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Crime Bill Guts Educational Programs

The Angolite

Paralegal course graduates, class of 1993-94, were honored last May at Northwest Missouri Community College's commencement exercises at the Louisiana State Penitentiary at Angola, Louisiana. Another 39 students graduated from the computer technology program. Under the new crime bill, these programs will be eliminated.

The following is an address given by John Whitley, Warden of the Louisiana State Prison in Angola, to inmate graduates of paralegal and computer programs at the prison. He challenges the idea of "tougher" sentencing as a means to control crime and criticizes Congress for ending educational program funding for prisoners (Pell grants).

This is our second graduating class, and it may well be our last. We're having a War on Crime; it's the problem of the year. Politicians fight to show who can be the toughest. The country is ready to spend billions of dollars on what politicians say are solutions to crime: more prisons, longer sentences, more death penalties, and the famous "three strikes and you're out." These are supposed to deter violent crime.

Let's look at a state that has tried them for the past 20 years. Louisiana has increased its prisons from 3 to 12 since 1975. Louisiana has lengthened sentences until we have the harshest penalties in the nation. We have executed 21 people since 1983. For the last 15 to 20 years Louisiana has had laws that for all practical purposes mean one strike and you're out. Its 12 prisons are full, housing about 17,000 inmates. We have 7,000 more state prisoners in parish jails waiting to come to prison. Our death row has 43 inmates, with more on the way. And more lifers are being kept in prison until they die.

If these policies were effective, Louisiana would be the safest state in the Union. Is it measurably safer? Only a few months ago Louisiana was declared the most dangerous in the nation in which to live.

Congress also wants to end post-secondary education programs for prisoners. The Clinton Crime Bill will stop Pell grants for all inmates in prison. This, when statistics show that education is one of the few things that work. Politicians aren't sure what to do about crime, but they're going to do something. I consider myself to be

INSIDE . . .

tough on crime, but only if it makes sense.

Violent crime is not coming from in prison; violent crime is coming from young criminals on the streets. Inmates in prison are out of the war. Give them something that can keep them out of the war after they return to the streets — education. The better educated a person is, the better chance he has of staying out of prison.

Is it measurably safer?

It's a shame that after this administration has fought so hard to get education here at Angola, we may see it disappear. Politicians say it's not fair to taxpayers to pay for educating prisoners. I say taxpayers are either going to pay now or pay later. ■

New Legal Standard Set on Religious Rights of Prisoners

BY NICK STRALEY AND STEPHANIE MORRIS

May a prison restrict an Orthodox Jewish prisoner's right to have a beard; or an American Indian prisoner's right to not cut his hair? Before November 1993, the answer was quite often "yes." Under *O'Lone v. Estate of Shabazz*, 482 U.S. 347 (1987), prison restrictions were upheld so long as they were "reasonably related to legitimate penological objectives." However, in November 1993, President Clinton signed the Religious Freedom Restoration Act [RFRA] which was intended "to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Shabazz*." S. Rep. No. 111, 103d Cong., 1st Sess. at 9 (July 27, 1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1899. Under RFRA, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except ... if it demonstrates that application of the burden (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." Title 42 U.S.C. §2000bb-1 (Supp. 1994). State and federal prison regulations must meet this strict standard. See, S. Rep. No. 111 at 9-12. Notably, Congress specifically rejected an amendment to RFRA which would have exempted prisoners' free exercise claims. *Id.* at 11.

...[D]efendants have the burden to come forward with evidence that any policy burdening religious freedoms is the least restrictive policy.

Pre-*O'Lone* case law in which the court upheld a prisoner's rights may provide some insight into which religious restrictions are inappropriate. However, although Congress claimed to restore the traditional test, few pre-*O'Lone* cases applied both the compelling interest and the least restrictive means standards. Thus, cases in which the court upheld restrictions provide little insight into what restrictions are appropriate. *See* John Boston, *Highlights of Most Important Cases*, National Prison Project JOURNAL, Vol. 9, No. 9, 7-9 (Spring 1994). In this article, we will examine the new legal standard in light of the prisoner religious rights case law decided under RFRA. Following this article we list the post-RFRA prisoners' rights cases.

Substantial Burden on a Person's Exercise of Religion

To prove a violation of the Act the plaintiff must "make a threshold showing that his exercise of religious rights has been substantially burdened." *Boone v. Commissioner of Prisons*, 1994 U.S. Dist. LEXIS 10027 at *23 (E.D.Pa July 21, 1994). Since neither "religion" nor "substantial burden" are defined by the Act, recent courts have examined pre-enactment precedent to help define these two terms. *See also*, S. Rep. No. 111 at 12 (discussing role federal courts play in differentiating between sham and sincerely held religious beliefs).

What is a Sincerely Held Religious Belief?

Prior to the Act, courts generally gave deference to plaintiffs' sincerely proffered interpretations of the tenets and requirements of their own religion, unless an asserted claim was "so bizarre; so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707, 713 (1981); *see also United States v. Lee*, 455 U.S. 252, 257 (1982) (Supreme Court accepted the plaintiff's contentions concerning the fundamental beliefs of the Amish religion by stating, "[i]t is not within the 'judicial function and judicial competence,' to determine whether appellee or the Government has the proper interpretation of the Amish faith; 'courts are not arbiters of scriptural interpretation'"); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989).

Since passage of the Act, a few courts have confronted this issue in the midst of prisoner rights litigation. For example, in *Allah v. Menei*, 844 F.Supp. 1056 (E.D.Pa 1994), a district court invalidated a Pennsylvania prison regulation enabling

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prison officials to determine whether one faith is theologically identical to another.

"The defendants have thus far barred recognition of the Temple of Islam, a faith group that the plaintiff believes is substantially different from the Nation of Islam. The defendants seem to assert that prison officials may judge whether the plaintiff's honestly believed contentions of difference between his faith and the Nation of Islam are correct. The government has a constitutional obstacle to making any such judgments." *Id.* at 1065.

In *Campos v. Coughlin*, 854 F. Supp 194, ___, 1994 U.S. Dist. LEXIS 5721, *44 n.13 (S.D.N.Y. May 3, 1994), the court stated in *dicta* that individual religious practices which vary slightly from traditional religious doctrine do not necessarily invalidate a claim. "That some adherents choose to follow certain tenets of a religion in a manner different than the majority, does not alter the genuine character of the religious tenet or the importance to the adherent of the manner in which he or she follows the tenet." *Id.* Nevertheless, the *Campos* court paid a great deal of attention to the opinions of experts concerning the importance of beads to adherents of the Santeria religion. *Id.*

As in *Campos*, other courts have not readily accepted religious interpretations advocated by prisoner plaintiffs absent other evidence. Without "documentation or affidavits" in support of his argument, the Eighth Circuit rejected a prisoner's claim that he had not violated Muslim tenets requiring fasting, by eating while injured. *See Brown-El v. Harris*, 1994 U.S. App. LEXIS 14379, *2 (8th Cir. June 13, 1994). A district court in *Rust v. Clarke*, 1994 U.S. Dist. LEXIS 5663 at *2 n.1 (D.Neb. April 21, 1994), requested additional information concerning the beliefs and practices of members of the Asatru religion from "published theology texts or similar objective sources." When bringing a claim under the Act, plaintiffs should be prepared to provide evidence concerning the religious nature of their beliefs, especially when the religious practice or belief is not one generally known or recognized.

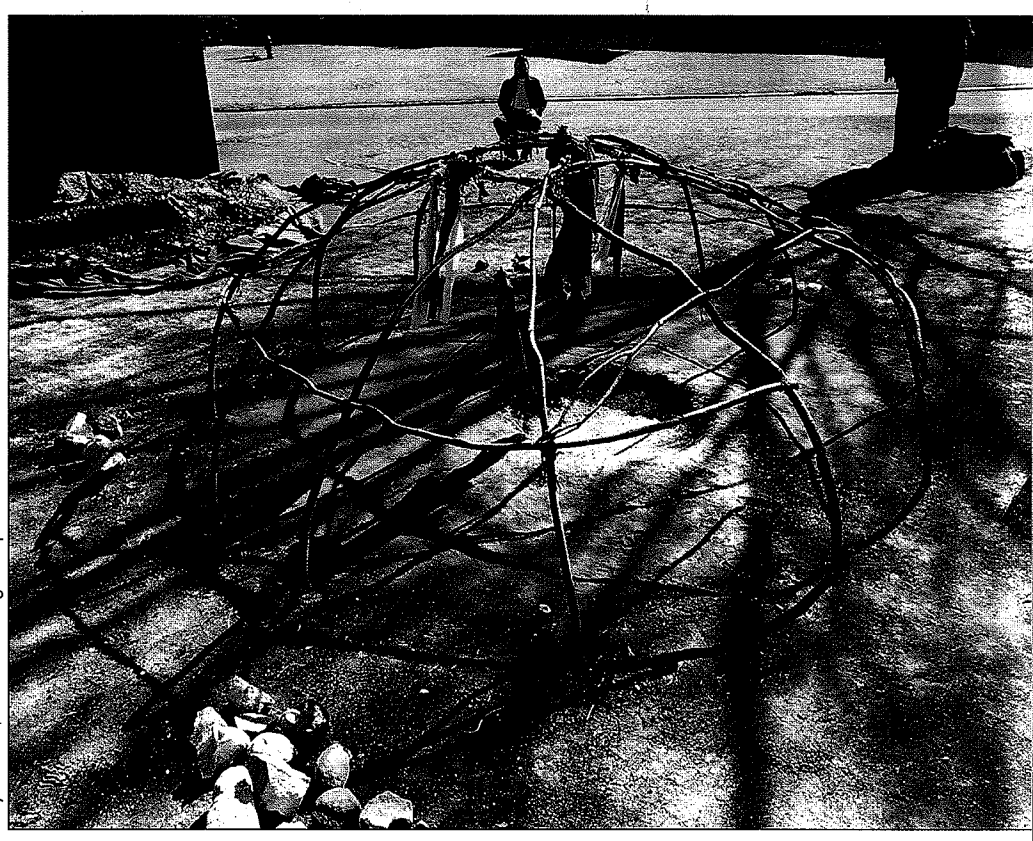
What is a Substantial Burden?

Once a plaintiff demonstrates that a restrictive policy has an impact on a bona fide religious belief or practice, the court will examine whether the policy imposes a "substantial burden" upon a plaintiff's ability to practice this religion. A governmental activity places an impermissible burden upon an individual's religious freedom, "by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more that an inconvenience: the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." *Boone*, 1994 U.S. Dist. LEXIS 10027 at *22, (citing *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987)), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680, 688-700 (1989).

Certain limitations on state intrusion in the religious lives of prisoners can be identified within the *Boone* court's opinion. Prisoners must be allowed the opportunity to pray and to meet with other inmates to worship within a group. The state may not completely deny a prisoner access to religious literature. Disciplinary detention is not a *per se*, substantial burden upon an individual's religious freedom. However, even in disciplinary detention the inmate must have the opportunity to pray and read religious texts. *Boone*, 1994 U.S. Dist. LEXIS 10027 at *24.

In Furtherance of a Compelling Government Interest

Any state action that places a substantial burden upon religious freedoms must be in furtherance of a compelling state interest. "Only regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims." S. Rep. 111, 103d Cong. at 11. Safety and security within the prison will continue to meet this high standard. *See Campos*, 1994 U.S. Dist. LEXIS 5721 at *34 (citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)) ("Prison security and penological institutional safety goals are a most compelling government interest"); *Lawson v. Dugger*, 844 F. Supp. 1538, 1542 (S.D. Fla. Feb. 16, 1994). However, "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the Act's requirements." S. Rep. 111, 103d Cong. at 10. Courts should be cognizant of attempts by prison officials to "manufacture security rationales for practices that are in reality based on financial or administrative factors," (Boston, *supra*), interests which are not normally considered compelling.



Tony O'Brien, Frost Publishing Group

A sweat lodge frame which was built at the South Dakota Penitentiary in the early 1980s. Sweat lodges are used in Sioux purification rites. Heated rocks are dropped in the pit, and blankets are wrapped around the frame to trap the steam.

