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"Corrections-Industrial Complex" Expands in U.S.

BY JAN ELVIN

Ted Goins, a securities analyst at Branch, Cabell & Co. in Richmond, Va. spent a weekend last spring reading through every detail of the federal Crime Bill and watching the debate on C-Span. He then came up with a list of "theme stocks of the 90s."

Goins' highest recommendation went to the Nashville-based Corrections Corporation of America (CCA)—the nation's most successful operator of private prisons—whose stock had recently hit an all-time high. CCA's chief financial officer was quoted as saying that the Crime Bill was "very favorable to us."[1]

CCA's success is but one example of the profits to be made by a rapidly growing constituency of architects, private prison operators, vendors, labor unions, developers, financiers, and other entrepreneurs. Most recently, defense contractors, who have been hurt by cuts in military spending, have been searching for opportunities in the corrections industry.

The combination of these lucrative business opportunities, political posturing, the war on drugs, and deep social divisions within the United States have created a rapid expansion of the "crime control industry." The buyers and sellers of prison goods and space are lining up to cash in.

Critics warn, however, that the economic interests of industry will always be on the side of oversupply of prison space rather than undersupply, establishing an extraordinarily strong force for expansion. Renowned Norwegian criminologist Nils Christie, one of the most outspoken critics of the emerging "corrections industrial complex," cautions against the spread of a system of crime control in which ethical questions are suppressed and efficient management supplants justice.[2]

Will the economic motives of business conflict with the objectives of providing decent conditions of confinement? Will prison businesses maintain high occupancy rates even in the absence of demonstrated need? And, as Malcolm Feeley asks, to what extent does privatization expand and transform the state's capacity to punish?[3]

That the United States is moving full steam ahead to expand this system is unquestionable. In 1980 the total state and federal sentenced inmate population was 329,821. At midyear 1994 that total had risen to 1,012,851.[4] The 1994 federal Crime Bill provides nearly $9 billion for state prison construction. During FY 1993-94 state prisons added at least 105,219 beds, an increase of 13% from the 1992-93 totals of 92,028 beds.

Some of the biggest names in finance

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have become involved: Goldman Sachs & Co., Prudential Insurance Co. of America, Smith Barney Shearson Inc. and Merrill Lynch & Co. Many of the companies work to underwrite prison construction with private, tax-exempt bonds which require no voter approval.

A Shoppers' Guide

Private companies are now available to provide consulting, personnel management, architecture and building design, vocational assessment, medical services, drug detection, transportation, food service and management to state prison systems. Other businesses have been formed to sell specialized products such as body armor, closed circuit television systems, mechanical and electronic locks, perimeter security and motion detection systems, tamper-proof furniture, fencing, flame-retardant bedding, heavy duty furniture, shatter proof plastic panels, plastic bunks, tamper-proof fasteners, and clog proof waste-disposal systems. One company sells high-security fire sprinklers designed so that inmates cannot hang themselves.

A quick look through the advertisements in any issue of *Corrections Today*, the ACA's glossy magazine, reveals a certain talent for word play:

- *Coastal Correctional Healthcare, Inc.: Put a Lock on Healthcare Problems. Are correctional healthcare problems on the loose in your facility? Let us put the cuffs on them."*
- *Santana (plastic toilet compartments): "I got 10 years, but Santana is in here for life!"*
- *AT&T: Strike Three! 3-way call detect system stops your inmates from getting out. And it's proven 93% effective."*
- *Point Blank Body Armor: "Some inmates would love to stab, slash, pound, punch and burn you. But they won't get past your S.T.A.R. (Special Tactical Anti-Riot Vest).*

The lobbying power of these companies, especially defense contractors with lobbyists in Washington and long-term relationships on Capitol Hill, distorts the dialogue that should be taking place about the effectiveness of incarceration as a policy and drowns more reasonable voices.

"We're not going to be able to lock up everyone," said Bobbie L. Huskey, president of the ACA. "The absence of a noticeable reduction in adult crime rates as incarceration rates have climbed raises serious questions about the efficacy of America's sentencing policies."[5]

Yes, In My Back Yard

For many years prison officials faced the "NIMBY" problem: when communities heard about plans for a new prison, the outcry was "Not In My Back Yard!" Times have changed.

"Communities started looking for any kind of economic growth," says Bill Patrick of the Federal Bureau of Prisons. "They started realizing we were a recession-proof, environmentally clean, attractive, safe industry."[6]

Financially strapped communities are now begging for prisons to be built in their back yards. Town leaders in Coleman, Florida, the former "Cabbage Capital of the world," population 854, lobbied aggressively for a new Bureau of Prisons site. The new prison is now partially completed.

In Texas, some communities have offered free memberships in local country clubs to top officials of any prison that comes to town. Dick Lewis, spokesman for the state jail division of the Department of Corrections, said, "Fifteen years ago, if you wanted to place a prison in a locale, you would have major opposition. Now the turnaround is 180 degrees. They are seeking these prison units. The local media calls it the prison derby."[7]

Braham, Minnesota is trying to purchase about 300 acres to donate the land to the state for an $80 million, 800-bed, close custody prison. (The BOP requires that land for a prison be donated by the state.) James Bruton, the state's deputy commissioner for institutions, said he could understand why small towns like Braham seek the prison for economic salvation. But he worries about the long run. "We can-

Drawing by Wm. Hamilton; ©1994 The New Yorker Magazine, Inc.

"Remember, we're not just making money. We're building prisons."

THE NATIONAL PRISON PROJECT JOURNAL

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not build ourselves out of the crime problem," says Bruton. "Every state that's tried it has failed miserably. You'll never see a reduction in the crime rate by building more prisons. What you're going to find out is that you can't afford to operate what you've built."

Privatization

Cornell Cox, a private firm in Houston, entered the California market by buying the state's largest private prison firm, Eclectic Communications, Inc. Cornell Cox is backed by Wall Street investment houses Dillon, Reed & Co. and Charterhouse. Since 1988, Eclectic has received contracts worth more than $50 million. The former owner, Arthur McDonald, sold the company for more than $10 million, according to the Los Angeles Times. "Crime pays. I hate saying that, but it really does," said McDonald from retirement in South Dakota.[8]

The two largest companies in the field are Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation. CCA recently entered the inmate transportation business by purchasing TransCor America. "One of TransCor's biggest expenses is overnight housing of prisoners on transcontinental routes," said Doctor Crants, CCA chairman and chief executive officer. "CCA's network of facilities will give TransCor ready access to quality, secure beds, while CCA will gain incremental occupancy."

Tennessee's $60 million contract with CCA is currently under review by the state legislature.

CCA has come under fire from government audits in Texas of two of their privately run prisons. The 1990 report disclosed that "inexperienced" prison employees had used excessive force on inmates. Additionally, inmates were not getting the services which were required under the state contracts and intended to help inmates return to society.[9]

Another unfavorable report was issued by the Prison Officers' Association in the United Kingdom in 1987, alleging cruelty to inmates at the CCA facility at Silverdale and abhorrent conditions.[10]

As of now, fewer than 2% of the nation's prisoners are incarcerated in private facilities, but the new Republican crime bill presently before Congress will add $10 billion for prison construction, some of which will go to private prisons.

State spending

According to a survey of 47 states for Fiscal Year 1994-95, the average DOC budget is around $507 million per system, up from an average of $447 million per system in FY 93-94.

Six states have a corrections operating budget of over one billion dollars. California's tops the list with a budget of over $3.6 billion. Here are some examples of what that has meant for Californians:

- In the last ten years the DOC's share of the State's General Fund rose from 3.9% to 8.2% while higher education's share declined from 14.4% to 9.3%.
- The multi-billion dollar prison and so-called crime control expansion will force cuts in education, job training, youth counseling and other social services, the very programs that address the root causes of crime;
- The Los Angeles District Attorney's Office says that three out of four offenders who get life sentences under Proposition 184 ("Three Strikes You're Out") will be non-violent offenders, at a cost of $48 billion over 20 years for Los Angeles' prisoners alone.
- Based on information provided by the DOC, increases in California's prison population will result in additional state operating costs of about $200 million in 1995-96, and will grow by several hundred million each year until the full impact is realized in about 32 years. By the year 2003, the additional costs will reach about $3 billion, and will grow to about $6 billion annually by the year 2026. The DOC predicts that it will incur one-time costs of about $20 billion over the next 32 years to construct new facilities.

Connections

Corrections has traditionally operated without political advantage, but can now benefit from the lobbying skills of many private providers.

"An urge for expansion is built into industrial thinking," says Dr. Christie. But the prison industry is one with particular advantage because it provides "weapons for what is often seen as a permanent war against crime. The crime control industry is like rabbits in Australia or wild mink in Norway—there are so few natural enemies around."

With the boom have come lobbyists who have an economic interest in keeping sentences harsh and long, so that prison populations continue to soar.[11] Thus, we see a system developing where the deprivation of liberty is powered in large part by the profit motive. Christie warns, "You get private lobbying for prisons and you get private capital interested in building more prisons, in expanding that system...The industry has no interest in its own abolition." ■

Jan Elvin is the editor of the NPP Journal.

Continued on next page

"A Fortune 500 Industry!"

"By advertising in CorrectCare you will: tap into a $3 billion piece of the health care market...reach a market that has doubled its size over the last 10 years and currently grows over 14% each year....Don't miss this opportunity!"

–CorrectCare, magazine of the National Commission on Correctional Health Care

"Corrections—A 'Fortune 500' Industry!...Take advantage of the sales opportunities this burgeoning industry has to offer....As the industry grows, the billions of dollars spent on daily operational expenditures and construction translates into extensive sales opportunities for suppliers of correctional products and services."

–Annual conference brochure, American Correctional Association (ACA)

"Make the connection...enjoy the surge! Corrections is facing an explosion....Why shouldn't your company profit from this incredible growth?"

–1994 promotional brochure, ACA

"Call on jail administrators, sheriffs, and other jail professionals from across the country! You will be face to face with thousands of buyers in the expanding jail market. You will have the opportunity to personally present your products and services to the decision in this billion dollar industry...Put your company in front of this lucrative market!"

–1994 American Jail Association (AJA) conference brochure

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[1] Paulette Thomas, "Making Crime Pay," *The Wall Street Journal*, May 12, 1994, p. A1.

[2] Nils Christie, *Crime Control As Industry: Towards Gulags, Western Style*, London and New York: Routledge, 1993.

[3] Malcolm M. Feeley, *The Privatization of Prisons in Historical Perspective*, Criminal Justice Research Bulletin. Sam Houston State University 1991, vol.6 No.2 pp.1-10.

[4] Bureau of Justice Statistics, U.S. Department of Justice.

[5] *Criminal Justice Newsletter*, Vol.26, No.1, Jan.3, 1995, p.5.

[6] Meddis and Sharp, "Prison Business is a Blockbuster," *USA Today*, Dec. 13,1994, p. 10A

[7] Edward Walsh, "Strapped Small Towns Try to Lock Up Prisons," *The Washington Post*, December 24, 1994, pA3.

[8] Dan Morain, "Privately Operated Prisons a Potential Growth Industry," *Los Angeles Times*, October 19, 1994, p. A15.

[9] Mike Ward, "Private prisons faulted on services, discipline," *The Austin American-Statesman*, Wednesday, May 16, 1990.

[10] "The State and Use of Prisons in England and Wales," Written Evidence to the Inquiry of the Home Affairs Select Committee of the House of Commons, February 1987.

[11] "Politicians who support prison construction receive money from one of the biggest beneficiaries—the California Correctional Peace Officers Association," from the *Los Angeles Times*, Oct. 16, 1994. The union gave more than $900,000 to Governor Pete Wilson's 1990 run for governor.

"Crime pays..."

