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No Equal Justice Under the Law in India—or the U.S.

BY ALVIN J. BRONSTEIN

The following remarks were presented at the International Conference on Prisons and Punishment in New Delhi, India, March 3–5, 1994.

No Equal Justice

I am an advocate and, as such, my role is to challenge the complacency, actions and inactions of my colleagues wherever I am. My purpose here is to make you feel and think deeply, not to offend you. I want to focus on what I believe is the most fundamental and serious problem in all of the criminal justice systems I know anything about, and that is unfairness and inequality. I will do that by talking primarily about the United States, the system I know best.

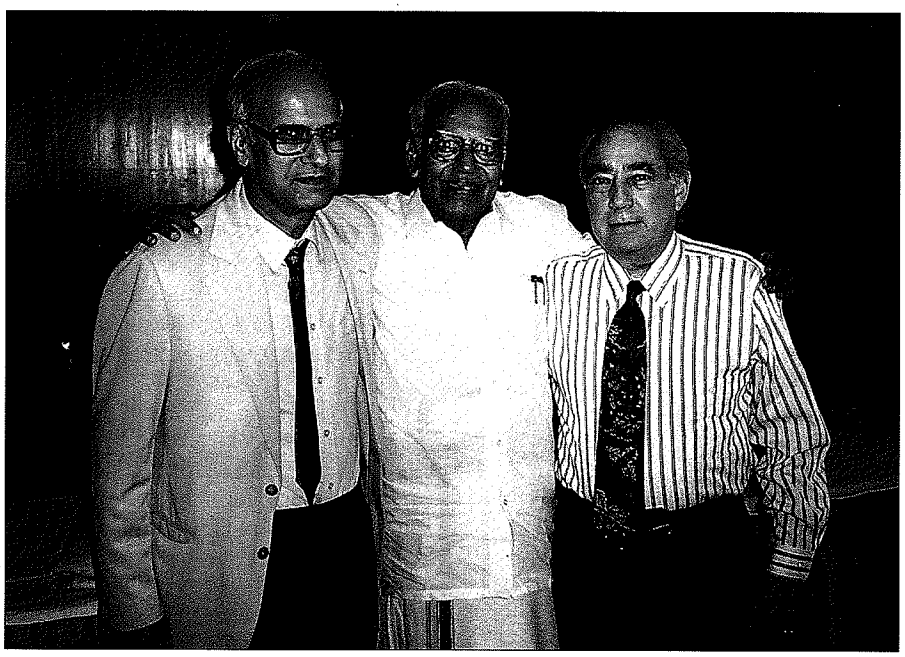
In both the United States and India, much homage is paid to the idea of the balance of the scales of justice—equality under the law. In the U.S., justice is supposed to be "blind," meaning, of course, that all will receive equal treatment regardless of color, economic status, or background.

. . . justice requires equality of treatment.

Equal justice under the law is a myth and a lie. Unequal justice is the reality. I know of no criminal justice system that comes close to providing equal justice under the law. Certainly not the criminal justice system in the United States and certainly not the system in India.

If you look closely, you will find the gross inequality that exists in the American criminal justice system. Our criminal justice and imprisonment systems are used primarily and almost exclusively as a means of controlling poor people (the underclass), people of color, and our indigenous populations. We are not alone, as the following examples suggest:

- In Canada you will find the government uses the criminal justice system disproportionately against the native and aboriginal populations;
- Tony Peters, the Belgian criminologist, has pointed out that while only 9% of Belgium's total population is non-Belgian, non-Belgians make up 37% of its prison population. He describes the non-Belgians as primarily Moroccans, other and North Africans and Turks; all of them, not coincidentally, people with dark skin;
- Peter McKinlay, the former head of the Scottish Prison Service, tells us that it is the poor underclass, "the lads from the public housing projects who face dead-end jobs," who are filling the prisons of Scotland;
- Duncan Chappell, an Australian criminologist, has told us that aboriginals make up 1% of the general population in Australia but over 14% of the prison



NPP staff photo

Left to right: Professor Ravindeer Kumar, director of the Nehru Museum; Justice Krishna Iyer, former Chief Justice, Supreme Court of India; Alvin J. Bronstein, executive director of the National Prison Project.

INSIDE . . .

population. Indeed, looking at a one-month picture (August 1992), 28.6% of all persons taken into police custody were aboriginals;

- In India, there are three classes of prisons and offenders are sentenced to a particular prison based upon their wealth, status and influence, not on their criminal behavior.

Today in the United States, we have about one and one-half million people in our jails and prisons. Over 99% of them are poor and 50% are people of color. One out of three black males between the ages of 20–29 in the State of California are in prison or on parole or probation. In the city of Baltimore, 50% of black males between the ages of 16–35 are in prison, jail or on some form of restriction (bail, parole, community custody, etc.). In our nation's capital the figure for that same age group is 42%.

Duncan Chappell, in a paper delivered to the 27th Australian Legal Convention, recalled the discussion on these issues at an earlier symposium:[1]

> *"With private prisons we build into the system a strong growth factor."*
> *–Prof. Nils Christie*

The United States prison crisis prompted some sharp exchanges between North American and European participants at the Ottawa symposium. Like their North American counterparts the Europeans have experienced significant increases in the number of offenders being dealt with by their criminal justice systems...

The true sentencing dichotomy revealed at the Ottawa symposium among North American and European participants was in reality an ideological split between the two continents regarding the severity of punishment to be imposed upon offenders. Speaking about this issue at the Symposium, the distinguished Norwegian criminologist, Nils Christie, sparked the wrath of many of the United States participants by suggesting that their ideological views had produced a punishment system which was not so dissimilar from that of the [former] Soviet Union's. The USSR had been severely criticized by Western democratic nations for its policy of keeping dissident citizens in Siberian and other labor camps but the United States was incarcerating in its prisons an equivalent underclass of black and other dispossessed minority groups.

The point is, then, how can we talk about models and values for the future of corrections without first addressing the problems in our society? Or is it possible that our society needs the poor, the people of color, the permanent underclass, in order to sustain our criminal justice systems and our corrections systems? If we acknowledge, as we must, that there is no fairness and equality under and before the law in the criminal justice systems of most North American and Western European countries, how can we participate in the travesty known as criminal justice and corrections? How can we sit around and discuss the use of the private sector, what works in conventional programs, correctional personnel and professionalism, the role of the media, standards and accountability, and all the rest?

The Correctional-Industrial Complex

The Canadian sociologist and former criminal justice and corrections official, Lorraine Berzins, recently challenged the entire concept of punishment under contemporary criminal justice systems: [2]

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. These inequities have been rationalized by those who have the power to produce our ideological theories—theories that define what is "right."

Within existing social contexts, many people are left at the mercy of the social ethic of the dominant group—those with the power to define for everyone which interests are valuable, whose interests are valuable, and what rights are valuable. Degrees of "blameworthiness" become very difficult to judge given the imbalance of power and wealth. Assigning proportional ratings is not possible and the end result is the justification of the oppression of one group by another....

The high collateral costs of this outcome, both financial and human, serve ultimately the interest of no one at all, save perhaps the industry that has grown up around it.

The inescapable conclusion: punishment cannot be proportional and therefore cannot be justified.

Nils Christie has written extensively about what he refers to as "the phenomena of the economy of penal measures."[3] He has argued that, for some people, prisons pay. "With private prisons we build into the system a strong growth factor."[4] This is no minor factor in the United States and our corrections "professionals" are part of the problem.

For example, at the American Correctional Association's annual Congress last year, the conference program contained 276 pages, 153 of which were devoted entirely to advertisements (new kinds of razor wire, restraints, various services, the

(cont'd on page 17)

[1] Professor Duncan Chappell, *Sentencing of Offenders: A Consideration of the Issues of Severity, Consistency and Cost*, Adelaide, (1991).

[2] Lorraine Berzins, *Is Legal Punishment Right? The Answer is No.*, NPP JOURNAL, Vol. 8, No.2, (Spring 1993), pp. 17, 18.

[3] His latest book, which examines the economic incentives behind prison growth, should be required reading for everyone in the criminal justice field. *Crime Control as Industry: Towards Gulags, Western Style?*, University of Oslo Press, (1993).

[4] Nils Christie, *The Eye of God*, Ottawa, (1991).

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Agreement Reached in Rhode Island Prison Case After 17 Years

BY JAN ELVIN

In 1974 a Rhode Island prisoner named Nicholas Palmigiano filed suit in federal court claiming that conditions in the Adult Correctional Institutions (ACI) violated the Constitution's ban against cruel and unusual punishment. The case finally started to wind down in March of this year—20 years after it began—with the signing of an agreement which followed nearly three years of negotiations.

It [the agreement] prohibits double-celling in certain facilities and limits its use in others.

Palmigiano v. Sundlun[1] has a lengthy and complex history. After an extended trial in 1977, evidence presented by plaintiffs' lawyers from the National Prison Project of the American Civil Liberties Union Foundation convinced U.S. District Court Judge Raymond J. Pettine to declare the entire Rhode Island prison system unconstitutional. Over the course of the next 15 years, the court found it necessary to resort to various coercive measures, including modifying orders, sanctions, and contempt citations in attempts to force the state to meet its obligations under the Constitution. During those years, the court found that most of the problems were attributable to overcrowding: in every instance, the court found that overcrowding had a serious deleterious impact on medical care and environmental health and safety.

On January 10, 1991, Judge Pettine, who had presided over the case from its inception and is now on senior status, held a conference in chambers with all the parties on the occasion of transferring the case to U.S. District Judge Ronald R. Lagueux. In his final order, Judge Pettine urged the parties, "Now is the time to institute safeguards that will forestall and hopefully prevent a recurrence of the past frustrating, costly and devastating ills."

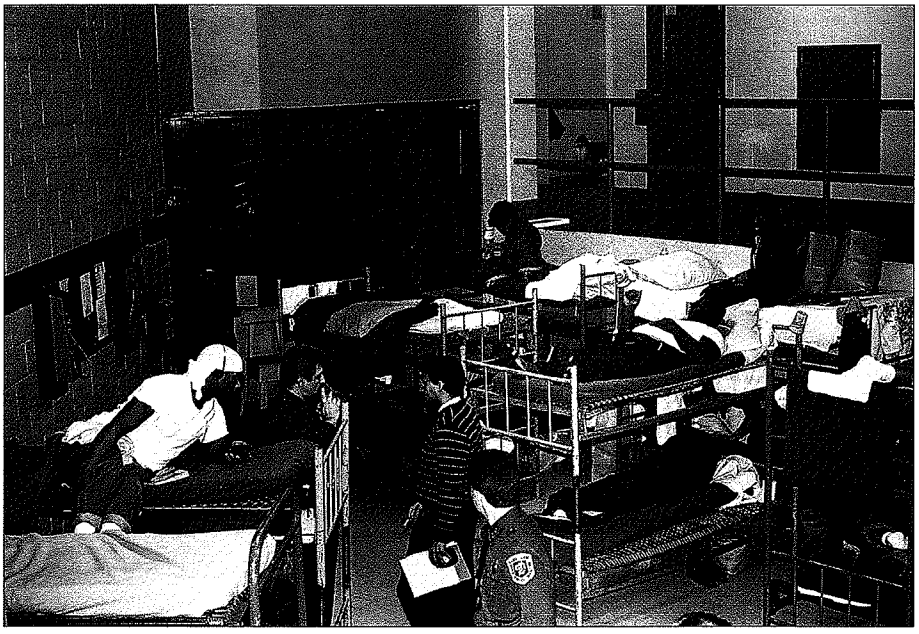
The parties have had a series of meetings over the past three years. Negotiations to reach the new agreement proceeded from the parties' shared belief that existing compliance problems could best be resolved by revising the compliance and monitoring process to make it more efficient, and by setting permanent population limits.

