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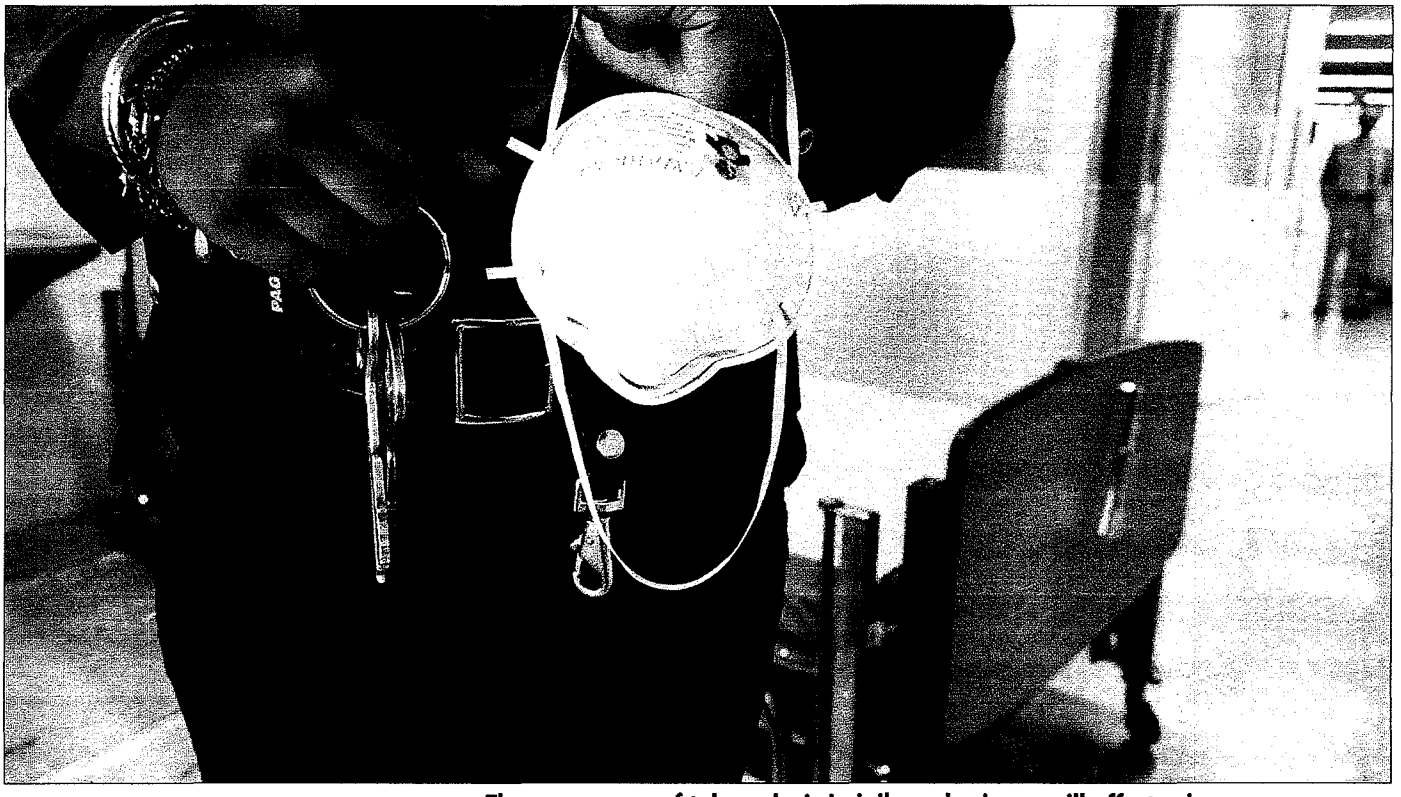
Spread of TB Poses Danger to Prisoners and Staff



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The resurgence of tuberculosis in jails and prisons will affect prisoners, correctional officers, and the community.

BY JONATHAN M. SMITH

If an evil genius set out to design an ideal breeding ground for tuberculosis, prison would be it. Prisons and jails are frequently overcrowded and poorly ventilated, conditions which encourage the spread of TB, an airborne disease. Moreover, prisoners are also frequently at the greatest risk for the disease. Those most likely to develop TB are the poor, substance abusers, immigrants, people who receive inadequate nutrition, or have compromised immune systems.[1] These are the very same people who make up the population that is found in our prisons and jails.

Prison officials routinely do a very poor job of screening for tuberculosis and treating and isolating prisoners who have the disease. Procedures to screen for TB are not complicated and treatment protocols are well known, which leaves little excuse for prison and jail administrators' inattention to this public health threat.

This article is intended to provide practical information to lawyers who wish to evaluate TB issues for possible litigation. Some basic science of the disease, as well as prevention measures, is discussed. An expert evaluation is necessary to definitively determine whether litigable TB issues exist in a particular case.

Tuberculosis and the D.C. Jail

The following brief discussion of litigation involving the District of Columbia illustrates how D.C. corrections officials

INSIDE . . .

have resisted the implementation of basic prevention and isolation measures.

As part of the ongoing litigation involving the conditions at the Jail, a court-appointed expert completed a review of health services, including the District's program for screening and treating TB on September 15, 1993. The expert found an alarming situation:

- Prisoners with active, infectious, multidrug-resistant tuberculosis were not being identified and isolated;
- Tuberculosis skin tests were being read during the middle of the night, in the dark, by unqualified personnel;
- Prisoners with active tuberculosis were being given inappropriate and ineffective treatment.[2]

The expert concluded:

Active tuberculosis is common in the [Jail] and often goes unrecognized and untreated or is inappropriately treated. I have reviewed documented cases of failure to diagnose and treat tuberculosis from 1990, 1991, 1992, and extending to the present. There are no adequate isolation facilities for patients with tuberculosis at [the Jail].[3]

In response to this report, United States Judge William Bryant ordered, *inter alia*, that the Department of Corrections perform a skin test and chest X-ray on every prisoner upon intake to the Jail and that prisoners with active tuberculosis be isolated. For months following this Order the Department of Corrections, by its own admission, failed to fulfill these requirements. Many prisoners did not receive a chest X-ray. Instead of isolating infectious prisoners, they were sent to a locked ward at the District of Columbia General Hospital, which has no respiratory isolation capacity.[4] In early 1994, two prisoners developed active TB while on the locked ward, presumably having been infected by another patient.[5] These infections caused plaintiffs' counsel and the Special Officer to step up efforts to have the Court's Order implemented.

Finally, in April of 1994, five months after entry of the court's order, the Department of Corrections promulgated a TB control policy. Unfortunately, they failed to implement the policy and the court was forced to impose a schedule of automatic fines for future violations. Only the threat of substantial fines has resulted in any improvement in the District's compliance.

Among the most troubling aspects of this case was the District's lack of concern about the public health threat created by the spread of TB in the Jail. Efforts to appeal to public health officials to compel

[D.C.] health officials maintained that their jurisdiction ended at the prison gate.

the Department of Corrections to address TB were totally unsuccessful. Consistently, health officials maintained that their jurisdiction ended at the prison gate.

The Tuberculosis Epidemic

Tuberculosis is caused by a slow-growing bacillus that ordinarily, but not exclusively, infects the lungs.[6] The bacillus which causes the illness is transmitted in the moisture of the breath of a person with active infection. It is spread by the sharing of air in close quarters.[7] The bacillus can live for a prolonged period of time in moist air.[8]

There are three types of tuberculosis infection. In the first type, a person can be infected with the bacillus (i.e., have the organism in her or his system), but neither be ill with the disease nor infectious. This is sometimes called "latent disease." Not all persons who become infected with the disease develop an active infection. Most persons with competent immune systems are able to fight off the disease and thus never become ill. Someone with latent TB will ordinarily have antibodies to the disease and will, as a result, have a reaction to a TB skin test.

In a minority of cases, the immune system cannot contain the disease and a person becomes ill with tuberculosis.[9] This second type is known as "active infection" or "TB disease." An untreated person with active disease is ordinarily infectious, meaning that the disease can be spread to others. However, a person may have active TB, receive a course of antibiotic therapy, and no longer be infectious.

An alarming aspect of the re-emergence of TB has been the development of high rates of "MDR-TB," or multi-drug resistant TB, the third type of infection. For example, 14% of the cases diagnosed in New York State, 12.4% of the cases diagnosed in Massachusetts, and 10.5% of the cases diagnosed in Rhode Island were resistant to the antibiotic most commonly used to treat TB.[10] Because the TB bacillus is very slow growing, the patient must remain on medication for very long periods, sometimes several years. Intermittent treatment permits the bacillus to become resistant to the medications being used.[11]

Tuberculosis rates are disproportionately high in prisons and jails. In some states, as many as 14% of all TB cases are found among prisoners. Tuberculosis has increased in prisons and jails for two reasons: first, due to the failure of corrections officials to properly screen, isolate, and treat prisoners with TB and, second, due to a high rate of HIV infection among prisoners.

HIV infection and TB interact in two important ways: first, persons with HIV disease are at a much greater risk for developing active tuberculosis than non-immunocompromised persons, and TB in an HIV-infected person is much more likely to result in death. Second, because the skin test commonly used to identify TB infection is a test for an immune response, a person with HIV infection may have negative results on a skin test despite active disease. Thus, it is much harder to screen for tuberculosis in a prison population where HIV infection rates are very high.

Litigation

In the D.C. Jail litigation, four areas of concern dominated:

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The National Prison Project is a tax-exempt foundation-funded project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities by using existing administrative, legislative and judicial channels; and to develop alternatives to incarceration.