"Crime pays. I hate saying that, but it really does."
***–Arthur McDonald,** former owner of Cornell Cox, a corrections firm in Houston, after selling the company for more than $10 million.*

"There's no bigger growth industry in the last two years in Michigan than the corrections department."
–State Senator Jack Welborn

"Prison construction is going crazy all over the country."
***–Jim Hawthorne,** project supervisor of Lott Constructors Inc., prison builders.*

"Americans' fear of crime is creating a new version of the old military-industrial complex, an infrastructure born amid political rhetoric and a shower of federal, state and local dollars."
***–The Wall Street Journal,** 5/12/94*

"The [prison industry] has produced a Pentagon-like bureaucracy—'the prison-industrial complex'—and, as in the defense business during the days of the cold war, there is lucrative work for all. The incarceration craze involves a vest network of Wall Street underwriters, architects, and computer specialists, as well as builders and developers."
***–Peter Pringle, The Independent,** London, 11/23/94.*

"I already sell $100,000 a year of Dial soap to the New York City jails. Just think what a state like Texas would be worth."
***–Rod Ryan,** representing Dial Corp. at the ACA's annual winter meeting in Dallas.*

"We try to keep a close eye on all the crime bills."
***–Melissa Crane,** Prudential Securities vice president, who is part of the prison-financing team.*

"Corrections has spawned its own self-perpetuating interest groups, complete with consultants, lobbyists, burgeoning state bureaucracies and a rising private corrections industry. Like any special interest group, the correctional industry is in business to keep its empire growing."
***–Texas Comptroller John Sharp,** in a 1994 report which described the state prison system as "a troubled giant."*

"What can I say, it's a great, great business."
***–Larry Solomon,** vice president of Florida-based Joy Food Service Inc., which delivers food to prisons. Wall Street Journal, 1/19/95.*

PRI Members Confer on UN Prison Standards

BY JENNIFER MONAHAN

"This is not, in fact, a very popular theme." With classic Dutch understatement Winnie Sorgdrager, the Netherlands Minister of Justice, introduced the major conference on prison standards held in The Hague last November by Penal Reform International (PRI), and funded by her government.

PRI members from five continents described a world where standards for prisoners, and penal reform in general, are indeed very low on the public agenda. We heard a dispiriting picture of rising crime, outstripped only by rising fear of crime, of public and political pressure towards more imprisonment, set against tight budget constraints. Above all, of the proven ineffectiveness of treating prisoners badly as a way of reducing crime. "Today's convict is tomorrow's ex-convict," Professor Monika Platek of Warsaw University summed up. "The better we treat prisoners, the safer is society."

Hence the main task of the conference: to prepare a manual that would update the 1955 United Nations Standard Minimum Rules (SMRs) for the Treatment of Prisoners. The rules are in many respects badly out of date—drawn up before equal opportunities, or drugs or AIDS. Nevertheless, international penal reformers (including senior UN officials) are convinced that a new set of rules would get nowhere today. Indeed, UN member states would not agree to new SMRs laying down even the 1955 standards. (As one participant pointed out, about half the member countries of the UN today use torture.)

During three days' hard committee work, three points in particular became clear. First, despite vast differences in wealth and culture, basic prison standards should be universal. Participants from the developing world did not want adjustments downwards, they wanted firm principles as a lever in the struggle to raise standards. Second, prisons are a reflection of how much the world is shrinking. Participants from western countries stress the growing proportion of their prison population who are foreign nationals. Immigration detainees—asylum seekers in particular—

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Status Report: State Prisons and The Courts January 1, 1995

SUMMARY

Thirty-nine states plus the District of Columbia, Puerto Rico, and the Virgin Islands are under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities. Thirty-three jurisdictions are under court order for overcrowding or conditions in at least one of their major prison facilities, while nine jurisdictions are under court order covering their entire system. Only three states have never been involved in major litigation challenging overcrowding or conditions in their prisons. The following list gives the current status of each state.

Note: There is some overlap between the second and fourth categories because, in some states, one or more facilities are under court order while other facilities in that state are presently being challenged (*e.g.*, Illinois). Also, Oklahoma is listed in both the second and third categories because the McAlester facility is still under the court order entered in *Battle v. Anderson* but is no longer under active court supervision.

Entire Prison System Under Court Order or Consent Decree

9 jurisdictions: Alaska, Delaware, Mississippi, New Mexico, Rhode Island, South Carolina, Texas, Puerto Rico, Virgin Islands.

Major Institution(s) in the State/ Jurisdiction Currently Under Court Order or Consent Decree

33 jurisdictions: Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, District of Columbia.

Formerly Under Court Order or Consent Decree or Currently Released from Active Supervision of the Court

7 jurisdictions: Alabama, Arkansas, Georgia, Oklahoma, Oregon, Tennessee, Wyoming.

Pending Litigation

11 jurisdictions: California, Colorado, Connecticut, Georgia, Montana, Nebraska, New York, North Carolina, Ohio, Utah, Vermont.

Special Masters/Monitors/Mediators Appointed (present and past)

24 jurisdictions: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Michigan, Nevada, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, District of Columbia, Puerto Rico.

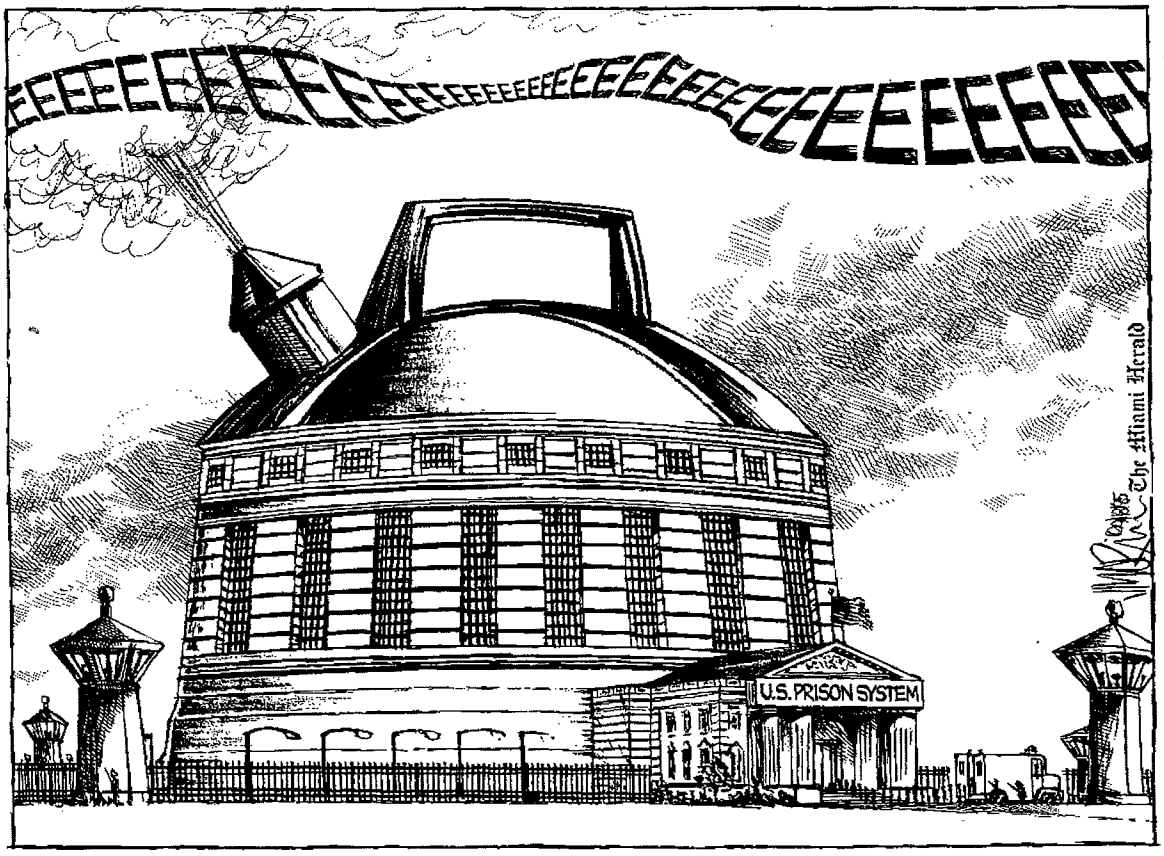
Prison Systems or Major Facilities Under Court Order and Cited for Contempt (present and past)

8 jurisdictions: Alabama, Michigan, Mississippi, Rhode Island, Texas, Virginia, District of Columbia, Puerto Rico.

Not Involved (to date) in Overcrowding or Conditions Litigation

3 jurisdictions: Minnesota, New Jersey, North Dakota.

The full Status Report, with details on the litigation in each state, will be sent to Journal *subscribers under separate cover. For non-subscribers the full Status Report is available for $5 prepaid from the NPP, 1875 Connecticut Avenue, Suite 410, Washington, DC 20009.*



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Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

Habeas Corpus/Exhaustion of Remedies

During the 1993-94 term, the Supreme Court finally addressed a long-standing ambiguity in the relationship between 42 U.S.C. §1983 and the federal habeas corpus statutes in cases where prisoners seek relief related to the fact or duration of their imprisonment. In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), the Court definitively clarified the matter for prisoners who allege that their criminal convictions or sentences are defective. However, the waters remain murky for prisoners challenging disciplinary, parole, or other administrative decisions affecting the time they must serve.

Heck addressed what one commentator has called "the *Preiser* puzzle." Schwartz, "The *Preiser* Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners," 37 *DePaul L.Rev.* 85 (1988). In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the plaintiffs brought suit under §1983 to get back "good time" (time off for good behavior) that had been taken from them in prison disciplinary proceedings. The Court ruled that when a state prisoner challenges "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole remedy is a writ of habeas corpus." 411 U.S. at 500. The Court reasoned that challenges to custody represent the "core of habeas corpus," 411 U.S. at 487, and that allowing such challenges under §1983 would let prisoners evade the statutory mandate of exhaustion of state judicial remedies. *See* 28 U.S.C. §2254(b).

The scope of the *Preiser* holding has been a source of persistent controversy. *Preiser* explicitly stated that a prisoner seeking damages "is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release;" accordingly, damage actions do not require prior exhaustion of state remedies. 411 U.S. at 494. The following year, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), a §1983 suit alleging that prison disciplinary proceedings denied due process, the Court held, "*Preiser* expressly contemplated that claims properly brought under §1983 could go forward while actual restoration of good time credits is sought in state proceedings," and that the plaintiffs could also obtain a federal court declaratory judgment addressing the adequacy of the procedures used and an injunction prospectively enjoining invalid regulations. 418 U.S. at 554-55. The Court added, "One would anticipate that normal principles of *res judicata* would apply in such circumstances." *Id.* at n. 12.

It is this distinction among remedies that sets up the "*Preiser* puzzle." If *Wolff* and *Preiser* mean what they say, then a litigant can get a ruling on the merits of an action that affects his or her release date, along with damages, a prospective injunction, or a declaratory judgment. The litigant can then go back into state court armed with the federal court judgment and demand the restoration of lost good time, rescinded parole date, etc., claiming *res judicata* or collateral estoppel or both. Insofar as *Preiser* was about federalism, this procedure—which would reduce the state courts to a "me too" role—does not seem to serve its concerns. Even if the federal judgment is not preclusive in state court, the potential result is highly unsatisfactory: contradictory judgments in different courts concerning the same subject matter.

In cases involving criminal convictions or sentences, federal courts have consistently refused to hear such claims, regardless of the relief sought, unless the litigant has previously exhausted state judicial remedies. *See, e.g., Johnson v. State of Texas*, 878 F.2d 904, 906 (5th Cir. 1989) (damage claim for speedy trial violation and the use of perjured testimony in a criminal proceeding may not be pursued without exhaustion of state remedies); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (a federal court should not make a ruling on a §1983 damage claim which might imply that a state conviction was illegal). In cases involving administrative decisions—discipline, parole, release date calculation—there has been a spectrum of approaches, discussed below.

Heck arose from a criminal conviction. The plaintiff sought damages, but not release, based on allegations that the defendants (county prosecutors and a state police investigator) had engaged in an "unreasonable" and "arbitrary" investigation, destroyed exculpatory evidence, and used an unlawful voice identification procedure at trial. The court of appeals had held that the claim was barred by *Preiser*. It had gone on to hold that the case should be dismissed, rather than stayed, pending the exhaustion of state judicial remedies. The appeals courts were in conflict on this point, which is important because a dismissed claim can become time-barred during the state exhaustion process. *See, e.g., Young v. Kenny*, 907 F.2d at 878 (9th Cir. 1990); *Prather v. Norman*, 901 F.2d 915, 919 (11th Cir. 1990).

The Court did not directly resolve this procedural issue. Rather, it held that Mr. Heck had no claim cognizable under §1983. Because §1983 creates a "species of tort liability," the Court looked to the law of malicious prosecution. The Court deemed this the common-law tort most nearly analogous to the plaintiff's claims because it "permits damages for confinement imposed pursuant to legal process." The Court noted that an element of that tort is termination of the prior criminal proceeding in favor of the accused. 114 S.Ct. at 2371. Adopting this tort rule, it held that the plaintiff would not have a cognizable claim unless and until he got his conviction reversed, which can only be done through exhaustion of state judicial remedies with subsequent resort to federal habeas corpus if necessary.