The agreement includes strong measures to control future overcrowding and to guarantee proper prisoner care and it applies to existing as well as newly acquired facilities. It states that "[a]reas not designed and built for housing prisoners

The following numbers give an idea of the length and complexity of the case:

- Out of the original five named plaintiffs, one has been paroled, one was killed, and one (Palmigiano) is living under a new identity in the witness protection program after testifying against Rhode Island mob boss Raymond Patriarcha.
- The entire pre-trial and sentenced prison population in Rhode Island at the time of trial was under 700; it stands today at approximately 3,000.
- In 1977, four facilities existed—"medium," "Old Max," "minimum" and "women's." Now Rhode Island has 10 facilities known as "high security," "maximum," "medium," "special needs," "men's minimum," "men's work release," "women's," "women's work release," "intake north," and "intake south." Today there are more people on work release and community confinement than there were in the entire prison system in 1977;
- Bronstein recalls that in 1977 there was only one hotel in downtown Providence; now there are three;
- This case has seen four governors, two judges, two special masters, three DOC directors, and a total of 24 attorneys for the defendants (12 attorneys from the Attorney General's office, six counsels for the Governor, three attorneys from the Department of Corrections, and three private attorneys).
- Plaintiffs have been represented over the course of the lawsuit by two lead lawyers from the Prison Project—initially Matthew Myers and then Alvin J. Bronstein. Staff attorney Mark Lopez currently assists with the case.

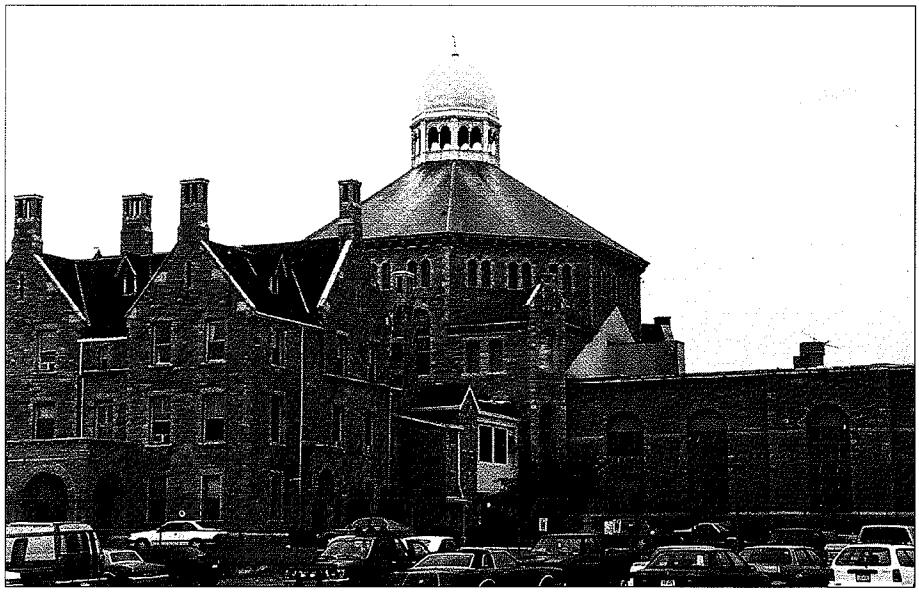
[1] Bruce Sundlun is the current governor of Rhode Island and has inherited the role of lead defendant. The case has at various times been called *Palmigiano v. Noel*, *Garrahy*, and *DiPrete*.



A 1985 photo of prisoners housed in storage space—a practice prohibited under the new agreement.

shall not be utilized for the housing of prisoners. For example, prisoners shall not be housed in corridors, dayrooms, program space, office space, recreation space or general purpose space." It also prohibits double-celling in certain facilities and limits its use in others.

Governor Sundlun signed an Executive Order in 1992 creating a Governor's Commission to Avoid Future Prison Overcrowding and Terminate Federal Court Supervision Over the ACI. The Commission was charged with developing an action plan, including legislation and policy initiatives, for dealing with the state's prison population. On February 15, 1993 the Commission issued a detailed report setting forth new approaches for the Rhode Island criminal justice system and recommending certain legislation. The Rhode Island General Assembly thereafter enacted legislation providing for intermediate sanctions, and a



"Old Max," the building where maximum security prisoners are housed, has been extensively renovated.

Roberta Richman — changing women's lives

Among the many changes that have taken place at the ACI since the lawsuit began, some of the most marked have been at the Women's facilities where Roberta Richman became warden in June of 1991. Ms. Richman took an unusual career path to this job, beginning with a Master's degree in Fine Arts, becoming an art teacher in prisons, running educational and vocational services and then prison industries for all of ACI before being appointed as warden by Director George Vose.

As warden, Ms. Richman has a very clear vision of what she wants for the women in her care, tempered by a realistic view of the limited resources available and the constraints of the system within which she operates. At the outset, she set herself three goals:

1) to create a humane and safe institution environment conducive to treatment and rehabilitation;
2) to prepare women for transition back into the community by providing sufficient educational, counseling and treatment opportunities;
3) to build partnerships with existing community agencies by allowing them access to the incarcerated women and sharing responsibility for their continued treatment and support after release.

She stresses that there are differences between the situations of incarcerated women and men. Most of the women have committed nonviolent crimes, have been victims of abuse all their lives, have very limited life skills, and are mothers and primary care givers to young children. Their sentences are usually short, which means the time available to help them is limited. Resources must be concentrated on preparing them for transition back into the community from the very first day they arrive. Six months, an average sentence length, is not enough time to do more than begin the process. The easy part is restoring physical well being, providing adequate nutrition, physical safety, and detoxing from drugs and alcohol. The harder part is planning for continued care after they leave prison.

The ideal situation for most of these women, Ms. Richman is convinced, would be placement instead in a community home. There they could receive help in a controlled environment for as long as they needed it and then move on to try life on their own on the outside—knowing that whenever they needed to, when life became too threatening or difficult, they could return temporarily to the more sheltered community. While the current political climate makes such a radical option unlikely, the next best thing, according to Ms. Richman, is to build links to caring groups in the community while the women are still in prison so that when they leave they have some kind of support system in place. At the same time counselling in prison prepares the women to deal with the pressures they will have to face — groups meet to deal with issues of rape, sexual abuse, domestic violence, and parenting. Contacts between mothers and children are encouraged with extended visiting in the informal setting of the recently created Sundlun Children's Center. An intensive drug treatment program has been started— 90 days in duration, holistic in philosophy, highly structured and restrictive—to be followed by three to six months of work release or home confinement to prepare the women for responsible living after release. HIV/AIDS peer education and training takes place in weekly group meetings; long-term mature women are trained to act as peer counselors on their wing; a mentoring program matches a community volunteer with a women six months before her release and the relationship continues as long as possible after release. All these programs are aimed at making long-term changes in the way the women face the world, giving them the strength and the inner resources to deal with the potentially overwhelming problems they will face when they leave prison. Is it enough? Warden Richman is far too much of a realist to believe that.

She knows that much more is needed —particularly, job training for available, well-paying jobs that will give the women economic independence and enable them to support their families in the community. She knows she cannot change the world but she is doing an impressive job in making changes where she can, day-by-day, step-by-step, providing the first helping hand that many of the women in her charge have ever had. –J.G. ■

Criminal Justice Oversight Committee that would permanently control the state's jail and prison population.[2]

The process for ending court supervision of the ACI has three phases: first, conditions at the ACI will be monitored by a team of independent experts (monitors) in medical services, environmental health and safety, and inmate management and programs. Second, after a finding of substantial compliance by the monitors, the Department of Corrections (DOC) will report to the court and plaintiffs' counsel on its progress with compliance. (Reports by monitors and by the DOC may be challenged by attorneys for the prisoners or for the Department.) Third, once the court finds continued substantial compliance with the new agreement, all of its provisions will be vacated, except the population controls, which will remain in effect indefinitely.

If the new population caps are exceeded, the Oversight Committee is empowered to release prisoners early or to speed up the parole process. Should the Committee fail to act, attorneys from the Prison Project may seek court intervention.

"Now is the time to institute safeguards..."
—Judge Pettine

Only under certain specific conditions and in certain facilities may prisoners be double-celled: double-celled prisoners must not be classified as maximum security; cells must adhere to the American Correctional Association standards on space requirements; and any double-celled prisoner must be out-of-cell at least 10 hours a day and have the opportunity for a wide range of programs.

The state now appears to realize that it cannot build its way out of its overcrowding problem. They recently closed their old Medium Security Facility (known as Special Needs) and are converting it into a community reintegration facility.

Alvin J. Bronstein, lead counsel for the prisoners and the executive director of the ACLU National Prison Project, said of the agreement, "The ACLU seeks to guarantee that the state will achieve full compliance with its mandates for constitutional prison conditions and procedures in the near future and do so in a manner that avoids the protracted litigation of the last 17 years. We believe that the population limits and self-monitoring and reporting process applied to the Department of Corrections under the new agreement, will assure that the progress that has been made in the *Palmigiano* case will continue." ■

[2] Rhode Island has a unified corrections system; the ACI has custody of pre-trial and sentenced prisoners.

NPP Hosts Litigation Conference

BY JENNI GAINSBOROUGH

On May 19 and 20, the National Prison Project hosted a conference on prison litigation. The 20 attorneys who attended, some of them special masters in prison cases, heard presentations and took part in discussions on a number of areas of current concern. John Boston of the Prisoners Rights Project of the New York Legal Aid Society talked about consent decree modification and termination issues, drawing on his experiences in the long-running New York City jails cases. There was also discussion of the "exit scenarios" developed in the New Mexico (*Duran*), Hawaii (*Spear*), and Rhode Island (*Palmigiano*) cases, and the implications for consent decree modification of the Supreme Court's *Rufo* decision. Modification of agreements was addressed further in a session on the implications of the current crime bill. The proposed Helms/Canady Amendments on "Appropriate remedies with respect to prison crowding" includes a provision that court orders and consent decrees should be reopened for modification at a minimum of two-year intervals. The proposed amendments also attempt to limit the use of class action suits in Eighth Amendment cases though there was a general sense that this change would meet so much resistance from judges, as well as litigators, that it was unlikely to stand.

NPP staff photo

NPP staff attorney Mohamedu Jones (left) talks with Jonathan Smith of D.C. Prisoners' Legal Services Project (right) between sessions.

The conference also looked at alternatives to using the Eighth Amendment in litigating prisoners' rights. Elizabeth Alexander of the NPP introduced the session on Statutory Causes of Action and talked about the Individuals with Disabilities Education Act as a means of bringing special education to incarcerated juveniles. Randy Berg and Peter Siegel of the Florida Justice Institute discussed litigation under the recently passed Restoration of Religious Freedom Act, which has already been used successfully to challenge restrictions on the religious practices of Jews and followers of the Santeria religion in prisons. The Americans with Disabilities Act also seems to offer a good tool for enforcing the rights of disabled prisoners but there is still some uncertainty about how its provisions will be interpreted by the courts.

The expense of using experts for prison litigation, now that their costs are no longer recoverable, prompted a debate on ways to minimize that expense. While there may be some ways to control costs, it was generally felt that timely expert tours are of such importance to the success of litigation that too much restriction on their use would be counterproductive. The best long-term hope is for legislation to reverse the *West Virginia Univ. v. Casey* decision.

Alvin J. Bronstein, NPP director, who chaired the conference, introduced the final topic—Public Advocacy on Criminal Justice Policy Issues—with a question as to whether the attorneys felt it warranted much discussion time. The answer to that question was made clear by the longest and liveliest debate of the conference. The participants saw influencing public opinion as key to the long-term changes they want in the current policy of over-reliance on incarceration. If public advocacy is to be effective, we have to give policy makers at the state and national level viable alternatives to imprisonment that they can take to their electorate. Agreement on that principle was easily reached —discussion on what those viable alternatives might be and how they could be "sold" to the public, politicians, and policy makers was still continuing without resolution when the conference reached its scheduled close. ■

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Case Law Report

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Highlights of Most Important Cases

BY JOHN BOSTON

CRUEL AND UNUSUAL PUNISHMENT

For the fourth time in four years, the Supreme Court has rendered a significant interpretation of the Eighth Amendment's cruel and unusual punishments clause in a prison conditions case. In *Farmer v. Brennan*, 62 U.S. Law Week 4446 (June 6, 1994), the Court vacated and remanded the Seventh Circuit's summary dismissal of a federal prisoner's claim that prison officials failed to provide her with adequate protection from violence by other inmates. For the plaintiff, the decision provides another chance at winning her case. For prison litigators, Justice Souter's majority opinion is a decidedly mixed bag.

