)

[1] This practice was recently enjoined by United States Magistrate Judge Alma Chasez, in litigation brought by the National Prison Project in *Hamilton v. Morial*, Civ. No. 69-2443 (Order, Mar. 4, 1993, E.D. La.) (discussed below).

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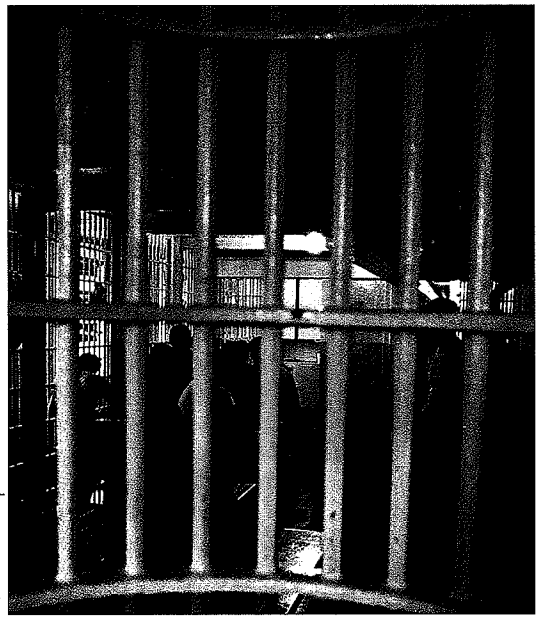
Criminologists, Practitioners Respond to Arguments Against "Legal Punishment"

In an article in the Spring 1993 issue of the JOURNAL, Lorraine Berzins challenged a basic assumption of our criminal justice system—the "rightness" of punishment for wrong-doing. We were pleased that the fundamental questions Berzins raised brought responses from several very distinguished criminal justice theorists and practitioners. Given the importance of the issue, we are devoting a part of this quarter's JOURNAL to these responses.



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The cruelty of punishment, says Berzins, is incompatible with the need to reintegrate the offender into society.

Berzins began her article with a critique of the widely accepted theory of "just deserts," which permits the punishment of errants provided the punishment is proportional to the seriousness of the crime, and is the minimum needed to achieve its purposes of deterrence and denunciation. While accepting that society requires a means by which to deter and discourage anti-social behavior, Berzins questioned whether punishment is effective or whether it can meet the test of proportionality. In particular, she argued that the inequality of economic conditions in society (exacerbated by racial inequalities) creates an unjust society in which just deserts are impossible. Just deserts is an abstract concept; proportionality is subjectively judged. Criminality does not exist as an absolute—it is defined by society. Imbalances of wealth and power enable the dominant group within society to impose its values and ideas of right or wrong, which may not be shared by other groups. This lack of shared values undermines the intended deterrent effect of punishment, which may well be viewed by the underclass as oppression or scapegoating rather than deterrence. Thus "just deserts," rather than building a stronger community, increases the divisions within it. The legal system that develops from it is of necessity adversarial, focusing on blame and punishment for the criminal, not on the harm done to the victim and the need for healing and restitution. The cruelty of punishment is incompatible with the need to reintegrate the offender into society.

According to Berzins, the outdated concept of punishment as a requirement of justice must be challenged. We can no longer mindlessly approve the "quick fix" approach of more and longer prison sentences which in reality is no fix at all, and only benefits the huge prison industry that it has spawned. A new paradigm is required which moves beyond retribution and emphasizes the liability of the offender for the offense. Such a paradigm might emphasize care for the victim, processes for resolving conflicts, and alternative nonviolent ways of expressing denunciation. Separation from society would be a last resort.

In summary, Berzins recognizes that crime and evil cannot be eradicated, but responding to them with the infliction of pain for the satisfaction of revenge cannot be an acceptable foundation for a criminal justice policy. Here are some of the reactions to her piece:

Lorraine Berzins' thoughts on the use of legal punishment raise many disturbing yet important issues, but none more significant for me, an African American, than her contention that a criminal justice system based on punishment is destructive and inevitably breeds "injustice in an unjust society." After all, African Americans have always known first-hand the destructive impact of the harshest forms of punishment in America—imprisonment and the death penalty. Historically, both have been politically directed against African Americans for the purpose of promoting white supremacy and controlling "a problem population". As did enslavement, these forms of retribution have served to destroy the body, mind, and spirit of untold numbers of African American males and females, decimated their families, and impaired their communities in ways that have rendered them almost incapable of adequately providing the most basic of human functions.

It is time the American people realized that their punishment-driven criminal justice system has not only failed to make communities safer, but promoted grave injustices in the process. And, if our nation is truly committed to safer communities and social justice, we must embrace new goals for our criminal justice system — ones that serve to strongly denounce, yet protect and even empower those who offend. For many criminal offenders suffer from alienation, powerlessness, and frustration over their inability to exercise even a modicum of control over their lives. It is this frustration that often gives rise to criminal behavior. Therefore, by addressing their needs, those of the rest of the nation can be satisfied as well.

Lorraine Berzins appropriately asks us to discard our outdated and harmful notions on the need to punish, and replace them with ones that promote justice and healing. ■

Dr. Alice P. Green is executive director of the Center for Law and Justice, Inc., in Albany, New York.

Ms. Berzins mounts a blunderbuss attack on the American criminal justice system. It over-criminalizes; punishes excessively, relying too heavily on lengthy imprisonment; fails to deliver the message of the law in a meaningful way to potential offenders; and heightens oppression of the few by the many in an unfair and unequal society.

So far, so good. Most thoughtful observers of the institution agree that it ails in serious respects, perhaps fundamentally. I especially share Ms. Berzins' view that "a radical downscaling of penalties is required even to pay lip service to the ethics of just deserts." That criticism resonates now with greatest force in the area of mandatory minimum sentences. The need to impose draconian sanctions

for federal drug crimes recently impelled two esteemed senior judges to decline such cases for the future. Plainly, abolition of these provisions should head the list of any serious reform agenda.

Berzins' account falls short, however, in its leap from description to diagnosis. While globally ascribing the system's flaws to the fact that it is based on "punishment," Ms. Berzins never defines this term as a penological aim. She shows only that the system produces punitive results—not that it does so *because of* any particular philosophy. She also evinces little grasp of the subtleties of, and relationships among, the key concepts in this area. For example, her claim that the principle of "just deserts" regards punishment as serving deterrence and denunciation conflates a number of different theories in a wholly unhelpful manner.

The belief that she has succeeded in pinning the tail of punishment on the criminal justice donkey leads Ms. Berzins to ignore ways in which alternative approaches to crime may create similar or worse problems. For instance, many scholars have noted how the ideal of rehabilitation, when it held sway, so often led to increased severity of penal sanctions. Indeed, her own suggested focus on "[p]re-emptive deterrence" raises a question whether any of the unexplained measures she envisions might violate civil liberties. She also overlooks the point that some of her closing recommendations, such as increased reliance on community-based problem solving, can coexist with punitive aims: local tribunals may stress punishment as much as more traditional courts.

I conclude that by switching her attention from theory to practice—fleshing out her specific proposals into a genuine action program—Ms. Berzins could more convincingly prescribe for the sick institution she knows so well. ■

Vivian Berger is a professor of law at Columbia University specializing in criminal law, and a National Board member and general counsel of the ACLU.

Given the dominance of South African issues in my recent professional life, the Berzins piece produced a number of reactions which related to that nation's use of the principles of punishment. There is probably no single other country, with the possible exception of the former USSR and the current People's Republic of China, which has used such a massive state apparatus to terrorize its population. The apartheid state, *par excellence*, utilized the threat and imposition of punishment to maintain its structures and control. As you are well aware, the enemies of apartheid were ruthlessly imprisoned or eliminated.

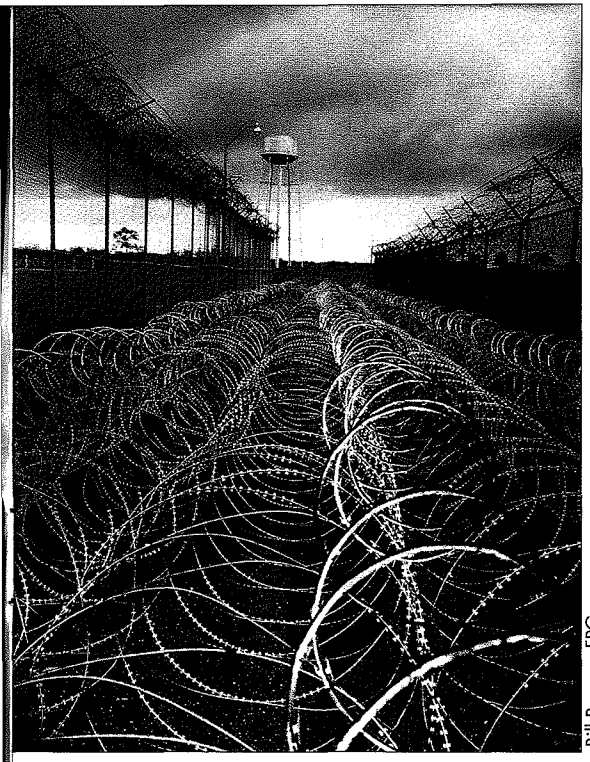
What is both surprising and very encouraging about the post-apartheid South Africa is that those who bore the brunt of this state of terror and punishment display the most amazing capacities to forgive their oppressors. Nelson Mandela is, of course, the shining example of this approach, but I met countless black South Africans who had every reason to demand vengeance but who instead were working now to build a new South Africa in collaboration and cooperation with their former enemies. The only demand that they made, and it is very relevant to the Berzins thesis, was that those who had perpetrated the horrors of apartheid admit publicly that they had done wrong and thus expurgate their misdeeds. Many of the old regime have not been able to accept this demand and they will undoubtedly be purged from their positions of power once the democratic process takes hold. ■

Duncan Chappell is the director of the Australian Institute of Criminology. At the time the Berzins article appeared he was a member of a Commonwealth Observer Group seeking to assist South Africa in its transition to a democratic society. In a letter written on his return, he related his experience of South Africa to Berzins' views.

Most ethical systems in the Western world have as a basic premise that suffering and pain ought to be limited. We live in "soft" cultures. Nurses deliver pain-killers to those who need it in hospitals. Social security systems are there to fend off the worst effects of social troubles. Torture is not highly regarded. Punishment means the intentional delivery of pain. We punish, but with considerable ambivalence. And we try to camouflage what we are doing. In my country, Norway, correctional officers are called "betjenter," which means those who serve other people, cells are called rooms, isolation cells are called single rooms, and the administration running all prisons is called "kriminalomsorgen." "Omsorg" can most easily be translated into "some sort of warm care for those who suffer."

But this ambivalence towards punishment leaves room for measures to limit that activity. Let me point to five strategies which are useful in attempting to bring pain delivery under control.