This holding does away with the "*Preiser* puzzle" for claims involving convictions and sentences. It also makes the stay versus dismissal question a non-issue: if the claim does not accrue until the conviction is reversed, the statute of limitations cannot run during the exhaustion process. 114 S.Ct. at 2373-74. *Heck* also resolved any doubt—not that any existed—about prisoners' inability to get around the exhaustion requirement by seeking other forms of relief against their criminal convictions or sentences.

The *Preiser* rule, however, is not limited to criminal judgments; it also applies to administrative actions such as prison disciplinary proceedings, parole decisions, and the calculation of release dates. For prison litigators, the important question is what application the malicious prose-

cution analogy may have for such administrative matters—especially disciplinary proceedings.

The answer should be "none." The tort of malicious prosecution was traditionally limited to judicial proceedings, which prison disciplinary hearings are not. Some states maintain this "courts-only" rule. *See Greer v. DeRobertis*, 568 F.Supp. 1370, 1376 (N.D.Ill. 1983) (holding that prison disciplinary proceedings cannot support a malicious prosecution suit under Illinois law); *Kerpelman v. Bricker*, 329 A.2d 423, 427-28 (Md.Ct. Special Appeals 1974). Other states permit some malicious prosecution claims based on administrative proceedings. Even these states have generally done so in instances, such as professional licensing and discipline proceedings, that were much more like judicial proceedings than is a prison disciplinary hearing. *See, e.g., Toft v. Ketchum*, 113 A.2d 671, 673-74 (N.J. 1955) (ethics and grievance committee proceeding against attorney); *Kauffman v. A.H. Robins Co.*, 448 S.W.2d 400, 403 (Tenn. 1969) (license revocation proceeding before state board of pharmacy with to subpoena witnesses and administer oaths).

Research reveals only one decision addressing directly and in any detail whether a malicious prosecution claim can arise from a prison disciplinary hearing. In *Treacy v. State*, 131 Misc.2d 849, 501 N.Y.S.2d 1005 (N.Y.Ct.Cl. 1986), *aff'd on other grounds sub nom. Arteaga v. State*, 72 N.Y.2d 212, 532 N.Y.S.2d 57, 527 N.E.2d 1194 (N.Y. 1988), the court held that New York's rule allowing claims for malicious prosecution in administrative proceedings applied only to proceedings "which provide for a 'hearing and trial of the issues on evidence and testimony under oath, with the right of cross examination'...." A prison disciplinary hearing "is not a full-scale adversarial hearing" because it is governed only by the minimal requirements of *Wolff v. McDonnell*, without a right to confrontation or the assistance of counsel and with only a qualified right to call witnesses. 501 N.Y.S.2d at 1006. Therefore *Treacy* held no malicious prosecution claim could lie.

More fundamentally, a malicious prosecution claim is completely different in concept and structure from a disciplinary due process claim. Malicious prosecution claims are brought against the complainant in the case, not the court or other tribunal that hears it. They are based on the lack of probable cause for making the charges, not on violations of procedural rights. W. Page Keeton *et al.*, Prosser and Keeton on *The Law of Torts §119* (5th ed. 1984). By contrast, a claim that the complainant falsely or baselessly filed disciplinary charges is exactly what federal courts will not hear in connection with prison discipline. *See, e.g., Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989); *Freeman v. Rideout*, 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied*, 485 U.S. 982 (1988). Viable disciplinary due process claims are brought against the disciplinary hearing officer or committee members, and they allege that these officials failed to follow the procedures required by due process in deciding the case against the prisoner.

Nothing in *Heck* is to the contrary. *Heck*'s discussion of malicious prosecution focuses explicitly on criminal convictions and sentences, with no suggestion that it is intended to govern disciplinary proceedings or other administrative matters—which were, after all, not before the Court.

Although *Heck* makes *Preiser* and *Wolff* irrelevant to cases challenging criminal judgments, the Court did revisit these decisions in passing. Unfortunately, its comments, which are almost certainly *dicta*, do little to clarify *Preiser*'s application to administrative actions.

Before *Heck*, some courts held, or simply assumed, that *Wolff* permitted them to grant any relief not directly affecting a prisoner's release or parole date.[1] Others held that no relief could be granted under §1983 if it would require a ruling on whether good time was properly taken, parole was properly revoked or denied, etc.[2] One variation of the latter approach permits prisoners to obtain rulings under §1983 requiring officials to follow proper procedures in connection with future proceedings concerning their good time, parole, etc., because such rulings do not directly entitle the prisoner to earlier release.[3] A more restrictive view of this substance/procedure distinction holds that no relief can be granted under §1983 based on a challenge to an individual prisoner's hearing affecting her release date; only "broad-based attacks on general rules and procedures" can be heard without exhaustion of state remedies, and even a "broad-based attack" may be barred if it would resolve issues that would automatically entitle the prisoner to release.[4] Another appeals court similarly held that §1983 may not be used to decide an "underlying issue," even one of a general nature, that would indirectly entitle the prisoner to immediate or earlier release.[5]

Heck does little to narrow this diversity of views. The Court wrote:

> *...Petitioner contends that [the plaintiffs in* Wolff *were authorized] to recover damages measured by the actual loss of good time. We think not. In light of the earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think that this passage recognized a §1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in* Wolff *did not call into question the lawfulness of the plaintiff's continuing confinement...*
>
> *Thus, the question posed by §1983 damage claims that do call into question the lawfulness of conviction or confinement remains open....*

114 S.Ct. at 2370.

This passage continues to obscure the question whether *Preiser*'s application turns on the remedy sought or the claim presented. The distinction between "damages for the deprivation of civil rights" and "damages for the deprivation of good-time credits" is largely specious as a practical matter, as is the distinction between "a §1983 claim for using the wrong procedures" and one "for reaching the wrong result (i.e., denying good-time credits)." Damages are awarded for the actual loss to the plaintiff, monetary or otherwise, and not for the abstract value of constitutional rights. *Memphis Community School District v. Stachura*, 477 U.S. 299, 310 (1986). In procedural due process cases, the plaintiff's loss cannot be assessed without determining whether the same penalty, or any penalty, would have been assessed after a procedurally correct hearing. *See Carey v. Piphus*, 435 U.S. 247, 261-67 (1978). If "reaching the wrong result" is excluded from the damages calculation, the damage remedy is trivialized; if it is not, it is difficult to know what the above quoted passage from *Heck* could mean.

Heck's statement that "there is [no] indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits" simultaneously raises and begs the same question: whether the *Preiser* rule is invoked by the legal claim asserted or by the remedy sought. Under *Carey* and its progeny, the district court is obliged to find as a fact whether using the wrong procedures caused the improper imposition of a penalty. It is precisely this kind of determination that is barred by existing case law in some federal circuits. *Heck*'s subsequent reference to "call[ing] into question the lawfulness of the plaintiff's continuing confinement" also clarifies nothing. There are several levels of specificity at which the lawfulness of a penalty such as good time deprivation can be assessed—a ruling that good time was improperly taken, that it was taken in a defective proceeding, or that it was taken in a system that follows defective rules or procedures. These distinctions correspond to the varying interpretations of *Preiser* in the lower courts.

Not surprisingly, the lower courts have already begun to disagree about *Preiser* as interpreted by *Heck*, along the same lines as their pre-*Heck* conflict.

In *Whitman v. Ventetuolo*, 25 F.3d 1037 (Table), 1994 WL 246063 (1st Cir., June 7, 1994) (*per curiam*), a prisoner alleged that he had been improperly excluded from a blood donor program that would have yielded good time credits. The court held that all his claims for relief, and not just those bearing directly on his release date, were barred because adjudicating them "would invariably require a federal court to address the question of the constitutionality of state procedures utilized to determine eligibility for the blood donor program." This holding is consistent with the views of Preiser expressed in *Serio v. Members of*

Louisiana State Board of Pardons and *Offett v. Solem*, cited in notes 4 and 5.

The plaintiffs in *Best v. Kelley*, ___ F.3d ___, 1994 WL 558377 (D.C.Cir., Oct. 14, 1994), challenged the termination of a drug treatment program through which they had expected to earn good time credits. The appeals court upheld the dismissal of their claim for denial of good time, but it held that the *Preiser/Heck* rationale did not support the dismissal of the other claims, such as the claim for deprivation of the drug treatment itself—even though adjudication of these claims would require a federal court to address the constitutionality of the program's termination, the question which also underlies the good time claim. This holding is consistent with the view of *Preiser* expressed in *Thomas v. George State Board of Pardons and Paroles*, cited in note 3.

Thus, the *Preiser* puzzle has now become the *Preiser/Heck* puzzle. The most pressing question for prisoner advocates will be whether disciplinary proceedings involving loss of good time in addition to other sanctions are subject to the *Preiser* rule. The circuits are presently in disagreement on this point, compare *Sisk v. CSO Branch*, 974 F.2d 116, 118 (9th Cir. 1992) and *Viens v. Daniels*, 871 F.2d 1328, 1333-34 (7th Cir. 1989) with *Bressman v. Farrier*, 900 F.2d 1305, 1306-07 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1090 (1991), and *Heck* does not resolve their conflict.

Suicide Prevention/Deliberate Indifference

In *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), a case about protection from inmate-inmate assault, the Supreme Court significantly clarified its prior rulings concerning the Eighth Amendment deliberate indifference standard. Randall C. Berg of the Florida Justice Institute in Miami has pointed out that *Farmer* appears to overrule a major prop of existing law concerning jail and prison suicides.

Most federal courts have adopted some version of the rule that "a finding of deliberate indifference requires that officials have notice of the suicidal tendency of *the* individual whose rights are at issue in order to be held liable for the suicide of that individual." *Tittle v. Jefferson County Commission*, 10 F.3d 1535, 1539 (11th Cir. 1994) (*en banc*) (emphasis in original). In *Tittle*, the panel opinion held that a history of suicides from horizontal bars in jail cells, with no corrective action by jail officials, created a triable factual issue of deliberate indifference regardless of their knowledge of individuals' suicidal tendencies. 966 F.2d 606, 612 (11th Cir. 1992) ("It is true that prison officials are not required to build a suicide-proof jail. By the same token, however, they cannot equip each cell with a noose.") The *en banc* court rejected this theory of liability.

In *Farmer*, the Court explicitly rejected the notion that prison officials must have notice of the danger to a particular individual to be held liable. *The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health,"...and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.*

114 S.Ct. at 1982 (citation omitted).

Since the risk of prison suicide, like exposure to communicable disease, unsafe drinking water, exposed wiring, deficient firefighting measures, and the risk of assault, are all aspects of prison officials' general duty to provide "reasonable safety," *see Helling v. McKinney*, 113 S.Ct. 2475, 2480-81 (1993), there is no apparent reason why suicide risks should be treated any differently from risks of assault by others in applying the deliberate indifference standard. *Farmer* strongly suggests that the restrictive individual-specific rule of the jail suicide cases is history, and that jail officials are under a general duty to protect all prisoners—not just those already identified as suicide-prone—from unreasonable risks of suicide.

[1] *See, e.g., Sisk v. CSO Branch*, 974 F.2d 116, 118 (9th Cir. 1992); *Clark v. State of Georgia Pardons and Paroles Board*, 915 F.2d 636, 6308-39 (11th Cir. 1990) (claim for damages for parole denial based on unconstitutional grounds and for an injunction barring future consideration of those grounds could be heard under § 1983 since the plaintiff did not seek release); *Smith v. Maschner*, 899 F.2d 940, 951 (10th Cir. 1990) (claim

Dear Prison Project...

Dear Prison Project:

I am currently out on parole, and the parole board has recently informed me that I have violated the conditions of my parole and that the board will take "appropriate action." Do I have any protection against the board revoking my parole?

Parole Pending

Dear Parole Pending:

Revocation of parole requires two hearings: (1) a preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the parolee has violated the terms of parole; and (2) a final hearing to decide any contested facts and to determine whether revocation is warranted. *Morrissey v. Brewer*, 408 U.S. 471, 480-82, 92 S.Ct. 2593 (1971)

The preliminary hearing is held before a detached and neutral body at or near the place of the alleged violation. At the preliminary hearing, you are minimally entitled to (1) a written notice of the alleged violations; (2) disclosure of the evidence against you; (3) an opportunity to be heard by the board in person; and, (4) a written decision containing the facts and reasoning for a finding of probable cause. You have the right to confront and question those who have presented information against you unless the hearing officer decides that the witness would be subject to a risk of harm if his identity is revealed.