The plaintiff is a pre-operative transsexual who has been housed in male institutions even though she "projects feminine characteristics" and prefers to be referred to as "she" or "her." (The Court carefully avoided applying any personal pronoun to her in its opinion.) She alleged that she was placed in the general population of the United States Penitentiary at Terre Haute, Indiana, where she was beaten and raped. She further alleged that the defendants acted despite their knowledge that the penitentiary had a violent environment and a history of assaults and that she would be particularly vulnerable to sexual attack.

The Court did not dwell on these unusual facts but treated the case as invoking the more general duty of prison officials to protect prisoners from assault by one another. The Court noted that it had assumed, and the lower courts have "uniformly held," that such a duty exists. It stated:

> *...[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.... [G]ratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," ... any more than it squares with "evolving standards of decency." ...*

62 U.S.L.W. at 4448 (citations omitted). To establish an Eighth Amendment violation, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* (The Court declined to say when a risk becomes substantial, since the issue was not presented to it.)

Deliberate Indifference Redux

From these familiar generalities, the Court proceeded to the technical issue at hand: the definition of deliberate indifference, about which the federal appellate cases were in conflict. The appeals courts generally agreed that deliberate indifference is the equivalent of reckless disregard for risk—a view the *Farmer* Court explicitly endorsed. However, some courts had held that prison officials may be found liable if they disregard risks that they "knew or should have known" about; this standard has been termed the "objective" or "civil law" standard of recklessness. Other courts had held that prison officials may only be found liable if they disregard risks that they actually knew about; this definition of recklessness is generally applied in criminal law and has been termed a "subjective" standard.

For prisoner advocates, the bad news is that the Court rejected the civil law standard and adopted the criminal law standard. It stated, "We hold...that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 62 U.S.L.W. at 4449. The (relatively) good news is that the Court was careful to limit the impact of its holding, with the effect (and very likely the purpose) of curbing some extreme interpretations of the criminal standard that have appeared in lower court cases.

The Court's approach to the question was not one of making law but one of scrupulously applying its recent decisions, in particular *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Helling v. McKinney*, 113 S.Ct. 2475 (1993).

The Court thought that it was compelled to reject the objective civil law recklessness standard by *Wilson*, which declined to base Eighth Amendment liability purely on the existence of objectively inhumane prison conditions. Rather, *Wilson* held that the Eighth Amendment embodies a "subjective" requirement, also referred to as a "culpable state of mind." The *Farmer* Court, in effect, declined the invitation to define the terms "subjective" and "state of mind" in a broad and nonliteral fashion.

In hewing to the line of *Wilson v. Seiter*, the Court declined to follow its only previous attempt to give substance to the deliberate indifference standard. In *Canton v. Harris*, 489 U.S. 378, 390 (1989), the Court held that municipal liability for inadequate police training could be established "if the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." The *Farmer* Court declined to apply *Canton*'s holding that liability can be based on a risk's "obviousness" (or on constructive notice, as Justice O'Connor had phrased it in her *Canton* concurrence), since such a standard would be "hard to describe...as anything but objective." 62 U.S.L.W. at 4450.

The Court observed that *Canton*'s definition of deliberate indifference was an interpretation of 42 U.S.C. §1983, a statute containing no independent state of mind requirement. 62 U.S.L.W. at 4450. *Canton* itself had noted that the standard it announced for municipal liability did not turn on the standard governing the underlying constitutional claim. 489 U.S. at 388 n.8. *Canton* therefore does not govern the Court's interpretation of

the substantive requirements of the cruel and unusual punishments clause.

However one views the Court's reasoning, its holding that there are now two deliberate indifference standards is likely to breed confusion in the lower courts, especially since many cases will contain both kinds of deliberate indifference claims—e.g., a claim by a sentenced county jail prisoner that he or she was assaulted by other inmates as a result of the deliberate indifference of line staff, and as a result of a policy of deliberate indifference with respect to training or supervision on the part of the municipality. The prospect of instructing juries that deliberate indifference means one thing for one set of defendants and something else for other defendants will not be pleasing either to the trial judges who have to do it or to the appellate panels who will have to sort out their mistakes.

This problem is not limited to cases with municipal liability claims. Courts have often used deliberate indifference as a standard for individual supervisory liability in §1983 cases, regardless of the legal standard governing the underlying constitutional claim. *See, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989) (Fourth Amendment police shooting case); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990) (student sexual harassment complaint under due process clause); *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988) (baseless arrest and criminal prosecution); *McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983) (prisoner's procedural due process claim). Questions of supervisory liability, like those of municipal liability, are matters of statutory interpretation arising from Congress's supposed rejection of *respondeat superior* under §1983. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-93 (1978). Thus, all Eighth Amendment cases in which prisoners sue both line staff who are directly involved and supervisors who are alleged to be indirectly responsible will require juries to apply two different deliberate indifference standards.

The best practical solution to this problem may simply be to banish the conclusory terms "recklessness" and "deliberate indifference" altogether, and frame jury instructions, as well as the special verdict forms that seem increasingly necessary in civil rights litigation, by using only the definitions of those terms. For example: "Do you find that defendant Jones knew of and disregarded an excessive risk that prisoner Smith would be assaulted?" Or: "Do you find that defendant Jones failed to act to protect prisoner Smith from assault despite his knowledge of a substantial risk of serious harm to prisoner Smith?"

Qualms and Qualifications

Despite the Court's unfavorable holding, much of the majority opinion amounts to an exercise in damage limitation.

The Court rejected the view that its holding would allow officials to disregard obvious dangers by cultivating ignorance of them. It stated: "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence..., and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 4451.

This is an odd sort of reasoning; in effect, it suggests that officials will not be tempted to take refuge in willful ignorance because of the likelihood that factfinders will erroneously fail to give them the benefit of their ignorance. However, the Court's statement should prove invaluable to prisoner plaintiffs for an entirely different reason than the Court intended: it relieves them of the burden of going forward with direct evidence of prison officials' state of mind. In other words, an obvious risk, without more, creates a triable issue of fact. This point will be crucial at the summary judgment stage in many cases—especially those involving *pro se* litigants, who may have evidence that a risk was obvious, but lack the ability to conduct effective discovery of what prison officials knew. Since courts often withhold serious consideration of the appointment of counsel until after a *pro se* case has survived a summary judgment motion, the effect of this evidentiary pronouncement by the Court will be pivotal for many litigants.

Nonetheless, the Court's argument remains unsatisfactory for its intended purpose of refuting the "ignorance is bliss" argument. Suppose a prison administration purposefully avoids knowledge of risks of violence in an institution, e.g., by failing to maintain a system for reporting violent incidents and by discouraging inmates from complaining and staff from reporting incidents or threats to their supervisors. Can they still be held liable? One appellate court has stated that "[g]oing out of your way to avoid acquiring unwelcome knowledge is a species of intent" sufficient to establish recklessness under the criminal law standard. *McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 365 (1992). The *Farmer* opinion gives no evidence that the Court considered this point.

The Court did, however, deal definitively with one recurrent issue in prison violence litigation: the specificity of the threat of which prison officials must have had knowledge. The Court stated:

> *The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health,"...and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.*

62 U.S.L.W. at 4451 (citation omitted).

This holding amounts to a broad ratification of the body of case law finding prison officials liable for violence resulting from generalized failures of prison administration—or, as the case law puts it, "systematic deficiencies in staffing, facilities or procedures [that] make suffering inevitable...." *Fisher v. Koehler*, 692 F.Supp. 1519, 1561 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2nd Cir. 1990). Such deficiencies include the failure to classify and separate aggressive and vulnerable inmates, inadequate staff supervision, overcrowding, the lack of reporting and investigating systems for threats and assaults, and so forth. *See, e.g., LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994); *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1445, 1448 (9th Cir. 1991) (*en banc*), *cert. denied*, 112 S.Ct. 972 (1992).

The Court's acknowledgement that constitutionally significant risks to prisoners' safety may be found at different levels of generality may provide a fruitful approach to the "ignorance is bliss" defense. Instead of asking "Did the warden know that prisoners were at substantial risk of assault?" one might ask, "Did the warden know that the failure of a prison administration to monitor violence, or the failure to classify inmates, can itself create or aggravate the risk of assault?" It may be that prison officials' general knowledge of the dynamics of prison life, and not just their knowledge of conditions inside their own institutions' walls, may create a triable question of deliberate indifference.

Curbing the Seventh Circuit

Prisoner advocates were concerned not only with the disadvantages of the criminal law standard but with the radically anti-prisoner gloss placed on it by the Seventh Circuit. That court stated that prison officials may not be held liable unless they possess "*actual* knowledge of *impending* harm *easily* preventable," *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (emphasis in original, citations omitted), and that they must be

shown to have exposed the plaintiff to a risk "*because of*, rather than *in spite of*, the risk to him." *McGill v. Duckworth*, 944 F.2d at 350 (Easterbrook, J.) (emphasis in original), citing *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). The lack of apparent doctrinal support for these propositions did not impair the vigor with which the Seventh Circuit asserted them or the willingness of other courts to accept them uncritically. *See DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991); *Morello v. James*, 797 F.Supp. 223, 234 (W.D.N.Y. 1992).

The Seventh Circuit gloss does not survive *Farmer*. The assertion that officials must be shown to act, or fail to act, "because of, rather than in spite of," the risk to the prisoner is plainly contradicted by the *Farmer* opinion, which states: "Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; *it is enough* that the official acted or failed to act *despite* his knowledge of a substantial risk of serious harm." 62 U.S.L.W. at 4450 (emphasis supplied).

Similarly, the Seventh Circuit's requirement of "impending harm" is incompatible with the *Farmer* Court's invocation of *Helling v. McKinney*, which held the risk of "serious damage to [a prisoner's] future health" actionable. *Id.* at 4451, citing *Helling*. Since *Helling* refers to harm that may occur "the next week or month or year," and specifically addresses a risk (second-hand tobacco smoke) of harm that may remain latent for many years, it can hardly be maintained that a known risk of assault must be "impending" before officials are required to act to avert it.

The Seventh Circuit's requirement that harm be "easily preventable" falls for the same reason. The Court relied on *Helling* for the proposition that "[a] prison official's duty under the Eighth Amendment is to ensure 'reasonable safety.'" It is hard to argue that prison officials act reasonably if they do only what is easy in the face of a risk of death, rape, or other serious injury.

The Problem of Injunctive Cases

The *Farmer* opinion is most ambiguous in addressing the plaintiff's claim for injunctive relief, which the Court directed the district court to address on remand. Quoting *Helling v. McKinney*, it stated that deliberate indifference "'should be determined in light of the prison authorities' current attitudes and conduct,' ... *at the time suit is brought* and persisting thereafter." It added that "to survive summary judgment, [the plaintiff] must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so...". 62 U.S.L.W. at 4451-52. However, it added in a footnote that if the evidence supported the existence of an "objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness...." *Id.* at n.9.

Thus, it appears that in reality, whatever the state of the defendants' knowledge at the time the complaint was filed, the suit itself may provide defendants with sufficient knowledge to make out the subjective element of the claim. Presumably this is true at the summary judgment stage as well as later—especially since a claim dismissed because of the defendants' lack of knowledge at the time of the complaint could simply be refiled alleging the subsequent enhancement of their knowledge.

The Court then added that its holding "does not mean...that inmates are free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court." For this proposition, it cited a 1943 case about equity jurisprudence, and added that "an inmate who needlessly bypasses such procedures may properly be compelled to pursue them." *Id.* at 4452. The Court also observed that "[w]hen these procedures produce results, they will typically do so faster than judicial processes can." 42 U.S.L.W. at 4452. Unfortunately, the Court does not define under what circumstances this suggestion of a new exhaustion requirement should apply.

This portion of the Court's opinion reflects some naiveté about the practicalities of prison life. Complaints of threats to prisoners' physical safety are generally not handled through formal grievance or complaint procedures, but through direct communication with security staff. There are two reasons for this. First, the complaints are often too urgent to await the processes of even an efficient grievance system. Second, grievance systems are not necessarily confidential. An inmate's grievance may pass through the hands of a number of staff members and, in many cases, inmates, since grievance systems typically use inmates at least in clerical and administrative capacities. Given the stigma attached to "snitching" in many prison populations, the combination of delay and the risk of disclosure makes grievance systems an unattractive option for inmates in fear. If the Court's statement implies that an inmate who has complained fruitlessly to security staff must additionally go through the formalities of a grievance process, it is seriously misguided.