1. A basic tool is honesty in terminology. It is important to make clear what happens; that this suffering is intentional, that professors of penal law are professors in the laws regulating pain delivery, that prisons are not hospitals; that their basic intention is not to help, but to hurt. And this they do.
2. Punishments are man- or woman-made. There is no "natural" answer to the question: what is the "right" punishment? Punishments are based on decisions. The use of punishment in any society is a cultural question. What is seen as unwanted behavior can be dealt with in several ways. Punishment is only one. This brings us to the third point, which is:
3. Not to let ideas on crime and punishment begin with the concept of crime but with the concept of "acts. Crime does not exist. Acts exist, and then, later, some of these acts are interpreted as being crimes. The meaning of the acts are created through social processes, not by nature. By this type of thinking, we get an opening for considering alternatives to punishment—for going back to the original act and asking for other ways of looking at this act. Maybe it is more fruitful to look at this particular act as a conflict between parties. But conflicts most often have other solutions than punishments. The usual way of handling conflicts—discussions, quarrels, compensations—all these ways we call civil solutions. Compensation might also create pain, but that pain has another quality. It is the inevitable pain of social life when acts are discussed and evaluated, and blame and shame eventually are accepted.
4. The next natural question is how to create social life which encourages a tendency to perceive acts as conflicts, not as crimes. The possibilities here are many. Let me just point to the remarkable capacity we have to perceive what happens with unwanted acts inside our families, or in closeknit circles of colleagues, friends or neighbors as something different from crime. Unpleasant, silly, ought not to have happened, but not crime. The explanation is probably that we know so much about what happens here, and about the actors, that the formal categories of theft, of violence, of vandalism, do not quite fit. My son might have taken my money, but he is not a thief. I know him, know him so well that the label will not stick. In this perspective, all measures which help people to come close to each other can open us to relationships where limited use of punishments is appropriate.
5. But neighborhoods are damaged in many highly industrialized countries.



Bill Powers, FPG

The basic intention of prisons, according to Norwegian criminologist Nils Christie, is not to help, but to hurt.

This means a need for systematic encouragement of neighborhood-building. A conciliatory board, or boards, for advising on how to cope with conflicts might be a help in this situation. These are not an alternative punishment but, through their civil solutions, an alternative to punishment.

Is there then no need for formal punishment and for prisons in particular? There probably is a need in societies of our type. But this brings us back to Point 3. We are free to decide on the cultural question of amount of pain delivery. Prisons are, in a way, representative of national cultures. There are no rational reasons for not using flogging or other forms of physical maltreatment within prisons. When we do not use these measures, it is because we think that would be wrong. As members of nation-states, we would probably also think that such measures represented our nations, and thereby ourselves, in a way we would not like to be represented. As we would be proud of our country for certain accomplishments, we would feel shamed by others—such as flogging, such as torture, such as having a prison population very much higher than any other supposedly democratic country, such as having a prison population where more that half belong to ethnic minorities. The amount of punishment is not a result of "crime," but a result of the type of social organization and of human decision on delivery of pain. ■

Nils Christie is a professor of criminology at the University of Oslo and the author of numerous books on criminal justice. He has been a Rockefeller fellow to the U.S. and a visiting professor at universities in Europe and North America.

There have been two principal features of the development of what is known as the criminal justice process in the 20th century. The first is its inexorable extension into walks of life and elements of human behavior where it has no need to be. In many countries the statutory criminal law has expanded over the last 50 years at a rate which was not matched in previous centuries. The second feature is the extent to which the executive arm of the criminal justice process has taken over certain powers which more properly belong to the judiciary. The most obvious example of this is decision-making about the release of prisoners who are serving indeterminate sentences or who are eligible for early release on parole.

One of the main justifications for this expansion of the criminal justice machine has been the concept of rehabilitation of offenders. In very broad terms this assumed that there must be something "wrong" with people who broke the criminal code of a society. The task of the prison service, known in many countries as the correctional service, was to correct this individual wrong. A decision about release was best made by the executive at the point at which experts decided that the person had been made whole again.

There is now a general recognition among academics and practitioners, if not among politicians and the public, that this expansion of the criminal justice process serves no one's best interests. The first step in restoring some sense of balance is to recognize that criminal justice should not operate on a social welfare model. Its sphere of influence should be restricted to a penal model. People should not be deprived of their liberty "for their own good" or "for training" or because they need a place of asylum. If it achieves nothing else, the just deserts model of punishment can be a first step towards limiting the inappropriate involvement of the criminal justice process in modern society.

The next step, as Lorraine Berzins suggests, will be to restore a proper balance between the victim and the offender and to ensure that formal process is used only when the interests of society require it. In this respect western societies have much to learn from models which respect the rights of society, the rights of the victim, and the rights of the offender. ■

Dr. Andrew Coyle is the governor (warden) of Brixton Prison in London, England.

Lorraine Berzins argues rightly that crime policies should abandon punishment-based practices. In the U.S., such an approach exists largely in victim-offender reconciliation programs and in a small sample of academic writings and advocacy proposals. Alternatives to incarceration, particularly intermediate sanctions, are generally punishment-based, although the work of many defender-based sentencing advocates is frequently, albeit implicitly, nonpunitive. Seemingly there is a groundswell of support for "reparative justice," if one listens to the informal thoughts of many practitioners. Nevertheless, there are also barriers.

The failures of punitive policies are well-known, yet it is useful to describe them in sordid detail. Stories must be told. It hasn't sunk in yet. Criminology textbooks are socialization agents for millions of students. But how many textbooks discuss, in any detail, reparation, nonpunitiveness, penal abolition? These matters are less considered in the U.S. than in regions such as Canada, Scandinavia, and Western Europe.

Penal policies are less guided by philosophy than by politics. And even more thoughtful policy is often centered within contexts that do not align themselves with reparative sanctions. In short, nonpunitiveness is rarely considered seriously. More must be done to spell out how nonpunitive options work. Most practitioners know examples of how it can be done. I suspect these stories are not told because people feel uncertain about their legitimacy.

The "fatal flaw" of just deserts, Berzins argues, is its abstraction. Just deserts, by design, also has limitations. Reparative justice, too, has limitations. But, by being an open-ended rather than a restricted process of justice, reparative justice is potentially more based in social and economic realities.

Victim restitution, offender habilitation, and community-building interests, among others, are more feasible options with reparative justice. Reparative justice connects offending and victimization to the larger society, while just deserts, which is not entirely without advantages, blunts such connection. In practice, many sanctions, community service for example, go beyond their just desert base to informally explore more helpful, reparative interventions. Reparative justice requires further development and use. It addresses victims and offenders where they are, rather than where justice system workers prefer to see them. ■

Russ Immarigeon is a writer on criminal justice and regular contributor to

the JOURNAL. He works for the New York Statewide Youth Advocacy.

Lorraine Berzins' article, in which she scrutinizes and unravels the different arguments in favor of a punishment theory of "just deserts," demonstrates very well its unavoidable negative consequences and the abstraction in ethical thinking on which it is based.

The following statements in her text are very convincing conclusions resulting from a thorough and systematic observation of the criminal justice system in action.:

- punishment will inevitably breed injustice in an unjust society
- an overwhelming body of findings from the fields of social and modern physical sciences has shown that the imbalance of power and wealth in our society has led to inequities...rationalized by those who have the power...to define what is "right"
- many people are left at the mercy of the social ethic of the dominant group
- the power of the dominant group to assert that their perception justifies legal punishment can lead to scapegoating of those with whom there is not the relationship, bond or shared meaning-
- punishment is experienced as an injustice, a rejection, a scapegoating,...

The rediscovering of a wide variety of more civilized ways to deal with problematic situations gives a quite different perspective which includes the importance of positive goals such as "denunciation" and "the right to protection." The creation of a new paradigm for doing justice is the challenge for those who want to realize fundamental penal reform.

As stated in the article, new paradigms will especially enhance and give priority to a restorative approach. The combination of the care for the victim and the recognition of the liability and responsibility of the offender will find its place in a (for both parties) care-offering community. The special role of the criminal justice system is to safeguard that this process takes place, reckoning with the fundamental right of the parties (victim, offender, community) involved. ■

Tony Peters is a professor in the Department of Criminal Law and Criminology at the Catholic University in Leuven, Belgium.

Most people working in criminal justice will share the anger and exasperation which inspires Lorraine Berzins' article. Punishment does not work; worse still, it diminishes both the offender who receives it and the society in whose name it is administered. Her advocacy of crime prevention (in its widest sense), of reparative measures, and of a focus on the needs of victims will also all surely strike a chord.

She is right too in pointing out that 'just deserts' is an abstract concept. There is no logical nexus between any given offence and the penalty which ensues. A system which, say, equates a burglary or robbery with a period of incarceration is operating a convention, not expressing a universal principle.

On the other hand, to English eyes, Ms. Berzins perhaps overstates the degree to which 'just deserts' necessarily results in a continuing increase in the prison population. Our most recent legislation—the Criminal Justice Act 1991—was expressly based on 'just deserts', yet appears to have resulted in some reduction in the number of custodial sentences imposed. Indeed, there is now a backlash against the Act—led by sentencers—exactly because it has reduced their discretion and cut back on the use of imprisonment.

Three further points. First, unlike Ms. Berzins, I would not over-emphasize the role of "those who have the power to produce our ideological threads." As she says, many offenders have expressly rejected the perceptions of right and wrong promulgated by the "dominant groups." Yet we should not be too starry-eyed; prisoners are often very punitive (certainly they are towards each other).

Second, the proper aims of criminal justice which Ms. Berzins says include denunciation and the right to protection may always be perceived as punitive by those on the receiving end. Ms. Berzins admits that "some separation from society may be needed, but not for the purpose of punishment," and that—as a last resort—"some strictly coercive measures bordering on punishment may have to be invoked." I would not like to explain to offenders that their sentences are strictly coercive but heaven forbid they be thought of as punitive.

Finally, what is perhaps lacking from Ms. Berzins' account is any examination of the process of *transition* from our present arrangements to those she (and I) would like to see. Is justice possible in an unjust society? Surely not. But what in practice do we do while awaiting the creation of a just society (even if we could agree upon the parameters of such a society)? ■

Stephen Shaw is the director of the Prison Reform Trust in London, England.

I am pleased that you have published Lorraine Berzins' critique of punishment. In our debates about jail and prison crowding, we often miss the most important question: instead of asking which punishment, we should be asking whether we should punish.

My own book, *Changing Lenses: A New Focus for Crime and Justice*, critiques the existing paradigm along the same lines as Berzins and, like her argument, points toward a paradigm which focuses on harm and liabilities instead of punishment. However, Berzins helpfully extends the critique of punishment further, e.g., by demonstrating its connection to issues of social justice.

John Braithwaite's recent work (*Crime, Shame and Reintegration*) helps to explain why punishment denounces wrong so ineffectively. He argues that shaming is an important form of social control but that punishment as we practice it represents disintegrative shaming; we shame, but do not offer offenders a way to regain the respect of themselves or the community. Consequently, they seek out other outcasts like themselves, delinquent subcultures, thus strengthening their self-image as offenders and their alienation from the community. "Reintegrative shaming," however, denounces the wrong effectively because it offers a way back through such processes as restitution and reconciliation.

It is doubtful that we will ever eliminate punishment. If, however, punishment begins to give us a bad conscience, if the imposition of pain becomes a choice of last resort rather than the aim of justice, we will have made great progress. ■

Howard Zehr is the director of the Mennonite Central Committee U.S., Office of Crime and Justice.

EDITOR'S NOTE:

The full text of Mr. Berzins' original speech (from which her JOURNAL article was derived) can be obtained by writing either Jan Elvin at NPP, or Lorraine Berzins at the Church Council on Justice and Corrections, 507 Bank St., Ottawa, Ontario K2P 1Z5, Canada.

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Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

COLOR OF LAW

Six years ago, the Supreme Court held in *West v. Atkins*, 487 U.S. 42 (1988), that a private physician providing services to prisoners acted "under color of state law" and was therefore amenable to suit under 42 U.S.C. §1983. The Court rejected the arguments that non-employees working for the prison under contract, or persons exercising professional judgment without "custodial or supervisory" authority, do not act under color of law. Rather, the Court emphasized that the state has a constitutional obligation to provide medical care to prisoners, and that prisoners may receive only that medical care that the state provides. When a prisoner is subjected to deliberate indifference by a prison medical practitioner, the consequences are "caused" by state action regardless of the contractual relationship between the state and the practitioner, the amount of time the practitioner spends dealing with prisoners, or the similarity between the practitioner's role and that of a private physician treating non-prisoners. ("State action," required to show a violation of the Fourteenth Amendment, and "color of law," required in order to seek a remedy under §1983, amount to the same thing for purposes of this discussion.)