At the final hearing, you are also guaranteed (1) the right to present witnesses and documentary evidence that support your claim that parole should not be revoked; and, (2) a written decision setting forth the reasons for revocation. You have the right to confront and cross-examine adverse witnesses unless the board finds good cause why this should be denied, such as cost and difficulty of producing these witnesses. *See Kell v. U.S. Parole Com'n*, 26 F.3d 1016, 1019 (10th Cir. 1994); *White v. White*, 925 F.2d 287, 290-91 (9th Cir. 1991); *Downie v. Klincar*, 759 F. Supp. 425, 426-27 (N.D.Ill. 1991). A parolee is generally entitled to a prompt hearing, but a delay does not deny due process unless the parolee can show that the delay prejudiced his ability to present evidence. *Cortinas v. U.S. Parole Com'n*, 938 F.2d 43 (5th Cir. 1991) *(per curiam)*. If prejudicial delay is established, due process requires the quashing of the parole violation warrant. *United State ex rel Sims v. Sielaff*, 563 F.2d 821, 828 (7th Cir. 1977).

Finally, counsel may be provided to a parolee who requests assistance and does not have the capacity adequately to represent himself. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 1764 (1973) You should request counsel if you believe that the issues involved in the hearing are too complex for you to handle without professional assistance. *See U.S. v. Dodson*, 25 F.3d 385, 389 (6th Cir. 1994). ■

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for good time was subject to habeas exhaustion requirement, but damage claim about same disciplinary proceeding could go forward under §1983); *Viens v. Daniels*, 871 F.2d 1328, 1333-34 (7th Cir. 1989) (if "significant sanctions" other than loss of good time are imposed, the prisoner may resort to §1983 without exhaustion).

[2] *See, e.g., Sheppard v. State of La. Board of Parole*, 873 F.2d 761, 762 (5th Cir. 1989) (*Preiser* rule barred prisoner whose parole was revoked from challenging the constitutionality of a parole revocation statute even though he sought only damages and a declaratory judgment).

[3] *Offett v. Solem*, 823 F.2d 1256, 1258-60 (8th Cir. 1987) (barring §1983 challenge to good time statute); accord, *Bressman v. Farrier*, 900 F.2d 1305, 1306-07 (8th Cir. 1990) (holding that *Offett* rule bars all federal court challenges to disciplinary proceedings in which good time was taken, regardless of the relief sought), *cert. denied*, 111 S.Ct. 1090 (1991).

[4] *Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1118-19 (5th Cir. 1987).

[5] *Offett v. Solem*, 823 F.2d 1256, 1258-60 (8th Cir. 1987) (barring §1983 challenge to good time statute); *accord, Bressman v. Farrier*, 900 F.2d 1305, 1306-07 (8th Cir. 1990) (holding that *Offett* rule bars all federal court challenges to disciplinary proceedings in which good time was taken, regardless of the relief sought), *cert. denied*, 111 S.Ct. 1090 (1991).

Other Cases Worth Noting

U.S. COURT OF APPEALS

Suicide Prevention

Hare v. City of Corinth, Miss., 22 F.3d 612 (5th Cir. 1994). The defendants were not entitled to summary judgment on qualified immunity grounds in a jail suicide case in which the record was "replete with evidence that the custodial officers knew or should have known of Tina Hare's vulnerability to suicide" (615) yet they placed her in a cell in which she could not be seen or reached by the trustee or dispatcher on duty and then left her hanging for an indeterminate time.

Classification—Race/Procedural Due Process—Disciplinary Proceedings

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994). The plaintiff filed a complaint of racial discrimination. He had previously filed an administrative complaint with the Office of Civil Rights Compliance of the Department of Justice, which sustained his complaint and led to a resolution agreement concerning job discrimination. After six years of proceedings, including a trip to the appeals court, the defendants defaulted in answering the amended complaint, and the court denied their motion to vacate the default four months later. The magistrate judge held a hearing on damages and awarded $50 after dismissing substantial parts of the complaint for failing to state a claim.

The plaintiff's claim of denial of due process in disciplinary proceedings should not have been dismissed. His claim that he was repeatedly subjected to false and unjustified disciplinary charges amounts to the claim that they were unsupported by "some evidence."

The plaintiff's allegations of false disciplinary charges stated a substantive due process claim. At 1402: "Issuing false and unjustified disciplinary charges can amount to a violation of substantive due process if the charges were in retaliation for the exercise of a constitutional right." At 1402 n. 11: The court explicitly rejects the view that such allegations do not state a constitutional claim if *Wolff* is complied with and there is some evidence. "The fact that Black alleges retaliation for the exercise of a constitutional right ...is a decisive distinction" from prior authority.

Procedural Due Process—Disciplinary Proceedings

Walker v. Bates, 23 F.3d 652 (2d Cir. 1994). A prisoner whose disciplinary conviction was administratively reversed after he had served two months of punitive segregation was not barred from pursuing a claim for denial of due process. At 658-59:

> *The rule is that once prison officials deprive an inmate of his constitutional procedural rights at a disciplinary hearing and the prisoner commences to serve a punitive sentence imposed at the conclusion of the hearing, the prison official responsible for the due process deprivation must respond in damages, absent the successful interposition of a qualified immunity defense.*

Procedural Due Process—Disciplinary Proceedings

Mays v. Mahoney, 23 F.3d 660 (2d Cir. 1994). The administrative reversal of the plaintiff's disciplinary conviction did not cure any due process violations at his hearing.

Access to Courts

Holloway v. Hornsby, 23 F.3d 944 (5th Cir. 1994). At 946:

> *It is very important to our treasured system of justice that our courts be open to anyone with a case or controversy presenting a justiciable claim. Ready access to our court system, including access by those who are incarcerated, is recognized as a valuable constitutional right, one to be carefully guarded. Complaints about the validity of incarceration or the treatment accorded inmates are entitled to timely and meaningful consideration.*

Dental Care

Kinney v. Kalfus, 25 F.3d 633 (8th Cir. 1994). The plaintiff alleged that he complained of various dental problems, and the dentist first extracted the wrong tooth and then refused to deal with his subsequent complaints of pain, difficulty eating, and bleeding gums.

These allegations raised a disputed issue of material fact. The plaintiff conceded that removing the wrong tooth did not violate the Constitution, but the allegation that the dentist refused repeated requests for treatment for two and a half weeks and then refused to see the plaintiff again after learning he had filed a malpractice action.

Law Libraries and Law Books

Clayton v. Tansy, 26 F.3d 980 (10th Cir. 1993). The plaintiff, convicted in Oklahoma and transferred to New Mexico pursuant to the Interstate Corrections Compact, sued New Mexico officials for denying him Oklahoma legal materials. At 982: "In the context of denial of access claims, the general rule imposes upon the sending state authorities the responsibility for ensuring their prisoners incarcerated in sister state facilities are afforded access to state courts." The court rejects *dicta* from another circuit indicating that the receiving jurisdiction shares the responsibility, since in that case the prisoner was transferred to a federal prison. The district court properly denied permission to amend, since the only defendant who could have saved his case is an Oklahoma official not subject to service of process in New Mexico. The plaintiff must pursue his case against the proper defendant in the proper venue.

Pre-Trial Detainees/AIDS/Privacy

A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994). The plaintiff was arrested for passing a bad check; the arresting officer found a piece of paper in his wallet indicating (erroneously) that he was HIV positive, and told his sister, his housemates, and at least one other witness about it. The officer had no basis to believe that the plaintiff engaged in sexual activity or IV drug use with these people. He also told the jailer, though there was no basis to believe the plaintiff had done anything to put anyone else at risk. As a result, his friends and family shunned him and refused to visit him; he suffered harassment and discriminatory treatment in jail; he was treated for depression as a result of these events.

At 990:

> *There is no dispute that confidential medical information is entitled to constitutional privacy protection.... We believe...that the actual validity of the HIV test results discovered in Plaintiff's wallet is entirely irrelevant to whether he has a reasonable expectation of privacy in the results, or whether he suffered an "injury in fact" as a result of the unlawful disclosures.* [Citations omitted]

Pre-Trial Detainees/Use of Force

Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994). The Due Process Clause, rather than the Fourth Amendment, governs a claim based on a police shooting of a person escaping from custody during transportation from one holding cell to

another. At 457: "Once an individual has been arrested and is placed into police custody, and surely after the arresting officer has transferred the individual to a jail cell, the individual becomes a pretrial detainee, protected against excessive force by the Due Process Clause." Otherwise escapees would receive more protection than detainees who peacefully remained in their cells. (The dissent argues that this view is inconsistent with the extended duration of Fourth Amendment protections acknowledged in *Albright v. Oliver*, 114 S.Ct. 807 (1994).)

Under the due process standard—which in the Fifth Circuit is identical to the Eighth Amendment standard—the shooting was not unlawful.

Non-English Languages/Publications

Kikumura v. Turner, 28 F.3d 592 (7th Cir. 1994). Federal prison officials denied the plaintiff incoming books, magazines, newspapers and letters on the ground that they "could be detrimental to the security, good order and discipline of the institution" because they were "printed in Japanese and, therefore, can not [sic] be monitored or reviewed by institution staff." The relevant regulations mentioned publications written in code but not those written in non-English languages. Prison officials made no attempt to try to find a translator or otherwise screen the material until the plaintiff sued; then they found an employee in another prison who was proficient in Japanese.

The defendants were entitled to qualified immunity. There is only one case in point (*Ramos v. Lamm*), it is from another circuit, and the Supreme Court has relaxed the relevant legal standard anyway.

In general, voluntary cessation of allegedly illegal conduct does not moot a case. The burden of proving mootness, which is on the defendant, is a heavy one. When the defendants are public officials, "we place greater stock in their acts of self-correction, as long as they appear genuine." (597, internal quotes and citation omitted). Here, where the defendants' policies "have apparently ebbed and flowed throughout the course of the litigation," the government failed to meet its burden of proof.

The court frames the question "whether the prison's alleged *de facto* policy of summarily rejecting foreign language publications without making any effort to translate or screen such material is constitutionally permissible." (597, footnote omitted) The court notes that *Thornburgh v. Abbott* emphasized the individualized nature of the determination in upholding federal censorship practices, and there were no particularized findings in these cases.

Federal Officials and Prisons/Use of Force

Munz v. Michael, 28 F.3d 795 (8th Cir. 1994). A state prisoner released to federal marshals pursuant to a writ of *habeas corpus ad testificandum* was a convict subject to the Eighth Amendment and not a pre-trial detainee.

Allegations that the plaintiff was beaten while restrained and then beaten again while in a padded cell raised a triable factual issue despite the fact that he had been convicted in a jury trial of destroying government property based on his destruction of the inside of the patrol car, and injuries limited to rib contusions. The defendants were not entitled to qualified immunity based on these allegations.

Psychotropic Medications/Administrative Segregation

Walker v. Shansky, 28 F.3d 666 (7th Cir. 1994). The defendants were entitled to qualified immunity from the plaintiff's due process claims of involuntary administration of Haldol because these claims were not sufficiently well defined before *Washington v. Harper*. They were not entitled to qualified immunity from the Eighth Amendment claim, since the deliberate indifference standard applicable to medical care cases was well established. However, the use of Haldol did not violate the Eighth Amendment in light of the plaintiff's violent and uncooperative behavior and the defendant doctor's behavior. If he had presented evidence from a medical professional disputing the diagnosis, or if he had disputed the facts on which the defendant doctor based his medical opinion, there might have been a factual issue sufficient to withstand summary judgment.

Prolonged administrative segregation may violate the Eighth Amendment. "Whether such confinement does in fact violate the Eighth Amendment depends on the duration and nature of the segregation and the existence of feasible alternatives." The plaintiff's claim of ten plus "several" months, combined with allegations that he was denied exercise, that sometimes he had no water for a week, and he was physically abused raised a triable issue of fact.

Procedural Due Process—Classification/Administrative Segregation

Mackey v. Dyke, 29 F.3d 1086 (6th Cir. 1994). The plaintiff remained in administrative segregation for 117 days after a recommendation that he be released to general population, in part because of lack of bed space.