Presumably—and consistently with other aspects of equity jurisprudence—a prisoner who seeks a temporary restraining order or preliminary injunction and alleges an actual, present danger to safety will still be given the opportunity to show that he or she is at risk of "irreparable harm" supporting such preliminary relief. *See, e.g., Mitchell v. Cuomo*, 748 F.2d 804, 806 (2nd Cir. 1984) (Eighth Amendment violations would constitute irreparable harm); *Cohen v. Coahoma County, Miss.*, 805 F.Supp. 398, 406 (N.D. Miss. 1992) (physical abuse by jail staff would constitute irreparable harm). Such a holding would also be consistent with the law of exhaustion in federal prisoner litigation, which excuses exhaustion where the administrative procedure is "inadequate to prevent irreparable injury." *Terrell v. Brewer*, 935 F.2d 1015, 1019 (9th Cir. 1991).

Like the Court's other recent Eighth Amendment cases, *Farmer* involved the claim of a single inmate. The Supreme Court has not reviewed the merits of an Eighth Amendment class action since *Rhodes v. Chapman* in 1981, and in particular has not considered the implications of its state-of-mind requirement for such cases.

Justice White, concurring in *Wilson v. Seiter*, observed that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." 502 U.S. at 310. Justice Blackmun, concurring only in the result in *Farmer*, elaborated:

> Wilson *failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level".... The responsibility for submini-mal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature.*

62 U.S.L.W. at 4454 (citation omitted). For this reason, Justice Blackmun argued that *Wilson* should be overruled.

One solution to this problem lies in the difference between damage claims, brought in an official's individual capacity, and injunctive claims, which name defendants in their official capacities. Such claims are "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). This approach lends itself to a focus on "the combined acts or omissions" of the state's agents, *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988), rather than the search for a particular "bad guy" whose individual culpability could support liability. (This point is argued more fully in the *Journal*, Vol. 8, No. 4 [October 1993] at 8-9.)

Farmer seems to assume that the subjective element of the plaintiff's injunctive claim is to be assessed in the same way as that element of her damage claim, although the issue of capacity was not raised. Additionally, the Court observes, in connection with its discus-

sion of *Canton v. Harris*, that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." 62 U.S.L.W. at 4450. (It is not clear why that is so. A standard that imposes liability where an official "knows of and disregards" an unacceptable risk seems readily adaptable to entity liability as long as the knowledge exists at a reasonably high level within the entity. *See Alberti v. Sheriff of Harris County, Texas*, 978 F.2d 893, 894-95 (5th Cir. 1992) (finding of deliberate indifference was supported by evidence "that *the state* knew that by refusing to accept felons it was causing serious overcrowding in Harris County jails") (emphasis supplied), *cert. denied*, 113 S.Ct. 2996 (1993).)

However, the *Farmer* Court did not have a systemic claim before it and did not purport to address such cases. *Farmer*'s injunctive claim involves the actions or inactions of particular identified officials with respect to a particular inmate, and not with the constraints that other state actors (including the legislature) may have placed on them, or with systemic deficiencies resulting from policies or absence of policy for which responsibility is diffuse. This kind of distinction has been acknowledged in other cases. *See LaMarca v. Turner*, 995 F.2d 1526, 1542 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) (citing "the institution's historical indifference" as a basis for injunctive relief); *Hoptowit v. Spellman*, 753 F.2d 779, 782 (9th Cir. 1985) (declining to reevaluate liability based on turnover in prison administration because the "personal conduct of the principal named defendants" was not the focus of the case); *see also Mayor v. Educational Equality League*, 415 U.S. 605 (1974) (barring an injunction based on conduct that was limited to the tenure of a single departed official).

Thus, the relevant distinction for purposes of the method of assessing deliberate indifference may not be the formal and technical one between individual and official capacity, but a practical one based on the degree to which the complaint's claims are systemic in nature and the relief sought goes to the functioning of the institution and not the treatment of an individual prisoner. But these comments are speculative at best, and will remain so until the Supreme Court finally elects to examine the implications of its recent decisions for institutional litigation.

PROCEDURAL DUE PROCESS—DISCIPLINARY PROCEEDINGS

In the last *Journal*, I commented on two Second Circuit opinions suggesting that defective prison disciplinary proceedings do not deny due process if they are reversed by administrative appeal. After those comments were written, the Second Circuit revisited the subject and definitively rejected that view. In *Walker v. Bates*, ___ F.3d ___, 1994 WL 161050 (2nd Cir., April 29, 1994), the court reasoned: "The constitutional violation... obviously occurred when the penalty was imposed in violation of state law and due process requirements. Administrative appeal, whether successful or not, cannot cut off the cause of action any more than can a [state court] proceeding...." 1994 WL 161050 at 5. It concluded: "The rule is that once prison officials deprive an inmate of his constitutional procedural rights at a disciplinary hearing and the prisoner commences to serve a punitive sentence imposed at the conclusion of the hearing, the prison official responsible for the due process deprivation must respond in damages, absent the successful interposition of a qualified immunity defense." *Id.* at 7. The court rejected the analogy, made in one of the earlier decisions, to criminal proceedings, in which defendants who prevail on appeal frequently are incarcerated pending the appellate decision. The criminal defendant's usual lack of recourse under 42 U.S.C. §1983 is attributable to the fact that judges are entitled to absolute immunity, while prison disciplinary officials are entitled only to qualified immunity. *Id.* at 6–7.

Interestingly, the court still did not refer to *Zinermon v. Burch*, 494 U.S. 113 (1990), which sets out a framework for determining when post-deprivation remedies meet due process requirements and when they do not. The notion of "cutting off the cause of action" begs the question when the presence or absence of a post-deprivation remedy may well be an element of the cause of action. However, the result in *Walker* is consistent with *Zinermon*, as argued in this column in the last *Journal*.

The court distinguished one of its earlier decisions by observing that the inmate in that case would have been confined in segregation regardless of the disciplinary conviction, and therefore no constitutional harm resulted from his additional, defective conviction. *Id.* at 6, citing *Russell v. Scully*, 15 F.3d 219, 222 (2nd Cir. 1994). In light of prison officials' history of trying to "avoid their due process responsibilities simply by relabelling the punishments imposed on prisoners," *Taylor v. Clement*, 433 F.Supp. 585, 586-87 (S.D.N.Y. 1977), a cynic might predict that New York prisoners will soon find themselves receiving disciplinary sentences and commitments to administrative segregation contemporaneously. *See also Sanders v. Woodruff*, 908 F.2d 310, 316 (8th Cir. 1990) (dissenting opinion) ("One of the unanticipated and unfortunate consequences of *Wolff v. McDonnell* has been the tendency of prison administrators to label disciplinary actions administrative rather than punitive to avoid having to comply with the due process requirements of *Wolff*"). It would be pleasant to be wrong.

The state Attorney General's office announced that it would seek *certiorari* in *Walker*.

Other Cases Worth Noting

U.S. COURTS OF APPEALS

Correspondence—Legal and Official

Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993). After *Turner* and *Thornburgh*, the Fifth Circuit cases of *Taylor v. Sterrett* and *Guajardo v. Estelle*, which applied least restrictive alternative standards to mail claims, are no longer good law. Accordingly, prisoners' incoming legal mail need not be opened and inspected only in their presence.

An allegation that outgoing legal mail was opened and material removed stated claims for denial of First Amendment rights and the right of access to courts. The allegation that officials' actions prevented plaintiff's document from arriving at court sufficiently alleged prejudice to state a court access claim.

Attorney Consultation/AIDS/Work Assignments/Standing/Deference

Casey v. Lewis, 4 F.3d 1516 (9th Cir. 1993). Under the *Turner* standard, prison officials need only put forward a legitimate government interest and provide some evidence that the interest put forward is the actual reason for the regulations. In a challenge to the prison's denial of contact attorney visits to high-security prisoners, the district court placed an "unduly onerous burden" on the defendants by relying on their failure to cite any incident of assault, hostage-taking, or escape under the former contact visit policy. At 1521: "A prison official's concern for prison security is entitled to significant deference." The policy did not eliminate all alternative means of court access. At 1523: "Contact visitation with an attorney is merely one aspect of the broad and fundamental right of meaningful access to the courts." The court does not weigh the *Turner* factor of impact on others. The plaintiffs' proposal of searches before and after contact visits was not an acceptable alternative because it only addressed the defendants' concern about contraband but not hostage-

taking and injury to staff and attorneys.

The district court should not have enjoined the defendants' policy prohibiting HIV-positive prisoners from working in food service because there was no evidence that any named plaintiff was HIV positive or that any named plaintiff had ever stated he or she was interested in a food service job or had applied for one.

Qualified Immunity/Law Libraries and Law Books/Class Actions—Effect of Judgments and Pending Litigation/Mootness

Abdul-Akbar v. Watson, 4 F.3rd 195 (3d Cir. 1993). The defendants are entitled to qualified immunity from the plaintiff's damage claims based on denial of law library access in segregation. At 203: "... [E]ach legal resource package must be evaluated as a whole on a case-by-case basis." "... [T]he standard to be applied is whether the legal resources available to a prisoner will enable him to identify the legal issues he desires to present to the relevant authorities, including the courts, and to make his communications with and presentations to those authorities understood." (203) At 203:

> *With the availability of basic federal and state indices, citators, digests, self-help manuals and rules of court, along with some degree of paralegal assistance and a "paging system" through which photocopies of materials from an institution's primary facility may be obtained, we are persuaded that even a prisoner in a segregated unit...would not be denied access to the courts. Nor could the absence from the satellite library of any particular volume or research aid be construed as a barrier to constitutionally required legal access.* [Footnote omitted]

The exact materials required may vary by institution. At 204: "The hallmark of an adequate satellite system, which achieves the broad goals of *Bounds*, is, in our opinion, whether the mix of paralegal services, copying services and available research materials can provide sufficient information so that a prisoner's claims or defenses can be reasonably and adequately presented."

A prior consent decree governing law library services is to be presumed valid and in conformity with the law; the district court's view that it did not provide adequate court access at most demonstrated that the parameters of the law were uncertain.

Once the plaintiff was released from the segregation unit, he had no further interest in the library resources available on that unit, and his claim was moot. The "capable of repetition, yet evading review" doctrine applies only to deprivations that are too short in duration to be fully litigated during their existence and that the same complainant is reasonably likely to be subjected to again. The court rejects the district court's conjecture that the plaintiff "could again" be placed in segregation. In any case, since the defendants had implemented the legal access plan approved by the district court and said they intended to stick to it, there was no likelihood that he would be subjected to the same deprivations.

Procedural Due Process—Property/Standing/Attorneys' Fees

Stewart v. McGinnis, 5 F.3d 1031 (7th Cir. 1993). The plaintiff's allegation that his property was taken in shakedowns without complying with the regulation requiring a "shakedown slip" listing the property taken and other relevant information did not state a due process claim because post-deprivation remedies were available in the state Court of Claims. The deprivation was "random and unauthorized" and not pursuant to established procedures because those procedures required shakedown slips. This holding is contrary to *Zinermon v. Burch*, which held that conduct was authorized when "[t]he State delegated to [the defendants] the power and authority to effect the very deprivation complained of here...and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." 494 U.S. at 138. (Another way to say this is that it is the deprivation of property, not the denial of due process, that must have been unauthorized.)

At 1037: "Due process requires that Stewart have a meaningful opportunity to be heard on the issue of whether the fan was contraband." As to property for which he received a receipt, the disciplinary hearing at which he was convicted of possessing contraband provided this opportunity. In addition, regulations provided that the prisoner had 30 days to file a grievance contesting whether the property was contraband; he wrote to the warden and asked that his letter be treated as an emergency grievance, but it wasn't, and he never communicated with grievance personnel.

The plaintiff lacked standing to seek injunctive relief because he had been transferred to a different prison. Even if his complaint was construed to address the entire prison system, he would lack standing. Shakedowns were conducted every 60 days but the plaintiff said he had had property confiscated only twice in one year. At 1038: "We do not believe that this rate of incidence supports a conclusion that Stewart is under an immediate threat of harm."