Least Restrictive Means of Furthering that Compelling Interest

Although the policy may further a compelling state interest, courts will nevertheless invalidate prison policies that do not represent the least restrictive means of effectuating that interest. Recently a Florida Department of Corrections' policy totally banning Hebrew Israelite literature from its prisons was overturned on this basis. *Lawson*, 844 F. Supp. 1538. In response to the defendants' argument that the literature fostered racial hatred and therefore caused a security risk, *Lawson v. Wainwright*, 641 F. Supp. 312, 327 (S.D. Fla. 1986), *aff'd* 840 F.2d 781 (1987) (1994 court affirmed and readopted initial findings of fact), and after reviewing the group's literature, the court wrote:

"The documents do not, on their face, advocate or encourage any unlawful or disruptive actions by inmates (or any other person), and no testimony was presented which would suggest that their introduction and use within the prisons presents a 'clear and substantial threat' to any of the defendants' legitimate penological goals."

On the contrary, the evidence shows that, in those institutions in which the subject literature was made available to inmates (either officially or surreptitiously), no incidents of violence or disciplinary problems occurred which could be attributed to the use of these documents for study and worship.

Id. at 327. Thus, the court concluded, the ban was not the "least restrictive means" to assure prison security. *Lawson v. Dugger*, 844 F. Supp. at 1542.

Plaintiffs may suggest to the court other less burdensome means of furthering the government interest. The prison's policy will then be upheld only if the defendants are able to justify not using the less intrusive, proposed alternative. For example, in *Campos*, 1994 U.S. Dist. LEXIS 5721, a pair of prisoners challenged Department of Corrections' directives which prohibited prisoners from wearing certain religious artifacts, including religious beads. The prison officials alleged that the system-wide use of beads as gang membership identification symbols caused "friction, rivalries and even violence among inmates." *Id.* at *5. The plaintiffs, however, stated that the beads functioned solely to "protect [them] from danger and from evil to which [they] might otherwise be vulnerable," and to "bring [them] good fortune, peace, purity and good health." *Id.* at *13 (alterations in original).

In granting a preliminary injunction, the court ruled that a complete ban on the wearing of beads was not the "least restrictive means" of furthering the state's compelling interest in combatting the spread of gangs within the prison system. The defendants were unable to provide the court persuasive evidence that wearing beads under clothing posed a security risk; but instead merely "articulated a speculative difficulty associated with the enforcement of the directive if they permitted inmates to wear their beads under their clothing." *Id.* at *37.

In the future, prison authorities will need to employ more narrowly defined policies in order to further security interest and avoid infringing upon prisoners' religious rights. As these cases demonstrate, defendants have the burden to come forward with evidence that any policy burdening religious freedoms is the least restrictive policy. They may also be required to prove that other, less restrictive policies suggested by the plaintiffs will not advance the same compelling interest.

...[E]ven in disciplinary detention the inmate must have the opportunity to pray and read religious texts.

Conclusion

May a prison restrict an Orthodox Jewish prisoner's right to have a beard; or an American Indian prisoner's right to not cut his hair? The answer now is most likely "no." Congress has specifically protected the religious freedom of prisoners by enacting RFRA. Pre-Act case law, favorable to prisoners, seemingly invalid after *O'Lone*, is now useful precedent when litigating religious freedom claims against correctional officials. For example, in *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975), the Eighth Circuit ruled that prison officials violated the civil rights of an American Indian by prohibiting him from wearing long braided hair, a fundamental element of his Cree religion. The holding in *Teterud* should be good law in light of RFRA.

In addition, many prisons have begun to update their regulations in order to comply with RFRA. State correctional officials in Oklahoma rescinded their prohibition on long hair and beards immediately following the passage of the RFRA. The Department of Corrections cited the expense of litigating religious rights cases, the absence of security breaches, and the passage of RFRA for its decision to rescind its policy. *Oklahoma Department of Corrections Internal Memorandum from Director Larry Fields*, (November 10, 1993). *See also* Anthony Thorton, *Prisons End Grooming Battle: Inmate Policy to Allow Long Hair*, The Daily Oklahoman, December 14, 1993. As the Oklahoma DOC's decision indicates, correctional officials must now formulate policy that respects the religious rights of prisoners or face intense judicial scrutiny. By enacting the RFRA, Congress took a substantial step forward in protecting individual religious freedoms. ■

Prisoners' Rights Cases Decided Under the RFRA as of August 28, 1994:

Merritt-Bey v. Delo, 1994 U.S. App. LEXIS 14892 (unpublished decision) (8th Cir. May 12, 1994) (summary judgment for defendants affirmed when members of the Moorish Science Temple of America failed to show that their exercise of religion was substantially burdened by the prison officials refusal to buy materials with canteen funds from a particular Temple).

Brown-El v. Harris, 26 F.2d 68 (8th Cir. April 15, 1994), *reh'g denied*, 1994 U.S. App. LEXIS 18404 (July 21, 1994) (court upheld policy in which an inmate who broke his fast during Ramadan would no longer be provided meals after dark).

Smith v. Elkins, 1994 U.S. App. LEXIS 4293 (unpublished decision) (9th Cir. Jan. 31, 1994) (Muslim inmate, who alleges that he was praying in Arabic, was disciplined for making an utterance capable of being heard by others in a language other than English; case was remanded to consider restriction under the RFRA).

Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. Feb. 8, 1994) (court noted, in a non-religious rights case, that "the constitutionality of [the RFRA] — surely not before us here — raises a number of questions involving the extent of Congress' powers under Section Five of the Fourteenth Amendment").

Bates v. Oregon Department of Corrections, 1994 U.S. Dist. LEXIS 11423 (D. Ore. August 11, 1994) (call out system for all non-Catholic and Protestant religious services does not violate constitutional rights of inmates even under the RFRA).

Prins v. Coughlin, 1994 U.S. Dist. LEXIS 10564 (S.D.N.Y. Aug. 3, 1994) (court denied reversal of transfer of Jewish inmate; the inmate claimed that he was not being provided adequate kosher food at the new institution, but the court found that he was provided adequate food and that he was a security risk at the old institution).

Boone v. Commissioner of Prisons, 1994 U.S. Dist. LEXIS 10027 (E.D.Pa. July 21,

1994) (summary judgment granted for defendants when officials confiscated only religious documents that indicated that prisoner was organizing an "unauthorized and potentially coercive paramilitary-type group;" when 15-day cell restriction, in which prisoner could not teach and lead group religious discussions, was the result of prisoner's failure to follow regulations; and when requirement of prior approval for group meetings did not substantially interfere with prisoner's ability to practice his faith).

Campos v. Coughlin, 854 F. Supp 194, 1994 U.S. Dist. LEXIS 5721 (S.D.N.Y. May 3, 1994) (court granted plaintiffs' preliminary injunction forbidding directive which prohibited inmates from wearing religious beads).

Rodriguez v. Coughlin, 1994 U.S. Dist. LEXIS 5832 (S.D.N.Y. May 4, 1994) (same as *Campos* above).

Rust v. Clarke, 851 F. Supp. 377 (D. Neb. April 22, 1994) (defendants' motion for summary judgment denied, without prejudice, when the defendants failed to discuss RFRA. Followers of the Asatru religion sued Nebraska DOC Services after being denied privileges).

Allah v. Menei, 844 F. Supp. 1056 (E.D. Pa. Feb. 23, 1994) (defendants' motion for summary judgment denied when inmates asked that the Temple of Islam be recognized as a distinct religion from the Nation of Islam).

Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. Feb. 16, 1994) (total ban of literature of the Hebrew Israelite Church not least restrictive means).

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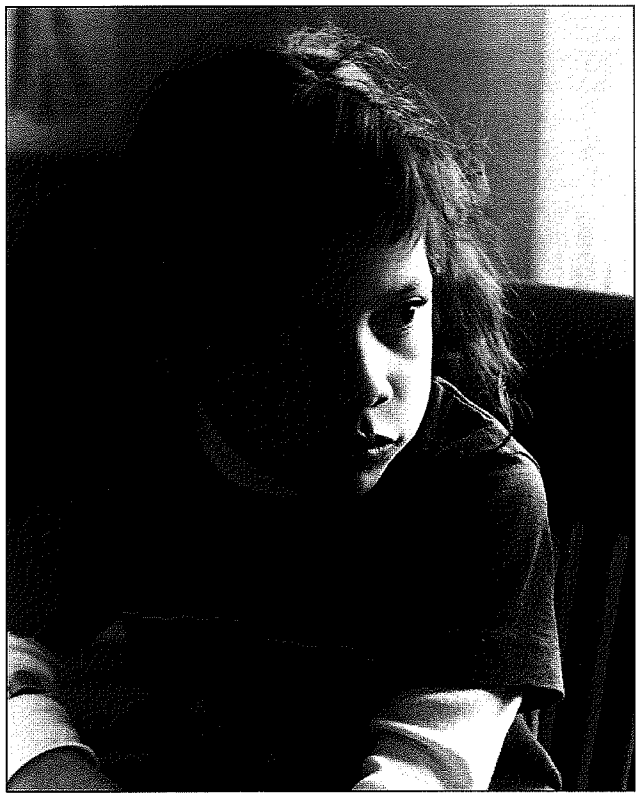
When Parents Are Sent to Prison

BY RUSS IMMARIGEON

A group of young people at Edwin Gould Services for Children in New York City recently expressed some of the feelings they have and the problems they encounter in the following comments: "It's horrible." "It's depressing." "I can't see my mom every day." "She's not home when I come home from school." "I miss her cooking." "There is no one to tell me a story, to tuck me into bed." "No matter how hard I try, I still feel guilty about this myself." "I lost a good role model." "I was an A student, then my grades ran down and I stopped going to school. Not one teacher asked me why or sought to take an interest in me."[1]

Other concerns, such as financial needs, housing assistance, and parental attachment, loom larger once the surface of this issue is scratched, but, by and large, the child welfare and corrections literature is rather remiss on this question. The American Bar Association's Center on Children and the Law's "Children on Hold" Project is currently completing a three-year investigation of how local jails, the police, and child welfare agencies respond to the children of arrested and convicted parents. But there is very little information available about what specifically happens to children when their parents are imprisoned. Do they live with the non-incarcerated parent, other relatives or grandparents? Are they placed with non-relatives? Or, do they become homeless?

Moreover, what kinds of financial entitlements do they need or receive: Aid to Families with Dependant Children (AFDC)? Foster or kinship care payments? Or are they left with economically strapped families who now have to struggle even harder with scant or fragile fiscal resources? Will they be adopted by a family member or by a traditional foster parent? Parental rights may be terminated, effectively cutting them off from further contact with their mother or father; they may live in another context—open adoption, legal guardianship, or kinship care. Or will they drift through life with little sense of permanency?



Marilyn Nolt

When a parent is imprisoned, can parental rights be terminated?

Imprisoned Women and Their Children

Nationally the number of incarcerated women has soared disproportionately to the number of men incarcerated over the past decade. And the accelerated confinement of African-American women has expanded even more dramatically.[2]

The more women are incarcerated, the more their children are victimized.[3]

According to the most recent Bureau of Justice Statistics report on "Women in Prison," two-thirds of the 39,000 women in state prisons in June 1991 had at least one child under the age of 18 and only 9 percent of these women were visited by their children. More than one-half of the women said that at least one of their minor children was living with grandparents, over 25 percent were living with their mothers and/or fathers, about 20 percent were living with other relatives, and 4 percent were in the care of friends. Only approximately 11 percent of the children were in foster homes or similar settings.[4]

In 1991, the ABA's Children on Hold Project started with the assumption that "increased drug enforcement efforts have resulted in greater numbers of arrests of *women* who are sole caretakers." In developing its research design, however, the project expanded its scope to "examine system-wide responses of law enforcement, child welfare, and corrections officials in any case in which a *sole* parent is arrested for any type of crime (except

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Highlights of Most Important Cases

BY JOHN BOSTON

CONTEMPT

The Supreme Court's parting gift of the 1993-94 term to civil rights litigators was not a civil rights case but a contempt case arising from a labor dispute. However, it has significant implications for enforcement of civil rights injunctions, including those in prison cases, where the difficulties of obtaining compliance are notorious and the need for enforcement measures is frequent. Unfortunately, the Court's concern was entirely for the dangers of arbitrary action or other abuse of power by judges who have become too personally invested in the proceedings, and not for the practical problems of judges and litigants faced with protracted noncompliance with remedial orders.