West carried an importance beyond its facts. At the time it was decided, the fad for private prisons was at its height—in part, it appeared, because some believed that government could avoid federal court scrutiny under §1983 by delegating the entire function of incarceration to private entities. *West* seems to have put an end to that line of wishful thinking. If a private contractor providing one of the necessities of life to prisoners acts under color of law, then *a fortiori* the same must be true of a private contractor providing all of the necessities of life.

Case law since *West* bears out this view. Courts have concluded with little difficulty that private operators of prisons and jails act under color of state law. *See*, e.g., *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1682 (1992); *Payne v. Monroe County*, 779 F.Supp. 1330, 1335 (S.D.Fla. 1991) (Wackenhut Corporation).

It is equally clear that persons or entities providing constitutionally required services to prisoners other than medical care act under color of law. For example, in *Islam v. Jackson*, 782 F.Supp. 1111, 1113 (E.D.Va. 1992), a private company that provided food to a jail population did not dispute that it acted under color of state law in a case alleging that inmates were served unwholesome food. Similarly, a volunteer chaplain who excluded a prisoner from religious services was held to be a state actor. *Phelps v. Dunn*, 965 F.2d 93, 101-02 (6th Cir. 1992).

Interestingly, *Phelps* did not cite *West v. Atkins* and did not rely on its reasoning. Instead, it used more traditional state action analysis, noting that the chaplain's right to conduct services in prison was a privilege created by the state and that the chaplain "functions as part of and within the institutional structure of chapel command," having signed an agreement to abide by prison rules and having received training and an institutional ID from the prison. But *Phelps*' result fits comfortably within *West*'s rationale as well, since prisoners are entitled to some measure of the free exercise of religion, and as with medical care, their only access to religious services is through the means permitted by prison authorities. (Another religion case, which alleged that a private party had contracted with prison officials to help determine which prisoners should be eligible for religious privileges allowed to Sikhs, was resolved on slightly different grounds: that the private defendant was a state actor because he was a "willful participant in joint action with the State or its agents." *Swift v. Lewis*, 901 F.2d 730, 732, n.2 (9th Cir. 1990), citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).)

There is one exception to the general rule that the providers of constitutionally mandated services act under color of law. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that prison officials are obliged to provide for prisoners' access to courts by supplying either law libraries or the assistance of legally trained persons. In some jurisdictions, such services are provided through contract with private organizations. However, before *West*, the Supreme Court had held that a public defender, even though employed by the state, does not act under color of law in the course of client representation because such representation must be in the interest of the client and in opposition to the state. *Polk County v. Dodson*, 454 U.S 312, 318-19 (1986).

The *Polk* holding was applied to a provider of legal assistance to prisoners, Prisoners' Legal Services of New York (PLS), in *Miller v. Fisher*, 1993 WL 438761 (N.D.N.Y., Oct. 26, 1993). PLS is a non-profit corporation that at the relevant time was funded pursuant to state statute by the state Interest on Lawyers' Accounts program. The plaintiff alleged that a PLS legal assistant conspired with prison officials to prevent his being transferred to a unit for physically disabled inmates. The court observed, "Much like the role of the public defender in Polk County, the staff at PLS stands in direct opposition to the state during the representation of its clients," *Id.* at 9, and added that PLS attorneys have an ethical obligation to pursue their clients' rights zealously rather than act at the state's direction. The defendant, though not an attorney, acted at attorneys' direction. Moreover, the court said, "it is the function and role of PLS that shields her from state action, not whether she is an attorney." *Id.* at 10.

There are exceptions to this lawyers' exemption from the *West* color of law analysis. The *Miller* court acknowledged that a public defender who conspires with state employees may be held to act under color of law. *Id.* at 10, citing *Tower v. Glover*, 467 U.S. 914 (1984). Presumably the same is true of persons providing civil legal services to

prisoners. However, the *Miller* court held that the plaintiff had not produced any evidence to support his conspiracy allegation, and dismissed it on that ground.

Another potential exception, and one that may be more significant, arises from the Supreme Court's pre-*Polk* holding that a public defender may act under color of law in making personnel decisions, *see Branti v. Finkel*, 445 U.S. 407 (1980) (holding unconstitutional the firing of assistant public defenders based on political affiliation), and from the acknowledgement in *Polk* itself that administrative or investigatory decision-making by public defenders may be action under color of law. 454 U.S. at 325. While a prison legal services provider's handling of a particular case will be exempt from federal court scrutiny, more general policies—for example, blanket policies of refusing certain kinds of cases—might well be subject to challenge as actions under color of law.

In practice, however, the legal service provider is unlikely to be the proper defendant in most such cases. It is the state's obligation to provide for prisoners' court access, and court access systems must be evaluated as a whole. *See Abdul-Akbar v. Watson*, 4 F.3d 195, 203 (3rd Cir. 1993). If a legal assistance program does not or cannot provide assistance in certain kinds of cases—as is often the case, whether from lack of resources or because of state law or contractual restrictions—it is the state's responsibility in the first instance to provide alternative means of court access in those cases. Moreover, if other elements of the state's court access program, such as the existence of adequate law libraries, fill the gap left by a legal service provider's policies, there will be no constitutional violation.

Apart from the special case of legal services, it appears that when prisoners allege deprivation of constitutionally mandated services, private persons or entities will be held to act under color of law unless their relationship with prison officials is greatly attenuated. Recent decisions illustrate two ways that that relationship can be attenuated. In *McIlwain v. Prince William Hospital*, 774 F.Supp. 986, 989-90 (E.D.Va. 1991), the plaintiff was brought to the defendant hospital by prison personnel and was treated there. The hospital had no contract with the prison system and there was no prior arrangement concerning the prisoner's care; from the hospital's standpoint, he was just another injured person. On these facts, the court found no state action. *See also Calvert v. Hun*, 798 F.Supp. 1226, 1229 (N.D.W.Va. 1992) (physical therapist to whom a prisoner was referred on a one-time basis did not act under color of state law). In *Kost v. Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993), the defendant pharmacy did have a contractual arrangement with private medical providers to fill prescriptions, and these providers in turn contracted to provide medical care to jail inmates. However, the court held that the pharmacy did not act under color of state law, stating conclusorily that "it had no contact whatsoever with a state actor and was not one itself." *Id.* at 184.

These decisions—especially the *McIlwain* decision—may be hard to square with the logic of *West v. Atkins* alone. *West* explicitly disavowed the notion that the economic form of the relationship, or the extent or frequency of interaction, between prison officials and private service providers determines the presence of state action. *West*, 487 U.S. at 55-56. It did note that the state delegated its obligation to provide medical care to the defendant physician, who "voluntarily assumed that obligation by contract." *Id.* at 56. However, Prince William Hospital presumably "voluntarily assumed" the care of Mr. McIlwain when state employees brought him to the emergency room, and the relevant difference between it and Dr. Atkins is not apparent. *McIlwain* appears to rest more on implicit folk-justice notions of fair notice than on close analysis of *West*'s holding and rationale. (It may be that the hospital acted under the compulsion of state law to treat anyone, including prisoners, appearing for emergency room care. If that were the case, however, the hospital would properly be viewed as a regular part of the state's medical care system for prisoners, just as if it acted pursuant to contract.)

Other fringe questions will arise in cases that do not involve constitutionally mandated services. The application of *West v. Atkins* in such instances has not yet been seriously explored by the courts. One recent case held that MCI, the telephone service company, acted under color of state law in the disposition of commissions and in announcing that outgoing calls were being made by prison inmates. *Griffin-El v. MCI Telecommunications Corp.*, 835 F.Supp. 1114 (E.D.Mo. 1993). Telephone service is not one of the basic human needs required by the Eighth Amendment, nor have courts squarely held it to be required by any other constitutional provision except in the case of pre-trial detainees. Possibly for this reason, the court in *Griffin-El* relied on more traditional state action doctrines, holding that with respect to the commissions, the corporation had a "symbiotic relationship" with the state, since its contract dictated the disposition of the commissions and MCI profited from the arrangement. With respect to the announcements, MCI was held to be a state actor under the "close nexus" and "state compulsion" tests, since its contract compelled it to make the announcements. *West v. Atkins* was not cited in the decision.

One can readily imagine other examples. There is no constitutional right to rehabilitation. Suppose an employee of a private, nonprofit rehabilitation service, operating in the prison by permission but without a contract or compensation, violates a prisoner's rights, for example by disclosing his HIV status or otherwise violating his privacy rights. Or suppose that the prison employs a band of musicians to perform at a prison program or celebration, and one of the musicians assaults a prisoner with her guitar.

At these margins the color of law doctrine remains unsettled. However, it is hard to believe that there will be significant numbers of cases arising in this zone of uncertainty. From the standpoint of prisoner advocates, it is comforting—and unusual—to know that the color of law question has been resolved so favorably to prisoners with such minor exceptions.

PROCEDURAL DUE PROCESS—DISCIPLINARY PROCEEDINGS

It is a cliche among federal courts that they are overburdened by the ever-growing caseload of prisoners' lawsuits. It is seldom acknowledged that the growth of prisoner litigation has been driven by the growing number of prisoners rather than by any increase in their litigiousness. In fact, comparing the Bureau of Justice Statistics' prison population data with data on federal court prisoner filings maintained by the Administrative Office of the United States Courts shows that prisoners have become *less* litigious. Between 1982 and 1992, while the prison population increased by 114%, filings increased by only 65%.

Nonetheless, the perceived overburden has tempted judges to look for ways to push prisoners' cases out of the federal courts without addressing their merits. The highest-profile instances are, of course, cases in which the Supreme Court has simply defined prisoners' constitutional rights out of existence. *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that prisoners have no Fourth Amendment rights with respect to cell searches); *Parratt v. Taylor*, 451 U.S. 527 (1981) (holding that unauthorized deprivations of prisoners' property do not deny due process if state tort remedies are available). More banal devices, such as broad-ranging and poorly supported injunctions against prisoner litigants and dismissal of *pro se* cases for failure to comply with difficult technical hurdles (or even for failure to appear in court while locked up!), have generally been curbed by appellate courts. *See, e.g., Kilgo v. Ricks*, 983 F.2d 189, 193-94 (11th Cir. 1993); In *re Powell*, 852 F.2d 427 (D.C.Cir. 1988); *Hernandez v. Whiting*, 881 F.2d 768, 770-71 (9th Cir. 1987). In between are the exhaus-

tion of remedies provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997(e), which appear to be the subject of increased interest after years of neglect. Comment, Resolving Prisoners' Grievances Out of Court: 42 U.S.C. §1997(e), 104 *Harv.L.Rev.* 1309, 1316-17 (1991) (noting numerous states seeking certification of their grievance procedures).

Recent developments in the Second Circuit provide a new variation on this theme. In *Young v. Hoffman*, 970 F.2d 1154 (2nd Cir. 1992) (*per curiam*), the plaintiff brought suit over a disciplinary conviction that had been reversed through the New York prison system's administrative appeal mechanism. The appeals court reversed the district court's grant of summary judgment and nominal damages, holding:

The administrative reversal constituted part of the due process protection he received, and it cured any procedural defect that may have occurred. We believe that, as a policy matter, this possibility of cure through the administrative appeals process will encourage prison administrators to correct errors as an alternative to forcing inmates to seek relief in state or federal courts.