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- the failure to screen prisoners and staff;
- the failure to isolate infectious prisoners;
- the failure to provide proper treatment; and
- the need for enhanced ventilation and other structural modifications to prevent transmission.

1. Screening

The identification of prisoners with TB infection or disease is the cornerstone of an effective prevention program. Historically, screening has been done by skin test upon admission to the corrections system. Screening should be performed by the Mantoux skin test ("PPD").[12] All positive PPDs should immediately be followed by a chest X-ray to rule out active disease. In addition, because of the risk of a false negative skin test, all persons infected with HIV, or who are at risk for HIV and whose HIV status is unknown, should be screened by chest X-ray. In urban settings where HIV infection rates among prisoners are high, routinely screening all prisoners by chest X-ray may be advisable. Repeat screening should be performed annually on all prisoners and staff.[13]

Screening of persons who have been in contact with a known infectious case is also required. The Centers for Disease Control (CDC) recommend screening all close contacts, with a repeat screening 10 to 12 weeks after exposure. These contact investigations should be performed as part of routine policy and should be documented.

2. Isolation

Anyone suspected of having tuberculosis, or who has known active disease, must be isolated in proper respiratory isolation.[14] Isolation must include negative air pressure (i.e., air flows into the room when the door is opened), venting of air directly out-of-doors, six or more air exchanges per hour, ultraviolet lighting, and a vestibule with a sink for hand washing.[15] Isolation should continue until samples of sputum (fluid from the lung) test negative for bacillus on three consecutive days.[16]

3. Treatment

A person with active disease must remain on multiple antibiotics for months, possibly years. In addition, anyone with latent disease may be eligible for prophylactic drug therapy that lasts at least six months. It is essential that once started on medication, the course of treatment is completed so as to avoid relapse and the development of drug resistance. As a result, directly observed therapy (individual dose delivered to the patient with ingestion monitored by trained staff) is recommended by the CDC.[17]

Moreover, correctional medical staff need to be trained to diagnose and treat TB. Multidrug resistance, for example, can be created by the misprescription of drug therapy.

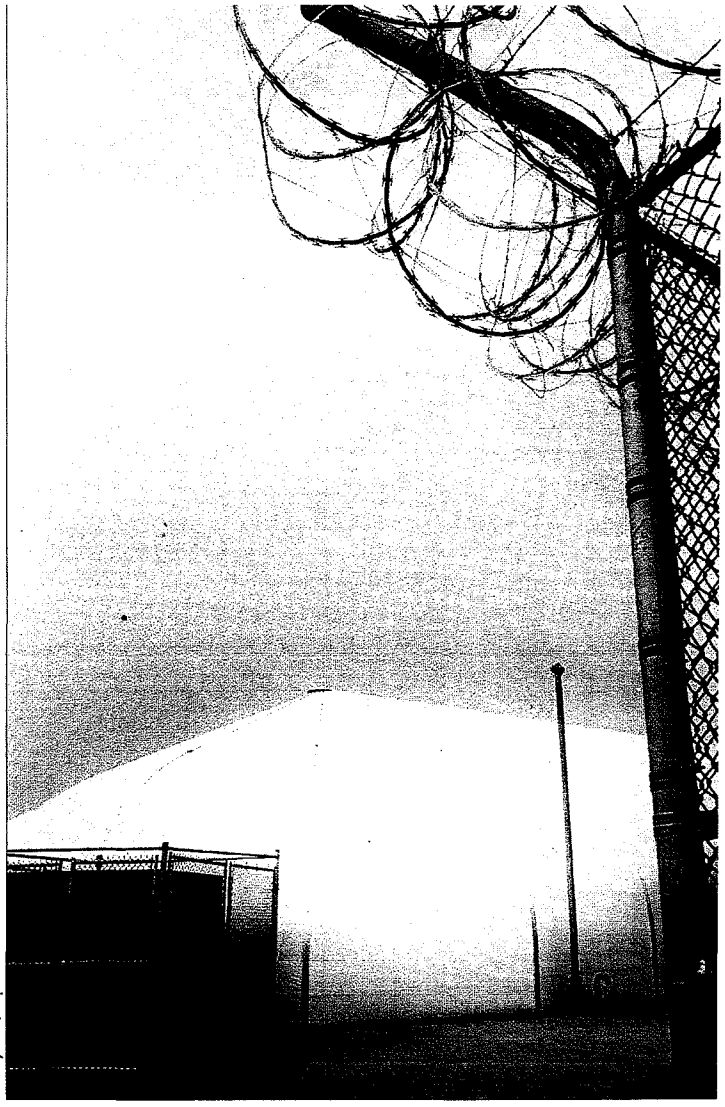
A particular problem for prisoners, especially in the jail setting, is the continuation of treatment after release. Close coordination should be maintained between corrections medical staff and public health officials.

4. Ventilation and other preventive measures

Transmission of TB is, fortunately, relatively easy to prevent. Intake sites should have good ventilation; prisoners should not be placed into general population until they have been screened. Medical units should also have ample ventilation and be equipped with ultraviolet light, which kills TB bacilli. Sputum induction and other tests which require prisoners to cough should only be performed in areas designed to reduce the risk of transmission.[18] Thus, simple technology, such as fans and ultraviolet lighting, can have a substantial impact on stopping the spread of the disease.

It is much harder to screen for TB in a population...where the HIV infection rates are high.

The resurgence of TB in prisons and jails offers a unique opportunity for advocates to show the impact that prison conditions have on the community outside the prison walls. The failure to combat TB in prisons will certainly spread the disease to members of the free world. Infected correctional officers will carry it home at night and infected prisoners will be released. Tuberculosis is but a clear example of a greater truth, that despite the prison walls, prisoners remain part of the greater community. ■



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Units like this one at Rikers' Island in New York City have been added on to house inmates with contagious diseases such as TB.

Jonathan M. Smith is the Executive Director of the D.C. Prisoners' Legal Services Project.

[1]See, Ted Hammet and L. Harrold. "Tuberculosis in Correctional Facilities." National Institute of Justice. (January 1994); J. Elvin, (TB Comes Back, Poses Special Threat to Jails, Prisons." NPP JOURNAL, Vol. 7, No. 1. (Winter 1992.)

[2]*Cambell v. McGruder*, C.A. No. 1462-71 (Bryant, J.), in Robert Cohen, M.D., "Review of Medical Services in the Central Detention Facility (CDF)." (September 15, 1993.)

[3]*Id.* at 80. In addition, plaintiffs were able to

document that corrections officials did not report TB cases to appropriate public health officials despite an express statutory obligation to do so.

[4]Two Hundred and Seventeenth Report to the Court, *Campbell v. McGruder*. C.A. No. 1462-71 (D.D.C.) (Bryant, J.).

[5]Both of these prisoners had a history of negative TB skin tests and were sent to the locked ward for treatment of other AIDS-related infections. During their stay in the hospital, a patient with active TB was housed in the locked ward. One of these prisoners died from TB. These prisoners were identified because they were both clients of the D.C. Prisoners' Legal Services Project.

[6]R. Berkow, ed., *The Merck Manual of Diagnosis and Therapy (Sixteenth Edition)*. (1992)

[7]U.S. Department of Public Health, Public Health Service, "Control of Tuberculosis in Correctional Facilities: A Guide for Health Care Workers," ("Control of TB in Correctional Facilities"), (1992.)

[8]"Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Facilities, 1994," ("Health Care Facilities Guidelines"), Vol. 43, No. RR-13, Centers for Disease Control and Prevention. (October 28, 1994.)

[9]Approximately 10% of those infected with tuberculosis develop active disease. "Health Care Facilities Guidelines." (1994.)

[10]"Tuberculosis Case Rates by State: United States, 1993,"
"TB Case Rates" Centers for Disease Control and Prevention. (October 1994.)

[11]AIDS Action Foundation. "Tuberculosis and HIV Public Health Policy: A Dual Challenge." (March 1992.)

[12]The PPD is performed by injecting a small amount of protein from the coating of the TB bacillus under the skin. A person infected with TB will have an antibody response to the injected material and will develop a raised hard lump at the site of the injection. The multiple puncture, or tine test, historically used to screen school children is not as accurate as the Mantoux, and is thus disfavored. The CDC recommends that correctional institutions screen by use of the Mantoux, and not the tine. "Control of TB in Correctional Facilities."

[13]*Id.* at 5.

[14]*Id.* at 8.

[15]"Guidelines for Health Care Facilities" at 29-30; "Control of TB in Correctional Facilities" at 8.

[16]The only definitive test for TB is to culture a sample of fluid from the patient. Since TB is slow growing, cultures can take up to six weeks. However, TB is one of a category of organisms called acid fast bacilli ("AFB"). AFB can be identified by staining a sample and viewing it under a microscope. Thus, a positive skin test, chest X-ray and sputum, although not definitive, strongly suggest a diagnosis of tuberculosis. "Guidelines for Health Care Facilities" at 24.

[17] Id.

[18]*See* "Guidelines for Health Care Facilities" at 69-95.

Bill Seeks to Stop Courts From Protecting Basic Rights

BY ALVIN J. BRONSTEIN AND CHASE RIVELAND

Nine children in South Carolina who were confined to the state training school attempted suicide and were transferred to the state mental hospital. Each child was subjected to long periods of isolation and injected by state doctors with drugs as part of "aversive therapy." Some were bound hand and foot (four-point restraints) to their beds while naked or in paper gowns.