In *International Union, United Mine Workers of America v. Bagwell*, 114 S.Ct. 2552 (1994), a state court judge had imposed fines totalling $64 million—which it characterized as coercive civil fines—against a labor union for violating an injunction against various unlawful activities during a strike. The strike was settled, and the parties agreed to vacate the fines, but the court refused to vacate those it had made payable to state and local governments, totalling about $52 million. To collect the fines, it appointed a special commissioner, who became the petitioner in the Supreme Court.

The issue put to the Supreme Court was whether substantial noncompensatory fines in a fixed amount, payable to the court or government, could be awarded in a civil contempt proceeding, or whether a criminal contempt prosecution was required. (A narrower question—whether civil fines could survive the parties' settlement of the main dispute—was mooted by the Court's decision, and a third question—whether these fines violated the Eighth Amendment's Excessive Fines Clause—was not reached.)

The Court rejected the rather straightforward arguments the parties put before it. The Union argued that because the injunction was primarily prohibitory, violations of it should be deemed criminal. The Court observed that the distinction between mandatory and prohibitory is difficult to draw and that the same obligation may sometimes be stated in either form. 114 S.Ct. at 2561. The special commissioner, conversely, argued that as long as the fines had been announced in advance, they were civil, since the adverse party could avoid them by complying with the order. Under this argument, a prospective fine schedule such as the trial court adopted is indistinguishable from a system of per diem fines. However, the Court declined to permit advance notice to be the touchstone of civil contempt, since advance notice of prohibited conduct and the sanctions to be imposed is no more than the traditional requirement of due process in criminal law. 114 S.Ct. at 2561-62.

The Court preferred broadly to review the differences between civil and criminal contempt, starting with the usual proverbs that civil contempt is coercive in nature, criminal contempt is punitive, and the two are distinguished by the nature of the sanction and not by the court's subjective intent. 114 S.Ct. at 2557, citing *Hicks v. Feiock*, 485 U.S. 624, 636 (1988). In taking this approach, the Court acknowledged but then disregarded the substantial body of scholarly opinion that the civil/criminal distinction is "unworkable" and should be abandoned. 114 S.Ct. at 2557 n.3 and materials cited.

The Court began by taking several forms of contempt relief out of the discussion by reaffirming that they are civil in nature. First, it observed that "[t]he paradigmatic coercive, civil contempt sanction" is to lock up the contemnor until he obeys the court's command. By contrast, a fixed and immutable sentence of imprisonment is punitive and criminal because the contemnor cannot avoid or abbreviate it by complying after it is imposed. The same distinction applies to fines. "Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." 114 S.Ct. at 2558, citing *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947). For the same reason, per diem fines imposed for each day of noncompliance are civil; they bear a "close analogy to coercive imprisonment," since they "exert a constant coercive pressure" but can be prospectively purged.

The Court declared itself "[l]ess comfortable" with "the analogy between coercive imprisonment and suspended, determinate fines." The Court had held such fines to be civil in nature in *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), and lower federal and state courts had relied on that case "to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines." 114 S.Ct. 2559. However, the Court noted that in the intervening years it had "erected substantial procedural protections in other areas of contempt law," and went on to curb the lower courts' broad reading of the UMW holding (without, however, overruling the case itself).

Having framed the issue in terms of the nature of the remedy imposed, with emphasis on the ability of the litigant to purge, the Court turned to an entirely different set of concerns: the kinds of fact patterns that have invoked the contempt power and the degree to which these call for more or less procedural protection. It noted that petty contempts committed in the court's presence and sanctioned immediately may be adjudicated with summary procedures, and that indirect contempts such as noncompliance with discovery may be adjudicated civilly because they go to the court's ability to adjudicate the proceedings before it.

However, the Court went on to make a new kind of distinction:

> *...[I]ndirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings since the need for extensive, impartial factfinding is less pressing.*

For a discrete category of indirect contempts, however, civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding....Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial....Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.
114 S.Ct. at 2560-61.

The Court concluded that the fines at issue were criminal. It cited the fact that the contempts were committed outside the court's presence and did not otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it. The contempts did not involve "simple, affirmative acts," but rather "widespread, ongoing, out-of-court violations of a complex injunction," and the court "effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed." The fines were "serious," totalling over $52 million. "Under such circumstances, disinterested factfinding and even-handed adjudication were essential, and petitioners were entitled to a criminal jury trial." 114 S.Ct. at 2562. In concluding, the Court observed, "Our decision concededly imposes some procedural burdens on courts' ability to sanction widespread, indirect contempts of complex injunctions through noncompensatory fines." 114 S.Ct. at 2563.

Thus, an opinion that began by emphasizing the nature of the civil contempt remedy, with specific reference to the ability to purge fines once they have been imposed, ends by emphasizing an entirely different set of considerations, i.e., functional concerns about the need to guarantee impartiality and reliable factfinding when dealing with "out-of-court disobedience to complex injunctions."

It is not clear what, if anything, the discussion of complex injunctions contributes to the result. A close reading makes it clear that this discussion does not qualify the distinction the Court initially made between sanctions that can be purged after they are imposed and sanctions that are not purgable. Before declaring the instant fines criminal, the Court stated, "The fines are *not* coercive day fines, or *even* suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." 114 S.Ct. at 2562 (emphasis supplied). Thus, it appears that those remedies identified early in the opinion as coercive civil remedies remain so, regardless of the nature of the order that is violated. Similarly, in that earlier discussion, the Court stated without qualification that a fine is "civil only if the contemnor is afforded an opportunity to purge," and that "a 'flat, unconditional fine' totalling even as little as $50" with "no subsequent opportunity to reduce or avoid the fine through compliance" is criminal. 114 S.Ct. at 2558. It is implausible that the Court, having restated prior law in such unequivocal terms, would overrule it in whole or in part without making its intentions explicit. *See Downey v. Clauder* ___ F.3d ___, 1994 WL 382469 at 5 (6th Cir., July 25, 1994) (reaffirming civil/criminal distinction based on ability to purge, citing *Bagwell*).

It is therefore hard to discern what kind of contempt relief could be deemed civil in connection with one injunction but criminal in connection with another. It appears that the entire distinction between complex injunctions and "discrete, readily ascertainable acts" is analytically superfluous, and that the Court's conclusion that the fines in this case were criminal was compelled by its analysis of remedy alone. The concern about complex injunctions may have helped persuade the Court to reject the view that advance notice of the possibility of sanctions renders the sanctions civil. But neither the complexity nor the simplicity of an injunction appear to have any actual consequences for the procedures required to impose particular contempt remedies.

Justice Scalia's concurring opinion makes considerably more of the complex injunction point, arguing that modern courts have abandoned traditional limitations upon the scope of injunctive decrees, and suggesting that any civil enforcement of some orders is inappropriate. He concluded: "We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement." 114 S.Ct. at 2552. Thus, he seems to advocate an approach that would turn entirely or mostly on the nature of the injunction rather than the remedy; but no other Justice joined his opinion.

The other concurring opinion, by Justice Ginsburg joined by Chief Justice Rehnquist, is notable mainly for its reticence and adds nothing to the analysis. Justice Ginsburg agreed with the majority's view that the mere announcement of penalties in advance is insufficient to render those penalties civil. In addition, she believed that the fact that the private parties had settled their dispute negated any claim that the fines conferred any benefit on the private complainant. 114 S.Ct. at 2567. (The latter point would have sufficed to dispose of the case without any broader discussion of civil versus criminal contempt.) But she offered no affirmative views on the more general question of how the criminal/civil line should be drawn.

Conspicuously absent from any of the three opinions is a consideration of the unusual enforcement problems to which "the modern, complex decree" is often a response. Nor is serious attention given to the different challenges that different varieties of complex injunctions may pose to an enforcing court.

What Criminal Contempt Involves

Criminal contempt is a peculiar hybrid. It has been described as sui generis, a phrase historically used in justification of the denial of procedural rights such as trial by jury. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 661 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); *see also United States v. Dickinson*, 465 F.2d 496, 513 (5th Cir. 1972) (characterizing contempt as "the last vestige of the so-called 'common law crimes'"). Although modern decisions have extended due process protections to contempt prosecutions, the Supreme Court has adhered to the view that contempt is an inherent power of courts not dependent on legislative authorization, although it may be regulated to some degree by legislative enactment. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-96 and n.8 (1987).

For this reason, *Bagwell*'s holding that particular sanctions may only be imposed through "the criminal contempt process" does not necessarily invoke the full panoply of federal criminal procedure, including court rules and sentencing guidelines. For that matter, it does not invoke every provision of the Constitution; there is no right to a grand jury indictment for contempt, *Green v. United States*, 356 U.S. 165, 183-85 (1958), and the "vicinage" clause of the Sixth Amendment, which requires that all criminal prosecutions be tried in the state and district in which the crime was committed, does not apply to criminal contempt prosecutions. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d at 666, citing *Myers v. United States*, 264 U.S. 95 (1924).

More basic constitutional protections do apply in criminal contempt proceedings, including the rights to notice of charges, the presumption of innocence, counsel, proof of guilt beyond a reasonable doubt, calling of witnesses, a public trial before an impartial judge, and trial by jury. *Bagwell*, 114 S.Ct. at 2561; *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 798-99. Some rights, however, will be significantly altered in their application by the prosecution's origin in a civil injunctive proceeding.

The Fifth Amendment privilege against self-incrimination should have little practical effect in most institutional reform cases because injunctive actions against public officials are, for all practical purposes, brought against the governmental entity that they serve. *Hutto v. Finney*, 437 U.S. 678, 699 (1978); see *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (official capacity action "is, in all respects other than name, to be treated as a suit against the entity") (citation omitted). The privilege against self-incrimination belongs only to natural persons; it may not be invoked by organizations, *United States v. White*, 322 U.S. 694, 698-99 (1944)—presumably including municipal corporations and state governments. Thus, self-incrimination should be an issue only if the contempt prosecutor seeks relief against particular defendants in their individual capacities or seeks relief that by its nature is individual, such as incarceration.

Even when seeking relief against individuals, the prosecutor will be able to rely on and use as evidence the prior record in the civil proceeding. The contempt prosecutor should also be able to use discovery materials, including deposition testimony, obtained by the plaintiffs either in the main action or in a subsequent civil contempt proceeding. *See United States v. Handley*, 763 F.2d 1401, 1405-06 (11th Cir. 1985) (supposed misconduct by civil plaintiffs' counsel in obtaining depositions would not be imputed to the government in criminal case, absent evidence that the government knew of the misconduct at the time, and where civil suit was independently viable and was not filed solely to obtain evidence for the criminal proceeding), *cert. denied*, 474 U.S. 951 (1985).

The Double Jeopardy Clause, while applicable to contempt proceedings, *In re Bradley*, 318 U.S. 50, 52 (1943), may not constitute a significant limit on the courts' criminal contempt power. The Clause does not prohibit imposition of both a remedial civil sanction and a criminal sanction for the same conduct. *United States v. Halper*, 490 U.S. 435, 447-49 (1989). As one commentator observed, "The double jeopardy prohibition...is difficult to assimilate to a process in which multiple sanctions serving different purposes may be appropriate for a single contumacious act—and where continued refusal to obey may be seen to constitute multiple acts of contempt."[1]

For purposes of plaintiffs' counsel in institutional litigation, the most important attribute of criminal contempt is that, at least in federal court, it may not be prosecuted by the plaintiffs' counsel. A federal court "ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions"; if the public prosecutor declines, the court may then appoint a private prosecutor. (The government construes statutes providing for the operation of the federal courts to permit paying attorneys for this purpose, albeit only at the rates at which Department of Justice attorneys are compensated. 481 U.S. at 807 n.17.) However, the court may not appoint "counsel for an interested party in the underlying civil litigation." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 801-02 (relying on federal judicial supervisory power and not the Constitution).