The court relied on *Harper v. Lee*, 938 F.2d 104, 105 (8th Cir. 1991), which contains a similarly conclusory statement, quoted from an earlier state court case, that administrative appeals are "part of the due process protection afforded prisoners."

What's wrong with this picture? The question presented is not a "policy matter"; it is a question of law. Moreover, it is a question governed by a substantial body of case law in the Supreme Court. All procedural due process claims are governed by a balancing test that considers the seriousness of the deprivation, the likely benefits of additional or different procedures, and the expense or difficulty that such procedures would pose to government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see Washington v. Harper*, 494 U.S. 210, 229 (1990) (applying *Mathews* to a prison due process question).

The administrative appeal question is fundamentally one of timing. Must prison officials get it right at the initial hearing? Or may they have a post-hearing interval to correct their errors? The timing of procedural protections—and in particular, whether they must be provided before or after the deprivation—is governed by the *Mathews* balancing test, which prescribes a pre-deprivation hearing in most situations. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The major exception to this requirement is "random and unauthorized" deprivations; because of their unpredictability, there is no pre-deprivation process that the state can provide that will address such deprivations. *Id.* at 128-29, citing *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981). Under the *Mathews* test, due process does not require futile gestures.

Prison disciplinary hearings are neither random nor unauthorized; twenty years after *Wolff v. McDonnell*, 418 U.S. 539 (1974), they are one of the most heavily regulated and rule-bound aspects of prison life. Thus, the *Parratt v. Taylor* rationale is simply inapplicable to them. Courts have generally assumed that pre-deprivation process is required for prison discipline. See *Gilbert v. Frazier*, 931 F.2d 1581, 1582 (7th Cir. 1991) (due process requires a disciplinary hearing "*before* the punishment is imposed") (emphasis in original). This view is supported by the severe character of punitive segregation, seemingly the most common prison punishment in most American jurisdictions, and the fact that the disciplinary hearing—which will have to be held anyway—can avert the imposition of this punishment on prisoners who are innocent, or not guilty enough to be punished so severely.

Whether or not one agrees that pre-deprivation process is essential, it is remarkable that a liberal panel (including Judges Oakes and Kearse) of a normally careful court would resolve the case in this manner on its views of policy without noticing that it is governed by authority in the Supreme Court. This result is particularly odd, since another, dispositive basis for decision was available and was cited. The plaintiff in *Young* had not served a day of his punitive segregation sentence at the time of the administrative reversal, presumably because he was already serving segregation time for previous offenses. Therefore, he had not in fact been deprived of liberty at all by the disciplinary proceedings.

Subsequent Second Circuit case law has taken an odder turn. In *Russell v. Scully*, 1993 WL 188677 (2nd Cir., June 4, 1993), modified on denial of rehearing (2nd Cir., Jan. 3, 1994), the plaintiff was convicted at a hearing, which was administratively reversed; he received a second hearing, which was also reversed. Unlike the plaintiff in *Young*, Mr. Russell had served several months of his special housing sentence during these proceedings. The court held that due process had not been violated because the plaintiff's confinement pending the appeals was administrative in nature, since New York's regulations permit confining inmates in special housing to preserve order and to protect safety and "as a result of a hearing." The court then added a sentence reiterating that "an inmate is not deprived of due process where an administrative appeal has cured a hearing's procedural defects." Once more, there was no reference to the *Mathews v. Eldridge* test or to the case law concerning pre- and post-conviction deprivation.

On petition for rehearing, the court modified its opinion, accepting the plaintiff's contention that his confinement was punitive—at least to the extent that he was deprived of privileges in addition to his confinement in special housing. However, the court added, his damages would be limited to that deprivation of privileges. Since the state had the right to confine him administratively, and since his confinement continued even after the disciplinary proceedings were dropped, the court concluded that he did not suffer any constitutional harm from the confinement itself.

The court, however, ultimately rested its decision on other grounds. It held that the defendants were entitled to qualified immunity, and it added, "We do not reach the question of whether due process is violated by the imposition of punishment pending an appeal that redresses any error in the earlier proceeding."

The court did note by analogy that commencing a criminal sentence before the completion of appellate proceedings does not deny due process. The analogy misses the point. The plaintiff's claim was that his disciplinary hearing was conducted in violation of due process. The question is not whether confining him pending appeal independently denied due process. Rather, it is whether the initial denial of due process, in a proceeding that requires pre-deprivation process, can be erased by a post-deprivation proceeding. If that proposition is rejected, as *Zinermon v. Burch* suggests it must be, the months of segregation time pending administrative appeal should be compensable as a foreseeable element of damages stemming from the defective hearing.

Other Cases Worth Noting

U.S. COURTS OF APPEALS

Pretrial Detainees/Use of Force/Summary Judgment

Wilson v. Williams, 997 F.2d 348 (7th Cir. 1993). The district court should not have granted summary judgment in a use of force case in which the plaintiff's and defendants' affidavits were in contradiction. It "usurps the role of the factfinder" for the district court to credit the affidavits of physicians analyzing the plaintiff's injuries over the plaintiff's affidavits, or otherwise to make credibility judgments.

The district court's assertion that "[s]ome evidentiary facts must be produced proving that a viable claim exists" upon which a reasonable jury could find for the plaintiff is

correct. However, the plaintiff's affidavit was evidence for this purpose.

Ex Post Facto Laws

Flemming v. Oregon Board of Parole, 998 F.2d 721 (9th Cir. 1993). An amended parole regulation limiting the amount by which the petitioner's sentence could be reduced relative to the reductions permitted by prior law violated the Ex Post Facto Clause despite the fact that the parole board always retained discretion in deciding how much to reduce the sentence.

Protection from Inmate Assault

Nelson v. Overberg, 999 F.2d 162 (6th Cir. 1993). The plaintiff received warnings from the victim of his crime and from another prisoner that he would be assaulted, and he wrote two letters to the Chief of Classification of the Ohio prison system requesting a transfer. He got back a form letter that did not address his safety concerns, instead of the form letter that tells fearful inmates to request protective custody or contact officials at their prison. No investigation was conducted because the Chief concluded that the threats were fabricated based on of the lack of specificity in the letter and the lack of corroboration in the plaintiff's institutional file. The plaintiff was severely beaten and hospitalized.

The defendant was not entitled to qualified immunity. At the time of the assault, the plaintiff "had a clearly established right to be free from attack by other prisoners," and the defendant "had an obligation to take reasonable steps to protect [him] from violence at the hands of other inmates." (166) The defendant argues that the issue is not whether a reasonable prison official should have been aware that disregarding the letters would violate the Eighth Amendment, but whether he reasonably *could have* believed that his actions were consistent with the Eighth Amendment. The court concludes that it doesn't make a difference how the question is framed.

The evidence is sufficient "to allow the jury to draw the conclusion that Overberg knew of a threat to Nelson's safety and yet disregarded it, despite the availability of relatively effortless ways of addressing it, and that Overberg's conduct amounted to a conscious lack of concern or aloofness." (166)

Correspondence—Nonlegal

Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993). The plaintiff wrote in an outgoing letter that "[t]here's a beetled eyed bitch back here who enjoys reading people's mail" and similar obscenities about the mail censor, and was convicted of violating a rule prohibiting abusive or obscene language or written statements intended to annoy, offend or threaten. He spent 10 days in disciplinary detention. The district court granted summary judgment on liability and ordered expungement; a jury awarded $102.50 in damages. The judgment is affirmed under the standard of *Procunier v. Martinez*, which governs outgoing mail.

Pro Se Litigation/Statutes of Limitations

Dory v. Ryan, 999 F.2d 679 (2nd Cir. 1993). The plaintiff's complaint was timely because it was given to prison officials before the running of the statute of limitations. The court applies the rule of *Houston v. Lack* to a civil rights complaint.

Procedural Due Process—Administrative Segregation, Disciplinary Proceedings/Damages—Due Process Violations

Stevens v. McHan, 3 F.3d 1204 (8th Cir. 1993). The plaintiff received a medical exemption from work, was charged with malingering, and was placed in administrative segregation for eight days. He was then exonerated at a hearing. The district judge found that his placement in administrative segregation was "malicious and arbitrary" and done with an "express intent to punish," and held that he was entitled to a prior hearing.

The district court's findings are not clearly erroneous and the judgment of liability is affirmed. However, damages of $500 a day were "arbitrary and excessive" and an abuse of discretion. It is permissible to award damages on a per-day basis. The court cites prior awards ranging from $25 a day to $129 per day.

Pre-Trial Detainees/Medical Care

Harris v. Coweta County, 5 F.3d 507 (11th Cir. 1993). The plaintiff complained of a hand injury caused by handcuffs; a doctor recommended a nerve conduction study be done if symptoms persisted. He continued to complain but did not receive this study until almost four months later, despite a doctor's recommendation that he receive it as quickly as possible. The doctor who conducted the study recommended that he receive surgery as quickly as possible. He filed suit and the sheriff obtained a statement from the doctor indicating that the surgery could wait a few weeks. The plaintiff was then tried, convicted, and transferred to state custody, where he received the surgery after another seven weeks.

On these facts, which support the allegation that the Sheriff deliberately delayed treatment until the plaintiff was transferred to state custody, the Sheriff was not entitled to summary judgment.

Procedural Due Process—Disciplinary Proceedings/Qualified Immunity

Richardson v. Selsky, 5 F.3d 616 (2nd Cir. 1993). Prison officials were entitled to qualified immunity from the plaintiff's claim that a hearing officer's failure to make an independent assessment of the reliability of a confidential informant deprived him of due process. The court notes that it has never ruled on the question whether such an assessment is required by due process, though it has "clearly implied" that this is the case. The right, assuming it exists, was not clearly established as of 1985.

Personal Property

Tellis v. Godinez, 5 F.3d 1314 (9th Cir. 1993). Prison officials failed to credit the plaintiff with the interest on his savings. The court begins by stating the question whether this failure constitutes a "taking" under the Fifth Amendment, and then proceeds to determine whether the plaintiff has a state-created property interest in the money. He does, because state statutes say so, and because other state statutes permit the expenditure of prisoners' funds and interest only under certain enumerated circumstances. Prison officials' argument that they had been using the interest since 1981 for prisoner recreation and law library expenses, that annual audits gave the legislature constructive notice of this practice, and that its silence constituted tacit approval is unsupported by any authority "to support such an approach to statutory construction." (1316)

Procedural Due Process—Transfers, Administrative Segregation

Howard v. Grinage, 6 F.3d 410 (6th Cir. 1993). Michigan administrative segregation regulations create a liberty interest. At 412: "Continued confinement in protective custody after the reasons for such segregation no longer exist could constitute a violation of plaintiff's liberty interest. . . ."

Classification regulations created a liberty interest by providing that each prisoner "shall be classified according to his or her behavior, attitude, circumstances," and apparent trustworthiness; enumerating several factors to be considered; requiring that the prisoner "shall be assigned" to the least restrictive level of custody consistent with the criteria; and requiring hearings except in enumerated circumstances. At 413: "Accordingly, an increase in plaintiff's security classification level without notice and hearing could under certain circumstances constitute a violation of plaintiff's liberty interests."