The "STOP" bill (Stop Turning Out Prisoners Act), passed by the U.S. House of Representatives and now pending before the Senate, would permit this kind of abuse to go unchecked. In essence, "STOP,"–Senate Bill 400–would deprive the courts of the power to remedy proven constitutional violations in adult and juvenile prison conditions cases. It violates the basic principle that all people, even the least deserving, are protected by the Constitution.

A lawsuit was filed on behalf of the youths in South Carolina, resulting in a consent decree in which the use of restraints and isolation were limited and the use of drugs as aversive therapy prohibited. The STOP bill, if passed, would invalidate this consent decree, making abuses once again possible.

While on the surface the bill targets prisoners, in reality it represents an attack on the power of the courts to protect fundamental human rights. It also strikes a blow against the authority of state and local officials to address and remedy severe health and safety problems in their own institutions.

We urge the rejection of the STOP bill for the following reasons:

- *STOP would limit a federal court's time to remedy unconstitutional prison conditions to two years after judgment.* A California judge found that prisoners, while restrained by guards or in shackles, were beaten on the head, kicked and hit with batons, had teeth knocked out, and were burned by scalding water. Prison administrators knew about the guard brutality and ignored it. The judge ruled the beatings unconstitutional and ordered officials to develop a plan to end them. Under the STOP bill the order would end in two years, even if the abuses continue.
- *STOP would strip the courts of the power to grant preliminary or emergency relief, even in the face of major crises.* In Pennsylvania, prison officials were ordered by the court, on an emergency basis, to implement tuberculosis screening and control because of evidence of the existence of TB. The STOP bill would have prevented the emergency order, thereby endangering the health of prisoners, correctional officers, their families, and the larger community.
- *STOP is based upon the spurious premise that the federal courts have responded to lawsuits challenging prison overcrowding by "turning out" prisoners.* Prisoners are only released if state officials elect to meet constitutional requirements through releases rather than by building new facilities or considering alternative sentencing options.
- *STOP makes settlement agreements void, hampering state government officials who want to settle meritorious prison conditions lawsuits before trial.* In Ohio, a consent decree prohibiting juveniles from being housed in a jail where a 15-year old girl was raped by a guard, would be terminated by STOP.
- *STOP should not be confused with the "frivolous prisoner lawsuits bill."* That bill, entitled "Stopping Abusive Prisoner Lawsuits," (Title II of House Bill 667) is intended to control frivolous lawsuits filed by individual prisoners without attorneys.

State officials do not want to run their prisons concentration-camp style, nor do they want to put their staff at risk of injury or disease. STOP would prevent them from entering into consent decrees, and would have the unintended consequence of forcing states to bear the expense of long and costly trials. To pass STOP would be a grave mistake for all concerned. It would also be the beginning of a dangerous trend that prevents the courts from reviewing human rights violations. ■

Alvin J. Bronstein is the Executive Director of the National Prison Project of the American Civil Liberties Union Foundation, Inc.
Chase Riveland is the Secretary of the Department of Corrections, State of Washington.

'Three Strikes' Laws Won't Reduce Crime

BY JAN ELVIN

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"Play ball!," "Safe!," and "Strike three–you're out!" are all phrases that bring to the minds of most Americans warm summer breezes, hot dogs and good clean fun. After all, baseball is (once again) America's national pastime.

But during the past year we have heard the phrase "three strikes and you're out" in a different context. It has been appropriated by lawmakers and political pundits to mean something else entirely, and this game is not so pleasant. It means that anyone who is convicted of a felony for the third time will spend the rest of his or her days behind bars. Three strikes and you're out (or rather, in) with no hope of parole, ever.

Across the country "three strikes and you're out" legislation has seized the public imagination. While attention has been focused on the federal crime bill passed last year, which includes a "three strikes" measure, state legislatures have also moved quickly to pass similar legislation.

Rhetoric vs. reality

Crime rates in the United States have, contrary to popular belief, remained relatively static over the last 10 years (although crime is significantly higher than it was 30 years ago).[1] The public's fear of crime, however, is at a fever pitch, fueled largely by two things, the press and the politicians. First of all, the media make a practice of sensationalizing many crimes. A handful of particularly frightful and tragic events have dominated the airwaves and print media in recent years, for example, the Willie Horton furlough case, the Florida tourist killings, the murder of 12-year old Polly Klass in California, and the Long Island RailRoad shootings. While these were all horrible crimes and frightening in their randomness, they are nonetheless atypical events and present a distorted view of the actual risks.

Second, politicians, responding to public demand and acting out of their own desire to get reelected, ignore the facts about the crime problem and its possible solutions. Candidates for reelection seem to view a "tough on crime" attitude as the key to career advancement. Most politicians, aware that the public's perception of a crime wave far outpaces the actual incidence of crime, nevertheless have no qualms about using inflammatory rhetoric to increase public apprehension. As Marc Mauer, associate director of The Sentencing Project, says, "The data don't have much impact on the debate."

Offering no leadership, no real solutions, nor even an understanding of the problem, American politicians have given us political demagoguery at its worst. Professor Philip Heymann, former number two official at the Clinton Justice Department said, "One should never underestimate the capacity of politicians to fool a frightened constituency and perhaps themselves as well."

Legislators in about one half the states have introduced "three strikes" or similar bills, most of which have been enacted. Georgia and South Carolina have actually passed "two strikes" legislation.

Leading the charge on the "three strikes and you're out" trend was Washington state and the National Rifle Association (NRA). In the fall of 1993 the National Rifle Association sponsored the three strikes bill in Washington in its effort to stress incarceration as an alternative to gun control. The initiative got on the ballot with lots of help from the NRA, and passed overwhelmingly. In November 1993 Washington state voters approved an initiative calling for life sentences for anyone convicted three times from a list of more than 40 serious crimes.

"A young man's game"

Get-tough laws ignore the most powerful crime-reducer of all, however: age. "Crime is a young man's game," says Wilbert Rideau, a lifer in the Louisiana State Penitentiary. Research shows that criminals commit fewer crimes as they grow older. According to FBI data, violent crime arrests rise rapidly in the teens, peak at 18 and taper off through the 20s. By 35 most adults "mature out" of crime and actually commit crimes at a lower rate than 13-year olds.

Given current sentencing trends, Federal and state governments will be left housing aging prisoners who are well beyond their criminogenic years; U.S. prisons will before long look like geriatric wards. "Three-time losers" can never be released, even when they are 80, 90, or 100, in a wheelchair or in a coma. Mammoth medical expenses may well bankrupt state governments already strapped for funds, as the cost of incarceration rises from an average of $20,000 per year for a younger prisoner to more than $60,000 to care for an elderly one.

Perry Johnson, the immediate past-president of the American Correctional Association, says, "The idea of sentencing every three-time offender in their mid-twenties to life without parole is ludicrous. The last 40 years of the sentence buy almost nothing for the public safety, but have an incredible cost to the taxpayer."

Continued on next page

Signs of uneasiness

According to recent press reports, some state legislators are getting cold feet and rethinking the "three strikes you're out" fad because of the financial cost.

There are also early signs that the public, seeing the impact up close, may not have the stomach for "three strikes" for humane reasons:

- In San Francisco, the 71-year old victim whose car had been burglarized refused to testify in court because she felt the sentence of life with no possibility of parole was too severe.
- In Los Angeles, a jury was deadlocked on a routine burglary charge because jurors believed that life in prison was too harsh for a non-violent crime.
- One of the first offenders sentenced under Washington State's three strikes and you're out law was 35-year old Larry Fisher, whose third strike involved robbing a sandwich shop of $151 by pretending that his finger in his pocket was a gun. His two previous strikes involved pushing his grandfather down and taking $390 from him; and a $100 pizza parlor robbery with no weapon.

Financial costs

The only real beneficiary of these repressive and costly laws will be the prison construction industry, which is already enjoying a boom in business, due to stiff mandatory minimum sentences already in effect. The California Department of Corrections estimates that the new "three strikes" legislation will add 58,518 inmates to the projected base of 165,000 by the year 1998. By the year 2028 it will add 275,000 more at a cost of $5.7 billion. To give a more human face to these huge numbers, consider that for the past six years, the percent change in California's state appropriations for corrections was almost three times greater than its appropriations for primary school education.

"The data don't have much impact on the debate."–Marc Mauer, the Sentencing Project

A million behind bars already

Nearly one and a half million people are locked behind bars in the United States, a three-fold increase over 1980 and an annual rate of increase of 8.5 percent.

In the 1970s the incarceration rate was 110 people per 100,000. In the 1980s it skyrocketed to between 300 and 400 per 100,000 and it is now over 500. By contrast, over the last 20 years, murder rates have remained flat, robbery has grown by 1 percent, and burglary has declined somewhat. Alfred Blumstein, a professor at Carnegie-Mellon University in Pittsburgh, says, "[Incarceration] has had no clear impact on crime rates."

Drug offenders, most non-violent first-time offenders, now make up 46 percent of new prison admissions. With the enactment of the "three-time loser" laws, more and more scarce prison space, which should be reserved for those who pose a real threat to public safety, will be taken up by lower-level recidivists.

Crime is too complex an issue to try and resolve with a baseball slogan. Three strikes measures may make people feel better in the short run, but they offer only empty promises. The problem of crime can only be addressed through long-term initiatives which require consideration of many factors–individual, family and community. The current narrow and highly politicized debate only intensifies the public's fears and leads to disappointment.

In any event, prison is a mop-up operation, as one prisoner put it. Lawmakers would make better use of taxpayers' money by emphasizing front-end, crime prevention approaches than back-end, reactive tactics such as "three strikes and you're out." ■

Jan Elvin is the editior of the National Prison Project JOURNAL.