The plaintiff was not entitled to attorneys' fees on a "catalyst" theory based on the fact that he was transferred 15 months after his attorney demanded it. The defendants did not use the transfer to argue that the plaintiff's claims were moot, and the plaintiff failed to bear the burden of proof on the causation issue.

Evidentiary Questions/Trial

Davidson v. Smith, 9 F.3d 4 (2nd Cir. 1993). The district judge ruled that the defense could not refer to the plaintiff's psychiatric history (institutionalization during 1972-76) during his civil trial, in which he alleged that a correctional officer had destroyed some of his legal papers. This testimony was not harmless error, despite a curative instruction.

Consent Decrees/Correspondence—Legal and Official

Kindred v. Duckworth, 9 F.3d 638 (7th Cir. 1993). A class action consent decree limited the opening of "confidential correspondence," even in the inmate's presence, to cases of reasonable cause to believe it contained contraband. The district court rejected the plaintiff's motion to enforce the decree on the ground that a consent decree could not require more of the defendants than the Constitution.

At 641: "This view quite simply is incorrect. Consent decrees often embody outcomes that reach beyond basic constitutional protections...Indeed, it is a rare case when a consent decree established only the bare minimum required by the Constitution." The court also rejects the view that the decree set forth only procedural obligations or that it was intended to track minimum constitutional standards, based on the language of the decree itself.

The court rejects the defendants' argument that given the ease of smuggling contraband in confidential correspondence, reasonable grounds exist to believe that there is contraband in every piece of incoming mail, since the wording "obviously" contemplates particularized suspicion.

Use of Force/Summary Judgment

Norman v. Taylor, 9 F.3d 1078 (4th Cir. 1993). The plaintiff alleged that he took a drag of an inmate worker's cigarette and an officer ran up and hit him with his keys. The officer said that the plaintiff was not only smoking but yelling, and denied he ever threatened or hit him. The district court held that the plaintiff had insufficiently refuted the statement that he was causing a disturbance, justifying the use of force, and granted summary judgment.

The district court should not have granted summary judgment against this *pro se* litigant without directly posing the "pivotal question" whether he was creating a disturbance and

permitting him to clarify it. At n. 1081: Under the plaintiff's version of the facts, the defendant needed only enough force to stop him from smoking. "Accepting this version of events...the act of swinging heavy, brass keys at Norman's face clearly exceeded the amount of force required. It is hard to imagine a sound penological justification for using *any* physical force, without any prior warning, for such a minor violation of the jail's rules." The facts alleged could certainly support a finding of malicious and sadistic intent.

The plaintiff's alleged initial and lingering pain to his hand, swelling and decreased mobility, and psychological injury resulting from the defendant's alleged threats, is "beyond the *de minimis* level" (1082). At n. 5: The threats are "relevant to this inquiry as well."

Appointment of Counsel/ Pro Se Litigation

Williams v. Carter, 10 F.3d 563 (8th Cir. 1993). The plaintiff complained of unconstitutional jail conditions. The district court requested appointment of counsel. Before a hearing, the plaintiff had submitted a witness list, requesting that the court subpoena the witnesses. Later, in response to a form order from the court, he submitted a different list. The district court acted only on the second, despite the plaintiff's protests at the hearing, apparently treating the second list as the only one requiring attention.

The district court abused its discretion. At 567:

> *We believe this action held an uncounselled litigant to too strict a standard. When a court has denied a motion for appointment of counsel, it should continue to be alert to the possibility that, because of procedural complexities or other reasons, later developments in the case may show either that counsel should be appointed, or that strict procedural requirements should, in fairness, be relaxed to some degree.*

The district court is directed to reconsider calling the witnesses in the original list, especially state officials who had recently inspected the jail and inmates who were in it at the time of the events complained of.

Access to Courts— Punishment and Retaliation

Gibbs v. Hopkins, 10 F.3d 373 (6th Cir. 1993). The plaintiff's allegation that he was subject to retaliation for helping other prisoners with lawsuits should not have been dismissed. There is no constitutional right to assist other inmates in lawsuits, "but prisoners are entitled to receive assistance from jailhouse lawyers where no reasonable alternatives are present, and to deny this assistance denies the constitutional right of access to courts." The plaintiff should be permitted to prove that no reasonable alternatives existed for other inmates. He should have been permitted to take discovery concerning the merits of the defendants' claim that they kept him in segregation because of lack of bed space.

Law Libraries and Law Books/Transfers

Petrick v. Maynard, 11 F.3d 991 (10th Cir. 1993). The plaintiff's Oklahoma conviction was enhanced based on his prior convictions in two other states. He attempted to obtain legal materials to attack the earlier convictions but the prison law library did not have them, declined to get them, and would not authorize obtaining them through interlibrary loans.

The plaintiff's inability to challenge the convictions that resulted in his enhanced sentence meets the actual injury requirement of court access claims. The state did not meet its obligations under *Bounds*. At 995: "Having exercised its prerogative under *Bounds* to afford Petrick law library facilities rather than legal representation, Oklahoma owed Petrick a duty to provide adequate legal resources to him." In a case like this, the prisoner need not identify the materials required with specificity, but "the materials sought should be described sufficiently so that the prison can obtain them for the prisoner without being required to perform legal research for the prisoner...." The prisoner must also "*articulate*" (not prove) a need for the materials.

Modification of Judgments/ Judicial Disengagement/Pre-Trial Detainees/Crowding

Inmates of Suffolk County Jail v. Rufo, 12 F.3d 286 (1st Cir. 1993). On remand from the Supreme Court, the district court denied the sheriff's renewed motions to modify a jail conditions consent decree to permit double-celling and denied the state Commissioner of Correction's motion to vacate the decree entirely. The commissioner, but not the sheriff, appealed.

The court rejects the commissioner's position that motions to vacate are determined only by "whether the defendants are in present compliance with constitutional requirements and whether the effects of the original violation have abated." (291) The Supreme Court's decisions in *Dowell* and in *Freeman v. Pitts*, which the court "tentative[ly]" believes apply generally to institutional reform litigation and not just to school desegregation cases (293),

> *... indicated that there are two conditions that must be met before a district court is essentially obliged to terminate a litigated decree and return the institution or programs under court supervision to the governance of state or local authorities. First, the district court muse determine that the underlying constitutional wrong has been remedied, either fully or to the full extent now deemed practicable... Second, there must be a determination that the authorities have complied with the decree in good faith for a reasonable period of time since it was entered...*
>
> *Implicit in these requirements is the need for the district court, before terminating the decree entirely, to be satisfied that there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted... Whether authorities are likely to return to former ways once the decree is dissolved may be assessed by considering "[t]he defendants' past record of compliance and their present attitudes toward the reforms mandated by the decree." ... Of possible further relevance is the way that demographic, economic, and political forces may be expected to influence local authorities and the institution once the shelter of the decree has been lost.* [Citations omitted]

The court assumes *arguendo* ("we neither adopt nor reject") the standard "most favorable to the Commissioner that we can imagine being adopted by the Supreme Court," i.e., entitlement to termination on a showing "that the federal violations of the type that provoked the original action have been entirely remedied or remedied to the full extent feasible; that a reasonable period of time has passed during which such compliance has been achieved; and that it is unlikely that the original violations will soon be resumed if the decree were discontinued." (293)

Applying this hypothetical standard, the court agrees that double-celling of detainees is not automatically unconstitutional. At 293: "... [B]ut we think it obviously apparent that double-celling in very small quarters, with lack of security against assaults, and possibly other threats (disease) could violate due process." It is not clear that the sheriff's immediate plans, much less the complete vacation of the decree, would ensure constitutional conditions, given that the facility was designed with single-celling in mind. Even if the immediate plans were accepted, unconstitutional conditions might later be recreated.

The sheriff submitted a new motion to modify and gained some relief in a later district court opinion not yet reported.

Cruel and Unusual Punishment/ Negligence, Deliberate Indifference and Intent/Punitive Segregation/ Remedial Principles

LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993). Rules imposed for security reasons in a punitive segregation unit are to be reviewed under the "malicious and sadistic" standard of *Whitley* and *Hudson* rather than the deliberate indifference standard applied in *Wilson v. Seiter* to conditions of confinement. At 1452–53:

> *What LeMaire complains of are not so much conditions of confinement or indifference to his medical needs which do not clash with important governmental responsibilities; instead, his complaint is levelled at measured practices and sanctions either used in exigent circumstances or imposed with considerable due process and designed to alter LeMaire's manifestly murderous, dangerous, uncivilized, and unsanitary conduct.*

This holding is directly contrary to *Jordan v. Gardner*, 986 F.2d 1521, 1529 (9th Cir. 1993) (*en banc*), which reversed a similar panel holding by the same judge and held that deliberate indifference is applicable to security practices.

Restraints (1457): Requiring dangerous inmates to take showers in shackles does not violate the Constitution. "That LeMaire finds showering in restraints difficult is merely the price he must pay for his violent in-prison behavior."

Exercise (1457–58): The denial of exercise privileges for most of a five-year period was sufficiently serious to violate the objective prong of the Eighth Amendment, but was not imposed either with deliberate indifference or maliciously and sadistically, since it was a direct response to his own dangerous conduct. "All LeMaire had to do was to follow the rules." The court notes that he could exercise in his cell, and the district court's injunction requiring provision of tennis shoes for this purpose was not disputed.

Punitive Segregation, Access to Medical Personnel, Lighting (1458–59): Placement in "quiet cells" with two solid outer doors was not disputed to violate the Eighth Amendment. The court rejects the argument that the prohibition on their use should be limited to inmates with serious medical problems, since previously healthy inmates may have a medical emergency or be injured in a fall or accident. However, the requirements that the outer door be left open *and* an intercom be provided were redundant. The defendants also agreed to "modify its use of lighting in the cells"; the district court had found that they kept the lights on 24 hours a day.

Restraints (1459–60): The placement of inmates in full mechanical restraints while locked in their cells does not violate the Eighth Amendment as long as it is conducted in conformity with the prison's regulations, which require express approval of the superintendent or designee; limits the practice to inmate behavior risking major destruction of property, creating serious health or injury hazard, or threatening to escalate into a serious disturbance; and requires that they be discontinued as soon as it is reasonable to believe the behavior will not recur. The state did not contest the unconstitutionality of practices beyond those regulations. The district court's injunction should do no more than order the defendants to follow their regulations.

Use of Force

Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993). It was unconstitutional for prison staff to shoot the plaintiff with a stun gun because he refused to sweep his cell. The court rejects the defendants' efforts to equate the stun gun with the pain of a shock from static electricity. At 757: "This is exactly the sort of torment without marks with which the Supreme Court was concerned in *McMillian*, and which, if inflicted without legitimate reason, supports the Eighth Amendment's objective component." (Footnote omitted) At 758: "The relationship between the need for force (zero) and the force used (a painful and incapacitating shock) was excessive." At 759:

> *There is no question that prison officials may compel compliance with legitimate prison regulations. A requirement that inmates sweep their cells is clearly a legitimate regulation. Nor do we dispute that circumstances may arise where prison officials are justified in using summary physical force. These three facts, however, simply do not translate into a mandate to use summary physical force to compel compliance with all legitimate rules.*

Use of Force

Johnson v. Bi-State Justice Center, 12 F.3d 133 (8th Cir. 1993). Although the plaintiff admittedly created a disturbance and then acted to prevent the closing of a security door, his testimony that he was hit in the head, rendered semi-unconscious, and then kicked, stomped and beaten after he had been pushed to the ground and subdued might support an inference of an unnecessary and wanton infliction of pain. The appeals court says this is "not an easy question" and remands, since the trial court failed to consider the *Hudson* standard.

Religion—Services Within Institution/Access to Courts—Law Libraries

Alston v. DeBruyn, 13 F.3d 1036 (7th Cir. 1994). The district court erred in dismissing as frivolous the plaintiff's complaint of complete denial of religious services to segregation inmates without evidence concerning the prison's policy and the need for it. At 1040: "The court's assumption that the defendants were justified in restricting Alston's religious freedom simply because he was in administrative segregation was improper."