Appointment of Counsel

Tabron v. Grace, 6 F.3d 147 (3rd Cir. 1993). "Exceptional circumstances" need not exist to support the appointment of counsel. If the case has "arguable merit in fact and law" (155), the court should consider other factors. These include (at 156):

> *The plaintiff's ability to present his or her case. . . .Courts generally should consider the plaintiff's education, literacy, prior work experience, and prior litigation experience . . . [as well as] factors such as the plaintiff's ability to understand English, . . . or, if the plaintiff is a prisoner, the restraints placed upon him or her by confinement. . . .*
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> *. . . [T]he difficulty of the particular legal issues.*
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> *. . . [T]he degree to which factual investigation will be required and the ability of the indigent plaintiff to pursue such investigation. . . .Additionally, where the claims are likely to require extensive discovery and compliance with complex discovery rules, appointment of counsel may be warranted. . .*
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> *Similarly, when a case is likely to turn on credibility determinations, appointment of counsel may be justified. . . .Along the same lines, appointed counsel may be warranted where the case will require testimony from expert witnesses. . .*

Communication with Media/Qualified Immunity

Kimberlin v. Quinlan, 6 F.3d 789 (D.C.Cir. 1993). The plaintiff told the press that he had sold drugs to Dan Quayle; he had another press interview scheduled. The director of the Bureau of Prisons cancelled the interview and had him put in administrative detention. Two days later, he was again placed in detention before a scheduled phone call to the press.

The defendants are entitled to summary judgment on the question of qualified immunity. At 793:

> *We impose a more stringent standard . . . on a plaintiff who charges a government official with a constitutional deprivation where the outcome depends on the official's state of mind. Such a plaintiff is subject to this court's so-called "heightened pleading" standard, requiring pleading of specific* direct *evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment.* [Emphasis in original, footnote omitted]

Since the plaintiff had only circumstantial evidence of improper motivation by the defendants, he did not meet this standard.

One judge concurs in this opinion because it is compelled by circuit precedent but suggests that he disagrees with that precedent and notes that all other courts have rejected it. The other judge dissents at length.

Accidents/Personal Involvement and Supervisory Liability

Choate v. Lockhart, 7 F.3d 1370 (8th Cir. 1993). The plaintiff fell off a 45-degree roof. The district court found the defendants liable because they should have known the plaintiff had a knee problem and should not have been engaged in roofing work; that too many inmates were required to work on the roof at once; that the use of an electric saw generated sawdust on an already slick surface; that inmates wore leather-sole shoes on the roof; that one inmate complained about the roof being slick and was told to shut up and work; and that the roof was not equipped with scaffolding or toe boards.

At 1373: "Prison work assignments are conditions of confinement subject to scrutiny under the Eighth Amendment." At 1374: "In the work assignment context, prison officials are deliberately indifferent when they 'knowingly . . . compel convicts to perform physical labor . . . which is beyond their strength, or which constitutes a danger to their . . . health, or which is unduly painful.'" (Citation omitted)

None of the defendants were deliberately indifferent. The plaintiff's work supervisors could not be charged with knowledge of his medical condition because they did not select inmate workers and were entitled to assume that workers were not medically inappropriate for the job, and the plaintiff admitted he had not complained to them. The supervisors were not deliberately indifferent to all workers' safety; there was evidence that they took measures to protect safety, and the particular safety deficiencies did not rise to the level of deliberate indifference.

Higher level supervisors who visited the project site could not be held liable because there was no reason for them to know about the severity of the plaintiff's medical condition and the site conditions were not unconstitutional.

Procedural Due Process—Administrative Segregation

Jones v. Coonce, 7 F.3d 1359 (8th Cir. 1993). Missouri statutes create a liberty interest in staying out of administrative segregation, and a reasonable official would have known that even before the court said so.

It was not clearly established that 15 days' delay before a hearing was unreasonable, but it should have been clear that 30 days was an unreasonable time without a hearing.

Interviews by an official who merely reported to the decision-maker did not constitute the hearing required by *Hewitt*, nor did "walk-bys" by the unit manager to explain the reasons for segregation that did not give inmates a chance to state their side of the incident under investigation.

DISTRICT COURTS

Correspondence—Nonlegal

Bressman v. Farrier, 825 F.Supp. 231 (N.D. Iowa 1993). The plaintiff wrote a letter to his brother referring to various prison personnel as "assholes," "dick head[s]," "punks," and "bitches," and added "now I hope they all read this letter and get their kicks off of it." He was found guilty at a disciplinary hearing of "subject[ing] another person" to verbal abuse.

The disciplinary conviction violated the First Amendment. Prison officials may punish disrespect expressed to staff members, but the plaintiff did not directly address staff members and did nothing to cause the objects of his comments to read the letter other than to mail it. The defendants were not entitled to qualified immunity.

Protection from Inmate Assault

Schwartz v. County of Montgomery, 823 F.Supp. 296 (E.D.Pa. 1993). The plaintiff was assaulted by an inmate who had been convicted of rape nine times, mostly against younger and weaker prison inmates. Since there was evidence that defendants had constructive knowledge of the assailant's history and classification, the defendants were not entitled to summary judgment on the plaintiff's deliberate indifference claim.

Service of Process

Schroeder v. Mabellos, 823 F.Supp. 806 (D.Haw. 1993). The plaintiff was given permission to "give some papers" to a prison official and served process on him. He was then suspended from his law library duties, and the official on whom process was served filed disciplinary charges.

At 809:

> *Assisting another person in litigation is a form of expression and association protected by the First Amendment to the United States Constitution. . . . A prison inmate retains a right to assist others in litigation. . .*
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> * * *
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> *The service of process is an expressive act protected by the First Amendment* . . . [Citations omitted]

AIDS/Attorney Consultation/Medical Care—Standards of Liability—Deliberate Indifference

Haitian Centers Council, Inc. v. Sale, 823

F.Supp. 1028 (E.D.N.Y. 1993). The government violated the Haitian Service Organization's First Amendment rights to free speech and association by denying them equal access to Haitians held at the Guantanamo military base while permitting many other non-lawyers to have access to them and while permitting discussions of the Haitians' legal rights "but only from the viewpoint of which the Government approves."

The court states that persons in "nonpunitive detention" have the right to "'reasonable medical care,' a standard demonstrably higher than the Eighth Amendment standard" of deliberate indifference.

The government's failure to act on military doctors' recommendations that detainees with T-cell counts of 200 or below or percentages of 13 or below be medically evacuated to the United States constituted a violation of their constitutional rights.

Women/Equal Protection/Programs and Activities

Klinger v. Nebraska Dept. of Correctional Services, 824 F.Supp. 1374 (D.Neb. 1993). Women prisoners' claims of inequality in programs and services are governed by the intermediate "heightened scrutiny" equal protection test. Women are housed at the women's prison for reasons of gender and not some other factor that happens to be associated with gender, and the men's and women's prison populations are generally "similarly situated." The heightened scrutiny test requires the court to determine whether there is a "substantial burden" on female inmates; if so, whether the difference is attributable to an important government objective; and if so, whether the means chosen to further the objective are "directly and substantially related" to it. (1391)

Absent such justification, equal protection requires programs that are "substantially equivalent" and requires "parity of treatment." (1392) Equality is not measured by the amount of money spent, and the relatively small size of women's prisons and greater expense of operating them is no excuse for unequal treatment. Economic considerations alone cannot excuse failure to meet constitutional standards. (1392)

The court notes that female prisoners are different from male prisoners in that many are "passive to the point of dysfunction," have had lower incomes, lack job training and education, have severe confidence problems and lack self-esteem, are often traumatized by separation from their children, and have poor living skills and little exposure to employment opportunities. These differences are largely the product of gender bias, and remedying them would be an important interest.

Work Assignments: Paying women on an hourly basis and men on a daily basis for prison work substantially burdened women, was not related to the interest of remedying past discrimination, and was not justified by any other important interest.

Education and Training: The failure, first, to offer on-site post-secondary education, and second, to offer it (and correspondence courses) on equal terms, substantially burdened women, as did the failure in some respects to offer vocational education and pre-release programs on equal terms. The defendants did not justify the disparities.

Law Libraries and Law Books: Women were substantially burdened by the housing of the law library in an inadequate physical facility, by the absence of Shepard's Citations, and the more limited hours relative to the men's prison. The defendants failed to justify the disparities. At 1436-37: Women were also denied access to courts during the period when segregation inmates were denied physical access to the law library and not provided with trained legal assistance, when there was completely inadequate space, and when the materials were not organized.

Access to Medical Personnel, Dental Care: Women were substantially burdened by the failure to provide trained medical personnel during the evenings and by lack of timely dental services as compared to male inmates. They were substantially burdened by inequalities in mental health care. The disparities were not justified by the defendants.

Education and Training, State Officials and Agencies: Title IX of the Education Amendments of 1972, which bars sex discrimination in educational programs receiving federal money, was violated by the disparities in pre-release programs. The plaintiffs need not show intentional discrimination under this statute, but they did.

Personal Involvement and Supervisory Liability: The directors of the prison system are liable in damages for the violations because they knew of the inequities, displayed deliberate indifference or tacit authorization of them, and failed to take sufficient remedial measures.

Procedural Due Process—Disciplinary Hearings

Moye v. Selsky, 826 F.Supp. 712 (S.D.N.Y. 1993). The plaintiff was convicted of stabbing another inmate based solely on statements by two officers that confidential informants had implicated him.

The exclusion of the testimony of an alibi witness who had been transferred to another prison the day before the hearing denied due process and violated a clearly established constitutional right. Defendants did not contend that his testimony would have compromised safety, that it would have been irrelevant, or that the transferred witness could not have testified by telephone. The claim that the testimony would not have established the plaintiff's innocence is rejected since it would have been strongly probative.

The hearing officer's failure independently to assess the reliability of a confidential informant denied due process, but the right was not clearly established as of 1988, since the Second Circuit had not ruled on it and other circuits were divided.

An official who reviewed disciplinary proceedings was not entitled to absolute quasi-judicial immunity. There was no evidence that he had been harassed or intimidated by lawsuits and he had the benefit of qualified immunity. It would be "inequitable and inconsistent" to give the appellate officer absolute immunity while the hearing officer only had qualified immunity. The officer lacked independence, since he was subject to removal by his superiors and since he provides both general advice to facility staff on disciplinary proceedings and specific advice on particular proceedings, and thus in some circumstances might be asked to reverse himself.

Procedural Due Process—Disciplinary Proceedings

Harris v. Maloughney, 827 F.Supp. 1488 (D.Mont. 1993). Plaintiffs' allegation that prison officials took "progressive" disciplinary action against a group of inmates consisting of reduction of privileges because no one had come forward and admitted to a particular act of misconduct stated a due process claim despite the argument that there was no liberty interest in the privileges involved. At 1494: "The Constitution protects individuals from arbitrary governmental action, and from discipline which is in the form of punishment or retaliation, where legitimate government interests are lacking."

Disabled/Equal Protection/Procedural Due Process

Donnell C. v. Illinois State Board of Education, 829 F.Supp. 1016 (N.D.Ill. 1993). Allegations that many school age pre-trial detainees were not receiving special educational services they needed, that they were not being taught courses other than reading and math, and that some school-age detainees received no educational services. These allegations of a "lack of instruction on even the educational basics, or worse, a total lack of instruction altogether," stated a claim under the substantive component of the due process clause.

The allegations also state an equal protection claim, and the defendants did little to establish a rational relationship between their practices and jail security. Instead, they argued that if inmates could bring equal pro-

tection suits alleging they did not receive services equal to the free community, "chaos" would result. At 1019: ". . . [T]his argument does not relate to the state's interest in maintaining prison security, but the state's desire to be free of prisoner litigation. . . Apocryphal claims of burdensome litigation do not justify disparate treatment under the Equal Protection Clause."