Michigan regulations create a liberty interest in being released from segregation when the justification has expired, either because the inmate is "cleared" of the original reason, or because the prisoner's behavior and attitude has changed. Lack of bed space would constitute a defense; if there was sufficient bed space, the court must determine whether the failure to release the plaintiff was the result of "willful and wanton behavior." (1092) The defendants are not entitled to qualified immunity because *Hewitt v. Helms* and Sixth Circuit precedent clearly established the "particularized" right "not to be arbitrarily kept in administrative segregation for 117 days after the reason for [the] original confinement there expired." (1094)

Appeal

Oliver v. Commissioner of Mass. Dept. of Corrections, 30 F.3d 270 (1st Cir. 1994). The plaintiff's notice of appeal was late. He alleged that he left it in his cell door for prison officials to mail, although he was aware that only certified, registered, insured, COD or express mail was officially recorded. At 272: "By failing to take advantage of the prison mail log system, Oliver undermined the 'bright-line rule' rationale on which the Supreme Court in *Houston* relied and made it more difficult for this court to 'avoid uncertainty and chicanery.' . . ." (Citation omitted) The court does not hold that the plaintiff is not entitled to the benefit of the *Houston* rule, but concludes that the district court's finding that he failed to submit a timely notice of appeal was not clearly erroneous.

Use of Force

McLaurin v. Prater, 30 F.3d 982 (8th Cir. 1994). The plaintiff was hit in the face by an officer who was accusing him of stealing another inmate's cigarettes. The district court correctly found an Eighth Amendment violation; no force was needed since the officer was not acting to protect himself or others or to serve any legitimate penological interest, and the officer acted solely and purposely to harm the plaintiff. The plaintiff "suffered pain, which is a sufficient injury to allow for recovery for an Eighth Amendment violation." (984)

Plaintiff's counsel orally moved to include state law claims of assault, battery and outrage on the day of trial, and the district court declined after the trial to entertain them because they were not raised by amended complaint. This reason does not fall within the four bases for declining supplemental jurisdiction in 28 U.S.C. § 1367, and the court had discretion to permit an amendment to conform to the evidence; the case is remanded for a ruling on that request.

Women

Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994). Title IX of the Education Amendments of 1972, which prohibits gender discrimination in educational programs receiving federal funding, applies to prisons. So do the regulations of the Department of Health and Human Services implementing the statute.

The language of the statute suggests that the standard is one of "equality" and not "parity." However, it does not require gender-integrated classes in prisons. At 1229:

> *Strict one-for-one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs....*

It may not be necessary to offer as many classes in a small women's prison as in the larger men's prisons. But the number of classes offered should at least be proportionate, not just to the total number of inmates, but to the number of inmates desiring to take educational programs. And the inmates must be made aware of the opportunity for participation in various programs before their interests can be assessed. In order to give women "equal opportunity," there may need to be a higher number of courses offered so that women have comparable variety in course selection.

"Penological necessity" is not a defense to Title IX; it is "just one concern to be considered in *how* the equality principles of Title IX are to be applied in prison." (1230) Efficiency and cost effectiveness are not valid security concerns; they are cost and management concerns.

Paying men but not women for vocational training participation violated Title IX. The absence of a discriminatory motive did not make this a non-discriminatory policy; it amounted to disparate treatment, not a neutral policy with disparate impact.

Procedural, Jurisdictional and Litigation Questions

Caldwell v. Amend, 30 F.3d 1199 (9th Cir. 1994). The plaintiff's motion for judgment notwithstanding the verdict was subject to the *Houston* "prison mailbox" rule that it was timely filed if delivered to prison authorities for mailing within the relevant time limit. The prisoner's sworn declaration that he did so, while not necessarily sufficient to prove the date of filing, shifts the burden to the opposing party to produce evidence to the contrary such as a legal mailbox log or a date-stamped envelope. The fact that the plaintiff did not use the more expensive certified mail procedure did not matter, since he utilized the prison's legal mail procedure.

DISTRICT COURTS

Pre-Trial Detainees/Telephones

George v. Carusone, 849 F.Supp. 159 (D.Conn. 1994). At a police station, nearly all incoming and outgoing calls were taped. An arrestee's claim under the Omnibus Crime Control and Safe Streets Act of 1968 was not barred by express or implied consent because there was no evidence that he knew of the recording. The conversations were "intercepted" for purposes of the statute when they were taped, not when or if they were listened to. The exception for recording by a law enforcement agent "in the ordinary course of his duties" does not apply where the recording is done surreptitiously.

Procedural Due Process—Disciplinary Proceedings

Nix v. Evatt, 850 F.Supp. 455 (D.S.C. 1994). The plaintiff was charged with possession of an excessive amount of money and canteen items and asked to call witnesses including his cellmate, who allegedly would have testified that some of these items were his. He said he asked his assigned assistant (an inmate) to procure the witnesses, but he failed to do so, and when he asked at the hearing, the hearing officer said such requests must be in writing—a requirement both he and the assistant said they had not been informed about. At 458:

...[T]his court finds that it is clear that once a prisoner is placed in administrative segregation, he is then incapable of interviewing or obtaining statements from potential witnesses. Thus, this court concludes that at the time of plaintiff's hearing there was a clearly established constitutional right to sufficiently competent representation when a prisoner in administrative segregation is facing a disciplinary hearing.

Use of Force/Searches—Person—Arrestees/Pre-Trial Detainees/Hygiene

Huffman v. Fiola, 850 F.Supp. 833 (N.D.Cal. 1994). The plaintiff's complaint of sexual assault in a booking cell in the guise of a search stated a constitutional claim under the Fourth Amendment. Jail personnel who watched and refused to stop the alleged assault could be held liable under the deliberate indifference standard.

At 837: "Under ordinary circumstances denial of a shower for three days would not be actionable. However, due to the nature of the Plaintiff's allegations and Defendants alleged knowledge of the sexual assault, the denial reaches the level of a cognizable claim in this case."

Allegations that the plaintiff was hog-tied, her head was bashed against a well, and an officer stomped on her bare feet stated use of force claims. The court previously stated that this case was being decided under the Due Process Clause.

At 838: "Even where one has no entitlement to a benefit, one cannot be deprived of it in retaliation for the exercise of constitutional rights." Allegations that the plaintiff was denied a shower because she reported the assault and had her bare feet stomped on because she said she was going to file suit stated constitutional claims.

Women/Legal Assistance Programs

Glover v. Johnson, 850 F.Supp. 592 (E.D.Mich. 1994). Prison officials unilaterally reduced funding to Prison Legal Services of Michigan, which provides legal assistance to women inmates pursuant to a prior court order, and excluded parental rights matters from PLS' services contrary to that order, after the Sixth Circuit *Knop* decision holding that the right of court access did not extend to parental rights matters in a case involving male inmates. This court had previously determined that women inmates, because of their backgrounds, were entitled to the assistance of attorneys (though not necessarily representation in court), and not just law libraries, because they do not have male inmates' "history of 'self-help' in the law."

The court holds the defendants in contempt and grants a preliminary injunction requiring the continuation of services consistently with prior orders.

The court holds that women inmates are constitutionally entitled to continuation of the relevant legal services; the *Knop* decision did not address the equal protection violation previously found for women inmates. At 596: "Equal protection is not the same as identical treatment, for identical treatment may indeed result in very unequal protection." (Citation omitted) The court then proceeds to find that *Bounds* requires assistance of attorneys for women inmates because of the structure of the probate, juvenile and circuit courts and the informal procedures required to get a hearing in them as well as the prisoners' lack of access to the telephone. The court also concludes under the *Matthews v. Eldridge* test that due process requires legal assistance in parental rights matters. At 600: "The structure of the various courts as well as the regulations of the Department constitute a barrier to the plaintiff class' exercise of a fundamental right."

Religion

Rust v. Clarke, 851 F.Supp. 377 (D.Neb. 1994). The plaintiffs are devotees of "Asatru," which they say is an "Icelandic word/term for the ancient religion of the Teutonic people of Northern Europe ...also known as 'Odinism' or 'Troth.'" They claimed unequal treatment with respect to other religious groups.

The Religious Freedom Restoration Act "was specifically intended to apply to state prisons (and other institutions of state and federal government) and in the prison context was designed to overrule the Supreme Court's decision in *O'Lone v. Estate of Shabazz*..." (380) Since the defendants' summary judgment motion is addressed primarily to the *O'Lone* standard rather than the RFRA, the court denies the motion without actually addressing the merits.

The RFRA "does not appear to have waived the [Eleventh Amendment] immunity of the states, either.... While Congress could abrogate the immunity of the states, it must express itself without equivocation, and it has not done so here." (This is completely wrong. The statute says that plaintiffs can sue "Governments" including "a State, or a subdivision of a state." How unequivocal can you get?)

The individual defendants are entitled to qualified immunity.

At 378 n. 1: "Defendants do question whether certain practices are necessarily a part of the Asatru religion. In the future, Plaintiffs would be well advised to document why Plaintiffs believe a particular practice is part of the Asatru religion, such as by referring to published theology texts or similar objective sources." This is blatantly wrong. *See Thomas v. Review Board*, 450 U.S. 707, 715-

16, 101 S.Ct. 1425 (1981) (religious freedom "is not limited to beliefs which are shared by all of the members of a religious sect"); *Thacker v. Dixon*, 784 F.Supp. 286, 295 (E.D.N.C. 1991) ("Except in the most extreme cases, a court must confine itself to a determination of whether the practice in question has a basis in religious belief *as the individual sees it*") (emphasis supplied), *aff'd*, 953 F.2d 639 (4th Cir. 1992).

Attorneys' Fees

Kersh v. Board of County Commissioners of Natrona County, 851 F.Supp. 1541 (D.Wyo. 1994). Plaintiffs' counsel's efforts in connection with a successful contempt motion "constituted reasonable post-judgment work that was necessary to secure the improvements anticipated by the 1990 Consent Decree." (1543) In addition, they were prevailing parties in the contempt motion.

Plaintiffs' attorney is awarded fees at the rate in his community (Denver) rather than the site of the litigation (Casper, Wyoming), since there is no indication that any Wyoming attorney has ever filed a "totality of conditions" case or would consider doing so. In addition, expertise in the field of litigation was necessary, and it was reasonable for this attorney to handle the contempt motion given that he had obtained the underlying consent decree.

Access to Courts/Legal Assistance Programs

Carper v. DeLand, 851 F.Supp. 1506 (D. Utah 1994). Utah provides legal assistance to prisoners by contract with local attorneys; there are no law libraries and inmates are not allowed assistance from "writ writers." The contract was changed to eliminate general legal assistance in civil matters and to restrict the services to writs of *habeas corpus* and challenges to conditions of confinement. The court previously granted a preliminary injunction to the named plaintiffs and to several additional prisoners. A class was certified of "all current and future inmates in the Utah prison system who seek to exercise certain legal rights." (1510-11) The court here grants summary judgment to the plaintiffs and issues an injunction.

At 1517-18:

...If defendants are correct that increased legal services will result in a decrease in educational and other programs, that is unfortunate. However, the court is unpersuaded by defendants' argument that budgetary considerations justify limiting the scope of their duty to the level provided under the current contract.

While it is true that economic factors may be considered in determining the method used to provide meaningful access to the courts, the cost of protecting the right of access cannot be used to justify its denial.... [citations omitted]

...Although providing such programs is a legitimate penological objective, defendants may not choose to provide them at the expense of a constitutional right. Furthermore, the decision whether to fund such programs is a question for the legislature, not for the court.

The right of court access extends to the pursuit or defense of actions to adjust family relationships, including initial papers opposing the termination of parental rights, including a request for the appointment of counsel, and preparing petitions for divorce or the initial response to divorce petition. It does not extend to enforcement or contempt or modification proceedings in divorce cases. Assistance in adopting a prisoner's spouse's children is not required.

Workers' compensation claims are included in the right of court access. Although the tribunal is administrative, "such proceedings are judicial in nature and provide the only means by which an eligible inmate may obtain worker's compensation benefits." (1523)

Religion/Standing

Scarpino v. Grossheim, 852 F.Supp. 798 (S.D. Iowa 1994). The Iowa Civil Liberties Union has taxpayer standing to challenge the prison system's "The Other Way" program, a twelve-step rehabilitation program alleged to violate the Establishment Clause.

The claim of a prisoner who had been released from the institution and then reincarcerated is not moot because given the twelve to sixteen-week duration of the program, it is "capable of repetition yet evading review." The claim of a prisoner on parole is moot.

The court distinguishes earlier authority holding that an AA-type program was not religious on the ground that this program not only refers to God and a higher power, but also because it involves group prayer, individual pressure to accept religion as the solution to addiction, and the use of religious video tapes.