[1]According to a recent report done by The Sentencing Project, crime rates in the United States are not substantially higher than in other industrialized nations, contrary to popular belief. A comprehensive study of victimization rates in the third world conducted by the Dutch Ministry of Justice Statistics show that rates of property crimes and some assaultive crimes do not differ significantly among comparable nations. A 20-nation survey showed that four countries (New Zealand, the Netherlands, Canada and Australia) exceeded the United States rate of victimization for 11 crimes, which included robbery, burglary and car theft. Marc Mauer, Americans Behind Bars: The International Use of Incarceration, 1992-1993. Washington, D.C.: The Sentencing Project (September 1994).

An Analysis of Drug Testing in Prison

BY J.D. DOLBY AND KATHI S. WESTCOTT

Tests for the presence of illegal drugs are often used as evidence in prison disciplinary hearings. Based on the test results, disciplinary committees make decisions regarding probation and parole revocation, loss of good time, loss of parole, and segregation for individual inmates.

Drug testing methods

There are several types of urinalysis technologies: (1) Enzyme Multiplied Immunoassay Technique (EMIT); (2) Radioimmunoassay (RIA); (3) Fluorescence Polarization Immunoassay (FPIA); (4) Gas-Chromatography/Mass-Spectrophotometer (GC/MS); and (5) Thin Layer Chromatography (TLC).

A "false positive" result indicates a positive for a given drug when that drug is actually absent in a urine sample, or present in concentrations below the designated cutoff level. To avoid testing errors, confirmation of initial immunoassay positives by an alternative method–preferably GC/MS–is recommended. Since the GC/MS testing is so expensive, however, prisoners may be subjected to disciplinary action because of inaccuracies in other technologies.

Legal issues

A. *Fifth Amendment*

The Fifth Amendment privilege against compulsory self-incrimination is not violated when a positive urine sample is used against a prisoner at a disciplinary hearing, nor does the Fifth Amendment prohibit prison officials from using a prisoner's refusal to provide a urine sample as evidence against him.

The Fifth Amendment protects an accused *only* from being compelled to testify against himself, or from otherwise providing the State with evidence of a testimonial nature. In *Schmerber v. California*, 384

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Case Law Report

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Highlights of Most Important Cases

BY JOHN BOSTON

PELICAN BAY: Use of Force, Medical Care and Mental Health Care

In January 1995, a California federal court issued the long-awaited decision in the Pelican Bay litigation, and it was largely favorable to the plaintiffs. *Madrid v. Gomez*, No. C90-3094-THE, Findings of Fact, Conclusions of Law, and Order (N.D.Cal., January 10, 1995) ("Opinion").

Pelican Bay State Prison, touted as a high-tech, state-of-the-art maximum security facility, generated large numbers of serious complaints from the time it was opened in 1989. The prison contains a 2000-inmate general population maximum security unit, a small minimum security unit, and a Security Housing Unit (the "SHU") holding 1000 to 1500 inmates. The SHU is characterized by extreme social isolation and lack of environmental stimulation; the prisoners are held in windowless cells for 22 hours a day. It is the SHU that generated some of the most lurid allegations of mistreatment.

The case was properly treated as a major piece of litigation by plaintiffs, defendants and the court. The trial court heard testimony from ten experts and 57 lay witnesses and received more than 6000 exhibits and thousands of pages of deposition excerpts. The district court's decision is 345 pages long. The defendants have already filed a notice of appeal, despite the apparent lack of an appealable order.

The most important single issue in the case was probably the misuse of force by staff. The record included incidents in which an inmate was beaten on the head with a gun butt, an officer broke an inmate's arm while it was extended through the cell food slot, and an inmate was punched in the head while in handcuffs and leg irons. A mentally ill prisoner was hospitalized with second- and third-degree burns over a third of his body after he was placed by officers in a bathtub of scalding water. Prisoners were left in "fetal restraints" for hours, sometimes chained to toilets or other fixed objects, for punitive purposes, and in other instances were left naked in outdoor holding cells during inclement weather. Forcible cell extractions were conducted even when there was no imminent security risk, and often with an extremely high degree of force, including use of batons, taser guns, and gas. Firearms were used unnecessarily and sometimes recklessly, in some cases because administrators failed to provide staff with alternative weapons.

The court made no finding about the number of incidents of excessive force. Indeed, it observed that such a finding was impossible in view of the "code of silence" among staff, the inadequacy of the prison's incident reports, and the fact that some incidents went entirely unreported. Opinion at 68. However, the court concluded that "the instances of force being used excessively and for the purpose of causing harm are of sufficient scope, variety and number to constitute a pattern. Plaintiffs have convincingly documented a staggering number of instances in which prison personnel applied unjustifiably high levels of force, both pursuant to, and in contravention of, official prison policies." Opinion at 69-70.

The court attributed the pattern of excessive force to a series of defaults by prison authorities with respect to written policies governing the use of force, supervision of the use of force, investigation of possible misuses of force, and the discipline of officers who misused force. Written policies were found to be incomplete and inconsistent, with little attention paid to them in practice. Prison administrators were found to have "abdicated their responsibility" for supervising the use of force by permitting or encouraging staff to submit overly general incident reports and by "turn[ing] a blind eye when an incident report clearly calls for further inquiry, such as when it indicates that an inmate sustained serious injuries that are either unexplained or suspiciously explained." Opinion at 87.

The court made similar findings about reports on shooting incidents. Internal Affairs Division investigations of uses of force were described as "counterfeit investigation[s] pursued with one outcome in mind: to avoid finding officer misconduct as often as possible... [N]ot only are all presumptions in favor of the officer, but evidence is routinely strained, twisted or ignored to reach the desired result." Opinion at 99. Finally, in three of the four incidents in which Internal Affairs found that excessive force had been used, the Warden acted to minimize or eliminate any adverse action against the staff.

In reaching its conclusions, the court repeatedly questioned the credibility of assertions by the defendants and their employees, both on the witness stand and in internal reports. The court also explicitly acknowledged

> *the undeniable presence of a "code of silence" at Pelican Bay... [T]his unwritten but widely understood code is designed to encourage prison employees to remain silent regarding the improper behavior of their fellow employees, particularly where excessive force has been alleged. Those who defy the code risk retaliation and harassment.*

Opinion at 6.

In its legal analysis, the court had to determine what standard governed the plaintiffs' claim. The defendants–the prison's warden, deputy warden, and chief medical officer, and the director of the state prison system–argued that they could not be held liable unless they were shown to have acted maliciously or sadistically, the standard that the Supreme Court has applied "whenever prison officials stand accused of using excessive physical force." *Hudson v. McMillian*, 112 S.Ct. at 199. However, the court observed that these defendants were not charged with misusing force but with "conduct of a completely different nature: abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist." Opinion at 252. In that situation, the court held, the rationale for the malicious and sadistic standard does not apply. There is no need to balance prisoners' interest in being free of excessive force against competing administrative

concerns for safety and order, and there is no need to make decisions hastily and under pressure. These factors were cited as the reasons for adopting the malicious and sadistic standard in the first place. *See Whitley v. Albers*, 475 U.S. 312, 320 (1986). In their absence the court applied the deliberate indifference standard that governs "prison conditions" cases. *Id.* at 253-56.

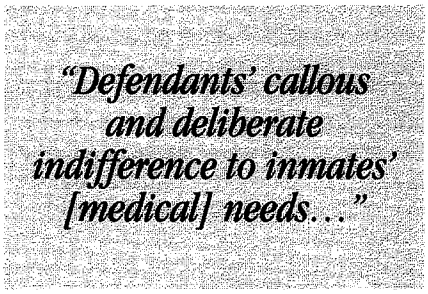
In reaching this conclusion, the court threaded its way between two seemingly contradictory Ninth Circuit precedents. In *Jordan v. Gardner*, 986 F.2d 1521, 1529 (9th Cir. 1993) (*en banc*), the court held that a search practice, even though nominally security-related, was not governed by the malicious and sadistic standard because its security justification was not legitimate, it had not been adopted under time constraints, and it routinely inflicted pain on prisoners. Id. at 257. In *LeMaire v. Maass*, 12 F.3d 1444, 1453 (9th Cir. 1993), the court (per a judge who had dissented in *Jordan*) held that prison policies related to security are governed by the malicious or sadistic standard, explicitly rejecting the view that the need to make decisions hastily and under pressure is essential to invoke that standard.

The *Madrid* court followed *Jordan* and not *LeMaire*. It distinguished *LeMaire*, first, because that case addressed security measures applied by prison administrators to a particular inmate's "extreme and dangerous conduct," and second, because it challenged the facial validity of the prison regulations under which those measures were taken. Opinion at 255-56 n.198. While these distinctions are not altogether convincing, the district court can hardly be faulted, since *Jordan* and *LeMaire* are virtually irreconcilable.

The court went on to reject the defendants' argument that the plaintiffs had to show that each incident of staff violence on which they relied was done with malicious or sadistic motivation. Because the liability of individual officers was not at issue, and the plaintiffs sought only injunctive relief against high-ranking administrators, findings as to individual officers' liability were not necessary. Their actions were not weighed for the purpose of assessing their mental state, but only as part of the inquiry into the objective component of the Eighth Amendment claim–i.e., whether the force was "objectively 'excessive,'" which the court defined as "unnecessary or grossly disproportionate to the circumstances." Opinion at 262.

In other words, prison administrators' duty with respect to the use of force is not discharged by ensuring that their staff do not act maliciously and sadistically. If an officer uses excessive force "because of lack of training and supervision, rather than out of malice," the officer may not be liable, but those charged with training and supervision may be, and that determination is governed by the deliberate indifference standard.