Classification—Race/Modification of Judgments/Emergency

White v. Morris, 832 F.Supp. 1129 (S.D. Ohio 1993). A consent decree prohibited cell assignments based upon race, unless the warden or his designee personally found the segregation of an inmate necessary for institutional security reasons. After a major riot in which files necessary for inmate classification were destroyed, the defendants moved for modification.

The court simultaneously "adhere[s] to the principle that, as a general matter, racial segregation in prisons is unconstitutional," acknowledges a "crucial exception" for the "necessities of security and discipline," and suggests that the constitutional merits of the defendants' position are governed by the *Turner* standard. It later explicitly holds that *Turner* governs (1136-37).

The defendants have met their burden of showing that changed circumstances (i.e., the riot, its consequences, and inmates' claims that the order was one of the sources of tension in the prison) warrant a temporary emergency modification. However, the defendants' proposal did not provide an end date for segregated celling. "Such an indeterminate modification of the Decree would not be suitably tailored to the changed circumstance." (1133) The modification should be approved "only with a strict, Court-imposed timetable aimed at rapidly abolishing the current celling policy, combined with the long range objective of creating an environment in which the Consent Decree can be fully and successfully enforced. . . ." (1133) Modifications must further the purpose of the decree without upsetting the basic agreement between the parties; the purpose of this decree was to ensure the safe integration of the prison.

Mental Health Care/Medical Care—Standards of Liability—Deliberate Indifference

Casey v. Lewis, 834 F.Supp. 1477 (D.Ariz. 1993). In cases challenging the medical care system's constitutionality, deliberate indifference may be evidenced by repeated examples of negligent acts or by systemic and gross deficiencies in staffing, facilities and equipment.

The defendants lacked any system for managing chronically ill patients and provide preventive care or for ensuring continuity of care in the event of transfers. They substantially remedied these problems by the time of trial.

Medical Care—Staffing (1544-45): The defendants are unable to obtain enough staff positions from the legislature or to fill the positions they have. The staff shortage results in delays that could violate the Constitution if they caused an inmate serious harm, and such repeated examples of delay or negligence may violate the Constitution.

Medical Care—Staffing—Qualifications of Personnel; Denial of Ordered Care (1545):

> *. . . Security staff have inappropriate roles in the medical care system, including conducting health and welfare checks on seriously ill inmates without the supervision of medical personnel. In addition, when no medical staff are on duty, security staff are forced to make medical judgments. Security staff also have the authority to overrule medical orders. Finally, in some instances, security staff interfere with access to medical care. Such interference can rise to deliberate indifference so that a constitutional violation occurs.*

Access to Outside Care (1546): Referrals to outside providers must be "reasonably speedy." The court cites a one-month delay for a serious gynecological problem. Defendants only contracted for specialists when enough inmates were referred, appointments were cancelled because of funding problems or transfers, and defendants lacked a procedure or policy to determine whether referrals had been completed.

Injunctive Relief—Changed Circumstances, Mootness (1546-47): The court finds that the foregoing problems constituted deliberate indifference at the time the case was filed but that they had been sufficiently remedied by the time of trial to eliminate the constitutional violation. The court commends the defendants but does not find the case moot. At 1547:

> *Based on past experience with the ADOC, this Court cannot be assured that defendants will continue to implement the new programs and staff the facilities after the termination of this case. Further, with the history of the funding situation within the state and the current state of budget cuts, the Legislature is unlikely to appropriate additional funds for the ADOC. . .Thus, the Court has the authority to monitor the medical and dental care systems for a reasonable period of time to assure that the department implements the pilot program statewide and provides sufficient staff to treat the inmates' serious medical needs. . . .*

Mental Health Care (1548-49): Delays in mental health assessment and treatment are unacceptable. Delays result in locking down inmates with serious mental illnesses when they act out, despite agreement that more than three days of segregation is inappropriate for acutely psychotic inmates and that lockdown damages their mental health. Inmates receive inadequate or no mental health care in lockdown, though they should be seen immediately and seen daily by a psychiatrist. At 1549: "The use of lockdown as an alternative to mental health care for inmates with serious mental illnesses clearly rises to the level of deliberate indifference to the serious mental health needs of the inmates. . . ." At 1550: Referrals to mental health facilities are not "reasonably speedy." The parties are directed (1553) to file a plan to develop "sufficient and adequate mental health housing facilities" to prevent the retention of seriously mentally ill prisoners in lockdown.

Mental Health Care, Communication of Medical Needs, Medical Examinations, Staffing (1547): The defendants "lack a system and the psychiatric staff to identify and evaluate female inmates with serious mental illnesses when those inmates come into the system," resulting in unqualified security staff identifying seriously ill inmates. The defendants have a policy of review of records upon transfer between facilities, but the policy is not routinely carried out because of staff shortages.

> *Therefore, seriously mentally ill male and female inmates do not receive treatment until they request treatment or regress to the point that security staff recognize the illness or lock them down for the behavior caused by the mental illness. Thus, mentally ill inmates are unable to make their problems known to staff and their constitutional rights are violated.*

Mental Health Care—Staffing, Financial Resources (1547): The lack of adequate mental health staff, caused partly by the legislature's failure to provide funding, results in a constitutional violation. At 1548: ". . . [L]ack of funding is not a defense to eighth amendment violations." At 1548 n.6: "Budgetary constraints are not a defense to liability for deliberate indifference to inmates' serious medical care needs." At 1553: The parties are directed to file a proposed plan to provide for sufficient numbers of qualified mental health staff and provide for recruitment and incentives to assure that defendants can fill their positions.

Psychotropic Medication (1549): The defendants fail adequately to monitor the prescription of psychotropic medication; instead of having them seen monthly by a psychiatrist,

they prescribe, continue and discontinue medication without face-to-face evaluations. They also lack a system of insuring that inmates take medications. At 1553: The defendants are required to develop written policies governing medications.

Mental Health Care, Women, Equal Protection (1550-51): Disparities in mental health care between men and women violate the women's equal protection rights under the "parity" test. The court cites the lack of a long-term psychiatric hospital for women, the lack of a "progressive unit" for women, and disparities in programs. (The men got better access to occupational therapy, plus computer training, communication training, stress management and anger control; women got "aerobics, board games, movies, and 'Women Who Love Too Much.' ")

Injunctive Relief, Financial Resources (1551-52): The basis for injunctive relief is irreparable injury and the inadequacy of legal remedies. The harm to inmates is continued mental illness, resulting in fear and in some cases self-mutilation. "On the other hand, the only harm to defendants is additional costs to hire staff and implement programs." The court directs monitoring and reporting on medical care improvements and enhancements in mental health staffing and facilities.

Law Libraries and Law Books

Casey v. Lewis, 834 F.Supp. 1553 (D.Ariz. 1992). At 1566:

> *The prison may preclude physical access to segregated inmates if such access would interfere with institutional security. . .However, if the state denied physical access to the law library, the state must provide that prisoner with legal assistance. . . .*
>
> *A "paging system," in which a prisoner who is denied direct access to the law library is allowed to request that legal materials be brought to his or her cell, does not provide adequate access to the courts. . . .*
>
> *Untrained prisoner legal assistants cannot provide constitutionally sufficient access to the courts for prisoners denied access to a law library. . . .*

At 1567: "To provide adequate access to the courts, a law library must be staffed by a person with adequate legal training; a law library staffed only by security officers untrained in legal research and writing is not sufficient." (Footnote omitted)

At 1567-68: "Indigent prisoners must be provided sufficient legal supplies and services to ensure meaningful access to the courts. . . A policy which forces inmates to choose between purchasing hygienic supplies and essential legal supplies is unacceptable." The defendants' definition of indigency as less than $22 in the prisoner's account at the time of the request is inadequate because it is not based on the actual cost of hygiene items.

Disabled/Financial Resources

Casey v. Lewis, 835 F.Supp. 1569 (D.Ariz. 1993). At 1581: "Disabled inmates must be provided with physical accommodations necessary because of their disabilities, including adequate toilet and shower facilities. . . . Further, mobility impaired inmates must be provided with wheelchairs and other mobility aids. . . . Disabled inmates are also entitled to rehabilitative therapy." The duration of a challenged condition is relevant to the existence of a constitutional violation. "The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." (1582, citation omitted)

After the filing of the lawsuit, the defendants established a plan that, if fully implemented, would meet Eighth Amendment requirements by providing adequate facilities at one unit of each prison and concentrating mobility impaired inmates there. However, voluntary cessation of allegedly illegal conduct does not moot the case. Since many renovations had been delayed for funding reasons, the plan had not "completely and irrevocabl[y] eradicated the effects of the alleged violation." (1582)

A consistent pattern of delays in providing hearing aids violated the requirement that referrals to outside care be "reasonably speedy," although the plaintiffs did not prove any resulting harm.

NON-PRISON CASES

Discovery

Siegfried v. City of Easton, 146 F.R.D. 98 (E.D.Pa.1992). The records of employment-related psychological examinations of a police officer accused of misuse of force are not protected by the psychologist-patient privilege because it was understood that the psychologist would report back to the police department. Even if the privilege existed in this case, the plaintiff's need for the information outweighs the officer's privacy interests. The court orders the material produced first *in camera* and urges the parties to agree to a protective order.

The officer's records are not protected by the executive privilege, which "is designed to protect only documents whose disclosure would so seriously hamper the operation of government that they should be kept secret notwithstanding their utility in establishment of a litigant's claim." (101)

Discovery

Hampton v. City of San Diego, 147 F.R.D. 227 (S.D.Cal. 1993). Personnel files and internal affairs histories of defendant police officers are relevant in a police misconduct case.

At 229:

> *Information contained in these files may be relevant on the issues of credibility, notice to the employer, ratification by the employer and motive of the officers. Further, information concerning other instances of misconduct may also be relevant on the issue of punitive damages, in that the information may lead to evidence of a continuing course of conduct reflecting malicious intent.*
>
> *The same files as to non-party officers may be relevant to plaintiffs' claims against the City as related to its policies of hiring, training, supervision and control. In addition, such information may be relevant to the non-party officers' credibility and their willingness to intercede during instances of alleged improper conduct of fellow officers.*

Disabled/Exhaustion of Remedies

Finley v. Giacobbe, 827 F.Supp. 215 (S.D.N.Y. 1993). State law notice of claim requirements do not apply to claims under the Americans with Disabilities Act. There is no administrative exhaustion requirement for claims under Title II of the ADA.

Discovery

Hall v. Clifton Precision, 150 F.R.D. 525 (E.D.Pa. 1993). A lawyer and witness do not have the right to confer during a deposition except to determine if a privilege is to be asserted, even if the conference is initiated by the witness.

FEDERAL RULES DECISIONS

Judicial Disengagement/Monitoring and Reporting

Celestineo v. Singletary, 147 F.R.D. 258 (M.D.Fla. 1993). The court issues a final judgment "closing" the statewide Florida crowding and medical care litigation, i.e., vacating previously imposed injunctions and relieving class counsel, the Special Master and the Monitor of further responsibilities, leaving open only any issues concerning attorneys' fees. (The list of vacated orders does not appear exclusive, but there is no explanation for this.) Class counsel agreed that the defendants were in substantial compliance with the previously imposed injunctions, but expressed concerns about the defendants' future performance. The defendants "affirm[ed] that the Defendant and the state remain committed to the orders previously entered, to the Agreement of May 1991 [not described], and to the [Correctional Medical Authority] as an independent and

well-supported oversight and monitoring prison medical authority."