Young's reasoning probably also precludes the prosecution of criminal contempt by a special master or other official previously appointed by the court to help enforce the underlying injunction. Young rests on the sharp distinction between "the public interest in vindication of the court's authority" and "[t]he private party's interest in obtaining the benefits of the court's order." 481 U.S. at 804-05. A master or monitor charged by the court with ensuring that an injunction is implemented may be on the wrong side of the Young distinction regardless of that official's impartiality with respect to the parties and their litigation positions. *Cf. Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (holding that a trustee in bankruptcy is disqualified under Young because he is charged by law to represent the estate's interests against claimants).[2]

Thus, once a contempt proceeding has been declared to be criminal in nature, plaintiffs' counsel loses control of its prosecution, and it is put in the hands of someone who probably will have no prior acquaintance with the case—certainly not the intense familiarity that plaintiffs' counsel will usually have. The problem of unfamiliarity can be mitigated by permitting plaintiffs' counsel to assist in but not control the prosecution, which *Young* does not foreclose, 481 U.S. at 806 n. 17, and which some lower courts have endorsed. *Person v. Miller*, 854 F.2d 656, 663 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 1119 (1989); *Polo Fashions v. Stock Buyers International*, 760 F.2d 698, 704-705 (6th Cir. 1985), *cert. denied*, 482 U.S. 905 (1987). Under most circumstances, however, additional delay and complication will be introduced if the prosecution is to be led by a newcomer to the proceeding.

In addition, the loss of control by plaintiffs' counsel may complicate efforts to settle the proceeding by plea bargain or by conditional dismissal. The Supreme Court in *Young* warned against the temptation of a prosecutor who is also counsel for a private litigant to use the criminal process to generate information for the civil proceeding, or to use the civil claims as bargaining leverage in the criminal prosecution. 481 U.S. at 806. However, contempt proceedings in institutional litigation are often resolved by modifying the underlying court order to provide additional relief or to make the existing relief more efficacious. Would this kind of trade-off present the same conflict of interest as the horrible examples cited in *Young*? The answer might depend on how closely the proposed modification hewed to enforcement of the existing order as opposed to additional substantive relief.

Avoiding Criminal Contempt

The way to avoid being forced into proceeding by criminal contempt is clearer in some respects than in others. One way to avoid the entire *Bagwell* controversy is not to seek sanctions but rather to request additional prospective relief that is designed to end the noncompliance, either by enhancing the substantive terms of the underlying judgment or by adding additional remedial measures such as requirements of record-keeping and reporting, external monitoring, or requiring defendants to establish internal mechanisms of monitoring and accountability. Such relief is clearly coercive rather than punitive and, indeed, can be granted under Rule 60(b), Fed.R.Civ.P., without resort to the contempt power at all.

Often, however, such relief is ineffectual, and it becomes necessary to impose sanctions of some sort, either to focus the defendants' attention on the problem or to motivate them to comply with commands they find unpalatable. Whenever possible, plaintiffs should seek relief in the form of compensatory fines or per diem fines. Fines in a fixed amount that are suspended to give the defendants a chance to comply may also be permissible under *Bagwell*, but the Court's observation that the analogy between these fines and traditional coercive relief is "[l]ess comfortable" than for per diem fines may signal its willingness to declare such fines criminal in a future case.

In class actions, compensatory relief may be difficult to fashion because of the large number of individuals affected and the difficulty of measuring their injuries. In contempt as in ordinary damage proceedings, compensatory awards must be based on evidence of actual loss. *Elkin v. Fauver*, 969 F.2d 48 (3d Cir.), *cert. denied*, 113 S.Ct. 473 (1992); *In re Chase & Sanborn Corp.*, 872 F.2d 397, 400-01 (11th Cir. 1989). However, courts have shown some willingness in class actions to allow standardized or liquidated awards for nonmonetary injuries as long as there is some evidentiary basis for the amount. *See Doe v. District of Columbia*, 697 F.2d 1115 (D.C.Cir.), *separate statements filed*, 701 F.2d 948 (D.C.Cir. 1983); *Dellums v. Powell*, 566 F.2d 167, 195 (D.C.Cir. 1977) and *id.* at 209-10 (Leventhal, J., concurring); *Dellums*

v. Powell, 566 F.2d 216, 227 (D.C.Cir. 1977); *Langley v. Coughlin*, 715 F.Supp. 522, 558-59 (S.D.N.Y. 1988). In addition, at least one court in a contempt proceeding has granted compensatory relief prospectively on a per diem basis—in effect, ordering liquidated damages. *Benjamin v. Sielaff*, 752 F.Supp. 140, 148-49 (S.D.N.Y. 1990) (awarding $150 a day to inmates held for more than 24 hours in receiving rooms and other non-housing areas).

In some cases, however, the injury caused by noncompliance—for example, from failure to complete an exercise yard or implement a sick call or disciplinary procedure—may be much more diffuse, affecting the entire class. Whether courts may make a compensatory award to the entire class—one that might, for example, be paid into a fund to provide amenities for inmates—has not been directly addressed by the courts in those terms.

There is, however, an intriguing reference in *Bagwell* itself on this subject. At the end of the opinion, Justice Blackmun stated that its holding "leaves unaltered the longstanding authority of judges...to enter broad compensatory awards for all contempts through civil proceedings. *See, e.g., Sheet Metal Workers v. Equal Employment Opportunity Comm'n*, 478 U.S. 421 (1986)." 114 S.Ct. 2563 (parallel citations omitted). *Sheet Metal Workers* was a Title VII employment discrimination case against a union in which the court imposed a number of contempt remedies including a $150,000 fine. The fine was placed in a fund designed to increase nonwhite membership in the union and its apprenticeship program and was then used to finance recruiting efforts, summer and part-time jobs, services for nonwhite apprentices, etc. The Supreme Court rejected the argument that this sanction was criminal, noting that it was designed to secure compliance with prior orders, and that if the union purged its comtempt it could recover any money remaining in the fund. 478 U.S. at 443-44.

But the Court in *Sheet Metal Workers* did not describe these fines as compensatory; rather, it said, they were "clearly designed to coerce compliance with the court's orders." Id. at 444 (emphasis supplied). Whether the citation in *Bagwell* and the phrase "broad compensatory awards" represent an intent to re-characterize the *Sheet Metal Workers* relief, or just a hasty misreading of that case, is unclear. What is clear from *Bagwell* and *Sheet Metal Workers* is that, regardless of its characterization as coercive or compensatory, monetary relief may be awarded in civil contempt proceedings for the purpose of advancing compliance with the violated order. Thus, for example, *Bagwell* leaves intact the courts' ability to use contempt fines to establish bail funds to help remedy violations of overcrowding orders. *See Palmigiano v. DiPrete*, 710 F.Supp. 875, 887-88 (D.R.I. 1988), *aff'd*, 887 F.2d 258 (1st Cir. 1989); *Mobile County Jail Inmates v. Purvis*, 581 F.Supp. 222, 224 (S.D.Ala. 1984). The same is true of the courts' power, e.g., to use fine money—or to turn it over to a court-appointed master or administrator—to build facilities or to provide equipment or services required by a prior order. *See Cabrera v. Municipality of Bayamon*, 622 F.2d 4, 8 (1st Cir. 1980) (directing district judge to consider using contempt fines to pay a contractor to conduct land rehabilitation).

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[1] Dudley, Earl C., "Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts," 79 *Va.L.Rev.* 1025, 1088 n.248 (1993).

[2] The question whether a court may hear a criminal proceeding for out-of-court contempt without a prosecutor at all has not been addressed by the Supreme Court, and the lower courts have differed on the point. Compare *In re Davidson*, 908 F.2d 1249 (5th Cir. 1990) (holding the failure to appoint a prosecutor reversible error) with *In re Grand Jury Proceedings*, 875 F.2d 927, 933-34 (1st Cir. 1989) (holding that courts should "routinely" appoint a prosecutor for out-of-court contempts but that failure to do so was not reversible where the judge was impartial and the evidence was simple); see Dudley, Earl C., "Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts," 79 *Va.L.Rev.* 1025, 1059 and n.140 (1993) (disapproving the practice).

Other Cases Worth Noting

U.S. COURTS OF APPEALS

Emergencies/Procedural Due Process/Law Libraries and Law Books/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).

Res Judicata and Collateral Estoppel

Burgos v. Hopkins, 14 F.3d 787 (2nd Cir. 1994). The plaintiff brought a §1983 action based on an assault by another inmate. He had previously filed a state habeas corpus action based on the same incident which had been dismissed after a hearing. He had also brought an earlier §1983 action that had been stayed pending the completion of state proceedings.

Since compensatory damages are not recoverable in a state habeas corpus proceeding, the habeas judgment is not *res judicata* in this §1983 suit. The fact that the plaintiff could have brought a damages claim in state court is beside the point. The case is decided entirely on state law grounds under the Full Faith and Credit clause of the Constitution, without any reference to whether a contrary holding would deny due process.

Procedural Due Process—Disciplinary Proceedings, Administrative Segregation

Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1994), *superseding* 994 F.2d 1408 (9th Cir. 1993). Hawaii prisoners have a liberty interest in avoiding placement in disciplinary segregation because state regulations limit official discretion by requiring that the inmate admit guilt or that the disciplinary committee be presented with substantial evidence in order for segregation to be imposed.

At 1467: "Prison disciplinary committees may not deny a defendant the right to call important witnesses solely for the sake of administrative efficiency." A form stating that witnesses were unavailable "due to the move to the medium facility and being short staffed on the modules" did not meet the state's burden of justifying the denial of witnesses. The right to witnesses has been clearly established since 1974 and the defendant is not entitled to qualified immunity on this record.

Summary Judgment/Correspondence

Phelps v. U.S. Federal Government, 15 F.3d 735 (8th Cir. 1994). An allegation that prison personnel kept plaintiff's incoming and outgoing letters in storage without telling him that his mail was not being transmitted and delivered stated a constitutional claim.

The district court should not have granted summary judgment without giving the plaintiff notice that it intended to convert the defendants' motion to dismiss to one for summary judgment.

Good Time/Habeas Corpus

Duncan v. Gunter, 15 F.3d 989 (10th Cir. 1994). A new state statute doubled the amount of "earned-time credits" available to prisoners. The Department of Corrections refused to apply it retroactively. The plaintiffs' request for an injunction requiring the Attorney General to inform the Department of Correction of the changes in the law and direct it to comply was tantamount to a request for a ruling on their entitlement to earlier release and therefore could be pursued only in a habeas action after exhaustion of state judicial remedies.

Hazardous Conditions and Substances/Cruel and Unusual Punishment—Proof of Harm

McNeil v. Lane, 16 F.3d 123 (7th Cir. 1994). An allegation that the defendants allowed asbestos-covered pipes to exist directly outside the plaintiff's cell and said they could not transfer him to another cell are insufficient to establish deliberate indifference. At 124: "To state a claim under the Eighth Amendment, McNeil must, at minimum, allege facts sufficient to establish that the defendants possessed a total unconcern for McNeil's welfare in the face of serious risks."