Establishment Clause claims are not governed by the *Turner* reasonableness standard because they involve the insistence that public money cannot be spent to support religion rather than an assertion of inmates' rights to do something. Under *Lemon v. Kurtzman*, prison officials could have believed that this program did not violate the Establishment Clause, and they are entitled to qualified immunity from damages.

Hygiene/Negligence, Deliberate Indifference and Intent

Masonoff v. DuBois, 853 F.Supp. 26 (D.Mass. 1994). The plaintiffs complained that they did not have access to toilets in their cells; when they did not have access to a bathroom area, they had to use portable chemical toilets and a pitcher of water. Official policy was that the bathroom area was supposed to be opened at any time on request, but there was evidence that these orders were not followed by all officers with respect to all inmates.

At 29:

Having a sanitary place to dispose of one's bodily waste is one such "minimal civilized measure of life's necessities."...

The plaintiffs have presented evidence that some inmates have been barred from the shanty—the one place at the entire prison which has flush toilets available to inmates. These inmates, when they are out of their cells, are left with no place to deposit their bodily waste. The Constitution does not permit prison officials to force inmates to undergo such indignities.

The plaintiffs have thus shown a likelihood of success on the question of whether they have met the objective requirement of an Eighth Amendment claim. However, there is not presently enough evidence to support a finding of deliberate indifference, in the absence of a showing that the defendants had actual knowledge of the violations. At 29:

The representations made in affidavits and otherwise in connection with the present motion are sufficient, however, to put the defendants on notice that Superintendent Bissonette's order to provide full access to the shanty is not being diligently carried out. The court will take into consideration, in any future motion for injunctive relief regarding access to the shanty, that the defendants have had such notice.

Grievances and Complaints About Prison

Hines v. Gomez, 853 F.Supp. 329 (N.D.Cal. 1994). At 331: "...[F]iling an inmate appeal [i.e., grievance] falls within the plaintiff's first amendment right to petition the government for redress of grievances."

Searches—Person—Convicts

Castillo v. Gardner, 854 F.Supp. 724 (E.D. Wash. 1994). Conducting digital rectal probes without "cause predicate" is not reasonably related to legitimate penological goals and is unconstitutional under *Turner*. However, the defendants are entitled to qualified immunity on this claim.

Religion—Practices/Injunctive Relief—Preliminary

Campos v. Coughlin, 854 F.Supp. 194 (S.D.N.Y. 1994). State prison officials are preliminarily enjoined from prohibiting plaintiffs from wearing their Santeria beads under their clothing or placing beads on their non-publicly displayed shrines.

A preliminary injunction is appropriate. At 204: "Ordinarily, violations of First Amendment rights are recognized as constituting an irreparable injury." The balance of hardships favors plaintiffs, since they have no other way of practicing their religious beliefs, but the defendants have other ways of protecting security besides burdening the plaintiffs' religious practice.

The Religious Freedom Restoration Act applies to prisoners and displaces the *O'Lone/Turner* reasonable relationship standard for prisoners' reli-

gious claims in favor of a compelling interest/least restrictive means standard. Security is a compelling interest. At 207: "However, defendants cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed constitutionally permissible conduct." The court defers to defendants' assessment of the prison gang situation and the role of beads as gang identifiers, but notes that this argument fails to address why the beads cannot be worn under clothing. At 208: "I am troubled by defendants' complete rejection of plaintiffs' proposal based on what defendants speculatively describe as an 'enforcement problem.'" These enforcement problems are the same for Santeria beads as for crosses and crucifixes, which are allowed. The defendants also failed to show that gangs have actually used Santeria beads or that gang beads resemble Santeria beads. The fact that Santeria beads might be used in this fashion sometime in the future is "pure speculation," which cannot justify burdening the plaintiffs' constitutional rights. "I am not required, on a motion for preliminary injunction, to indulge DOCS' whims and anxieties about prospective hypothetical situations." (209)

The court reaches the same conclusions under the *O'Lone/Turner* test. There is no rational relationship between prohibiting wearing beads underneath clothing and the purpose of minimizing gang affiliation and violence. The plaintiffs have no alternative to exercise this particular tenet of their religion. The impact of permitting wearing beads under clothing will be "constitutionally insignificant," and this practice is an "obvious, easy alternative."

Use of Force

Messina v. Mazzeo, 854 F.Supp. 116 (E.D.N.Y. 1994). An allegation that all of the named police officers participated in excessive force was sufficient to state a claim. Discovery should determine the exact role of each officer, and a motion for summary judgment can be made based on lack of personal involvement.

An allegation that the plaintiff was slapped by police officers without any justification while handcuffed in a police car stated a claim for excessive force under the Fourth Amendment. Summary judgment could not be granted based on the lack of injury where the plaintiff had not had the opportunity to take discovery. The question is for the jury if the plaintiff can establish "that force was used and some injury was sustained."

Pre-Trial Detainees/Federal Officials and Prisons/Procedural Due Process—Disciplinary Proceedings

Collazo-Leon v. U.S. Bureau of Prisons, 855 F.Supp. 530 (D.P.R. 1994). The petitioner was convicted at a disciplinary hearing of attempted escape and offering a bribe to an officer; he was sentenced to a total of 90 days and loss of visiting and telephone privileges for six months.

Wolfish forbids the punishment of detainees. The Bureau of Prisons disciplinary regulations by their terms are intended to punish. In addition, "the severity of the sanction itself upon a pretrial detainee charged with misconduct, as to whom no attempt is made to deal with his disciplinary problem by means of less drastic actions, compel the conclusion that the purpose in segregating is to punish." (533) The court rejects the view that the petitioner's punishment is necessary to provide for an orderly environment, since upon his release he will present the same security hazard as when he was placed in segregation.

The court grants the writ of *habeas corpus* and orders his discharge from segregation and restoration of his visiting and telephone privileges.

Women/Privacy

Galvan v. Carothers, 855 F.Supp. 285 (D.Alaska 1994). The female plaintiff alleged that she was placed in an all-male wing and that she was subjected to sexual harassment. The court previously granted her a preliminary injunction requiring officials to find her alternative housing.

The plaintiff's claim meets the objective prong of Eighth Amendment analysis. At 291:

Defendants contend that there is no evidence regarding minimal standards of privacy and decency for a woman inmate. The court finds this statement to be fantastic.... The court finds that minimal standards of privacy and decency include the right not to be subject to sexual advances, to use the toilet without being observed by members of the opposite sex, and to shower without being viewed by members of the opposite sex.

There is sufficient evidence that the defendants knew or should have known of the potential risks inherent in placing a female inmate in an all male maximum security prison wing". (292).

(This opinion antedates *Farmer v. Brennan*, which held that "should have known" doesn't cut it under the Eighth Amendment.)

Federal Officials and Prisons

Lloyd v. Corrections Corporation of America, 855 F.Supp. 221 (W.D.Tenn. 1994). A private prison housing federal prisoners acted under color of federal law and not state law, and the plaintiff's complaint therefore must be construed as a *Bivens* action and not a § 1983 claim.

Communication with Media/Injunctive Relief—Preliminary

Pratt v. Rowland, 856 F.Supp. 565 (N.D.Cal. 1994). The plaintiff, a former Black Panther leader, was transferred after agreeing to be interviewed by a television station and double celled immediately after the interview was aired. Medical evidence showed that various physical and psychological afflictions he had were aggravated when he was double celled, and prison officials had generally acknowledged these.

The court concludes that the plaintiff was subjected to retaliation for being interviewed, based on evidence that suggests an extremely incompetent cover-up, and grants a preliminary injunction requiring him to be single-celled.

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Court Decides Landmark Class Action Case in Favor of Pelican Bay Prisoners

BY JENNI GAINSBOROUGH

On January 11, Chief Judge Thelton Henderson of the U.S. District Court, Northern District of California ruled substantially in favor of prisoners at Pelican Bay State Prison in their class action lawsuit against state prison officials (*Madrid v. Gomez*). The suit claimed that conditions at the facility, the state's first "supermax" prison, violate prisoners' constitutional rights.[1]

The judge, in his 345 page decision, wrote that "dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery" caused by the defendants. "In this landmark decision, Judge Henderson found that the California Department of Corrections is operating in flagrant disregard of the U.S. Constitution," said David Steurer, a partner in Wilson Sonsini Goodrich & Rosati who tried the case together with fellow partner Susan Creighton and attorneys Donald Specter and Steve Fama of the Prison Law Office in San Quentin.

The suit originated in 1991 after the U.S. District Court received more than 300 petitions from Pelican Bay prisoners alleging civil rights violations during the first two years of the facility's existence. A panel of federal judges referred the matter to the Pro Bono Committee of the San Francisco Bar Association which asked Wilson Sonsini Goodrich & Rosati to investigate the case. A lawsuit originally filed on behalf of one inmate eventually became a class action and trial took place from September 17 through December 15, 1993.

Among the constitutional violations found by Judge Henderson were a pattern of excessive guard brutality, a failure to provide

Continued on next page

For the Record

■ The **American Correctional Association** (ACA) believes the federal crime bill signed into law by President Clinton last September deserves a "mixed review" according to a statement to ACA members released in October. The ACA opposes mandatory minimum sentencing, including "three-strikes-you're-out' because it believes that "it is not reasonable or cost-effective to keep such persons in prison until they die" and is concerned about the "inevitable prison crowding" the measure will cause. Overall they believe the crime bill "places too much emphasis on incarceration as a solution to crime". They also opposed the ending of Pell grants for prisoners.

The ACA supported the Family Unity Demonstration Project which authorizes grants for the establishment of community-based residential correctional facilities in which offenders can live with their young children. ACA President **Bobbie Huskey** said "We are encouraged to see in the final bill a greater emphasis placed on children youth and families, because ACA believes that we will need to intervene early in the lives of these families if we are ever going to reduce future crime". Unfortunately, it is these very provisions that the crime bills introduced into the new session of Congress by the Republican majority sets out to dismantle.

■ Prison journalist and editor of the *Angolite*, **Wilbert Rideau** has become a special correspondent for the critically acclaimed **"Fresh Air"** series hosted by Terry Gross on National Public Radio. Rideau and Angola Warden John Whitley view it as an educational program to let the public know what prison life is really like. The first segment focuses on literacy and self-education behind bars. The payment which "Fresh Air" typically makes to its freelance contributors will, at Rideau's suggestion, be made to the Spaceman Foundation, a non-profit foundation. Rideau's childhood dream was to be a spaceman and he has dedicated the Foundation to the proposition "that all children should have dreams, should be able to achieve them and become productive members of society. The child who has hopes and dreams for his future will not end up in a prison cell."

■ Journalist **Gary E. Goldhammer** left his newspaper job in California and set out across the United States to explore the facts, emotions and politics surrounding capital punishment. He interviewed the people most affected by the death penalty — prisoners on Death Row, their families, victim's families, jailers and advocates. He has published these interviews and described his experiences in *Dead End*, a personal and compelling discovery of the costs—human, social and financial—of our continued use of this barbaric punishment. *Dead End* can be obtained from Biddle Publishing Company, PO Box 1305, #103, Brunswick, ME 04011, for $10.95 plus $2.00 shipping.

■ **Prison Information Service**, Inc. of Sioux Falls have distributed all their copies of the *Aboriginal Handbooks* and the *Bibliography of Selected Prison Cases* and cannot fulfill any more requests for these books at the moment. They hope in time to raise sufficient funds to reprint and send copies to everyone who is on their waiting list. For more information, contact Roger Flittie at Prison Information Service, Inc., PO Box 616, Sioux Falls, SD 57101

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minimal medical and mental health care, and confinement in conditions that are likely to cause or increase psychosis in many of the inmates in the prison's supermax facility. Pelican Bay's caging and hogtying of prisoners, its routine resort to lethal force, and its pattern of staff assaults on inmates caused Judge Henderson to conclude that the evidence "painted a picture of a prison that all too often uses force, not only in good faith efforts to restore and maintain order, but also for the very purpose of inflicting punishment and pain." In concluding that the defendants had failed to provide minimal medical or mental health services, Judge Henderson observed that "some of defendants' comments, actions, and policies show such disregard for inmates' pain and suffering that they shock the conscience." With regard to conditions in the Security Housing Unit (SHU) section of the prison, Judge Henderson wrote that "many, if not most inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation," and that defendants "cross the constitutional line when they force certain subgroups of the prison population, including the mentally ill, to endure the conditions in the SHU."