The district court erred in dismissing as frivolous the plaintiff's claim of denial of court access without a factual record. It "implied that the constitutional requirement is met whenever an inmate is given any time in a law library. Not so. The touchstone is 'meaningful' access, not just access." (1041) The lack of an allegation of prejudice did not make the claim frivolous; as a *pro se* litigant, the plaintiff should have had an opportunity to amend his complaint.

Protection from Inmate Assault

Williams v. Mueller, 13 F.3d 1214 (8th Cir. 1994). The plaintiff testified that he was assaulted by another inmate and an officer watched but did not intervene and delayed before calling for assistance. The district court granted judgment as a matter of law after the plaintiff's case. It shouldn't have. Such a motion is properly characterized as a motion for judgment on partial findings, and must be supported by findings of fact. Circuit precedent upholding a failure to intervene in an assault when it would have created a more dangerous situation may be distinguishable on the facts from this case.

Mental Health Care/Class Actions—Effect of Judgments and Pending Litigation

Martel v. Fridovich, 14 F.3d 1 (1st Cir. 1993). The plaintiff was criminally sentenced to 18 to 25 years. He was concurrently committed to the Massachusetts Treatment Center for Sexually Dangerous Persons for one day to life pursuant to a state statute that provides for discharge when he is no longer "sexually dangerous," at which time he would be required to serve any unexpired criminal sentence.

The defendants were required by consent decree to provide for "the day or other short-term release of Treatment Center patients for approved programs outside the Treatment Center where such relief is deemed appropriate by the Department of Mental Health." In 1991, after escapes from the program, the defendants suspended the program and then changed the rules to exclude persons under criminal sentence and not eligible for parole, including the plaintiff.

The change was not so "outrageous" as to deny substantive due process. Since the plaintiff did not meet the new eligibility rules, he had no state-created liberty interest that would require procedural due process. The changes did not violate the ex post facto clause because they "are not punitive but rather related to the state's concern for community safety." Insofar as the plaintiff alleges that the changes result in a denial of the adequate treatment required by the Constitution and a federal court consent decree, that concern "is best addressed through an action to enforce the consent decree." (3) At 3 n. 4:

> *Allowing the decree to be challenged through an individual action for declaratory and injunctive relief "would tend to discourage governmental authorities from entering into decrees in public law litigation, encourage the splintering of civil rights claims on an individual basis, and promote disrespect for judicial decrees duly entered following careful proactive review of the often complex mix of individual and institutional considerations involved in such litigation."* [Citation omitted]

Emergencies/Procedural Due Process/Law Libraries and Law Books/Food/Religion—Practices—Diet

Eason v. Thaler, 14 F.3d 8 (5th Cir. 1994). The plaintiff's allegation that he was placed in lockdown for 25 days even though he was not involved in the disturbances that precipitated the lockdown should not have been dismissed as frivolous. At 9: "Even though a lockdown rarely will require more than informal review, some process arguably was due Eason and, given the limited information before us, we cannot determine whether it was provided." (Footnote omitted)

The plaintiff's claim of deprivation of law library access should not have been dismissed as frivolous. At 9–10: "Though such rights may be narrowed without constitutional difficulty, especially in the wake of a riot, if Eason was pursuing a legal action which made the use of a law library necessary and all access was nonetheless denied, this deprivation constitutionally might be cognizable." (Footnote omitted)

The plaintiff's allegation that he is a Muslim and was deprived of all but three pork-free meals, subsisting on peanut butter biscuits during the 25-day lockdown, should not have been dismissed as frivolous. At 10: "Prison officials have a constitutional obligation to provide reasonably adequate food and, absent some legitimate penological interest preventing the accommodation of a prisoner's religious restrictions, food which is anathema to an inmate because of his religion is at least arguably inadequate." (Footnotes omitted)

Dear Prison Project...

Dear Prison Project:

I am a woman incarcerated in a state prison out West. The programs and law library here are very poor and I've heard the men's prison has many more programs. Can we sue for sex discrimination? How can we find out what programs are available at the men's prison?

Forgotten Female

Dear Not-Forgotten Female:

Yes, you can file a complaint against your state department of corrections if you have grounds for an equal protection (sex discrimination) claim under the 14th Amendment. Substantial barriers—such as prohibitions against correspondence between female and male inmates—make investigations of the programs available at mens' prisons difficult, but not impossible. However, once you file a complaint you can obtain information through a process called discovery.

Gail Perry, a plaintiffs' attorney in the *Klinger* case (824 F.Supp at 1391), offers the following suggestions to women prisoners: (1) send letters to friends/family and have them mail questions to male prisoners; (2) stay in contact with women prisoners who are released and who can write to male prisoners and collect documents; (3) ask for the annual department of corrections report—it is public record and you may find them "glowing" about how wonderful their programs (for male prisoners) are; and (4) ask friends and family to write and ask for other information, such as newspaper articles on prisoner programs, and ask them to send it to you. Take advantage of the word-of-mouth system and keep records of everything! Be sure not to violate any prison correspondence rules.

Ms. Perry reports that the women inmates involved in *Klinger* read *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982), and *Glover v. Johnson*, 478 F.Supp. 1075 (E.D.Mich. 1979), recognized factual similarities with their own situation, and then used the cases as models for their complaint. Women prisoners should look to *Canterino*, *Glover*, and *Klinger* for guidance.

The legal standard for a 14th Amendment equal protection claim based on gender is "parity of treatment." Parity of treatment means that the State must provide programs for women that are substantially equivalent, but not identical in form, to programs for men. *Glover*, 478 F.Supp. at 1079. Courts will analyze your case by asking the following questions: (a) are there programs provided to male inmates but not female inmates, resulting in a "substantial burden" to female inmates; (b) is there an important governmental objective for providing different programs; and (c) if so, are the program differences designed in such a way that they are substantially related to the governmental objective? *Klinger*, 824 F.Supp. at 1391. If a court answers "yes" to (a), and "no" to (b) and (c), you should win your case.

Kim Dvorchak is a student at the City University of New York Law School working as a law clerk at the National Prison Project this summer.

DISTRICT COURTS

Disabled/Qualified Immunity

Noland v. Wheatley, 835 F.Supp. 476 (N.D. Ind. 1993). The plaintiff is a "semi-quadriplegic" with a colostomy and a urostomy. He was subjected to disgusting conditions in jail and denied access to various jail programs and activities.

The plaintiff stated a claim under the Americans with Disabilities Act. Claims under Title II of the Act (public services) do not require exhaustion of administrative remedies. Though the statute is ambiguous, the court gives "controlling weight" to the Department of Justice's interpretative regulations.

Qualified immunity is not available against the ADA claims, since the very existence of the ADA and its regulations put them on notice that their failure even to attempt to accommodate the plaintiff was unlawful.

Procedural Due Process—Disciplinary Proceedings/Grievances and Complaints About Prison

Nicholson v. Moran, 835 F.Supp. 692 (D.R.I. 1993). Prison officials' policy of automatically filing a charge of providing false information against prisoners who complain

about assault by officers without obtaining the initiation of criminal charges or providing "sufficient conclusive evidence" to substantiate the allegation does not violate the First Amendment.

Disciplinary proceedings in Rhode Island are governed by the "Morris Rules," established by federal consent judgment and now embodied into state law. They require substantial evidence to support a disciplinary conviction, though "[t]here is some question" whether this standard should be applicable under §1983 in light of the Supreme Court's endorsement of a "some evidence" standard. Here, the some evidence standard was not met, since there was no evidence that the plaintiff provided false information. They only evidence against the plaintiff was a letter from the FBI stating there was insufficient evidence to support criminal prosecution and a similar letter from the Department of Justice.

Pre-Trial Detainees/Pest Control

Walton v. Fairman, 836 F.Supp. 511 (N.D.Ill. 1993). The plaintiffs' allegations that they informed the Cook County sheriff and the executive director and superintendent of the jail of an infestation of rodents was sufficient to support their liability for failure to correct it. However, the plaintiffs did not allege a city policy or custom "to allow rats or any other four-legged vermin to roam the jail freely" (514). (This holding illustrates the necessity to plead the supposed policy with specificity—e.g., a policy "to fail to provide adequate extermination services" or "of deliberate indifference to preventing vermin infestation.")

At 515: "... [I]mprisoning plaintiffs in dungeon-like conditions in which rodents crawl all over and attack them is barbarous to the standards of our contemporary society." The defendants' alleged failure to take action when informed of the infestation supported a claim of deliberate indifference.

Protection from Inmate Assault

Rutledge v. Springborn, 836 F.Supp. 531 (N.D.Ill. 1993). The plaintiff exposed an escape plot and was later threatened and assaulted several times despite prison officials' promises to protect his confidentiality.

The warden and assistant warden are not entitled to summary judgment on the plaintiff's allegation that at one point they removed him from segregation and put him in protective custody for the purpose of revealing his informant's role, and that they failed to transfer him promptly when he first reported threats against him.

False Imprisonment

Alexander v. Perrill, 836 F.Supp. 701 (D.Ariz. 1993). Prison officials were deliberately indifferent in doing nothing about the plaintiff's protestations that his good time had been miscalculated. At 705: "When an individual's freedom hangs in the balance and an official has been put on notice of a possible error affecting that freedom, it is incumbent upon the official to ensure that our democratic processes are not apathetically forfeited." The fact that the defendants did not themselves have authority to change the plaintiff's sentence did not matter.

Denial of Ordered Care

Brewer v. Blackwell, 836 F.Supp. 631 (S.D.Iowa 1993). The plaintiff's coronary artery disease is a serious medical need. The court includes a useful essay on the definition of this term (639-41). At 642: "Recklessness in the face of a serious medical need occurs if the prison officials disregard a substantial risk of danger that is known or would be apparent to a reasonable person in the prison official's position."

Suicide Prevention

Herman v. Clearfield County, Pa., 836 F.Supp. 1178 (W.D.Pa. 1993). A psychologist employed by a private mental health program who worked full-time in the jail and functioned as the jail psychologist, who made final decisions concerning prisoner supervision, and who was the only qualified person who could provide psychological screening services to detainees, acted under color of law, as did the program that employed him.

Procedural Due Process—Classification, Administrative Segregation

Casey v. Lewis, 837 F.Supp. 1009 (D.Ariz. 1993). Arizona regulations do not create a liberty interest in staying in general population and out of administrative segregation or in avoiding reclassification to higher security levels. In any case, their regulations provide the process due (hearings every six months, notice, and the opportunity to provide a statement or witnesses' statements, plus safeguards on the reliability of confidential informants). The plaintiffs had alleged that administrative segregation was used to lock up prisoners against whom prison officials could not prove disciplinary charges. The court ignores this allegation, analyzes the case in conventional due process terms, and commends the defendants for providing due process protections.

Suicide Prevention/Pendent and Supplemental Claims; State Law in Federal Court/Damages—Assault and Injury/State, Local and Professional Standards

Bragado v. City of Zion/Police Dept., 839 F.Supp. 551 (N.D.Ill. 1993). In a jail suicide case, the jury's finding of deliberate indifference on the part of a jail officer was supported by evidence that she "failed to comply with the established jail regulations and standards which provided guidance on the required precautionary measures to prevent possible suicides" (553). Even though she knew of the decedent's suicidal tendencies and intoxicated and unstable physical and mental conditions, and heard her yell repeatedly that she was going to kill herself, she did not personally monitor the decedent's cell.

Protection from Inmate Assault

Johnson v. Meachum, 839 F.Supp. 953 (D.Conn. 1993). Allegations that a warden failed to place the plaintiff in protective custody and the commissioner "failed to enact and enforce policies and procedures to protect the physical and mental health of inmates facing overt and explicit threats of physical and sexual abuse by other inmates" (955) stated a claim under the deliberate indifference standard. So did allegations that the plaintiff complained to another defendant repeatedly about incidents of sexual harassment, without response, and that a fourth defendant placed the plaintiff in a cell with another inmate that he knew presented a danger of sexual assault.

The defendants are not entitled to qualified immunity at this point because the right to protection of personal security was clearly established and their alleged behavior could not have been believed to constitute an exception to it. Whether the defendants can establish that their conduct was "objectively reasonable" depends on the facts, which are not before the court.