The court did hedge its bets on both of these holdings. With respect to the administrators' state of mind, the court concluded that the extent of misuse of force and the "flagrant and pervasive failures in defendants' systems for controlling the use of force reveal more than just deliberate indifference: they reveal an affirmative management strategy to permit the use of excessive force for the purpose of punishment and deterrence." This conduct meets the malicious or sadistic test. Opinion at 259. With respect to the individual officers' state of mind, the court found the record "replete" with instances where the



record showed that force was used "maliciously for the purpose of causing harm, i.e., with a knowing willingness that harm occur." Opinion at 265.

The deliberate indifference standard that the court applied requires a showing of actual knowledge of a substantial risk. *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994). The *Madrid* opinion is one of the first to apply this requirement to a systemic injunctive case. The court found that the defendants were aware of "serious problems concerning excessive force" because these problems were evident from the internal reports that the defendants routinely reviewed and that also formed the basis of expert testimony about the prevalence of excessive force. The court added that "the continuing and substantial risk of serious injury to inmates in a prison where misuse of force is prevalent is so obvious that defendants did, in fact, know of this risk." Opinion at 116. Moreover, it concluded that:

> *... [D]efendants consciously disregarded the risk of harm, choosing instead to tolerate and even encourage abuses of force by deliberately ignoring them when they occurred, tacitly accepting a code of silence, and, most importantly, failing to implement adequate systems to control and regulate the use of force, despite their knowledge that such systems are important to ensuring that the use of force is effectively controlled.*

Opinion at 258.

By the time of trial the defendants had made changes in some of the challenged practices, and they alleged that these constituted a sufficiently "reasonable response" to preclude a finding of deliberate indifference. See *Farmer v. Brennan*, 114 S.Ct. at 1983. However, the court noted that the changes all post-dated the filing of the litigation, the defendants had never acknowledged that there was a use of force problem to be addressed, they proffered other reasons to explain the changes, and they offered no assurances that the changes would persist. Accordingly, it found that they were not sufficient to avert a finding of liability.

The court also found an Eighth Amendment violation in the prison's system of medical and mental health care. Its condemnation was brief, blunt and sweeping. It described medical staffing levels as having progressed only from "abysmal" to "still insufficient," and used similar language with respect to mental health staff. Training and supervision of staff, particularly when medical technical assistants decide whether inmates may see a doctor, were "almost nonexistent." Intake health screening was "woefully inadequate" and screening for communicable diseases was "poorly implemented." The court cited significant delays in medical treatment and both delays in and failures to provide mental health treatment, particularly for inmates referred to other institutions for mental health reasons. The court cited the lack of protocols or training for dealing with emergencies or trauma, and the lack of effective procedures for managing chronic illness. It described medical recordkeeping as "utterly deficient." It cited the lack of programs to ensure the quality of care: "no working quality control program, no genuine peer review, no death reviews." Opinion at 278-79.

In light of this record, the court had no difficulty in finding that the defendants were deliberately indifferent. It stated: "Defendants knew that the plaintiffs had serious medical needs, knew that the medical system at Pelican Bay was inadequate to serve those needs, and nevertheless failed to remedy the gross and obvious deficiencies of the system." Opinion at 155-56. Their "abundant" knowledge "is reflected in records of complaints by prisoners and staff, audit reports, and budget requests that allude to the risk of harm (and of litigation) if conditions are not ameliorated." Opinion at 158. With respect to mental health care, the court stated: "It is certainly 'known' that there are inmates with serious mental disorders 'throughout' the California prison population," that it is

"obvious" that a prison like Pelican Bay would generate a substantial need for mental health services, and that it is equally obvious that the lack of such services would cause "considerable pain and suffering." The court added that "these facts are so obvious that we find that defendants clearly knew of them." Opinion at 191.

Two aspects of the court's analysis of the system are of particular interest. One is its emphasis on the lack of internal mechanisms to monitor the quality of medical services. It stated: "Defendants' callous and deliberate indifference to inmates' needs is particularly evinced by their failure to institute any substantial quality control. Quality control procedures represent the first critical steps of self-evaluation that could help defendants remedy widespread deficiencies..." Opinion at 281. This conclusion was amply supported by the record, since defendants' own medical expert agreed that quality assurance programs are "standard practice in virtually any health care facility in the country" and a "fundamental part" of the provision of health care." Opinion at 145. The court found that "[f]ailure to institute quality control procedures has had predictable consequences: grossly inadequate care is neither disciplined nor redressed." Id. at 146.

This discussion of medical care parallels the court's observation that the defendants had "fail[ed] to implement adequate systems to control and regulate the use of force, despite their knowledge that such systems are important to ensuring that the use of force is effectively controlled." Opinion at 258. It also meshes with the evidence of prison staff's concern–described by one expert witness as "an almost obsessive preoccupation"–that inmates are malingering or manipulating in their dealings with the medical and mental health system. Realistically, some degree of this adversary tension between patients and medical providers is inescapable in a prison setting, especially one that is designed to house the prisoners labelled as most problematic. In this context, the court's insistence on formal

Dear Prison Project...

Dear Prison Project:

I am in a state prison in the South, and I have been having terrible toothaches. Some of my fillings have fallen out. I have tried to get to the prison dentist but my appointments keep getting cancelled. What can I do to get my teeth fixed? What are my rights to health care?

Pain in My Head

Dear Pain:

In 1976 the Supreme Court ruled that the government must provide medical care for those whom it punishes by incarceration. It stated that "deliberate indifference" to an inmate's serious illness or injury constitutes cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 97 S.Ct. 285 (1976). A serious illness or injury is considered to be a serious medical need "that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980).

If a prisoner has been treated with "deliberate indifference" by prison staff, s/he may bring an action under 42 USC §1983 for violation of the constitutional right to be protected from cruel and unusual punishment. The following are examples of situations where courts have found that prison officials have acted with "deliberate indifference:" (1) delay or denial of access to medical attention, *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990); *Estelle v. Gamble*, 97 S.Ct. 285; (2) denial of access to medical personnel qualified to exercise judgment about a particular medical problem, *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); (3) failure to inquire into essential facts that are necessary to make a professional judgment, *Liscio v. Warren*, 901 F.2nd 274 (2d Cir. 1990); *Tillery v. Owens*, 719 F.Supp. 1256 (W.D.Pa. 1989); (4) interference with medical judgment by non-medical factors, *West v. Atkins*, 108 S.Ct. 2250 (1988); *Hamilton v. Endell*, 981 F.2d 1063 (9th Cir. 1992); and (5) failure to carry out medical orders, *Estelle v. Gamble*, 97 S.Ct. 285.

Dental care, in particular, has been recognized as "one of the most important medical needs of inmates." *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). Evidence of a few weeks' delay in dental treatment, for a painful condition, may support a claim of a constitutional violation under the Eighth Amendment. *See Patterson v. Pearson*, 19 F.3d 439 (8th Cir. 1994); *Hunt v. Dental Dept.*, 865 F.2d 198 (9th Cir. 1989); and *Fields v. Gander*, 734 F.2d 1313 (8th Cir. 1984).

Even if the action, or inaction, of prison personnel does not rise to constitutional dimensions, the prisoner may bring a malpractice suit in state court, or a tort claim in state court. This would be appropriate in cases where the mistreatment by prison officials is inadvertent, or the result of negligence. However, even simple negligence may constitute "deliberate indifference," and thus be a constitutional violation if a pattern of "repeated examples of negligent acts" by prison officials can be established. *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980).

Prior to taking action in federal or state court, you should use any internal procedures that are available, such as filing a grievance. The next step is to either file a §1983 civil rights suit in federal court or a malpractice or tort action in state court.

A §1983 action may be brought *pro se* by filing a complaint in the district court where the problem arose or where the defendant lives. The complaint must contain all the facts, in simple and straightforward terms, that have led you to believe that your constitutional rights have been violated. Additionally, the complaint must identify all of the defendants whose actions have violated your rights, and the relief requested (such as the performance of the treatment and money damages). *Pro se* civil rights complaint forms can be provided by the district court if you ask for them.

The filing of a malpractice or tort suit in state court will differ from state to state. It is important that you go to the law library in your facility or ask for legal assistance to find out what the procedures are for filing a state lawsuit. These state suits are beneficial because you do not have to show "deliberate indifference" by prison officials. In such suits, decisions can be based on the finding of a violation of the state constitution, a state law or regulation, or of the federal Constitution. ■

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procedures for the review of medical care is no more than a common sense acknowledgment of reality.

The court also focused on the relationship between mental illness and the institutional nature of Pelican Bay. It noted that a prison designed for particularly violent and problematic prisoners will inevitably end up with a disproportionate number of the mentally ill, since they often violate rules and cause management problems. Moreover, for some inmates, the severity of conditions in the SHU exacerbates previously existing mental illnesses or results in the development of psychiatric symptoms that had not been previously observed. Yet despite the obvious need for substantial mental health services at Pelican Bay, the prison was allowed to open with no psychiatrist on staff, and staff remained grossly inadequate up to the time of trial. Moreover, the court noted that mental health staff in practice have no input into housing decisions, even in cases where a change in housing conditions–e.g., removal from the SHU–is necessary to effective mental health treatment. Opinion at 179.

Not surprisingly, the court revisited this subject in discussing the plaintiffs' challenge to the conditions of confinement in SHU. The court held that the SHU's extreme isolation, idleness and lack of stimulation are not unconstitutional as applied to all prisoners, even if they have adverse psychological effects. However, if segregation conditions "inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence–indeed, they have crossed into the realm of psychological torture." Opinion at 292.