The plaintiff also failed to allege facts "sufficient to establish that he was exposed to unreasonably high levels of asbestos. Had, for example, McNeil been forced to stay in a dormitory where friable asbestos filled the air," a claim might have been stated. "Exposure to moderate levels of asbestos is a common fact of contemporary life and cannot, under contemporary standards, be considered cruel and unusual." (125)

Searches—Person

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). The male plaintiff complained of being viewed naked by female staff. His complaint should not have been dismissed. In such cases, the equal employment rights of female staff must be balanced against the privacy rights of inmates. At 187:

> *The cases therefore hold that sex is not a bona fide occupational qualification preventing women from working in all-male prisons, and that pat-down searches and occasional or inadvertent sighting by female prison employees of inmates in their cells or open showers do not violate the inmates' right to privacy. But that right is violated where this observation is more intrusive (like a strip search, in the absence of an emergency) or a regular occurrence.*

Non-English Languages/ Correspondence—Non-Legal

Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994). The plaintiff, a native of Laos who spoke some English, challenged a requirement that all his correspondence be in English except for correspondence with his parents and grandparents, who spoke no English at all. The prison had a general rule that all correspondence must be in English; Spanish was excepted because there was a prison employee fluent in Spanish and available to translate, and there was evidence that other exceptions had been made.

The rule was unconstitutional under the *Turner* standard as applied to the plaintiff because the Iowa Refugee Service Center was prepared to translate prisoners' letters free, and the prison practice was to read only randomly selected letters.

The jury awarded the plaintiff $4,000. The district court reduced this to $2,000 with no explanation, and the appeals court ordered the award restored.

Consent Decrees/Judicial Disengagement/Modification of Judgments

United States v. State of Michigan, 18 F.3d 348 (6th Cir. 1994). A consent decree entered into between the federal government and the state defendants provided that defendants may apply to "terminate the jurisdiction" of the court after *all* terms had been complied with. The parties moved to "dismiss" portions of the decree (all of them except for mental health care) and to modify the decree to provide for the termination of jurisdiction as to any provision if the defendants were in compliance with constitutional requirements. The court granted the requested modification, but changed it to refer to compliance with the consent decree. It refused to dismiss any portion of the decree without receiving an updated compliance report, and ordered a review by the independent expert previously assigned to monitor the decree. It refused to dismiss the provisions concerning mental health care because it viewed them as inextricably intertwined with the medical provisions such that the two should be reviewed together. After receiving the report, it dismissed provisions concerning sanitation, safety and health; fire safety; and overcrowding and protection from harm, but refused to dismiss portions concerning access to courts.

The district court was not obligated to follow the agreement of the parties in dismissing portions of the decree. At 351:

> *Because the "power and prestige" of the court rests behind a consent decree, a district court is not simply empowered, but is actually obligated, to exercise its independent judgment regarding compliance with a decree. Otherwise, a court would simply become a rubber stamp for the parties, and the policing role of the court would become meaningless.*

The district court's authority is not limited to determining whether a proposal is "unworkable or unconstitutional." At 352: "[A] stipulation does not deprive a court of its inherent supervisory authority under Fed.R.Civ.P. 60(b)." Moreover, the decree itself implies that the court is obligated to exercise its judgment and determine whether compliance has been achieved and termination is warranted.

Attorneys' Fees and Costs

McGill v. Faulkner, 18 F.3d 456 (7th Cir. 1994). Costs of over $3,000 were properly imposed against a prisoner proceeding *in forma pauperis* after a jury verdict in his favor was overturned on appeal. The defendants garnisheed the plaintiff's inmate trust account to recover the costs.

As to appellate costs, the plaintiff waived his right to challenge the order by failing to contest the bill of costs within 10 days of service. As to trial court costs, the plaintiff failed to establish (as opposed to allege) his indigency, and in any case indigency does not automatically require a waiver of costs. At 460: "...[P]risoners like McGill [must] learn to exercise discretion and judgment in their litigious activity and accept the consequences of their costly lawsuits." The court then analogizes the award of costs to a restitution order against a criminal defendant!

This plaintiff was raped in a protective custody unit whose occupants were commingled with punitive segregation inmates. The appellate decision, *McGill v. Duckworth*, was *de facto* overruled by *Farmer v. Brennan*.

Dental Care

Patterson v. Pearson, 19 F.3d 439 (8th Cir. 1994). The district court should not have granted summary judgment to a prison dentist in light of the plaintiff's allegation of a three-week delay in providing dental treatment for a painful condition.

Procedural Due Process—Disciplinary Proceedings

Reeves v. Pettcox, 19 F.3d 1060 (5th Cir. 1994). The plaintiff's plea of guilty to a disciplinary offense did not waive his claim that the failure to give him notice of the relevant rule denied due process. While such a waiver might have been valid in a criminal proceeding, the court declines to enforce it in a disciplinary proceeding because of the lack of other safeguards.

At 1061: "An inmate is entitled to prior notice, or 'fair warning,' of proscribed conduct before a severe sanction may be imposed." The plaintiff put his food tray outside his cell; the record showed that inmates entering segregation are not given copies of the rules and are not given an opportunity to read the unit bulletin board.

DISTRICT COURTS

Statutes of Limitations/ Pro Se Litigation

Higgenbottom v. McManus, 840 F.3d 454 (W.D.Ky. 1994). The court applies the "mailbox rule" of *Houston v. Lack* to find the plaintiff's complaint timely even though it arrived at the clerk's office after the statute of limitations had run. The prison keeps no records of when items are mailed, but since the complaint was only a day late, it clearly had to be in the prison mail system by the last day of the limitations period.

Law Libraries and Law Books

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....*

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 defendants 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.

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." The court rejects the unsupported claim that a missing filling can't cause great pain. *Id.*: "The need for treatment is a medical judgment that ought to be made by a qualified physician or dentist."

Searches—Person

Canell v. Beyers, 840 F.Supp. 1378 (D.Ore. 1993). The plaintiff alleged that visu-

Dear Prison Project...

Dear Prison Project:

I have been transferred twice in the past year. I'm afraid now I will be transferred again, this time even farther away from my family. How can I block another transfer?

On the Bus

Dear On the Bus:

The Supreme Court has held that there is no constitutionally based liberty interest entitling you to a hearing or any other procedural protections before transfer from one prison to another. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532 (1976); *Montayne v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543 (1976). According to these cases, you do not have procedural protections even if the transfer is to a higher-security institution or is motivated by a disciplinary purpose. See also *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989).

The same principle applies whether you are being transferred from state to federal custody (*Johnson v. Moore*, 948 F.2d 517 (9th Cir. 1991)); from one state to another (*Tyson v. Tilghman*, 764 F.Supp. 251 (D.Conn. 1991)); from city to state institution (*Neal v. Director, Dist. of Columbia Dept. of Corrections*, 684 F.2d 17 (D.C. Cir. 1982)); or to a distant location and alien cultural climate (*Olim V. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741 (1983)). Additionally, the principle applies if you have been denied transfer. *Paoli v. Lally*, 812 F.2d 1489 (4th Cir. 1987), *cert. denied*, 484 U.S. 864 (1987).

Generally, the only way you can obtain due process protections in transfers is if you can show that a statute or regulation provides them. Some federal or state regulations may call for hearings or other protections before transfers, but these regulations do not create a constitutional due process right to those procedures. At most, they may create a right in state law that can be enforced in state court. See *Blake v. Commissioner of Corrections*, 390 Mass. 537, N.E.2d 281 (Mass. 1983); *Watson v. Whyte*, 126 W.Va. 26, 245 S.E.2d 916 (W.Va. 1978).

There are some special transfer situations in which the Constitution creates a liberty interest even if state law does not. If you are transferred and committed to a mental hospital, you are entitled to a commitment hearing. *Miller v. Vitek*, 437 F.Supp. 569 (D.Neb. 1977), *aff'd as modified sub nom. Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980). Additionally, pre-trial detainees are entitled to due process protections if they are transferred to state prisons and the result is interference with their Sixth Amendment rights to effective assistance of counsel and to a speedy trial. *Cobb v. Aytch*, 643 F.2d 946 (3rd Cir. 1981). Furthermore, you can challenge a transfer if you can prove that the transfer decision was made to punish you for engaging in constitutionally protected activity (for example, peacefully circulating a petition to be sent to a federal court). See *Montanye v. Haymes*, 427 U.S. 236 (1976), on remand *Haymes v. Montanye*, 547 F.2d 188 (2nd Cir. 1976).

al body cavity searches were conducted in the view of other employees and inmates. Qualified immunity does not protect "gratuitous or unnecessary viewing" of unclothed prisoners (1380). At 1381: "Even assuming the viewings were inadvertent, a jury could find that the location and manner in which the search was conducted made such viewings inevitable, and the invasion of privacy was not offset by overriding penological justifications." The court rejects the argument that a single viewing is never actionable. At 1381: "A single, isolated inadvertent viewing is probably not actionable unless the search was conducted in a manner that exhibited total disregard for the inmate's privacy rights." In addition, "repeated incidents of 'inadvertent' viewings of different prisoners can amount to a violation when prison officials fail to take reasonable steps to prevent such incidents at a *de minimis* cost to legitimate penological considerations."

Use of Force/Damages—Assault and Injury

Davis v. Moss, 841 F.Supp. 1193 (M.D.Ga. 1994). The plaintiff alleged he was beaten in the aftermath of a riot and that he was also thrown down a fire escape while handcuffed. The court disbelieves the first allegation but believes the second, which was corroborated by a counselor, and finds it motivated by malice and ill will. The court awards $10,000 in compensatory damages for pain and suffering from injuries including disk damage that required surgery. The court declines to award damages for lost earning capacity because the plaintiff's employment record was so meager that such damages would be speculative. Punitive damages of $25,000 are awarded.

Protection from Inmate Assault/Damages—Assault and Injury, Punitive

Holloway v. Wittry, 842 F.Supp. 1193 (S.D.Iowa 1993). The plaintiff in an inmate assault case failed to prove that there was a pervasive risk of harm in the prison industries because the record showed that fewer assaults occured in that area than in other areas of the prison. In addition, defendants responded to the risk that did exist by providing staff supervision at all times and making security checks on the tools. However, a defendant who witnessed the altercation and did not sound his security beeper was deliberately indifferent. (The court disbelieves this officer's testimony that he didn't see it.)

Compensatory damages of $500 are awarded; damages are limited because some of the plaintiff's injury was inflicted before the defendant observed the assault. Punitive damages of $1,000 are awarded.

Recreation and Exercise

Jones v. Stine, 843 F.Supp. 1186 (W.D.Mich. 1994). The plaintiff, held in voluntary "protective segregation," was permitted only one hour a day of recreation, five days a week, in a "module cage," alone and without exercise equipment. These allegations stated a claim, but the defendants are entitled to qualified immunity from damages. At 1192: "Physical exercise is a necessity of civilized life. Unnecessary or extreme restriction of inmates' opportunity for fresh air, exercise and recreation may rise to the level of an Eighth Amendment violation."

Medical Care—Standards of Liability—Deliberate Indifference, Serious Medical Needs/Damages—Assault and Injury

Delker v. Maass, 843 F.Supp. 1390 (D.Ore. 1994). The plaintiff sustained a painful inguinal hernia before his arrest. After months of delay in prison, he was told that surgery to repair it is "elective" and that the prison did not provide "elective" procedures. It was not disputed that surgery was the usual treatment for the plaintiff's condition outside prison. After a court-appointed expert said his condition was both dangerous and painful, the defendants provided surgery, allegedly "for strategic legal reasons."

At 1398:

While an honest difference of medical judgment would ordinarily not constitute deliberate indifference,...a federal court is not required to blindly defer to the judgment of prison doctors or administrators in determining whether there has been deliberate indifference to an inmate's serious medical needs.... Moreover, the recommendations of the prison doctors were not based solely upon their professional medical opinions, but on legal and economic considerations as well. I accept the prison doctors' medical *opinions that the injury was not imminently life-threatening, but a federal court need not defer to a prison doctor's* legal *opinion as to the extent of the state's duties under the Eighth Amendment.*

Throughout most of this case, defendants asserted that the Eighth Amendment duty to provide medical care is limited to conditions that are life-threatening or will cause permanent disability. That is incorrect. The duty also applies to medical conditions that may result in pain and suffering which serve no legitimate penological purpose.