Restraints

Littlewind v. Rayl, 839 F.Supp. 1369 (D.N.D. 1993). The plaintiff and several other inmates assaulted an officer. Afterward, he fully cooperated with prison officials, who transported him to an "observation unit." There (at 1370-71):

> *... [P]laintiff was placed face down and without any clothes, in a 'North Dakota-style' four-point restraint [in which he] was handcuffed behind his back, his legs were shackled together by leg irons, and a length of chain connected the two behind his back... Plaintiff remained face down on his bed, with his feet bowed toward his head. The evidence was inconsistent whether plaintiff could rest his head on the bed, or whether it too was bowed toward his feet.*

He remained there for almost eight hours, with a 40-minute meal break but no bathroom break; he urinated on the bed and the floor. He was then placed in "three point restraint" for 23 hours, where he "spent the

majority of his time in a stooped position with his wrists handcuffed together underneath one leg, and both legs shackled together. In this position, plaintiff was able to use bathroom facilities, but unable to use toilet paper" (1371). He was then kept handcuffed and in leg irons for seven-and-a-half days. For all but the last three days of this period, he was kept naked, and he was without a blanket for the first two days. (This was in April in North Dakota.) He was not given a toothbrush or toothpaste until two days before his release, and his cell was illuminated 24 hours a day during the entire period.

The defendants testified that these measures were emergency safety measures, even though he did nothing disruptive during the entire period of restraint. A jury found for the defendants.

The court grants judgment as a matter of law for the plaintiff on liability and sets a trial on damages. Though the defendants cited case law upholding some of these deprivations, none of them involved all of these conditions imposed simultaneously. At 1373: "The chaining of an inmate in this manner and deprivation of every human necessity without provocation was so barbaric and inhumane that it could only have been done maliciously and sadistically for the very purpose of causing harm, and must be considered cruel and unusual punishment as a matter of law." The court notes that no justification was presented for the deprivation of clothing, the ability to use the toilet and toilet paper, and toothbrush, that the plaintiff was never examined by medical personnel although he was restrained next door to the infirmary, and also that the other three inmates were treated exactly the same as the plaintiff.

Law Libraries and Law Books/Access to Courts—Services and Materials Medical Care—Standards of Liability —Serious Medical Needs/Dental Care/Equal Protection

Canell v. Bradshaw, 840 F.Supp. 1382 (D.Ore. 1993). The plaintiff complained of inadequate law library access in a state prison intake center operated by county jail authorities. At 1388:

> *The state defendants contend the contract between the ODC and Clackamas County makes the County solely liable for day-to-day operations of the OCIC. Defendants cite no law to support the novel proposition that a state may avoid its constitutional obligations to inmates by contracting with a third party to house those inmates. The only reported cases discussing this question are squarely to the contrary....*

Moreover, staffing requirements, operating policies and procedures are jointly determined by state and county, and state officials retained the right to review the budget and make modifications as necessary. State officials "either knew, or should have known, the level of legal services that were being provided at the OCIC, and had ample opportunity and authority to adjust those levels." (1389, footnote omitted)

At 1389: "The paging system, also known as an 'exact-cite system' because an inmate must request materials by exact cite, has been condemned by courts throughout the country." By 1993, no reasonable official would have believed a paging system by itself was sufficient to protect the right of court access.

The right of court access applies to inmates temporarily housed at transient institutions such as jails and the reception center in this case. The deprivation was not *de minimis* because it was not limited to a few days and the court knew that the plaintiff had to respond to pending motions. The court also notes that the same defendants filed a summary judgment motion and asked for expedited consideration at the same time the plaintiff was deprived of legal access.

The fact that the plaintiff has continued to be a prolific litigator does not establish lack of harm. Actual injury is not required when deprivation of core court access requirements is alleged. At 1391: "In any event, 'injury' includes petitions not filed, allegations left out of the complaint, legal theories not pursued, and cases not cited in the briefs that plaintiff did manage to file." The complaint sufficiently alleged that the plaintiff missed a motion deadline and that a case was dismissed as frivolous because of his inability to conduct legal research.

An allegation of the denial of copying services stated a claim. At 1392: "Duplicating services were not expressly mentioned in *Bounds*, but the lower courts have recognized that photocopying can be an indispensable service when the plaintiff is obliged to provide copies of exhibits and other original documents to the court and opposing counsel." *Id.*

An allegation that the defendants refused treatment for a missing filling stated an Eighth Amendment claim. At 1393: "Defendants continue to labor under the fatal misconception that the Eighth Amendment duty to provide medical care is limited to conditions that are life-threatening or will cause permanent disability. In fact, the duty also applies to medical conditions that may result in pain and suffering which serve no legitimate penological purpose."

NON-PRISON CASES

Disabled/Construction of Facilities

Kinney v. Verusalim, 9 F.3d 1067 (3rd Cir. 1993). The Americans with Disabilities Act's distinction between new and existing facilities is now codified in Department of Justice regulations. At 1071:

> *With limited exceptions, the regulations do not require public entities to retrofit existing facilities immediately and completely. Rather, a flexible concept of accessibility is employed, and entities are generally excused from making fundamental alterations to existing programs and bearing undue financial burdens. 28 C.F.R. 35.150(a) & (b) (1992). In contrast, the regulations regarding new construction and alterations are substantially more stringent. When a public entity decides to alter a facility, it "shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.-151(b) (1992). This obligation of accessibility for alterations does not allow for non-compliance based upon undue burden.*

Discovery

Montalvo v. Hutchinson, 837 F.Supp. 576 (S.D.N.Y. 1993). Grand jury minutes and personnel records of police officers should be produced in discovery only after *in camera* review. At 580: "Because of these important interest on both sides of such matters, revelation of such files to adversaries should be granted where but only where found by an impartial reviewer to be likely to affect the outcome of the litigation."

Modification of Judgments

Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33 (2nd Cir. 1993). The "flexible standard" of modification stated by *Dowell* and *Rufo* is applicable in this discrimination case which does not involve a governmental entity. At 38:

> *...The "institution" sought to be reformed need not be an instrumentality of government. If a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective. Decrees in this context typically have effects beyond the parties to the lawsuit, as is true of the provisions for affirmative action remedies in this case. Though it is important to make sure that agreements in such litigation are not lightly modified, it is also important to provide all concerned with an incentive to enter into constructive*

settlements....For plaintiffs, the certainty that an agreement will be enforced without modification is an incentive to negotiate a settlement that achieves some, though not all, of what might have been obtained in litigation. For defendants, however, it is the prospect of modification as circumstances change or objectives are substantially reached that provides the incentive to settle on reasonable terms, rather than adamantly resist in protracted litigation....

The court describes its 1983 *New York State Association for Retarded Children* ("*Willowbrook*") decision as "the seminal case actually applying a more flexible standard."

Class Actions—Certification of Classes/Mental Health Care

Bradley v. Harrelson, 151 F.R.D. 422 (M.D.Ala. 1993). The father of a mentally ill prisoner could sue on his son's behalf as next friend without being declared his legal guardian, and under these circumstances his son was an appropriate class representative for a class of mentally ill prisoners. (The magistrate judge says the *father* is the class representative, but the district judge frames the question differently.)

The case meets the requirements of commonality and typicality. At 426:

...The plaintiff, through his complaint, has launched a systemic attack on the way that mental health care is provided to acutely and seriously mentally ill inmates in the Alabama prison system.... Though there certainly may be some factual differences between the individual class members and the nature and severity of their illness, such individual differences do not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way.

Rule 23(b)(2), Fed.R.Civ.P., is "particularly applicable to suits such as the one *sub judice* which involve conditions of confinement in a correctional institution."

Judicial Disengagement/ Modification of Judgments

Consumers Advisory Bd. v. Glover, 151 F.R.D. 496 (D.Me. 1993). The fact that defendants were in substantial compliance in 1983 did not entitle them under *Dowell* to vacation of a consent decree in 1993, since the decree was intended to create a continuing obligation, and since defendants made no showing of current compliance.

The defendants are not entitled to vacation under *Rufo* in the absence of any showing of changes in factual conditions. Alleged changes in the law (*Youngberg v. Romeo*) are characterized by the court as a clarification. The fact that some provisions are now embodied in state law does not bring the case within the bar of *Pennhurst*. At 501 n. 9: since the defendants did not establish changes in fact or law, they were not entitled to consideration of whether the proposed modification (vacation) was appropriately tailored. ■

John Boston is the director of the Prisoners' Rights Project, Legal Aid Society of New York.

For the Record

■ **Prisoner Visitation and Support** (PVS), a nationwide, interfaith visitation program for federal and military prisoners, has just released a 20-minute video about visiting in prison. The video includes interviews with prisoners and the volunteers who visit them. The video is an excellent way of educating people about prison — it breaks down many stereotypes of what prisoners are perceived to be by the public and shows what concerned people can do on an individual basis to bring some humanity to those who are locked up. It would be an excellent introduction for school, college or community groups planning to visit a prison. To obtain a copy, write to PVS, 1501 Cherrry Street, Philadelphia, PA 19102 (215/241-7117).

■ **Victim Meets Offender: The Impact of Restorative Justice and Mediation**, by Professor Mark S. Umbreit of the University of Minnesota, describes the results of the first large, multi-site evaluation of victim-offender mediation programs in the U.S. The study, sponsored by Minnesota Citizens Council Mediation Services in Minneapolis, examined mediation programs in which juvenile offenders meet with their victims to learn the full impact of their behavior and then make amends directly to the victims. Professor Umbreit concludes that such programs are often more effective than the traditional criminal justice system and should be given wider public policy consideration. He also discusses the procedures and problems in starting local programs. The book is available through Library Research Associates, Inc. (800/914-3379).

■ The most recent issue of **Jail Suicide Update** from the National Center on Institutions and Alternatives includes an article on the U.S. Justice Department's investigation of jail suicides in Mississippi, current research on jail suicide among American Indians, and a book review of "Deaths in Custody — International Perspectives." Copies of the newsletter (Vol. 5, No. 4, Spring 1994) are available free to readers of this *Journal* from NCIA, 40 Lantern Lane, Mansfield, MA 02048 (508/337-8806).

■ The American Correctional Association has published **Considering Marriage**, a guide for prisoners and their intended spouses to help them make the right decision regarding marriage. The book is written by Mary K. Fiskics-Warren, a minister who has counseled and officiated the ceremonies of numerous prison couples, and consists of questions and exercises to help the couple communicate and examine their relationship. Also included is advice on how to maintain a long-range relationship with an incarcerated partner, and living together and reestablishing communication after release. The book (item #193-F2) can be ordered for $8.50 (plus $3.50 for shipping and handling), from the ACA, 8025 Laurel Lakes Court, Laurel MD 20707-5075 (301/206-5059).

■ **The Future of the Death Penalty in the United States: A Texas-Sized Crisis** looks at the national implications of what is happening in Texas, which now carries out almost half of the death sentences in the entire country. Included are examples of official misconduct and resulting mistaken convictions; the evidence of racism in the application of the death penalty; the crisis in death penalty representation; and the way in which Texas' emphasis on the death penalty interferes with addressing the larger problem of crime. The report is published by The Death Penalty Information Center, 1606 20th Street, N.W., Washington, D.C. 20009 (202/347-2531).

latest in stun guns, etc.). In another example, I recently received an announcement of the 13th Annual American Jail Association Conference. On the first page, I am urged to "tap into the 65 billion dollar local jails market" and the following appears on the second page: "There are over *100,000* people who work in the nearly 3,400 local jails in the United States. Last year alone over *$65 BILLION* was spent in the industry. The local jail market is very lucrative! Jails are *BIG BUSINESS*!!" (Emphasis in the original.)

The Business of Punishment

Christie has said that we are all in the business of inflicting pain. Every sanction in the criminal justice system involves the infliction of pain—a little, a moderate amount, or a great deal of pain, but always pain. I have visited hundreds and hundreds of jails and prisons in more than a dozen countries, most recently in Eastern Europe. They all hurt people.

All of the above leads me to a series of questions. How can we be in the business of inflicting pain at the tail end of a criminal justice system that we know is unfair, that treats people differently because of race or economic status? Can we do better, can we cure the problem of bad jails and prisons? I think not. Not unless and until we do something about the larger problems of society, the inequities, the racism, the classism. No small task!