The court found that the defendants had indeed crossed this line with respect to certain categories of inmates for whom SHU conditions presented a high risk of severe damage to mental health: persons who are already mentally ill and those with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. "For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe." Opinion at 296. While these inmates may be segregated, the defendants "simply can not segregate them under conditions as they currently exist in the Pelican Bay SHU."

The plaintiffs were less successful on their other claims. The court ruled that prison staff's failure to assess inmates' prior assaultive record before assigning them to double cells was not shown to have caused a sufficiently pervasive risk of assault to violate the Eighth Amendment and that the defendants were not shown to have known enough about the risk to be found deliberately indifferent. (The court did, however, note that its opinion would provide them with actual knowledge that might support their liability in future litigation.) Nor did plaintiffs show that commingling inmates of different security levels created a pervasive risk of harm.

The court also rejected the plaintiffs' due process challenges to the segregation of prisoners believed to be gang members or associates; since their placement was deemed to be administrative rather than punitive, the defendants' compliance with the minimal requirements for administrative segregation placement satisfied due process. There was one exception. The court agreed with the plaintiffs that the defendants must make a record when they reject a particular piece of evidence as failing to support gang membership; the failure to do so creates a risk that the discredited evidence will be relied on in the future.

The court did not enter an injunction with its opinion. Rather, it appointed a Special Master (Thomas F. Lonergan, who has served in that capacity in several West Coast jail and prison cases), and directed the parties to meet with him to develop a remedial plan. The plan is to be submitted within 120 days, with the Special Master to make recommendations concerning remaining areas of disagreement.

The defendants have taken some remedial action since the opinion was issued. Cell extractions are now videotaped, the outdoor holding cells have been removed from the yard, and the deadly force regulations have been modified.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Women/Equal Protection

Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994). The district court found an equal protection violation in the relative lack of program opportunities at the state's women's prison.

The appeals court reverses on the ground that women prisoners are not "similarly situated" to men. At 731: "Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim." Women are not similarly situated because the women's prison is smaller than the men's prisons, the length of stay for men is longer, the women's prison has a lower security classification than some of the men's prisons, and women prisoners have "special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims." (731-32)

For these reasons, prison programs "reflect separate sets of decisions based on entirely different circumstances." Comparing an "isolated number of selected programs" between the prisons is a "futile exercise." Besides, *Turner v. Safley* counsels against a holding that male and female prisoners are similarly situated because plaintiffs' claim involves the day-to-day administrative decisions of prison officials.

The result of the "not similarly situated" analysis is that gender differences are not required to meet any standard of scrutiny, and the question whether the differences in programs actually do reflect different circumstances is not even to be asked. The court denied rehearing of this decision.

Pre-Trial Detainees/Crowding/ Negligence, Deliberate Indifference and Intent/State Officials and Agencies

Harris v. Angelina County, Tex., 31 F.3d 331 (5th Cir. 1994). The district court imposed a population cap on a county jail. Liability is affirmed under the Eighth Amendment, the court noting that if pre-trial detainees are subjected to cruel and unusual punishment, they are certainly punished within the meaning of the Fourteenth Amendment.

While design capacity is not always equivalent to constitutional capacity, it is "relevant" to the constitutional inquiry (334). The fact that the Texas Commission on Jail Standards issued a remedial order limiting the population to the same figure as the design capacity is "instructive." (335) Liability was supported by evidence that crowding compromised staffing, supervision, management and classification, and that when the population exceeded the design capacity, inmates had to sleep on the floors in day rooms. There was testimony concerning incidents "that the district court could have found were the result of, or at least were exacerbated by, the overcrowding at the jail." (335)

The subjective element of an Eighth Amendment claim was "established against the County." (335) Reports from the Texas Commission on Jail Standards, various incident reports, evidence brought to the county's attention through this litigation and testimony from the sheriff and jail administrators showed that the county was aware of the crowding and its consequences. The county defendants' decisions to pick up prisoners, to

release them or to detain them, as well as staffing, classification and other decisions, support a finding of deliberate indifference. The court rejects the defense that the county had done what it could do and the problem was out of its hands, since the county could delay acting on arrest warrants (and had done so) and could have used other means including probation, other facilities and electronic monitoring. At 336: "While such approaches may not be ideal from a public policy standpoint, they demonstrate that alternatives were available to address the unconstitutional conditions at the jail."

At 336: "Even if a cost defense were recognized, we would find it inapplicable here, since the evidence did not establish that additional funding was unavailable from the taxpayers to address the overcrowding."

Procedural Due Process—Administrative Segregation/Access to Courts—Punishment and Retaliation/Attorney Consultation

Barnett v. Centoni, 31 F.3d 813 (9th Cir. 1994). Due process was not violated by the plaintiff's reclassification for writing an abusive letter to a witness in his criminal case because he received some notice of the charges and an opportunity to present his views to the decision-maker. The court assumes without deciding that the plaintiff has due process rights in this context.

Because there was some evidence to support the reclassification, and therefore a legitimate penological purpose, summary judgment was properly granted on the plaintiff's claim that his reclassification was in retaliation for filing litigation.

The denial of contact visits and telephone contact with the plaintiff's attorney was not shown to be reasonably related to legitimate penological interests; summary judgment for the defendants was therefore erroneous.

Heating and Ventilation

Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994). The district court should not have granted summary judgment on the plaintiff's allegation of confinement in a "bitterly cold cell." At 1035: "To only find an Eighth Amendment violation from inadequate housing when the inmate's health is endangered suggests that frostbite, hypothermia, or a similar infliction is an absolute requisite to the inmate's challenge. Not so." The allegation that the plaintiff was held in a cell with broken windows at a temperature not much higher than the outside temperature, with a wind chill of forty or fifty degrees below zero, met the objective prong of the Eighth Amendment standard. The fact that prison officials provided the plaintiff with one blanket did not defeat the claim as to deliberate indifference.

Classification—Race/Rights of Staff

Moyo v. Gomez, 32 F.3d 1382 (9th Cir. 1994). A prison officer who claimed that he was fired for refusing to follow the practice of letting white inmates but not black inmates take showers after work stated a claim of retaliation under Title VII of the Civil Rights Act. Whether inmates were "employees" under that statute was irrelevant; requiring an employee to discriminate is an unlawful employment practice. In any case, this court has held that inmates may under some circumstances be "employees" for Title VII purposes.

Allegations that the officer was subjected to an offensive work environment, "one polluted by racial discrimination," would state a claim of racially-based harassment under § 703(a)(1) of Title VII.

Use of Force—Restraints/Access to Courts—Punishment and Retaliation

Davidson v. Flynn, 32 F.3d 27 (2nd Cir. 1994). The plaintiff complained that prison staff placed restraints on him too tightly in retaliation for his litigation activities. He complained that his ankle had a scar and numbness and his wrists were numb for several months, in addition to other short-term pain. These allegations met both the objective and subjective components of the Eighth Amendment standard. The fact that the plaintiff might have been restrained tightly anyway because he is an escape risk did not support summary judgment on his claim that the restraints were excessively tight. A retaliatory motive constitutes wantonness.

The allegation that the plaintiff was intentionally denied medical care for the injuries caused by the tight restraints was sufficient to state a constitutional claim.

Religion—Practices

Thomas v. Gunter, 32 F.3d 1258 (8th Cir. 1994). The plaintiff alleged that he was not permitted daily access to the sweat lodge for prayer, while Muslims and Christians had daily access to an "equivalent location" for prayer. Under the *Turner* standard, the defendants' "simple and unelaborated assertion" that their decisions were based on "security-related limitations" did not justify summary judgment under the *Turner* standard. Until the interests the defendants rely on are delineated, the court cannot assess their relationship to the challenged practices.

The plaintiff alleged that the sweat lodge was the only appropriate place for his prayers, so he had no alternative means of exercising his rights.

It is clearly established that inmates must be provided with reasonable opportunities to pursue their religions comparable to other prisoners who adhere to conventional religious precepts. In the absence of a rational justification for the distinction made by the defendants, they are not entitled to qualified immunity.

Modification of Judgments/Contempt

Cooper v. Noble, 33 F.3d 540 (5th Cir. 1994). In reviewing a contempt finding and a denial of a modification motion in a jail consent decree case, the appeals court is "mindful that our deference to the magistrate judge's exercise of his discretion is heightened in cases such as the one before us, which involve consent decrees directed at institutional reform... We owe substantial deference to the magistrate judge's many years of experience with this matter." (543, citing O'Connor's concurrence in *Rufo* and *Hutto v. Finney* respectively).

Changed factual circumstances by themselves do not justify modifying judgments; "the [Supreme] Court insisted that the petitioning party must 'ma[k]e a reasonable effort to comply with the decree.'" (544, citing *Rufo*) At 544: They must

> *(1) show that these changes affect compliance with, or the workability or enforcement of, the final judgment, and (2) show that those changes occurred despite the county officials' reasonable efforts to comply with the judgment... [The officials] do not adequately explain how increased inspections and changes in the number and diversity of inmates affect the workability of the final judgment, compliance with the judgment, or enforcement of the judgment. Neither do they show that those changes, many or all of which were changes made by the county officials* [footnote omitted], *occurred despite their reasonable efforts to comply with the judgment.*
> [Emphasis in original]

The magistrate did not err in finding the defendants in contempt; they argued that they were in substantial compliance because all they were violating were the provisions that they thought should be modified.