At 1399: "Prison officials may establish general guidelines, but the ultimate treatment decision must be made on a case-by-case basis, giving due consideration to the inmate's subjective complaints of pain and restricted activity, and also the inmate's psychological needs, where appropriate." *Id.*: "I also reject any suggestion that prison officials may avoid their duty to provide medical treatment by the simple expediency of labelling such treatment as 'elective.'" (citing cases)

At 1400:

Where surgery is elective, prison officials may properly consider the costs and benefits of treatment in determining whether to authorize that surgery, but the words "elective surgery" are not a talisman insulating prison officials from the reach of the Eighth Amendment. Each case must be evaluated on its own merits.

The defendant doctor was deliberately indifferent. He was aware of the plaintiff's problem and decided to withhold surgery, even though medical professionals agree that surgery is the standard treatment, it would not pose an unreasonable risk, and it would probably have alleviated the symptoms. At 1401: "The evidence also establishes that Dr. Vargo's decision was significantly influenced by non-medical factors," including that the injury was sustained before the plaintiff came to prison, which "has little relevance" to proper medical treatment.

The defendant doctor was not entitled to qualified immunity. At 1397: "A reasonable public official would have known that there are circumstances in which the Eighth Amendment requires prison officials to pay for 'elective' surgery to repair a hernia, and that a categorical refusal to repair incarcerated hernias violates the Eighth Amendment."

The plaintiff was injured by the lengthy delay in providing the surgery in that he suffered pain, anxiety, and inability to complete a program that would have yielded good time credit. The court awards $5,000 in compensatory damages.

Modification of Judgments/Crowding

Inmates of the Suffolk County Jail v. Rufo, 844 F.Supp. 31 (D.Mass. 1994). Once more, the sheriff moves to modify the prohibition on double-celling, and this time he actually gets some relief.

The court relies on the fact that the single-occupancy feature was an "important part" of the decree and that it had important consequences for the design of support services in the facility. The sheriff's plan is flawed in that it does not give adequate consideration to other aspects of the consent decree; increasing the jail's population would affect every inmate because of the dramatic reduction of space per inmate for support services and out-of-cell time. The plan does not proffer an adequate basis for comparing its costs and benefits (including the loss of common space) to the costs and benefits of developing

other facilities. It does not make an adequate showing of participation in the decision-making process by other responsible officials. It also asks for double-celling in 161 cells even though the jail was only 82 inmates over capacity at the time of the request, and subsequent increases seem to support the need for additional facilities. At 36: "If data are to be used as a basis for decision-making, both the data gathering and the inferences to be drawn should be shown to be supportable by creditable standards of statistical method."

Rather than rejecting the request, the court provisionally determines that the sheriff can alter up to 100 cells for double-bunking and can use them to the extent necessary to hold Suffolk County pretrial detainees.

Pre-Trial Detainees

Lattany v. Four Unknown U.S. Marshals, 845 F.Supp. 262 (E.D.Pa. 1994). Allegations that a pre-trial detainee was photographed without consent and without a law enforcement justification stated a constitutional claim for violation of privacy rights, but the right was not clearly enough established to defeat qualified immunity.

Allegations that the Marshals did not take the plaintiff to a hospital until three hours after a vehicle accident which caused pain in the plaintiff's back and neck and numbness in his legs and which rendered him unable to play basketball stated a claim of deliberate indifference to serious medical needs.

The plaintiff made sufficient allegations of racial animus to support a conspiracy claim under §1985(3).

Federal Officials and Prisons/Protection from Inmate Assault

Barrett v. United States, 845 F.Supp. 774 (D.Kan. 1994). The alleged negligence of Leavenworth officials in investigating alleged threats to the decedent by Muslim inmates was not the proximate cause of his murder by another inmate, since the murderer was a member of another group, the Moorish Science Temple. At 778: "Prison officials have a duty to exercise ordinary and reasonable care to safeguard a prisoner in their custody from attack by other prisoners." Claims based on the failure to keep the plaintiff in administrative segregation and the failure to continue the investigation they had begun into threats against the plaintiff were barred by the discretionary function exception to the Federal Tort Claims Act.

Use of Force/Attorneys' Fees

Stacy v. Stroud, 845 F.Supp. 1135 (S.D.W.Va. 1993). The plaintiff was beaten and denied medical care in jail and was awarded $4,147.25 by a jury. The court rejects the defendants' argument that special circumstances existed for denying fees because the suit was a private action brought only for the plaintiff's benefit. At 1139: "The conduct of public officials is an important public concern. Citizens and taxpayers necessarily benefit when public servants are deterred in their efforts to exceed their lawful authority."

The damage award was not technical, nominal or *de minimis*. At 1139: "...[T]he suit here implicated important public concerns and the damages sought need not be proportionate to the damages eventually obtained. Moreover, the fee award need not be proportionate to the damages."

Pendent Claims; State Law in Federal Courts/Medical Care

Cherry v. Chow, 845 F.Supp. 1520 (M.D.Fla. 1994). The decedent was admitted to jail for DUI and told medical staff that he consumed about a case of beer daily. For two days he asked for medical attention for alcohol withdrawal symptoms, and his wife informed jail employees that he had a history of DT's. He was put in the jail infirmary, where he was shackled to a bed while hallucinating. He walked or jumped off his bed, hit his head on the floor as a result of the leg shackle, and died.

The decedent was a third-party beneficiary of the contract between the county and the

For the Record

■ **Campaign For An Effective Crime Policy** is holding a conference on effective responses to crime in a political environment — "Crime and Politics in the 1990's: A National Leadership Conference" will be held December 1-3, 1994 in Arlington, Virginia. Speakers will include former Attorney General Elliot Richardson, former Deputy Attorney General Philip Heymann, Hubert Williams of the Police Foundation, and Professor Alfred Blumstein, former president of the American Society of Criminology. The conference will examine the intended and unintended consequences of American crime policies; the use and meaning of criminal justice data; issues of race, class and crime; the influence of the media on crime policy; legislative realities and strategies for more effective crime policies; and program opportunities created by the new federal crime bill. For further information contact the Campaign at 918 F Street NW, Suite 505, Washington, DC 20004, 202/628-1903.

■ **Poetry submissions by death row prisoners** are requested by the Biddle Publishing Company. Those whose poems are selected for publication in a book of poems by men and women living on death row will not be paid royalties, but will each receive five copies of the published book. Royalties from sales of the poetry book will go to the National Coalition to Abolish the Death Penalty, American Friends Service Committee, and the National Prison Project. Submissions should be sent to Biddle Publishing Co., PO Box 1305, Brunswick, ME 04011 by January 30, 1995. Please send a SASE if you would like your poems returned following review.

■ **Prisoners and the Law** and **Habeas Corpus Checklists**, both written by Ira P. Robbins, Professor of Law and Justice at The American University, Washington College of Law, are now available in new editions. **Prisoners and the Law** now has four volumes. Volume One has sections on "An Overview of Prison Law," "Litigating and Enforcing the Rights of Prisoners," and "Procedural Aspects of Prisoners Litigation." Volume Two covers *habeas corpus* and special issues and problems (including AIDS and jail litigation), Volume Three discusses the future of prison reform and Volume Four includes a number of appendices of statistical information on prisons and prisoners. **Prisoners and the Law costs** $450 and **Habeas Corpus Checklists** $75 from Clark Boardman Callaghan, 155 Pfingsten Road, Deerfield, IL 60015, 800/221-9428.

■ **Copies of a preliminary analysis of the Helms amendment,** which attempts to limit or prevent federal judges from entering effective orders against overcrowding, are available to interested parties — call the NPP at 202/234-4830 if you would like a copy. The NPP would also like to see any pleadings, judicial decisions or other discussions of the Helms amendment. Please send anything you have to the attention of Elizabeth Alexander, NPP, 1875 Connecticut Ave., Suite 410, Washington, DC 20009, FAX 202/234-4890.

private medical care provider and his representative could sue the provider for breaching the contract.

The court declines to strike allegations about prior incidents of medical neglect because they are intended to establish a policy or custom of the municipality or corporation rather than to show the character of particular individuals.

NON-PRISON CASES

AIDS/Medical Privacy

Doe v. City of New York, 15 F.3d 264 (2nd Cir. 1994). At 267: "Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." This is a right to "confidentiality," rather than "autonomy and independence in decision-making." *Id.* "...[T]he right to confidentiality includes the right to protection regarding information about the state of one's health."

Modification of Judgments

Ensley Branch, N.A.A.C.P. v. Seibels, 20 F.3d 1489 (11th Cir. 1994). At 1503-04: The court summarizes the law of modification under *Rufo*, which articulated a "two-pronged approach" under which the court first determines whether there has been a significant change in facts or law. Only if "the moving party satisfies this requirement" does the court move on to determine whether the modification is appropriately tailored. Modification may be justified by unanticipated developments or reasons that, "'for reasons unrelated to past discrimination or to the fault of the parties,' make it extremely difficult or impossible to satisfy obligations that, while imposed by the decree, are not part of its fundamental purpose.... However, a district court should not modify 'long-standing goals in consent decrees merely because the goals have not been achieved.'"

Use of Force

Smith v. Delamaid, 842 F.Supp. 453 (D.Kan. 1994). In a Fourth Amendment excessive-force case, the plaintiff "must establish that he suffered significant injury or that the defendant's actions were sufficiently reprehensible." However, "[a] §1983 plaintiff need not prove that he is permanently disabled or disfigured in order to establish a constitutional violation." (459)

The fact that the plaintiff could not identify which officer committed which act did not bar liability, since there was no dispute as to which officers were present and involved in the offending conduct. At 459: "An officer is liable under §1983 for the use of excessive force by another officer if he or she was in a position to prevent the excessive force, but failed to do so."

Use of Force/Municipalities

Brown v. City of Margate, 842 F.Supp. 515 (S.D.Fla. 1993). In a use-of-force case, municipal liability was supported by evidence of a city policy of "informally resolving complaints without written documentation" and by evidence that its response to two prior incidents was inadequate. At 518: "The City also conceded that all victims, witnesses, and officers present at the scene of an incident were not always questioned, statements were not taken, and police and hospital reports were not always reviewed with an eye toward isolating and resolving material discrepancies."

Modification of Judgments/ In Forma Pauperis

Koch v. Bridge, 151 F.R.D. 334 (S.D.Ind. 1993). Under Rule 59(e), Fed.R.Civ.P., a motion to alter or amend the judgment must be served as well as filed within 10 days of the entry of judgment, even in a case that was dismissed as frivolous and in which no defendant has entered an appearance. Where the *pro se* plaintiff filed a motion but did not serve it, it was not timely, and therefore had to be treated as a motion under Rule 60, which is not subject to the 10-day limit. However, Rule 60 may not be used to obtain relief from errors of law in a judgment.

This is one of the worst technical traps I have ever seen applied to a *pro se* litigant.

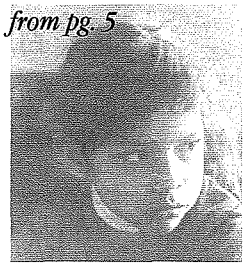
Judicial Disengagement/ Modification of Judgments

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.

PARENTS • *con't. from pg. 5*



crimes related to child abuse and neglect), regardless of whether that *sole* parent is female or male."[5]

This article focuses on women prisoners and their children. Nevertheless, male prisoners who serve as primary or participating caregivers to their children must also be recognized. In doing so, analysis must recognize the differences between the two populations. In New York, for instance, most male prisoners are from New York City yet they are confined throughout the state, at great distance from their home communities. Women in prison in New York are also largely from New York City but two of the three medium- and maximum-security prisons for women are relatively accessible to the city by public transportation.

New York State Takes a Step Forward and Stops

New York State is one of the few states to address permanency planning for the children of incarcerated parents. However, prior to 1983, according to Philip Genty, a law professor at Columbia University and associate director of its Child Advocacy Clinic, child welfare agencies "ha(d) no legal duty to provide an incarcerated mother with the social service necessary to address her unique needs and to improve and strengthen her parental relationship. New York law contained no express mandate that visits and other services be provided to the mother *at the prison*. An agency could therefore simply ignore an incarcerated mother's needs, just as an incarcerated mother could ignore her own parental duties" (emphasis in the original).[6]

In the early 1980s, however, several efforts effectively focused on the plight of these women and their children, and in 1983 legislation was passed (Chapter 911 of the Laws of 1983) mandating that incarcerated parents have the same duties and responsibilities as non-incarcerated parents and were now susceptible to termination of parental rights (TPR) proceedings. With passage of the 1983 law, incarcerated parents were now entitled to the delivery of social services at the prison, prison system cooperation with the child welfare system, and even the right to visit their children outside of the prison if appropriate. With this law, the legislature eliminated the automatic loss

of parental rights upon a mother's or father's incarceration.