In most societies a small group of people have most of the power. This small group, in order to maintain that power, appears to need an underclass —largely made up of the poor and people of color. One of the ways the people who have the power keep it is through their system of punishment, or the threat of it.

If we all agree, as I think we must, that our current system of criminal justice is grossly unfair, inequitable and treats people differently based upon impermissible criteria—race, wealth, class, access—then we must also agree that we have no system of justice at all. Justice implies equality of treatment, indeed, justice *requires* equality of treatment. If that is true, then we have to ask whether a society is justified in imposing any punishment or pain as part of a system or process that is so fundamentally flawed.

We can debate and disagree about whether a particular prison practice or a particular action or inaction in a correctional setting is a violation of human rights or international law or the Constitution of a particular country. There can be no disagreement, however, about the fact that our current systems of criminal justice—of which corrections is an integral part—violate the most basic human right of all, the right to equality of treatment under the law.

Conclusion

I have been painting a grim and somewhat hopeless picture. Let me close by offering some hope and some light. We are, after all, going to have prisons during my lifetime and that of my children and my grandchildren. On the opening day of this conference, Supreme Court Justice Krishna Iyer led us into a discussion of the importance of humanization. So long as we have jails and prisons let us at least try to prevent too much damage to the inmates. Let us have them function as much like the outside free world as possible. Recognizing that there are vast social, political, and economic differences between different countries, let me describe one effort:

One of the ways the people who have the power keep it is through their system of punishment, or the threat of it.

In the early 1970s in Denmark, it was decided to develop an experimental prison in the town of Ringe on the island of Fyn. The first governor of this prison, Eric Andersen, was given a very free hand in its design. As a result of those early decisions and plans, Ringe today holds prisoners who are between the ages of 18 and 25, who are recidivists, have sentences of two years or more (which is long in the Danish system) and must have had behavioral problems or disciplinary problems in the prior incarcerations—in other words, difficult prisoners. Not only is Ringe co-ed, but women prisoners who have babies are allowed to keep them with them in the prison, subject to the warden's approval, up to age three.

The prison at Ringe is small—six separate units of 16 prisoners each for a total of 96. Each housing unit is a self-contained unit. In the hiring of staff, Andersen had only two requirements. First, they must never have worked in a prison before; that way they were more free of preconceived notions or biases. Second, they must be experienced carpenters or cabinet makers. One of Andersen's desires was to eliminate the distinction between security staff and treatment staff. All the officers are required to do both kinds of work. Since the main industry was furniture making, officers have to be able to teach woodworking in the prison factory.

Officers wear no uniforms. One of the main goals of the prison is to make it as much like the real world as possible except that, recognizing it is a maximum security prison, prisoners are unable to go beyond the perimeter security without escort. From the beginning, prisoners have been involved in meetings with staff to develop rules and regulations for the functioning of the prison. All are required to work and are paid wages. The local bank opened a branch inside the prison where prisoners take care of their own funds and banking needs. The local grocery maintains a market in the prison where prisoners shop for and buy their food. Each of the housing units has a kitchen and dining room area where prisoners prepare their own food. The prison administration itself does not involve itself in this at all. The whole object, of course, is to require prisoners to do what they would have to do for themselves when they reenter the free world, rather than have the prison do everything for them and have them become institutionalized.

About six or seven years ago I invited Governor Andersen to the United States to participate in a conference that we were sponsoring. In connection with that visit he accompanied me to a meeting of the American Bar Association's Sentencing and Corrections Committee. He made a presentation to that group describing the prison at Ringe, and was subsequently asked about the cost and the recidivism rates. Andersen acknowledged that it cost a little more than the normal maximum security prison in Denmark because of its still experimental nature (although today it is no longer an experiment and many of the innovations at Ringe are utilized throughout the Danish prison system). Andersen said that recidivism was not really the point for them; their first desire was to stop making prisoners worse, and that rehabilitation, so-called, would have to take place in the community itself. At that point a member of the Committee, a judge from Denver asked, "If it doesn't work better or cost less, why do you do it"? Anderson paused, looked over his glasses and said, "Decency, human decency. Isn't that enough?"

What I hope we will all take away from this conference is the importance, at all times, in our work of remembering those words and letting those words guide our every action. ■

THE NATIONAL PRISON PROJECT

AIDS Update

An Interview with Theodore Hammett

BY JACKIE WALKER

Since 1986, the National Institute of Justice (NIJ) publication, *HIV/AIDS in Correctional Facilities,* has been the only national review of policies on the correctional management of prisoners with HIV/AIDS. I recently spoke with Theodore Hammett, senior researcher at Abt Associates and principal author of the annual *Update* to the NIJ publication. We spoke about the *Update* and changes in the field.

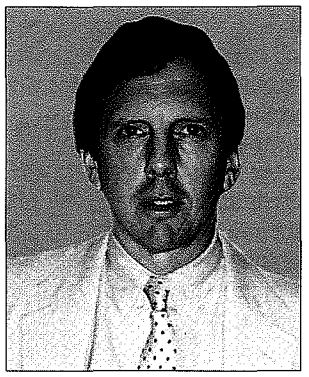
JW: How did the *Update* begin, and how do you actually go about gathering the information?

TH: The study was initiated after NIJ began receiving calls from prison systems concerning the management of prisoners with HIV/AIDS. Most systems had no idea what to do. Based on this lack of knowledge, NIJ initiated a national survey to learn what policies were emerging. Abt Associates was selected to contract the survey and the American Correctional Association (ACA) was enlisted as a co-sponsor. Since 1986 the reports have been published yearly. The Centers for Disease Control have reviewed drafts since the survey began and, with the 1992 *Update*, have joined NIJ as a sponsor.

Historically, the survey has been sent to state departments of corrections. This year we are also sending an abbreviated survey to 50 state correctional facilities, the idea being to compare what they say is happening with what is actually happening. We also include information from site visits to a variety of correctional facilities. Sites are chosen that have interesting policies or severe problems.

JW: What have been the most significant changes in the care and management of prisoners with HIV/AIDS since the first report in 1986?

TH: There have been a number of changes. First, there has been a change in the mentality of the correctional administrators. In the beginning there was more hysteria and panic. Now administrators see HIV/AIDS as a continuing issue. Other changes include a decline in systems practicing segregation and mandatory testing. There was a sharp jump in mandatory testing between 1986 and 1988, but it has been level since 1989. In fact, the number of states practicing mandatory testing didn't change between 1991 and 1992. The real change has been in the nature of the debate surrounding mandatory testing. The old argument was that mandatory testing was part of preventing transmission. Now the argument is framed in terms of identifying people for early treatment.



Theodore Hammett, author of *HIV/AIDS in Correctional Facilities.*

There has also been an increase in linkages with academic institutions for medical care, participation in clinical trials, and medical parole or compassionate release programs. We continue to see a higher rate of HIV infection in women prisoners than in men. I think services for women in prison have lagged behind somewhat. A lot more needs to be done in that area.

JW: Does the *Update* function beyond being a statistical analysis?

TH: I hope it does. The response to the *Update* has continued to be very positive. Not just as a statistical series, but to show examples of innovative programs and of the pros and cons of certain policies. The *Update* has also been helpful in formulating policies in certain systems.

JW: Are there any particularly innovative programs for prisoners with HIV/AIDS?

TH: The 1992 *Update* includes a segment on a two-year-old program in Rhode Island that provides a continuity of care model. Doctors from Brown University provide medical care, counseling, and discharge planning for prisoners with HIV/AIDS, and follow-up care upon release. With this type of program more than medical records are passed on—prisoners retain the same provider. There seem to be an increasing number of facilities arranging for medical care with academic schools. It's a good idea because it brings in outside expertise. With this higher level of expertise prisoners almost inevitably receive better care. In terms of education and support, I think the ACE program at Bedford Hills is good. There are now a number of peer-based programs that bear replication.

JW: What are the biggest challenges in the corrections and HIV/AIDS field?

TH: I think that achieving better quality of care in prison and providing continuity of care after release are the key challenges. There needs to be much more use of condoms and bleach. I understand it is a difficult position for administrators to take because it condones behavior which is against institutional rules.

But the countervailing argument that it occurs is very important. Bleach is another, more difficult issue. We've already seen some facilities with *de facto* policies regarding access to bleach. But the day we see needle exchanges in correctional facilities is very far off, if ever.

JW: What, in your own research, has shown you the most effective ways of handling the care and management of prisoners with HIV/AIDS in correctional facilities?

TH: I think that as the World Health Organization guidelines point out, we should strive to achieve a standard of care comparable to the community, as much as possible. This means no mandatory testing, no segregated housing, aggressive encouragement for people to test, and educational programs. There also needs to be intensive psycho-social care and peer support programs. And finally, we need much better discharge planning for prisoners to be able to access care on the outside. ■

"1992 Update: AIDS/HIV in Correctional Facilities" is available free. Call 1-800-732-3277.

Jackie Walker is the Project's AIDS information coordinator.

THE NATIONAL PRISON PROJECT

Publications

QTY. COST

___ **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.

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

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

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

___ **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.

Fill out and send with check payable to:

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

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THE NATIONAL PRISON PROJECT

Highlights

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

Farmer v. Brennan—The Supreme Court of the United States issued a unanimous opinion on June 6 reversing and remanding a lower court decision dismissing a prisoner's case. The Supreme Court's decision allows Dee Farmer, a pre-operative transsexual who was beaten and raped at USP-Terre Haute, to take her case back to the lower courts. For a detailed analysis of this case, see Case Law Report, page 6.

Ilick v. Miller—A class action lawsuit filed in May on behalf of inmates at Ely State Prison (ESP), Nevada, alleges that "an atmosphere of terror and violence" pervades ESP, resulting directly from improper training, supervision and discipline of correctional staff at this remote facility. The lawsuit alleges excessive use of force including "frequent and systematic beatings, the intimidating use of dogs, use of taser guns, chemical gas, electrified batons (cattle prods), nova (electrified) shields, and shotguns." It also challenges ESP's "shoot to wound" policy. Prisoners report being shot at for failure to obey orders to disperse, and even for "stepping out of line" on the way to the dining room. Medical care at the prison is inadequate. Prisoners are required to pay a fee to obtain medical care, and to purchase their own over-the-counter medications. They must also pay for personal hygiene items, reading and writing materials, and postage and phone calls, although most receive no state pay. The lawsuit also alleges that the special housing units (condemned men's unit, and disciplinary and administrative segregation) subject prisoners to a system of "terror, deprivation and isolation." Other issues include inadequate access to the law library, lack of proper winter clothing, and visitation hardships caused by prison lockdown policies.

Carty v. Farrelly—In a complaint filed in June, the NPP seeks relief from unconstitutional conditions for men and women, both sentenced and pre-trial, held at the Criminal Justice Complex (CJC) on St. Thomas in the U.S. Virgin Islands. For almost two years, the prisoners have been locked up for 23 hours a day in overcrowded, filthy cells infested with rats and roaches. They are allowed out for only a short period each day to shower and for an hour of recreation twice a week. Cells designed for one person are being used to house four or five, with mattresses on the floor which are frequently soaked by malfunctioning, overflowing toilets. The drinking water, recycled from the showers, is contaminated. The complaint describes the serious fire danger to the prisoners who are held on the third floor of a three-story building where the only exit is a locked stairway. Medical and mental health care is grossly inadequate. Mentally ill prisoners do not receive proper treatment and are housed with the general population.

Anderson v. Orr—The NPP has asked the District Court in Indiana to find the Department of Corrections in contempt of the court-approved agreement reached in 1989 concerning conditions at Westville Correctional Center (WCC). That agreement provided for a comprehensive health care service program and sweeping reforms in the psychiatric unit. Defendants have never fully complied with all the conditions of the settlement, and in the last year the level of medical and psychiatric services has deteriorated significantly. Instead of providing close supervision and intense treatment, extended use of physical restraints and seclusion continue as the treatment of choice for the mentally ill, with poor monitoring of medication. For the general prison population at WCC, the number of psychiatric and general medical staff has not been increased to the levels promised in the agreement. Prisoners, including the indigent, are instructed to buy over-the-counter medications without any clinical assessment of their condition. ■

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