The court ordered the parties, under the supervision of a court-appointed Special Master, to negotiate a plan to make Pelican Bay meet constitutional standards. "The court's decision is absolutely correct," said Donald Specter of the Prison Law Office. "Without an injunction there is no doubt that the brutality and lack of proper treatment would continue indefinitely." Judge Henderson could find "no serious or genuine commitment" by the defendants to "remedying the constitutional violations found herein." ■

[1]For more details about the Pelican Bay State Prison, see NPP *Journal* Vol. 7, No. 4, Fall 1992, "Isolation, Excessive Force Under Attack at California's Supermax" and "The Marionization of American Prisons"; and Vol. 8, No. 2, Spring 1993, "Pelican Bay–The Effects of Isolation."

Bill Seeks to Strip Courts of Power in Prison Cases

BY AYESHA KHAN

Among the package of new federal crime bills passed by the House of Representatives is the Stop Turning Out Prisoners Act ("STOP"), Title III of HR 667. STOP is not part of the "Contract With America," yet it was pushed through the Judiciary Committee and onto the floor of the House without hearing or testimony and virtually without notice to the public. A similar bill has been introduced into the Senate as S. 400. The proponents of STOP are trying to rush the bill through Congress without debate because the "facts" upon which it is based are bogus and the "solutions" it offers are fraudulent.

The STOP bill violates the guiding principle of this country that all people, even the least deserving, are protected by the Constitution. The bill sets a dangerous precedent for stripping civil rights from those in public disfavor. If this bill is successful in placing adult and juvenile prisoners beyond the full protection of the laws, the path will be clear to target other groups, such as ethnic minorities, the mentally ill, and gay people, for similar treatment.

The bill is a dangerous assault on federal court power to remedy civil rights violations, and thereby runs afoul of the separation of powers doctrine, which the "Framers of our

Constitution viewed ... as the central guarantee of a just government," *Freytag v. Commission*, 111 S. Ct. 2631, 2634 (1991), and "a bulwark against tyranny," *United States v. Brown*, 381 U.S. 437, 443 (1965). This bill works a gaping hole in that bulwark.

The lack of deliberation given to the bill accounts for the serious practical and constitutional problems with the legislation, which are discussed in more detail below.

Section (b)(1), Termination of Prospective Relief After 2-Year Period: This section calls for judgments to terminate two years after issuance or two years after passage of STOP, whichever is later, even when constitutional violations remain. For example, a court could not continue to enforce a judgment even in the face of a continuing threat to staff and prisoners. In institutional reform cases, it typically takes years of effort by state officials and supervision by the court to fix the major problems that are the subject of such litigation. Since the law already requires termination when constitutional requirements are met, *Board of Educ. v. Dowell*, 111 S. Ct. 630, 637 (1991), the perverse effect of this section would be to require termination when constitutional violations persist.

This provision also violates the separation of powers doctrine. The Framers criticized legislative efforts to vacate judicial proceedings, suspend judicial actions, and annul or modify judgments, *see* M.J.C. Vile, Constitutionalism and the Separation of Powers 153 (1967), and the Constitutional Convention rejected several proposals to allow legislative revision of judgments. 1 M. Jensen, The Documentary History of the Ratification of the Constitution 246-47 (1976). In light of this historical background, the Supreme Court has struck down statutes that revise or suspend judgments. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948).

Section (b)(2), Immediate Termination of Prospective Relief: This section requires the termination of all settlement agreements ("Consent Decrees") that were approved without a finding of a constitutional or statutory violation. This would render almost all existing Decrees void because, by their nature, they are approved without such findings. Prison officials usually seek to operate their prisons in a safe and professional manner because they do not want to put their staff at risk of the riots that can result from intolerable conditions. A court order is often necessary to get the resources that they need to do this.

By legislative fiat, this bill would indiscriminately undo decrees that play a vital role in protecting the health and safety of prisoners and staff. Moreover, by preventing settlements, this provision forces parties to costly trials in all cases. Forbidding a state from entering into a settlement agreement encroaches on state autonomy and raises serious federalism concerns. Furthermore, by requiring a lengthy trial in every case, this section increases the burden on the federal judiciary.

Section (a)(1), Limitations on Prospective Relief: This section limits the power of the federal courts to grant relief in prison conditions cases. To the extent that this provision prevents a court from issuing emergency interim relief, such as a temporary restraining order, it violates due process. *Cf. Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). If, for example, a prison is in imminent danger of a tuberculosis outbreak, a court must retain the discretion to issue an emergency order prior to a hearing.

Section (c)(2), Automatic Stay When Motion Pending: This section calls for an automatic stay of decrees and judgments after a defendant files a motion to modify or terminate, regardless of whether a constitutional violation is ongoing. In effect, this provision gives a defendant the temporary power to overrule a federal court. An automatic stay also deprives a court of its traditional power to balance the equities involved in a stay application.

Section (e), Special Masters: This provision requires courts to use Magistrates in place of special masters. This usurps the power of the judiciary in two ways. First, it abrogates Fed. R. Civ. Proc. 53, which authorizes courts to appoint special masters. The Supreme Court, rather than Congress, is empowered to modify the Federal Rules. 28 U.S.C. § 2072. Second, over and above the authority granted by Rule 53, "there has always existed in the federal courts an inherent authority to appoint masters." Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L.R. 452, 462 (1958).

Section (f), Attorney's Fees: This provision modifies 42 U.S.C. § 1988 by changing the standard for an attorney fee award in prison conditions cases. The passage of sections 1983 and 1988 was motivated by a commitment to the civil rights of all citizens. Singling out one group for lesser protection sets a dangerous precedent for other groups that fall into disfavor. The bill also prevents a state from entering into a settlement that includes a fee award, forcing states to risk a far greater fee award after trial. In the name of states' rights, the bill actually limits the freedom of a state to determine its own best interests. ■

For further information contact Joan Dolby, Jan Elvin or Jenni Gainsborough at the National Prison Project of the ACLU at (202) 234-4830, Fax (202) 234-4890.

Text of H.R. 667, Title III, "Stop Turning Out Prisoners Act"

Sec. 301. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) In General.—Section 3626 of title 18, United States Code, is amended to read as follows:

"Sec. 3626. Appropriate remedies with respect to prison conditions

"(a) Requirements for Relief.—

"(1) Limitations on prospective relief.—Prospective relief in a civil action with respect to prison conditions shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn and the least intrusive means to remedy the violation of the Federal right. In determining the intrusiveness of the relief, the court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

"(2) Prison population reduction relief.—In any civil action with respect to prison conditions, the court shall not grant or approve any relief whose purpose or effect is to reduce or limit the prison population, unless the plaintiff proves that crowding is the primary cause of the deprivation of the Federal right and no other relief will remedy that deprivation.

"(b) Termination of Relief.—

"(1) Automatic termination of prospective relief after 2-year period.—In any civil action with respect to prison conditions, any prospective relief shall automatically terminate 2 years after the later of—

"(A) the date the court found the violation of a Federal right that was the basis for the relief; or

"(B) the date of the enactment of the Stop Turning Out Prisoners Act.

"(2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief, if that relief was approved or granted in the absence of a finding by the court that prison

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conditions violated a Federal right.

"(c) Procedure for Motions Affecting ProspectiveRelief.—

"(1) Generally.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

"(2) Automatic stay.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

"(A) beginning on the 30th day after such motion is filed, in the case of a motion made under subsection (b); and

"(B) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law;

and ending on the date the court enters a final order ruling on that motion.

"(d) Standing.—Any Federal, State, or local official or unit of government—

"(1) whose jurisdiction or function includes the prosecution or custody of persons in a prison subject to; or

"(2) who otherwise is or may be affected by;

any relief whose purpose or effect is to reduce or limit the prison population shall have standing to oppose the imposition or continuation in effect of that relief and may intervene in any proceeding relating to that relief. Standing shall be liberally conferred under this subsection so as to effectuate the remedial purposes of this section.

"(e) Special Masters.—In any civil action in a Federal court with respect to prison conditions, any special master or monitor shall be a United States magistrate and shall make proposed findings on the record on complicated factual issues submitted to that special master or monitor by the court, but shall have no other function. The parties may not by consent extend the function of a special master beyond that permitted under this subsection.

"(f) Attorney's Fees.—No attorney's fee under section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) may be granted to a plaintiff in a civil action with respect to prison conditions except to the extent such fee is—

"(1) directly and reasonably incurred in proving an actual violation of the plaintiff's Federal rights; and

"(2) proportionally related to the extent the plaintiff obtains court ordered relief for that violation."

"(g) Definition.—As used in this section—

"(1) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

"(2) the term 'relief' means all relief in any form which may be granted or approved by the court, and includes consent decrees and settlements agreements; and

"(3) the term 'prospective relief' means all relief other than compensatory monetary damages."

(b) Application of Amendment.—Section 3626 of title 18, U.S. Code, as amended by this section, shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the date of the enactment of this Act.

(c) Clerical Amendment.—The table of sections at the beginning of the subchapter C of chapter 229 of title 18, United States Code, is amended by striking "crowding" and inserting "conditions." ■

Ayesha Khan is a staff attorney with The National Prison Project.

The advantages of settling cases through Settlement Agreements and Consent Decrees have been recognized by judges and state officials involved in prison conditions cases:

■ In his Memorandum approving the Settlement Agreement in the state-wide Pennsylvania case (*Austin v. Lehman*), U.S. District Court Judge DuBois noted that:

"the entire case was settled...without the need for judicial findings on the issues of liability and remedy... [which] would have involved the Court in the micromanagement of the state correctional system....Such a settlement, particularly in a case as complex as this one, represents an outstanding accomplishment by counsel and is of manifest importance to all citizens of the Commonwealth of Pennsylvania."

■ In the long-running New Mexico case (*Duran v. Johnson*), then-attorney general (now Senator from New Mexico) Jeff Bingaman, wrote in his "Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico:

"The consent decree agreed to by New Mexico since the riot will, if monitored effectively,...insure that New Mexico will never again deviate so greatly from accepted standards of prison management."

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were singled out as a group lacking any appropriate protection. Third, the overwhelming threat to decent prison standards is overcrowding.

The revised rules now go back to the UN for consideration. What was particularly fascinating at the meeting was the opportunity (in the gaps between the committee work) to learn how two traditional leaders in the world incarceration competition— Russia and South Africa—are reacting to the universal penal dilemma. Their divergent paths demonstrate vividly how prisons are both the product and the barometer of a country's civic health.

At the last PRI general meeting three years ago, a former dissident, Valery Abramkin, described a situation of appalling hardship. But he felt the underlying trend was towards improvement. At The Hague last November, however, he and other gave details that show this trend in reversal.

Public anger and fear of crime in Russia have contributed to delaying both the new penal code and the new code of criminal procedure. Long and undifferentiated sentences remain in force for many everyday offenses, and prisoners have no effective protection or redress against abuses. Human rights guarantees in the new Russian constitution (1993) are not, in reality, implemented. The PRI members from Moscow said they repeatedly received letters from prisoners describing beatings to extract confessions during the pretrial investigation period. Contact with the outside world, including with lawyers, is highly restricted.

Overcrowding is again rocketing. Official figures put the prison population at 886,000—proportionately 530 per 100,000 population. (Unofficial estimates are far higher.) No one who has visited the main urban prisons for pretrial detainees leaves

any doubt that ghastly conditions have got even more ghastly (See the NPP *Journal*, Vol. 8, No. 2, Spring 1993). Abramkin said that dormitories which had been overcrowded in Stalin's days with 80 occupants now held 140. He had seen prisoners with skin ulcers "like an apple." In the distant colonies for convicts, food was in short supply. TB was increasing again.

But the Russian prison authorities–who allow westerners access to their prisons–readily admit they have problems. One official was an active participant at the conference.

The status of the participants who came from South Africa is an indicator of the political priority given by this country to penal reform. The Minister of Correctional Services, Mr. Sipo Mzimela, was there; also the Commissioner, the chief administrator of correctional services, General J.J. Bruyn, who as a young prison guard had worked on Robbin Island. He told me, "President Mandela is a man who always commanded respect."

South Africa is facing the worldwide penal crisis in acute form. The public—black as well as white—demands a stop to a plague of crime. But prisoners are deeply disillusioned that a flat six-months' amnesty did not bring them all immediate release. The prison population remains high — proportionally third after the Russian Federation and the US with a rate of about 350 per 100,000. Immense changes are nevertheless underway.