The court describes the Correctional Medical Authority (CMA), which was created by agreement codified in state statute and which has substantial oversight powers, the right to pursue its position with the Florida Cabinet, and to enforce Cabinet decisions in state court. It notes that the CMA has an "indirect monitoring capacity" over the overcrowding agreement through its oversight of the Office of Health Services, which must certify housing for occupancy. The court presents the CMA as an innovative solution that provides assurance that "gains accomplished through litigation will not erode in the near term" (262) and that permits "satisfactory withdrawal of federal supervision." (263)

Modification of Judgments

Inmates of Suffolk County v. Rufo, 148 F.R.D. 14 (D.Mass. 1993). On remand from the Supreme Court, the district court declines to modify an injunction requiring single-celling in the jail to permit double celling. Although it finds that the current sustained rise in jail population was not foreseen, it also finds that the single-bunking requirement was a "significant objective of the consent decree," that double-bunking would substantially increase the risk of violence given the design of the cells, and that double-bunking would exacerbate the risks of transmission of tuberculosis.

At 21:

> *A refusal by government decisionmakers to appropriate more money is not, without a reasoned and supportable explanation of the refusal, an excuse for noncompliance with the consent decree. The decision as to whether the consent decree should be modified cannot be determined by a standard that considers only how well the Sheriff performs with the limited resources made available to him by other official decisionmakers.*
>
> *. . . A continued and unexplained failure of other public officials to provide resources consistent with maintaining the terms of the consent decree is not one of the identified changed circumstances justifying modification when no proffer of any justification for the failure has been made.*

This "central deficiency" in the Sheriff's argument is supplemented by another "core deficiency," "the failure to identify and evaluate, in comparison with the extensive double-bunking program the Sheriff proposes, alternative uses of the limited resources that have been and foreseeably will be available to the Sheriff." (22)

"Dear Prison Project..."

Dear Prison Project:

There has been a lot of talk recently about restricting or even prohibiting smoking in prison. May smoking be banned entirely in a prison? Isn't that cruel and unusual punishment?

Worried smoker

Dear Smoker:

In light of the 1993 Supreme Court case *Helling v. McKinney*, 113 S.Ct. 2475, which held that an inmate's exposure to environmental tobacco smoke may constitute cruel and unusual punishment, many correctional institutions are restricting or prohibiting smoking in order to protect themselves from liability against an Eighth Amendment claim. Although there is little case law on the constitutional right to smoke in prison, the courts that have heard the issue have agreed that there is no such right. Courts have upheld restrictions on smoking in disciplinary segregation and visiting areas, and complete prohibitions on smoking in county jails for convicted inmates and pretrial detainees.

The courts generally hold that a prohibition on smoking is not punishment (and thus not cruel and unusual punishment) as long as the policy is not "arbitrary, purposeless or intended to punish." *Doughty v. Board of County Comm'rs for County of Weld, Colo.*, 731 F. Supp. 423, 428 (D. Colo. 1989); *Reynolds v. Bucks*, 833 F. Supp. 518, 520 (E.D. Pa. 1993). Courts have found several legitimate government objectives that are furthered by a no smoking policy. For example, a no smoking policy prevents damage to the jail, allows guards to smell other contraband, protects the health of smoking and non-smoking inmates and staff, and eliminates the costs related to smoking. Thus, it is doubtful that any court will find the policy to be purposeless or intended to punish. In *Reynolds v. Bucks*, 833 F. Supp. 518 (E.D. Pa. 1993) the court upheld the ban on smoking by inmates, even though guards were allowed to smoke in designated areas. It is possible that some policies could be applied so arbitrarily that the policy violates the constitution. For example, allowing men but not women to smoke in prison might create a Fourteenth Amendment equal protection claim.

Courts tend to encourage medical assistance to cope with the withdrawal from nicotine, but it is not an absolute requirement unless an inmate is suffering from a medical necessity other than the need for "adjustment assistance." In *Doughty*, the court held that the no smoking policy did not violate the cruel and unusual punishment clause in light of the fact that the jail offered counseling, medical assistance and a video tape to help inmates quit smoking. The court stressed that "ideally" the jail should assist the inmates to cope with the smoking policy. In *Washington v. Tinsely*, 809 F. Supp. 504, 508 (S.D. Tex. 1992), the guards, but not the inmates, were provided medical assistance. The court found that the inmates were not similarly situated to the guards and therefore not entitled to the same treatments. The government had a legitimate interest to supply medical assistance to the guards in order to maintain a full, productive staff.

The reality of the situation is that prisons will be more difficult to run if inmates are suddenly prohibited from smoking. For example, in July 1992, the State of Vermont imposed a complete ban on smoking in prison. As a result, inmates were being assaulted as the price of a pack of cigarettes rose to as much as $40 on the black market. After five months, the prison allowed smoking outdoors in designated areas. It is probably best for everyone involved to provide medical assistance to help inmates quit smoking and/or to allow smoking in designated areas, but it is not required by the Constitution.

This issue's "Dear Abby" is Georgetown University law student Stephanie Morris, who is currently working at the Prison Project.

Use of Force/Evidentiary Questions

Eng v. Scully, 146 F.R.D. 74 (S.D.N.Y. 1993). Both parties filed motions *in limine* concerning the use of their prior records in a use of force case.

The plaintiff's disciplinary record may not be admitted to show that he intended to commit an assault or to rebut any claim that his actions were provoked, since the plaintiff's intent or motive is not relevant to the Eighth Amendment legal standard. Nor may the disciplinary record be used to attack credibility.

The plaintiff's 1967 murder conviction was too old to be used for impeachment because the plaintiff was released from prison in 1972; the fact that his parole was revoked did

not matter. His 1977 murder conviction was within the ten-year limit of Rule 609(a)(1) because he is still in prison for it, but the court excludes it. At 78: "Murder is not necessarily indicative of truthfulness, and the probative value of a murder conviction is substantially outweighed by the danger of unfair prejudice." His 1979 escape conviction was barred by the ten-year time limit because he finished the sentence for it in 1981. Escape is not a crime of dishonesty or false statement.

Evidence of prior incidents between the plaintiff and prison staff were relevant to the knowledge, motive and intent of the defendants, including the officers in their dealings with him and the Superintendent's knowledge of any danger to his safety.

Prior unusual incident reports involving use of force by the defendants are admissible without a preliminary finding by the court as to their truthfulness and regardless of whether the defendants were convicted of using excessive force.

Discovery/Medical Records

Jackson v. Brinker, 147 F.R.D. 189 (S.D. Ind. 1993). At 193-94: "The scope of material obtainable by a Rule 45 subpoena is as broad as permitted under the discovery rules."

State statutes and regulations do not bar the disclosure to the plaintiff of his medical records, and even if they did, the state privilege would not have sufficient "intrinsic merit" to be applied in federal court. The state argued that its law forbade release of these records without a court order and that it would not object to the court's issuing an order; the court describes this conduct as "a waste of this Court's and litigants' time."

The court gives the defendants another chance to supplement its "thin and non-specific showing" of privilege concerning the allegedly confidential portion of the plaintiff's prison packet.

The defendants' claim that they do not know what "incidents" the plaintiff is seeking documents about has no merit, since with one exception they could find out by reading the complaint.

Evidentiary Questions

Lewis v. Velez, 149 F.R.D. 474 (S.D.N.Y. 1993). The plaintiff's disciplinary record was inadmissible in a use of force case to show a propensity for violence. It was not relevant to the plaintiff's intent if he claimed self-defense, since his intent to defend himself would be admitted, and the jury issue would be who struck the first blow. The disciplinary record is not admissible to impeach credibility, absent testimony on his part giving a misleading impression of his behavior, because the infractions do not reflect dishonesty or deceit.

Incident reports and related documents are not properly business records because they record their employees' self-serving versions of incidents for which liability could be foreseen. In addition, at 486:

> *Where reports of inmate beatings show a lack of reliability and trustworthiness due to the self-interest of the correction officers responsible for the records, such records are inadmissible. . . . Self-interest functions strongly in the case at hand, where correction officers involved could be subject to disciplinary action, including dismissal, for using excessive force . . . and could, furthermore, be brought up on criminal charges or incur civil liability.*

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

■ **The National Law Journal** has again named the National Prison Project's Executive Director Alvin Bronstein as one of the hundred most influential lawyers in the country. In "Profiles in Power," *National Law Journal*, April 4, 1994, Bronstein is described as "continu[ing] to have more effect on conditions in the nation's prisons than any other individual." The Journal first published its "most powerful" list in 1985, and has subsequently updated it three times. Bronstein, who has headed the National Prison Project since it began in 1972, is one of only twenty-two lawyers chosen for the list every time it has been published.

■ State laws and regulations continue to mandate physician involvement in executions, in direct conflict with ethical standards set by the American Medical Association (AMA), according to the report, **Breach of Trust: Physician Participation in Executions in the United States.** The report, published jointly by The American College of Physicians, Human Rights Watch, The National Coalition to Abolish the Death Penalty, and Physicians for Human Rights, analyzes and documents the history and extent of physician participation in executions since 1976. Although physician participation in executions is not new, the increasing use of lethal injection (now allowed by 26 states), which requires special medical skills and devices, has brought the issue to greater attention. "Execution is not a medical procedure, and is not within the scope of medical practice," the report states. "Physicians are committed to humanity and the relief of suffering; they are entrusted by society to work for the benefit of their patients and the public. This trust is shattered when medical skills are used to facilitate state executions." The report contains examples of the varying degrees of participation and offers recommendations to ensure that current U.S. laws do not require physicians to violate professional ethics. For further information, contact Angela Petersen at The American College of Physicians, Independence Mall West, Sixth Street at Race, Philadelphia, PA 19106-1572, or by phone at (215) 351-2649.

■ **Jail Suicide Update** is a quarterly newsletter devoted to jail suicide prevention, training and research. The most recent issue (Vol.5, No. 3, Winter 1993) focuses on the relationship between mental health and correctional staff in preventing suicides, as well as discussion of "no-suicide contracts" and the use of restraints and pepper spray. To order contact either Lindsay M. Hayes, Project Director, National Center on Institutions and Alternatives, 40 Lantern Lane, Mansfield, MA 02048, (508)337-8806, FAX (508)337-3083, or NIC Information Center, 1860 Industrial Circle, Suite A, Longmont, CO 80501, (800)877-1461, FAX (303)682-0558.

Note: In *For The Record*, Winter 1993/94 issue, the address given to write to Janet Gardner for a copy of her questionnaire on coping with the imprisonment of a loved one was incomplete. Please write to Coping, Box 3125, 268 Bush Street, San Francisco, CA 94104, or call (415) 391-5360.

MEDICAL CARE • *con't. from pg. 2*

fee, nor that prison officials denied medical care to other prisoners who are indigent. "The complaint alleges no facts which the court could construe as deliberate indifference...." *Id* at 408. This case plainly fails to reach the issue of payment despite the claims of payment proponents.[2]

A policy in Louisiana of charging prisoners for over-the- counter medications was challenged recently by the National Prison Project in *Hamilton v. Morial.* The New Orleans sheriff instituted a policy whereby prisoners would be charged for 20 over-the-counter medications such as Tylenol, vitamins, ibuprofen, Sudafed, etc. The drug would be dispensed at sick call and the prisoner told that his commissary account would be debited the cost shown on the medication. He could either accept the charge and the drug, or refuse the drug. If he did not have enough money, the drugs would still be given, creating a negative balance in his account. The district court ordered the sheriff to stop charging prisoners for OTC medications. If the sheriff was having financial trouble with maintaining the pharmacy, the court said, he should seek redress with the city, not impose costs on the prisoners.