Searches—Person—Visitors

Daugherty v. Campbell, 33 F.3d 554 (6th Cir. 1994). At 556: "...[R]easonable suspicion must exist before a strip search is authorized for prison visitors." An anonymous tip relayed by a correctional officer does not meet that standard. At 556:

> *Generalized suspicion of smuggling activity does not justify a strip search... Instead, reasonable suspicion required individualized suspicion, specifically directed toward the person targeted for the strip search...*

Reasonable suspicion exists only if the information contained in the tip is linked to other objective facts known by correctional authorities... [Citations omitted]

Searches—Person—Visitors

Spear v. Sowders, 33 F.3d 576 (6th Cir. 1994) (per curiam). Searches of prison visitors are governed by a reasonable suspicion standard. At 581: "... [R]easonable suspicion must support the scope of a search as well as the initiation of it."

A report that a confidential informant informed a guard that an inmate was receiving drugs from a "young unrelated female" did not establish reasonable suspicion justifying a strip search of the plaintiff even though she was the only young unrelated female who visited the prisoner. The fact that all inmates are strip searched after their visits "vastly reduces the necessity to invade the privacy of a visitor, and it correspondingly narrows the circumstances in which it is reasonable to subject a visitor to a strip search," as does the degree of surveillance and the limitation of contact during the visits (582).

It is "absolutely clear" that there was not reasonable suspicion to search the plaintiff's car, and even if there had been, contraband in the car would not have been delivered to the prisoner and was therefore not subject to the "prison visitor exception to the warrant requirement." (582)

The defendants were not entitled to qualified immunity.

In Forma Pauperis

Carney v. Houston, 33 F.3d 893 (8th Cir. 1994). The district court's *sua sponte* dismissal under Rule 12(b)(6) was improper. District courts should dismiss frivolous *in forma pauperis* complaints out of hand; if the complaint is not frivolous, they should grant IFP status and order issuance and service of process. Once IFP status is granted, the complaint should be treated like any other "paid complaint." The district court's local rule is inconsistent with these requirements.

Access to Courts—Postage and Materials

Hershberger v. Scaletta, 33 F.3d 955 (8th Cir. 1994). Administrative segregation inmates were forbidden to earn money from prison jobs and were not provided any allowance for stamps or other incidentals. They were allowed to go into debt for stamps for legal mail, but were charged 50 cents a month service charge for a negative balance, and after the balance reached $7.50, they had to show "exceptional need," determined in officials' unfettered discretion.

The magistrate judge enjoined the service charge and the "exceptional need" standard and directed the provision of at least one free stamp and envelope a week for purposes of legal mail. The appeals court affirms. At 956: "While...an inmate alleging denial of access to the courts must show actual injury or prejudice,...a systemic denial of inmates' constitutional rights of access to the courts is such a fundamental deprivation that it is an injury in itself." (Footnotes and citations omitted)

Crowding/Pre-Trial Detainees

Hall v. Dalton, 34 F.3d 648 (8th Cir. 1994). The plaintiff was jailed for 40 days, confined to a windowless room for 24 hours a day, in a two-person cell containing four people which provided 14.22 square feet of space per person. He was required to sleep on the floor. A prior class action judgment

For the Record

■ **Legislative Update**–The STOP legislation discussed in the previous edition of the *Journal* ("Bill Seeks To Strip Courts of Power", Vol. 10, No. 1, Winter 1994/95) and in this edition on page 4, has been submitted to the Judiciary Committee of the Senate but it is still unclear what will happen next. The bill (S.400) may become part of the main crime bill (S.3) which the Judiciary Committee is expected to consider when members return from their spring break. Unfortunately, however, it seems unlikely that hearings will be held on the STOP bill even if it becomes part of S.3. It is possible that the bill will be introduced on the floor of the Senate and voted on immediately. As the Senators are back in their states for two weeks in April, a number of groups and individuals who understand and oppose the legislation are taking the opportunity to talk with their own Senators, to make sure that they will have some understanding of the impact of the bill if it does come to a floor vote.

There seems to be considerable confusion, both inside and outside the Senate, about the difference between STOP ("The Stop Turning Out Prisoners Act") and another piece of legislation with a similar name that is working its way through Congress – the "Stopping Abusive Prisoner Lawsuits" bill. The "Abusive Prisoner Lawsuits" bill seeks to limit the ability of prisoners on their own to file lawsuits dealing with various grievances they have against the prison system. It would allow judges to dismiss a case if the prisoner has failed to exhaust internal prison administrative remedies, or if the lawsuit "...fails to state a claim upon which relief may be granted..." Currently a judge can dismiss for "failure to state a claim" only when a motion has been made by defendants and the plaintiff-prisoner has had an opportunity to respond. The "Stopping Abusive Prisoner Lawsuits" bill passed the House as Title II of HR 667 and is now part of the Senate crime bill, S.3.

■ ***Prison Legal News*** is a monthly newsletter published and edited by Washington state prisoners Ed Mead and Paul Wright. The *PLN* has been regularly published since May of 1990. While the paper's focus is on Washington state, the PLN also has coverage of prison-related news and analysis from across the country and around the world.

The *PLN* reports on court decisions affecting prisoners and contains information designed to help prisoners vindicate their rights in the judicial system. The *PLN* is aimed at prisoners and their friends and loved ones on the outside, with the goal of helping prisoners and their supporters organize themselves to have a voice, and to be a progressive force in developing a public policy debate around the issue of crime and punishment. With those objectives in mind, the *PLN*'s motto is: "Working to extend democracy to all."

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held these jail conditions unconstitutional. Since there was no dispute that the conditions were the same in both cases and the class action court properly applied prior Eighth Circuit law, the plaintiff need not have made "a further, individualized showing" to establish that his constitutional rights were violated.

Correspondence—Legal and Official/Access to Courts

Muhammad v. Pitcher, 35 F.3d 1081 (6th Cir. 1994). Mail from the state attorney general's office is confidential and the inmate recipient is entitled to have it opened only in his presence. Inmates may correspond with the attorney general "to inquire about legal remedies, to negotiate about future prosecutions, to complain about prison conditions, etc." (1083) In addition, some divisions of the attorney general's office (those dealing with civil rights, consumer protection, etc.) might take action on a prisoner's behalf or based on information supplied by a prisoner. At 1083: "... [C]ourts have consistently recognized that 'legal mail' includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general... We can find no case that reaches a contrary conclusion."

The fact that the particular item of mail the defendants opened was not confidential did not mean that the plaintiff did not show injury. That argument "overlooks the chilling effect that the challenged policy has on inmates who desire to correspond confidentially with the state Attorney General." (1083) The court treats the question of injury as an element of the access to courts claim as equivalent to the "injury in fact" test of standing.

The policy of treating mail from the attorney general as ordinary mail does not pass muster under the *Turner* test. The defendants did not show that a large volume of mail was involved or that it would be more burdensome to open it in the inmates' presence than elsewhere, especially since it was already opening other legal mail in their presence. The court concludes that the incremental cost would be *de minimis* and the policy was not rationally related to saving resources. The plaintiff had no alternative means of exercising his rights. To say he could file lawsuits missed the point, since there was no alternative way of communicating with the attorney general.

Telephones/Federal Officials and Prisons

Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994). The federal prison system converted from a collect telephone system permitting unlimited calls to a direct dial system paid for by credits purchased in the commissary and limiting calls to a list of 20 approved persons who had to fill out an intrusive questionnaire. Many prisons had policies that automatically rejected calls to courts and elected officials, and one rejected calls to the news media. The district court granted a preliminary injunction based on these concerns, the Bureau of Prisons' failure to comply with the Administrative Procedures Act in amending the telephone regulations, the view that the pre-existing telephone regulations probably created a liberty interest, a probable violation of the appropriations law pertaining to the use of inmate trust funds, discrimination against indigent inmates, and linking of telephone privileges to participation in the Inmate Financial Responsibility Program.

The district court also certified a nationwide class of federal prisoners.

At 1100: "... [F]ederal court opinions have previously held that persons incarcerated in penal institutions retain their First Amendment right to communicate with family and friends, ... and have recognized that 'there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and ... such use is protected by the First Amendment.'" (Citations omitted) (The case cited for the latter proposition is a pre-trial detainee case.) Telephone use is subject to rational limitation in the face of legitimate security interests. At 1100 n. 8: The court does not reach the question whether the *Turner* standard applies or whether a stricter standard applies because communication with non-prisoners is involved.

The Bureau of Prisons' final rule increased the list of numbers to 30, permitting more based on individual situations; abandoned the intrusive questionnaire; provided a minimum of one collect call per month, exclusive of legal calls, for indigents; exempts $50 in funds sent to prisoners from outside from the Inmate Financial Responsibility Program for use for telephone calls, and increased the number of calls permitted to inmates not in the program to one a month. On appeal, the court was informed that barring courts, elected officials and the media was no longer permitted without justification.

The district court did not abuse its discretion in granting a preliminary injunction barring the use of Commissary Fund monies for paying salaries and other expenses associated with installing the telephone system, since the relevant rules earmarked these funds for purposes "accruing to the benefit of the inmate body, as a whole." The plaintiffs have standing to complain about the method of funding even if they don't have a right to any particular distribution of the funds. As to the rest of the injunction, changes in regulations and policy obviated the need for it. The injunction serves "the public interest in having governmental agencies abide by the federal laws that govern their existence and operations." (1103)

Suicide Prevention/Qualified Immunity/Medical Care—Standards of Liability

Hare v. City of Corinth, Miss., 36 F.3d 412 (5th Cir. 1994). The decedent committed suicide in an isolated cell in jail after the defendants had been given ample notice of her suicidal tendencies. In addition, when she was found hanging by a trusty who did not have a cell key, the only deputy on duty could not leave his post to cut her down under jail procedures, so they left her hanging until another deputy who was not present at the jail could get there.