The New York State Council on Children and Families also urged improved visiting arrangements, strengthened aftercare services, further interagency coordination, and additional expenditures. However, the Council warned that "none of these steps will be significant unless New York State Law clarifies the rights of incarcerated parents and their children. Unless parents are allowed and encouraged to participate in the lives of their children fear of official intervention will all too often prevent parents from reaching out for help, the help that may enable them to provide a stable supportive home for their children."

"Previously," Jane M. Spinak, also at Columbia, recently reported to the Task Force on Permanency Planning for Foster Children, "the deprivation of civil rights which occurred when a person was incarcerated included the loss of parental rights. The incarcerated parent now has the obligation of maintaining contact with the child or the agency at least once every six months to preclude a finding of abandonment, and the obligation of visiting with or planning for the child to preclude a finding of permanent neglect. The period of incarceration no longer tolls the time period during which the parent is expected to plan for or with the child. On the contrary, both the parent and the agency caring for the child now have affirmative statutory duties to fulfill."[7]

Keeping the Issues Alive

New York State does not collect data on how many children of women confined to its prisons are in foster care, kinship foster care, or other child-caring relationships. In 1988, Adela Beckerman, professor of Family Support Studies at Nova University in Fort Lauderdale, Florida, surveyed 53 mothers in four New York State prisons and they reported 109 children in foster care. "At the time of the mother's arrest," Beckerman notes, "41 percent of the children were already living in foster care, and another 41 percent were living with their mother or with other relatives."[8]

Inmate Foster Care Committee

Since 1983, women prisoners themselves have been the most consistent and persistent monitors and evaluators of New York State laws and social service regulations on imprisoned women and their children.

The Inmate Foster Care Committee of The Children's Center at the Bedford Hills Correctional Facility in Westchester County, New York was founded in 1981 in large part to counter the attitudes and practices of child welfare agencies toward bringing children to the prison to meet with their mothers. A major issue that the Committee examined was how to enable women to become their own advocates.

The Committee started with approximately 10 women, and while the number of women involved has varied over the years, the will of the group to continue meeting has never waned. The Committee identifies not only the rights of imprisoned mothers but also their responsibilities. Historically, social service agencies have resisted sending caseworkers to the prison and the Committee has invested much time in altering this non-functioning relationship. The Committee was influential in passage of the 1983 legislation and the group has reviewed its implementation over the past decade. Early this year, the Committee released a handbook for incarcerated mothers on New York State laws, regulations, and policies regarding incarcerated parents with children in foster care.[9]

The more women are incarcerated, the more their children are victimized.

New Programs in New York

The only programs currently receiving preventive services funding from the New York City Child Welfare Administration are the Hooper Home Alternative to Incarceration Program, operated by the Women's Prison Association, and the Incarcerated Mothers Program, run by Edwin Gould Services for Children.

Hooper Home Alternative to Incarceration Program

In March 1993, the Women's Prison Association (WPA), located on the Lower East Side of New York City, began working with the New York City Child Welfare Administration (CWA) to integrate foster care prevention services with alternatives to incarceration (ATI) programming. The program is based at Hooper House, a residential facility named after Isaac T. Hooper, a 19th century prison reform advocate. In this unique program, staff provide both ATI and foster care prevention services. The goal of the ATI program is to offer a non-incarcerative sanction guided by intensive supervision and the delivery of needed social services, including relapse prevention support; individual, group and family counseling; HIV and health care education and counseling; and training to enhance the self-esteem and to improve the decision-making of the women in the program. The foster care prevention services are intended to either keep the children of female offenders out of foster care or to reduce children's length of stay in foster care.

"By keeping the mother out of jail," the WPA posits, "the Hooper Home model also is designed to keep children out of, or limit the time they are in, foster care. The program design includes visitation and parenting workshops and discussion groups as well as on-site recreational activities for mothers and children. Women can practice what they learn on-site as they care for their own children and others with staff supervision."[10]

Incarcerated Mothers Program

In 1986, Edwin Gould Services for Children, a multi-service agency with offices throughout New York City, started a foster care prevention program for incarcerated mothers in the New York City region. In most cases, a program case worker meets with recently arrested women on Rikers Island, where women are detained in New York City. Less often, the program starts cases several months prior to a woman's release. In general, the program likes to begin services delivery as soon as possible.

The program works with the incarcerated mothers, children, and their families to prevent children from being placed into foster care and to strengthen families' capacities to maintain themselves as functioning units.

In New York, the program staff visit Rikers Island once a month, upstate prisons at Bedford Hills and Taconic twice a month, and a New York City-based work release facility at Bayview twice a month. Women in the community on work release visit the program directly.

The Incarcerated Mothers Program also has several associated support groups—a caretakers group for relatives who care for children without foster case assistance, a released mothers group, a domestic violence group, and a recently established teen group. The teen group—some of whom are quoted at the start of this article—allows young people to express and address their own experiences of being left at home when their parents are incarcerated.[11]

Conclusion

New York State has made significant changes in the way it meets the needs of

children of incarcerated parents, but more must be done. Other states must also review their policies and practices. Indeed, a national study of the relationship between child welfare, criminal justice, and correctional systems is in order.

Considerations of what more might be done are made more difficult with the incarceration of the primary care-providing parent(s). The first question is whether there are alternatives to the incarceration of parents, primary care-providers in particular.[12] These alternatives need to be used more extensively than in current practice.

Alternatives to incarceration are more than a matter of specific program options or penalties; they are also a matter of criminal justice policy. Serious review and analysis of experiences with alternatives to incarceration is needed. One clear lesson emerging from the U.S. experience is that unless a preference is explicitly expressed for reducing reliance on incarceration, jail and prison population will only grow larger. In this context, any analysis of how to maintain family relationships when particular family members face incarceration must focus on how to minimize the use of incarceration.

Professor Beckerman encourages a "more aggressive approach" toward greater contact between caseworkers and imprisoned mothers. She suggests reviewing policies on telephone contacts, informing mothers of parental rights and the impact of permanency planning on foster care decisions, and identifying prison caseworkers who can serve as a liaison between mothers and social service caseworkers.[13]

Philip Genty, focusing more on law than program intervention, suggests improving

"There is no one to tell me a story..."

mothers' access to court proceedings involving their children, and firming up social service agency responsibilities to incarcerated mothers to "ensure that incarcerated mothers who desire meaningful relationships with their children need not fear the permanent termination of their parental rights."[14]

The ABA's Children on Hold Project proposes "a comprehensive, system-wide approach to meeting the needs of children of arrested and/or incarcerated caretakers." Such a system, the ABA suggests, "requires an organization's longterm commitment and should include the principles of a strategic planning process."[15]

Other recommendations have also been made, such as making an incarcerated mother's child caretaking responsibilities a factor in her prison classification. Accordingly, women who are primary caregivers can be placed in facilities as close as possible to their children.

Critically important is the need, on a state-by-state basis, to gather more information about the number of children under the care of incarcerated mothers: who cares for them in the community while the mother is imprisoned, what financial assistance do they receive or are they eligible for, and what can be done to integrate their caregiving roles and responsibilities into community-based sanctions to replace the escalating level of jail and prison terms for women offenders. ■

Russ Immarigeon, contributing writer to the National Prison Project Journal, currently directs a research project on kinship foster care for Statewide Youth Advocacy, 17 Elk Street, Albany, New York 12207, 518/436-8525.

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[1] Press Release, Edwin Gould Services for Children (Incarcerated Mothers Program, 104 East 107th Street, New York, NY 10029, (212)410-4200), June 3, 1994.

[2] For a recent review, see Russ Immarigeon and Meda Chesney-Lind, "Women's Prisons: Overcrowded and Overused." San Francisco, CA: National Council on Crime & Delinquency, (1992).

[3] For a recent review, see Barbara Bloom and David Steinhart, "Why Punish the Children: A Reappraisal of the Children of Incarcerated Mothers in America." San Francisco, CA: National Council on Crime & Delinquency, (1993). For results of a recent survey of state prison parenting programs, see Mary J. Clement, "Parenting in Prison: A National Survey of Programs for Incarcerated Women." Journal of Offender Rehabilitation, 19(1/2): 89-100, (1993).

[4] Tracy L. Snell and Danielle C. Morton, "Women in Prison: Survey of State Prison Inmates, 1991." Washington, DC: U.S. Department of Justice (Bureau of Justice Statistics), (March 1994).

[5] Anna T. Laszlo, Barbara E. Smith, and Sharon Goretsky Elstein, "Children on Hold: What Happens When Their Primary Caretaker is Arrested?" Conference Papers for the Seventh National Conference on Children and the Law. Washington, DC: American Bar Association Center on Children and the Law, p. 139. (April 1994).

[6] Philp M. Genty, "Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law." Fordham Urban Law Journal, 17(1): 13, (1989).

[7] Jane M. Spinak, "Permanency Planning Judicial Handbook." Albany, NY: Task Force on Permanency Planning for Foster Children, pp.5-5. (1989).

[8] Adela Beckerman, "Mothers in Prison: Meeting the Prerequisite Conditions for Permanency Planning." Social Work, 39(1): 10 (January, 1994).

[9] The Children's Center at New York State's Bedford Hills Correctional Facility recently published "The Foster Care Handbook for Incarcerated Parents: A Manual of Your Legal Rights and Responsibilities." ($10.00/$2.00 for prisoners) which is available from The Children's Center, PO Box 803, Bedford Hills, New York 10507. For information on the Inmate Foster Care Committee, write Precious Bedell (#80G0280), P.O. Box 1000, Bedford Hills, NY 10507-2496.

[10] For further information, contact Ann L. Jacobs, Executive Director, The Women's Prison Association & Home, Inc., 110 Second Avenue, New York, NY 10003, (212) 674-1163.

[11] For further information, contact Sr. Mary Nearny, Edwin Gould Services for Children, Imprisoned Mothers Program, 104 East 107th Street, New York, NY 10029, (212) 410-4200.

[12] On this question for female offenders, see Immarigeon and Chesney-Lind.

[13] Beckerman, p.13.

[14] Genty, pp.25-26. Also, see Philip M. Genty, "Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis." Journal of Family Law, 30(4): 757-846, (1991-92).

[15] Lazlo, Smith, and Goretsky Elstein, pp.142-148. Further details about the project can be obtained from Barbara E. Smith, ABA Center on Children and the Law, 1800 M St., NW, Washington, D.C. 20036, (202) 331-2649 or Anna T. Lazlo, Circle Solutions, Inc. 8201 Greensboro Drive, McLean, VA 22102, (703) 821-8955.

Agreement Reached in Statewide Pennsylvania Case

BY JENNI GAINSBOROUGH

When trial began last December in *Austin v. Lehman*, the state-wide prison case filed against the state of Pennsylvania, corrections expert and former prison commissioner Pat McManus testified to the court that "overcrowding in combination with idleness is a formula for disaster." So it had proved in Pennsylvania, where in 1990 the prison system was on the verge of collapse. An increase in the prison population of almost 400% over 20 years had caused massive overcrowding, overburdened medical services, increased violence and simply overwhelmed the resources of the Department of Corrections. Overcrowding led to increased tension in the prisons and, as a result of either riots or threats of riots, the DOC had put one after another of its institutions on lockdown. The worst of the riots took place in October 1989 at S.C.I.-Camp Hill where 2,600 inmates were housed in a prison built for 1,800.