Better management of medical services is the answer

The real point of the payment policies is not to offset the expense associated with the delivery of health services, but to reduce the number of prisoners who attend sick call. Newly implemented department-wide policies in Indiana and Montana bear this out. A prisoner submits a request for medical attention, otherwise known as a "kite." Health officials return it, without seeing the prisoner, with instructions to purchase an OTC medication from the commissary. Through this measure, sick call attendance has been reduced dramatically, without regard to whether the prisoner has any money in an account. In Montana, an indigent prisoner may resubmit a kite pointing out a lack of funds. After considerable delay, the medicine will be supplied. In Indiana no such allowance is made. Prison officials there take the position that they have no constitutional duty to attend to "non-serious" medical needs. Yet such a policy ignores the fact that without proper treatment, a "minor" condition could become serious, and be prevented altogether with prompt attention. Such a gross inattention to medical needs threatens prisoners' Eighth Amendment right to medical care.

If the current sick-call process is unmanageable at a particular institution, prison administrators should manage it better or provide additional resources so that the required care is maintained. The appropriate response is to provide additional clinics, not to reduce prisoner access. This view is consistent with the analysis offered by B. Jaye Anno, secretary of the National Commission for Correctional Health Care. Writing about prisoner payments in a book published by the National Institute of Corrections, U.S. Department of Justice, she says:

> *...It begins with ensuring full and unimpeded access to the primary level of the prison's health care delivery system. Here the prisoner typically encounters a nurse... or other clinically trained person who listens to the complaint and evaluates the extent of need. Once the prisoner has "entered" the delivery system, all referrals to more specialized and more costly levels of care should be the decisions of professional staff based on an objective assessment. In this way the relatively few persons who choose to abuse sick call regularly will not impose significant monetary costs on the system...*[3]

As to any anticipated cost savings, she adds:

> *[E]stablishment of a co-payment system also may be viewed as a means of generating revenue, but fees high enough to generate appreciable revenues will inordinately reduce utilization. Moreover, the cost of collecting the co-payments is not insignificant and might well exceed any revenue generated. Therefore, the only possible economic benefit would result from decreased utilization.*[4]

The district court ordered the sheriff to stop charging prisoners for OTC medications.

To summarize, the various arguments raised to support payment policies all fail in light of the corresponding duty of the correctional system to provide for the medical care of its prisoners. A payment policy not only discourages the few who abuse sick call from attending, it also discourages those prisoners with legitimate medical concerns. Additionally, under no circumstances should the State be permitted to pass on the costs of medical care to prisoners by enforcing a fee policy. If that were allowed there would be no end to the costs the State might seek to recover from the prisoners and their families. Once prisoners have been deprived of their livelihood, it is incumbent upon the State to provide life's basic necessities, the most basic of which is medical care. See *DeShaney, supra*, 489 U.S. at 197-200. ■

Mark Lopez is a senior staff attorney at the Prison Project where he has worked for seven years. Kara Chayriques is a law clerk at the Prison Project.

[2] See also another inconclusive case from Nevada, *Scott v. Angelone,* 771 F.Supp.1064(D.Nev.199), *affd.* 980 F.2d 738 (9th Cir.1992).

[3] B.Jaye Anno, *Prison Health Care: Guidelines for the Management of an Adequate Delivery System,* NIC, DOJ March 1991, p.234.

[4] Id.

John J. Buckley

1929–1994

The staff of the National Prison Project was saddened to learn of the death of John J. Buckley, in March 1994.

Buckley was an administrator, teacher, policy-maker and consultant in corrections, and served as a jail expert in a number of cases brought by the Project.

From 1970–1981 he was the Sheriff of Middlesex County, Massachusetts, one of the largest counties in the nation. During that time he instituted many reforms including a program to remove all juveniles from adult institutions, the first furlough program in the state, a work release program and an educational release program. He was a strong advocate for corrections and police department reform in appearances before the U.S. Congress and state legislatures, and through active participation in numerous national and regional organizations.

Al Bronstein, executive director of the Project, described Buckley as "a lovely man, decent and committed, and a good friend and supporter of the National Prison Project."

BY JACKIE WALKER

Prisoners with HIV/AIDS need services after discharge

For prisoners with HIV/AIDS the lack of a comprehensive discharge plan can be a blueprint for failure. In some cases prisoners with HIV/AIDS unable to find treatment and services on the outside recidivate in order to receive medical care. California Department of Corrections' statistics for 1992 showed a recidivism rate of 70% for prisoners with HIV/AIDS compared to 52% for HIV-negative prisoners. Programs developed by community based organizations and parole departments in California and New York are creating models to decrease recidivism rates and assist prisoners with HIV/AIDS in their transition back into the community.

California—collaborative efforts

The Correctional HIV Consortium (CHC) receives five to ten letters a day from prisoners in California regarding discharge planning. CHC begins the discharge process 120 days prior to release in cases identified by social workers. CHC sends an application form to the prisoner in order to obtain information on parole county, housing, and medical assistance needs. A month later CHC staff arrange a collect call with prisoners to discuss any changes. Thirty days before the scheduled release date CHC sends a final discharge letter, indicating the agency providing case management, the address and directions. CHC also calls the case manager after the scheduled appointment to confirm that the client has reported.

Michael Haggerty, Executive Director of CHC, sees comprehensive discharge planning as critical. "If folks don't receive everything within the first 36 hours there's this feeling of panic and urgency. So it's important to have all services lined up. If this isn't done people disappear immediately.

"The release of medical records can be a problem also," says Haggerty. "Some institutions see us as a potential litigant. Not enough people work on the paperwork. It's not an overall issue of cooperation, but that people in the correctional system are overloaded."

A collaborative effort between Advocates for the Incarcerated of Los Angeles County and the correctional staff at the California Mens' Facility in Chino created a Pre-Release Planner position on site. Roland Souza, Pre-Release Planner with the Tarzana Treatment Center, identifies prisoners at least 90 days before their release date to begin linking them to community resources. Services include referrals to substance abuse treatment, medical treatment, mental health resources, transitional housing and public benefits along with case management. Souza and social work staff also facilitate a support group to help prisoners handle the crisis of leaving the prison community.

According to Art Downs, Program Director at CMF-Chino, the recidivism rate among prisoners with HIV/AIDS at Chino was 99% a few years ago. But collaboration with the Tarzana Treatment Center and other organizations has decreased that figure. Souza feels recidivism can be decreased in other ways. "I'd like to see more programs that could build prisoners' self-esteem to think they can be successful on the outside. We also need to use former prisoners who've navigated life on the outside to be role models." Says Downs, "We need to welcome organizations that have resources and programs to offer inmates. Community organizations and correctional systems should be close partners because we can help each other."

New York institutionalizes the process

In 1991 Terri Wurmser, Parole Services Program Specialist at the New York State Division of Parole, and her staff began to formulate the Discharge Planning Initiative. The program strives to discharge prisoners on time and link them to community programs appropriate to their needs. The policy classifies prisoners by four tracks, from those who require basic care to those who have intensive needs. For prisoners with HIV/AIDS, planning means completing applications for the AIDS Drug Assistance Program, SSI, links to outpatient care, local pharmacies, and multi-service agencies. Most applications are completed within two months, while others may require more time. The process involves collaborating with Department of Corrections' staff and many community based organizations.

Wurmser offers the following advice to community organizations doing discharge planning: "If you think you're doing a good job with your client but are not working with parole you're deluding yourself. We need to work collaboratively to supplement, not duplicate, efforts." Wurmser also feels greater attention needs to be focused on women and family issues. Additionally she sees more efforts needed toward staff training.

The Women's Prison Association links women prisoners with HIV/AIDS to community resources through its Transitional Services Unit. TSU is either on site or makes monthly visits to New York State facilities housing women prisoners. Working with women three to six months before release, TSU establishes a relationship that will continue after release. The service plan is created by TSU staff and prisoners to highlight the most immediate needs. TSU also works in partnership with ACE-OUT, a peer-support network founded and run by former prisoners. When a woman with HIV/AIDS is released, an ACE-OUT buddy will pick her up, take her to meet the parole officer, and provide emotional support.

Since 80% of the women TSU serves are mothers, discharge planning includes reconnecting women with their children. Yvonne Soto, Transitional Services Unit Manager, describes additional problems, saying, "The biggest problem is transitional housing, since only women with full-blown AIDS can receive emergency housing. If a woman is HIV-positive or HIV-negative she may end up in a shelter and later become further immune-compromised or HIV-positive. We need more funding for transitional rather than permanent housing." ■

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 1994. $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.

_____ **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.

_____ **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.

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THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project litigation program since January 31, 1994. Further details of any of the listed cases may be obtained by writing the Project.

John A. v. Castle—This case, filed in May 1990, challenged the conditions of confinement at the Ferris School and Bridge House for Delaware juveniles who have been charged with offenses or committed to state custody following adjudication. Plaintiffs complained of bad living conditions, physical and verbal abuse, inadequate medical care and inadequate education and access to courts finally resulted in a settlement agreement, and, almost simultaneously, the Governor announced plans to raze Ferris School and replace it with a new facility. The comprehensive settlement tentatively approved by the court addresses in detail virtually every aspect of the complaint and provides for a three-year monitoring period. The agreement commits the state to sweeping reforms in the areas of medical, dental, and mental health care; classification, programming, education, discipline and restraint; and environmental health and safety.

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. On the eve of inspections of the prison's health care by experts, the defendants announced that they would not allow review of medical records without individual releases from prisoners. The judge subsequently ruled that our experts were entitled to review the records and awarded discovery sanctions against the defendants. The judge also rejected defendants' jurisdictional challenge to enforcement motions while the judge's previous orders were on appeal to the Sixth Circuit.

Palmigiano v. Sundlun challenges prison overcrowding and conditions in Rhode Island. The entire state prison system was declared unconstitutional in 1977 and a Special Master was appointed. The remedial order dealt with overcrowding, idleness, violence, classification, medical and mental health care, and environmental health and safety. During the years since then, defendants have consistently been found in contempt of court-ordered population caps. In 1992, after lengthy negotiations with the NPP, the Governor created an overcrowding commission which recommended a statutory scheme for permanently controlling the prisoner population at certain agreed-to limits. This legislation was passed by the Rhode Island legislature during the spring of 1993. Negotiations to settle the case were held throughout 1993 and into 1994. On March 18, 1994, an agreement was signed, providing for permanent population caps on every Rhode Island jail and prison, male and female, and for a review of current compliance in other areas by outside monitors and plaintiffs' counsel. If there is a finding of continued substantial compliance, the orders dealing with issues other than population will eventually be dismissed.

Spear v. Waihee—The new agreement in the Hawaii prison conditions case received court approval in November. The compliance monitoring tour that took place in February included a visit to the newly-opened women's prison, a well-equipped modern facility that replaces the old Hawaii Women's Correctional Facility where condition so appalled NPP attorneys on their first visit in 1984. Then they found inmates at the women's prison crammed into double-bunked dormitories with beds literally only inches apart. A dayroom allowing less than ten square feet for each of the approximately 90 women in the main facility was used for almost every function including meals, visits and recreation. Hot water was rare and toilets, sinks, and showers were in short supply. Medical care and food services likewise fell below any acceptable standards. Most egregious was the dungeon-like Detention Unit where cells were so small that no bed would even fit. Plumbing leaked and ventilation and lighting were substandard. Suicidal and mentally disturbed women were housed in these tiny cells. Fire hazards were numerous. The final closing of this grim place provided a measurable result to a decade of work in *Spear*. ■

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