In February 1995 the constitution comes up for debate and, according to a senior South African academic at the conference, the expectation is that the death penalty will be abolished. Reforms had already started before last year's elections: no executions had been carried out since 1989; solitary confinement, corporal punishment and reduction of diet had all been banned. A separate penal approach for juveniles has now been drafted. But full racial integration of a justice system designed and run by whites is causing great tensions.

From the United States, there were neither politicians nor prison administrators. As Alvin Bronstein, Executive Director of the National Prison Project, pointed out: "U.S. officials don't come to this sort of meeting." Bronstein's description of "hot-racking" to be introduced in Mississippi to accommodate more prisoners, and the state's ban on all possessions that might make prison tolerable, confirmed fellow PRI members' feeling that the U.S. is not the model to follow. As Bronstein summed up: "The U.S. is marching firmly into the 19th century."

Penal Reform International celebrated its fifth birthday in The Hague. It now has over 300 members in 75 countries. It is helping local non-governmental organizations set up programs in East Europe and sub-Saharan Africa and—funding allowing—has plans in Asia and Latin America. It is most of all an astonishing worldwide network of individuals who share a commitment to fairer and more humane penal justice. Without PRI, many individuals would be operating in total isolation. ■

Jennifer Monahan is a British freelance journalist and member of Penal Reform International.

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NON-PRISON CASES

Personal Involvement and Supervisory Liability

Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576 (1st Cir. 1994). At 581-82:

> *Although a superior officer cannot be held vicariously liable under 42 U.S.C. §1983 on a* respondeat superior *theory,... he may be found liable under §1983 on the basis of his own acts or admissions....*
>
> *One way in which a supervisor's behavior may come within this rule is by formulating a policy, or engaging in a custom, that leads to the challenged occurrence....Thus, even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power and authority to alleviate it....*
>
> *To succeed on a supervisory liability claim, a plaintiff not only must show deliberate indifference or its equivalent, but also must affirmatively connect the supervisor's conduct to the subordinate's violative act or omission....This causation requirement can be satisfied even if the supervisor did not participate directly in the conduct that violated a citizen's rights; for example, a sufficient causal nexus may be found if the supervisor knew of, overtly or tacitly approved of, or purposely disregarded the conduct.... Consequently, deliberate indifference to violations of constitutional rights can forge the necessary linkage between the acts or omissions of supervisory personnel and the misconduct of their subordinates....*
>
> *A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations. When the supervisor is on notice and fails to take corrective action, say, by better training or closer oversight, liability may attach.*

Pleading

Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994). The court declines to adopt the D.C. Circuit's variation of the heightened pleading" that requires a plaintiff whose claim depends on the state of mind of a defendant to plead direct, rather than circumstantial, evidence of that state of mind.

Municipalities

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994). A claim against the municipality based on an allegedly unconstitutional policy does not turn on the lawfulness of the conduct of the municipal employee involved. At 1445:

> *A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers.... [I]f the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal "custom or usage" regarding the use of police dogs for which the city is responsible.*
>
> *...[M]unicipal liability could [also] be found under the "deliberate indifference" formulation of* Monell *liability.... Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a "deliberate indifference" to constitutional rights.* ■

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

Segregation in Alabama

BY JACKIE WALKER

Alabama Revisited: Separate But Equal?

In 1988 the National Prison Project, along with the Southern Center for Human Rights and local private lawyers, brought a class action suit, *Harris v. Thigpen*, (now *Onishea v. Herring*) which challenged the Alabama Department of Corrections' policy of mandatory testing and segregation of HIV-positive prisoners. Since then the Eleventh Circuit Court of Appeals affirmed the District Court's ruling to uphold both policies, but remanded issues of programming and legal access. While awaiting the latest decision we explore the experiences of three women housed in the Medical Isolation Unit (MIU) at Julia Tutwiler Prison for Women and one resident of Limestone Correctional Facility's MIU.

Small Changes

In 1986 M.W. became the first HIV-positive prisoner isolated at Julia Tutwiler Prison for Women. HIV-positive prisoners during this period were housed on death row with a quarantine sticker, required to disinfect telephone receivers after use and given meals served on paper plates. M.W. recalls waking up covered with maggots because correctional staff refused to empty her garbage. After 13 months M.W. was transferred to administrative segregation with a small group of newly diagnosed women.

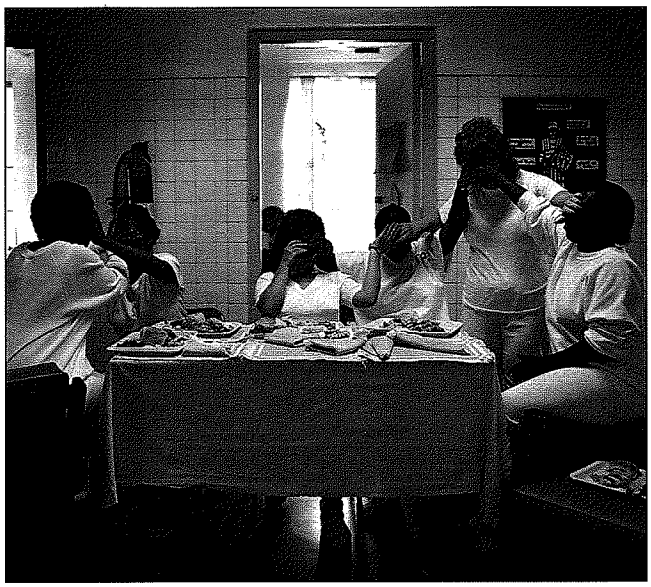
During the next two years M.W. received access to segregated Adult Basic Education (ABE)/General Equivalency Diploma (GED) preparation and college courses. When she returned in 1993 she found limited programming. GED preparation classes were sporadic, while college courses were nonexistent. In commenting on the policy's impact, M.W. says, "We do more time just because we're positive and can't receive the same programs as general population."

E.C. entered MIU in 1987 and has observed changes through three periods of incarceration. She recalls the medical staff greeted her wearing masks and gloves and being instructed she would have to wear the same whenever she left MIU. Her daily life included few activities beyond watching television, crocheting or knitting. Reflecting on these days E.C. remembers, "I felt like an animal placed in a cage and just left there."

Her second incarceration in 1992 brought some changes, though. E.C. took college courses from an inmate tutor and attended some programs separate from general population. Since returning in 1994 E.C. has participated in the Substance Abuse Program taught by an inmate tutor. By comparison, general population prisoners have access to a residential substance abuse program coordinated by a certified counselor. In commenting on the need for drug treatment programs E.C. explains, "Drugs is the reason I came back to the Unit. Instead of talking about my problems I turned to drugs. Being in a substance abuse program helps me to talk about it."

Carrie White has experienced two very different periods at Julia Tutwiler Prison for Women. During her first incarceration in the mid-Seventies Ms. White participated in a variety of programs from completing her GED and numerous college courses, to commercial sewing and bookkeeping. In addition to these accomplishments she participated in furlough programs and was employed in a "downtown job" with the Department of Corrections. She remembers that the current site of the Medical Isolation Unit once housed prisoners who worked in the healthcare unit.

Upon returning to prison in 1993 Ms. White was placed in MIU after testing HIV-positive, a status she now shares with two sons incarcerated at Limestone Correctional Facility's MIU. Today Ms. White's daily routine primarily consists of crocheting and cleaning up the MIU area. Her inquiries regarding college courses all return to an exclusion based on her HIV-positive status. For future MIU prisoners Ms. White has only one desire, "I hope other women won't have to go through what I'm going through. Sitting back here and deteriorating."



Melissa Springer

Thanksgiving Dinner in the HIV Isolation Unit, 1990

Transforming the Anger

Alester Moore is serving his second prison stint, one he hoped would provide rehabilitation. A former bridge builder once employed by a large construction firm, Mr. Moore hoped to continue learning building trades at Limestone Correctional Facility. He soon learned that being HIV-positive was enough to be excluded from vocational and other programming including the Interstate Commerce Compact, which he inquired about in order to be transferred closer to his family. Although a segregated drafting class has recently been offered, other vocational programs continue to be denied.

Moore has channeled his dissatisfaction into being a lay minister and serving as coordinator of education for Citizens On Prevention and Education (COPE), a prisoner run HIV/AIDS program. Founded by Unit prisoner Matthew Coleman, COPE members provide a 12 week training program in HIV/AIDS education, conduct monthly seminars on HIV/AIDS issues, correspond with the families of prisoners and visit sick prisoners in the infirmary. Mr. Moore says, "Being segregated and denied equal programming takes the sentencing judge's decision to another level. We're just asking DOC to open up the door. If they don't open the door to programs it will just cause more problems." ■

THE NATIONAL PRISON PROJECT

Publications

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

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

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1994. $5 prepaid from NPP.

QTY. COST

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

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

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

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

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

(order from ACLU)

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

QTY. COST

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1875 Connecticut Ave., NW #410
Washington, D.C. 20009

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THE NATIONAL PRISON PROJECT

Highlights

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

Carty v. Farrelly—Agreement has been reached in this lawsuit contesting conditions of confinement at the Criminal Justice Complex in St. Thomas, U.S. Virgin Islands. The complaint filed in June 1994 alleged severe overcrowding, unconstitutional environmental and fire safety conditions and grossly deficient medical and mental health care. The agreement, which has the same force as a court order, provides for improvements in all these areas, including limits on population, improved and expanded medical services, with testing and treatment for tuberculosis, and separate housing for mentally ill prisoners. Prisoners will have recreation for three hours daily with a maximum cell lock-in time of twelve hours daily. The agreement also contains several important provisions for monitoring. The BOC is also prevented from instituting another facility-wide lockdown without the court's permission.

Casey v. Lewis—This statewide class action suit, filed on behalf of Arizona state prisoners in January 1990, challenges legal access, health care and assignments to segregation. In November 1992, the court held unconstitutional the state's policies restricting prisoners' access to the courts. The Ninth Circuit Court of Appeals heard oral argument in November and on December 27, in a unanimous decision, upheld the trial court's ruling that the Arizona Department of Corrections denies prisoners access to the courts. The ruling affirmed virtually all of the trial court's order, and applies to all 15,000 prisoners in the Arizona system. The order, however, will not be implemented until the Supreme Court decides whether to grant review of the decision because in May 1994 the Supreme Court, with four Justices dissenting, granted a stay of the trial court decision.

Knop v. Johnson—involves four Michigan prisons. The case was filed in 1984 after the original comprehensive consent decree reached by the Department of Justice and the state of Michigan in *United States v. Michigan* was replaced with a modified five-page, non-enforceable consent decree. The new lawsuit, *Knop v. Johnson*, raised the same claims as *U.S. v. Michigan* as well as some additional ones. In 1992, the Sixth Circuit affirmed the trial court's finding of a denial of access to the courts but remanded to the trial court to revise the remedy. In June 1993 the defendants filed their legal access plan which the plaintiffs opposed. In March 1994 the district court held oral argument on the plan. On December 22, 1994 Judge Enslen issued an order rejecting the defendants' plan and requiring them to implement a revised plan at the Michigan Reformatory on a trial basis. After evaluation of the plan at the Reformatory, it will be ordered implemented at all the *Knop* facilities.

Onishea v. Herring—(originally *Harris v. Thigpen*) challenges the Alabama Department of Corrections policy of testing all state prisoners for HIV, segregating all those who test positive and preventing them from taking part in work, educational, recreational and other programs available to non-segregated prisoners. The plaintiffs sought relief on various constitutional claims and under §504 of the Rehabilitation Act. In 1991 the Eleventh Circuit Court of Appeals vacated and remanded the dismissal of plaintiffs' §504 claim challenging this blanket exclusion, and the dismissal of the plaintiffs' legal access claims. Years of settlement discussions finally proved fruitless, and the issues were retried before Judge Varner in November 1994. We are waiting for the court's decision.

Sandin v. Conner—The NPP filed an *amicus curiae* brief on behalf of the respondent in this case before the Supreme Court. Conner, a Hawaii state prisoner, claimed that he was punished with 30 days of solitary confinement without an adequate due process hearing after allegedly resisting a strip-search. The Ninth Circuit Court of Appeals, overturning the trial court's ruling in favor of prison officials, held that the prisoner had a right not to be arbitrarily subjected to punitive segregation. The Supreme Court granted prison officials' petition for *certiorari* from that decision. Oral argument is scheduled for February 28, 1995. ■

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