As a direct response to these events, the National Prison Project of the American Civil Liberties Union together with the ACLU of Pennsylvania, the law office of Kairys & Rudovsky, the Pennsylvania Institutional Law Project and the Disabilities Law Project filed suit against the state in November 1990. The complaint alleged that conditions of confinement in the state's prisons were unconstitutional (two prisons were excluded from the suit as they were already the subject of other court orders).

Over the next 20 months, plaintiffs' lawyers engaged in extensive discovery, obtaining hundreds of thousands of pages of Department of Corrections' records, as well as taking nationally recognized experts through the institutions. During discovery, the plaintiffs found problems concerning tuberculosis control in the prisons. As a result, there had already been a significant outbreak of active tuberculosis at Graterford, the largest prison. The Pennsylvania Department of Health had warned the DOC that more outbreaks would occur unless the system implemented reliable control procedures. The plaintiffs therefore requested a preliminary injunction from U.S. District Court Judge Jan DuBois. On September 27, 1992, the judge granted the injunction ordering the DOC to implement the new tuberculosis policy it had promulgated days before the hearing.

Because the allegations raised in *Austin* were so extensive, Judge DuBois divided testimony into four distinct phases — corrections, environment, medical and mental healthcare. In the first phase of the trial the court heard testimony concerning overcrowding, educational and vocational opportunities, access to law libraries and the courts, as well as inmate safety. Prisoners took the stand and told of guard brutality and excessive use of force which was inadequately investigated and rarely punished.

Five weeks into the trial, the parties, with the encouragement of the court, entered into settlement negotiations. On August 9, lawyers representing the prisoners announced that they have reached a settlement with the State, and the agreement will be presented to Judge DuBois for approval on November 18.

The agreement is a wide-ranging one covering corrections, environmental and fire safety, medical and mental health care issues. Some of the key provisions bind the state to:

- a strict policy for investigation of prisoner complaints of excessive force by guards;
- increased law library access and legal assistance;
- job and educational opportunities for all prisoners;
- a formula for establishing a minimum number of doctors, nurses and dentists at each facility which will require an additional 150 health care positions;
- number of new health care policies similar in scope and level of detail to the tuberculosis policy implemented under the preliminary injunction;
- a Chief of Psychiatric Services to oversee all aspects of mental health policies and practice system wide;
- a minimum of 800 special needs unit beds and 212 mental health unit beds;
- numerous changes to the environmental (food service, sanitation, ventilation, etc.) and fire safety conditions, all to be subject to independent inspection.

While the 87-page settlement agreement is not a Consent Decree and cannot be enforced directly in court, it does allow the lawyers for the plaintiffs to re-institute the lawsuit any time within the next three years if the defendants do not abide by the terms of the agreement. NPP attorney Elizabeth Alexander who was responsible for the medical aspects of the case was pleased by the settlement. "Not only does it make continued expensive litigation unnecessary, but more importantly it will bring immediate improvements to the conditions under which the men and women in Pennsylvania's prisons must live." ■

Ron Wikberg— Prison Reporter and Author

Ron Wikberg, who became an award-winning journalist while serving a life sentence, died of cancer on October 2 at his home in Rohrersville, Maryland.

Mr. Wikberg served 23 years in the Louisiana State Penitentiary in Angola, trained there as a paralegal and was released two years ago after he found a legal defect in his sentence of life imprisonment.

In 1971 he began to write for the prison magazine, *The Angolite*, becoming associate editor in 1988. Wikberg and chief editor Wilbert Rideau turned *The Angolite* into a prize-winning journal winning awards for reporting, editing and publishing. One article, "The Sexual Jungle," received a George Polk Award in 1980, and *The Angolite* was nominated for many National Magazine Awards.

NPP Executive Director Alvin Bronstein said "I met Ron at Angola in 1991, when he had already served 22 years in that prison. His intelligence, candor and sense of humor were amazing to me, especially when I think of how depressed I feel after a day of just visiting a prison like Angola. I am sure he felt rage but he made a great contribution nonetheless."

The Angolite

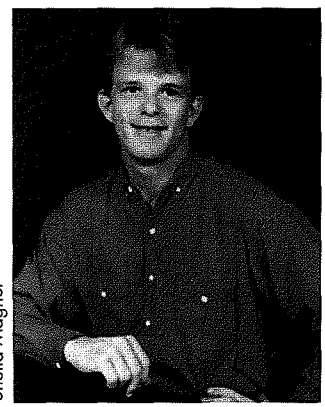
Ron Wikberg is shown here (r) with NPP Executive Director Alvin J. Bronstein (c) and *The Angolite* chief editor Wilbert Rideau (l) during a 1991 visit Bronstein made to the Louisiana State Penitentiary in Angola, La.

In Memory: Joann Walker and Jim Magner

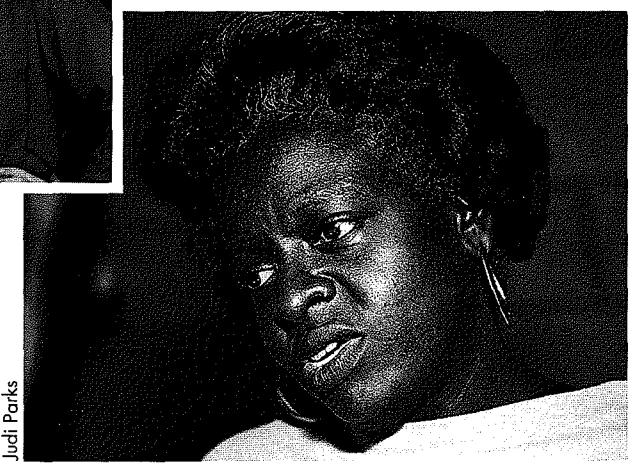
BY JACKIE WALKER

Last July, Joann Walker, former prisoner and peer educator, and Jim Magner, former prisoner and founder of Prisoners With AIDS Rights Advocacy Group (PWA-RAG), died. Activists Fred Beasley and Judy Greenspan reflect on their lives:

Those of us who live with HIV/AIDS in America's prisons have lost one of our finest generals to the disease she fought so hard to protect others from.



Sheila Magner



Judi Parks

When I received word that **Joann Walker** had died, my first reaction was to cry, and I cried hard. Later I read all the letters she had written me and in each one I found a message that soothed the pain of knowing I would never receive another one of her letters.

Joann became many things to me in the short time we shared through our letters, I found her to be kind, gentle and understanding, but she was also hard, forceful and unrelenting in her battle for the rights of prisoners who live with HIV/AIDS.

She really touched the hearts of the people who knew and loved her and I am glad to say I was one of those lucky people.

Her letters gave me strength and courage when I was ready to give up, and gave me insight on what I could be and what I should expect from others.

She was my light when my world was dark and I will always love her for providing me with that beam of light that guided me back to my soul, spirit and inner self and for proving to me I have the right to be loved.

I remember Joann telling me time and again, "I refuse to let the system kill me." And she didn't.—*Frederick Carl Beasley*

Jimmy Magner was one of the first prisoners that I "met" after becoming the National Prison Project's AIDS Information Coordinator in 1988.

Jimmy "educated" me about the federal prison system's treatment of prisoners with HIV/AIDS. Every time we talked he was en route somewhere else. It's "diesel therapy," reserved for the Bureau of Prisons' [BOP] troublemakers. Jimmy told me horror stories about the way prisoners with HIV/AIDS were treated that would have me in tears. Jimmy sent me a picture of himself holding a picket sign at an anti-nuclear demonstration. He also was quite open in his letters about being gay. In prison, the combination of being gay and HIV+ is a double stigma, but those two facts and his political activism made me feel close to him.

He started the PWA-RAG in 1988. When Jimmy first approached me about helping circulate a national newsletter for prisoners with HIV/AIDS, I became very excited. I knew from the volume of letters I was receiving that hundreds of prisoners around the country would benefit from such a publication. But I was really afraid he couldn't pull it off. I was wrong because Jimmy could do just about anything he set his mind on doing.

Jimmy's medical situation taught me a lot about the need for compassionate release for prisoners with AIDS and other terminal illnesses. In 1990, Jimmy started getting very sick. He called me weekly during this period; I studied the BOP's compassionate release policy. First I tried contacting the medical staff at the prison he was in and then I contacted the Medical Director of the BOP, Dr. Kenneth Moritsugu. They were all singing the same "no" song. I learned that if you are a political organizer like Jimmy, you get turned down every time. Here was a prisoner who was very ill and clearly could have died at any time but the Medical Director kept stating he was ineligible. The lack of compassion of the federal prison system made me very angry.

Jimmy didn't receive compassionate release, but our letters, public pressure and Jimmy's organizing influenced a transfer to the prison medical center in Rochester, Minnesota. Fortunately, even though the BOP kept threatening to move him, Jimmy served the last part of his sentence at the prison hospital.

Jimmy was an organizer, a fighter and a survivor. He fought every attempt the system made to kill him and won. Since his release, PWA-RAG has continued to grow. Of course, Sheila Magner, his mother, has been Jimmy's and PWA-RAG's mainstay of support.

I am honored to have had the opportunity to fight alongside him. His fighting spirit kept me going at the NPP and the PWA-RAG has become an important voice for the advocacy movement for prisoners with HIV/AIDS.

Jimmy, you will be missed by prisoners, former prisoners and activists whose lives you touched. We will continue the struggle you began until justice is done. —*Judy Greenspan* ■

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)

QTY. COST

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

Name _____

Address _____

City, State, ZIP _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project's litigation program since June 30, 1994. Further details of any of the listed cases may be obtained by writing the Project.

Austin v. Lehman—On August 9, lawyers representing the plaintiffs announced that they have reached a settlement with the state in the Pennsylvania prison case. The agreement will be presented to U.S. District Judge Jan DuBois for approval on November 18. For details of the settlement agreement see p.17.

Lambert v. Morial—The NPP has filed another complaint against the city of New Orleans in addition to its two existing cases, *Hamilton v. Morial* (conditions in the Parish Prison) and *Doe v. Foti* (conditions for juveniles). The named plaintiffs in the new case, *Lambert v. Morial*, are women detained at the South White Street jail (SWS) which houses more than 200 women, including sentenced prisoners, pretrial detainees and immigration holds. The complaint alleges that SWS is overcrowded with prisoners sleeping in mattresses on the floor; environmental conditions are dangerous with defective plumbing and ventilation and grossly inadequate fire safety precautions; medical and mental health care are deficient; legal access to attorneys and courts is obstructed; guards routinely use unjustified force against prisoners; and lack of rational classification and poor staffing (exacerbated by overcrowding) lead to assaults and victimization.

Hadix v. Johnson—The NPP appears in the medical and mental health care portion of this conditions of confinement case at the State Prison of Southern Michigan in Jackson. On July 15, 1994, the district court granted the plaintiffs further relief on a variety of medical issues, including tuberculosis control, medication monitoring, access to medical care, medical screening of new prisoners, and dental care. These orders resulted from an evidentiary hearing on June 9, 1994.

Goldsmith v. Dean—Since this statewide class action suit on behalf of prisoners in Vermont prisons was filed in December 1993, the state has been unresponsive to the plaintiffs' discovery requests. In a pre-trial order in August, the district court judge awarded sanctions against the defendants and discovery is now continuing.

Langford v. Racicot—Since this case was filed in December 1993, negotiations have continued with the state of Montana over the conditions of confinement at the Montana State Prison. A settlement has now been reached between the parties covering the issues of overcrowding, environmental and fire safety conditions, medical and mental health care and classification and treatment policies. The agreement will be submitted to the district court judge for approval on October 19.

Washington v. Tinney/Johnson v. Galley—The NPP has been representing prisoners in two Maryland state prisons (Maryland Correctional Institution at Hagerstown and Maryland House of Corrections at Jessup) since 1985, and continues to monitor the court-approved agreement covering conditions at these two facilities. During a tour of MHC-Jessup in March it became clear that the defendants were about to reinstitute double-bunking in violation of the agreement. The district court held a hearing in September on the contempt motion brought by the NPP and the counter-motion from the defendants to modify the agreement to permit double-bunking. The court's decision is awaited. ■

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