It was clearly established that pre-trial detainees must be provided with "reasonable care for serious medical needs, unless the deficiency reasonably served a legitimate governmental objective." (416, footnote omitted) Deliberate indifference need not be proved. On these facts, the defendants were not entitled to summary judgment.

Medical Care—Standards of Liability—Deliberate Indifference

Hathaway v. Coughlin, 37 F.3d 63 (2nd Cir. 1994). The plaintiff's complaint of continuing pain resulting from broken pins after hip surgery constituted a serious medical need.

A jury could infer deliberate indifference from evidence that the defendant doctor never informed the plaintiff that he had two broken pins in his hip ("information that would give most people pause to consider surgery") and never raised the possibility of surgery with him, and from evidence of a two-year delay between the discovery of the broken pins and the time the defendant asked that the plaintiff be evaluated for surgery (the referral was not made until the plaintiff filed suit).

The fact that the defendant frequently examined the plaintiff did not negate deliberate indifference. At 68: "A jury could infer deliberate indifference from the fact that Foote knew the extent of Hathaway's pain, knew that the course of treatment was largely ineffective, and declined to do anything more to attempt to improve Hathaway's situation." (68)

Appeal

Koch v. Ricketts, 38 F.3d 455 (9th Cir. 1994). The plaintiff's notice of appeal arrived nine days late; he said he had given it to an officer collecting regular mail three days before the deadline. He did not use reg-

istered, insured, or certified mail, which are logged by prison authorities.

The plaintiff was not entitled to the benefit of the "mailbox rule" of *Houston v. Lack* because he did not use one of the available means of mailing it that would result in a written record, even though they would have cost him more. At 457: "...[I]f a prisoner just sends the notice on its way, without providing some reliable evidence of the date on which he relinquished control, he bears the risk of delay just like any other party." The plaintiff did not assert that he lacked the money for registered, certified or insured mail.

Use of Force/Jury Instructions and Special Verdicts

Baker v. Delo, 38 F.3d 1024 (8th Cir. 1994). A jury awarded $1 in compensatory damages and $100 in punitive damages from each defendant based on allegations that the defendants had dragged him back to his cell from the medical unit.

Jury instructions that referred to the "unnecessary and wanton infliction of pain" but did not use the words "maliciously or sadistically" were not plain error, although an earlier case said "maliciously or sadistically" is required as a matter of law. The defendants proffered a similar instruction.

Grievances

Dixon v. Brown, 38 F.3d 379 (8th Cir. 1994). The plaintiff alleged that a false disciplinary charge that was dismissed was brought in retaliation for his use of grievance procedures. The district court erroneously dismissed on the ground that the plaintiff showed no injury. At 379: "Because the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself."

DISTRICT COURTS

Crowding/Modification of Judgments

Small v. Hunt, 858 F.Supp. 510 (E.D.N.C. 1994). A consent decree provided for 50 square feet of dormitory living space and 25 square feet of dayroom space per inmate at 49 of the state's 92 prisons, to be complied with by fixed dates. The settlement was reached by a Settlement Committee including representatives of the governor and several legislators as well as counsel and prison officials. The decree was approved by the state legislature, which passed a statute to that effect. The defendants sought modification of the 50-square-foot standard, claiming unforeseen increases in population. There had been a number of emergency releases of prisoners pursuant to a state statute that apparently contains an overall population cap.

The court finds that although increases in population were foreseen, the extent of the increases were not, and the defendants are entitled to some relief. The court rejects the view that it must accept or reject the defendants' position; instead, it tailors the relief itself. The court also rejects the view that any court-mandated early release of prisoners poses an unacceptable public risk, noting that prisoners are released early because of good time, parole, and other aspects of state law. The court also notes that the public has an interest in "having the state abide by the terms of agreements made on its behalf" and in having institutions operated in a fiscally responsible way (523).

The court allows newly constructed dormitories to be occupied at 125% of capacity, but not 130% (a difference of three or four inmates), because they had been occupied at 125% pending full compliance with the decree and conditions remained better than constitutional minima. The court declines to rewrite the decree to the constitutional floor and also because lack of experience means that the effects of a 130% occupancy are unknown.

The court declines the request to permit the older dormitories to house inmates at 140% of capacity, noting that they are configured with a center row of bunks that blocks vision, increasing the risk of assault, and reduces space. The court viewed one of these units "and concludes that although it was acceptable for the interim period, it must not be perpetuated."

The court notes that part of the problem is the escalating rate of misdemeanant admissions, which has resulted from the state's policy decision that it would rather use post-admission alternatives (such as boot camps) rather than diversion from prison, and is therefore "largely within the state's control." This fact gives the court "some pause," but a different policy with misdemeanants "could not have prevented the situation now facing the state and does not preclude the state from obtaining some relief." (519, emphasis supplied)

Color of Law/Qualified Immunity

Manis v. Corrections Corp. of America, 859 F.Supp. 302 (M.D.Tenn. 1994). A private corporation and its employees operating a prison pursuant to contract are not entitled to qualified immunity. At 305:

> *A private party that performs a government function for a fee, however, is not faced with the conflict of public officials, for it is not principally interested in the good of the public at large... In the case of a private for-profit corporation hired to perform a public function, there is an increased risk that the corporation's actions will diverge from the public interest. Unlike public officials, corporate officers and employees are hired to serve the interests of the corporation, and, more specifically, its stockholders, whose principal interest is earning a financial return on their investment...*
>
> *...Affording the shield of qualified immunity to a private corporation and its employees in these circumstances would directly contradict the policy behind qualified immunity: instead of promoting the public good by freeing public officials "to make decisions that are...above all ... informed by considerations other than the personal interests of the decisionmaker," ...it would simply free a private corporation to maximize its profits, even at the cost of citizens' rights.*

Use of Force/Pre-Trial Detainees

Bieros v. Nicola, 860 F.Supp. 226 (E.D.Pa. 1994). At 231: "...[A]fter the arrest had been completed and the individual is placed into police custody, then the individual becomes a pretrial detainee and is subject to the Fourteenth Amendment." The court declines to construe *Albright v. Oliver* as implying otherwise. The due process standard applies to force used in a vehicle transporting the prisoner to a preliminary hearing.

The use of force against an arrestee simply because he refused to sign his *Miranda* warnings and asked to make a telephone call would be objectively unreasonable under the Fourth Amendment. The same conduct would shock the conscience under the due process standard. The force concerned included hitting the plaintiff with a soccer ball to coerce him into signing the *Miranda* warnings. At 232-33: "Use of even minor physical force against a person in a police officer's custody without provocation is actionable under section 1983 even if the injuries are not severe or permanent... Further, any amount of force used during an interrogation violates one's constitutional rights."

Correspondence—Legal and Official

O'Keefe v. Murphy, 860 F.Supp. 748 (E.D.Wash. 1994). A prisoner's correspondence "sent to government agencies or officials as a grievance, is protected by his First Amendment right to petition the government for redress of grievances." (751, footnote omitted). The omitted footnote (n. 8) adds: "note that the grievance need not be

related to his incarceration." At 752: "To permit prison officials to read prisoners' 'grievance mail' would cause the same chilling of meritorious petitions as with officials' reading mail to attorneys or courts." Such mail may be opened and inspected in the prisoner's presence, and the mail may be inspected "noninvasively" outside the prisoner's presence.

The prison's policy of reading "grievance mail" to government agencies and personnel is invalid under the *Turner* standard. While there is a security interest in inspecting such mail, there is no security interest in reading it. There are also alternatives such as using non-invasive investigative techniques, requiring such mail to be marked "grievance" or to be addressed to an administrative complaint department, or inspecting in the prisoner's presence.

This initial decision addresses outgoing mail. With respect to incoming mail, the court later determines that the defendants cannot impose on correspondents a requirement that they label the mail "grievance mail." Such a requirement is valid only if the labelling is under prisoners' control, e.g., by requiring inmates to add to their return addresses the phrase "grievance mail" or "legal mail." (764)

The court grants summary judgment to the plaintiff although only the defendants moved for summary judgment.

On reconsideration, the court acknowledges that efficiency is a government interest supporting the reading of grievance mail. However, it reiterates that the plaintiff has no alternative means of exercising his right; even though he is permitted to send privileged mail courts and attorneys and to file grievances within the prison, "[t]he First Amendment grants an unrestricted right to petition the government for redress of grievances" (760), and defendants' suggestions do not address this unrestricted right. The court characterizes the added expense (which amounts to hiring one employee) as "slight"; the defendants' characterization of it as "significant" does not entitle them to relief.

Access to Courts—Postage and Materials

Hershberger v. Scaletta, 861 F.Supp. 1470 (N.D.Iowa 1993), *aff'd in part*, 33 F.3d 955 (8th Cir. 1994). Prison policy denied free postage to indigent inmates, applied a monthly service charge of 50 cents to inmates who had negative account balances because they had borrowed for legal postage, and set a presumptive limit of $7.50 on the amount of debt that prisoners could incur for legal postage.

The denial of free postage for legal mail and the 50 cent service charge (for which no service was actually provided) are enjoined as unconstitutional. The defendants are directed to provide at least one free stamped envelope a week for legal mail.The limit on debt is unconstitutional as applied to legal mail but not personal mail.

Prisoners may be required to pay for legal mail if they also pay for personal mail. However, indigents may not be denied postage for personal mail.

There is no requirement of a showing of prejudice when a court access claim involves systemic deprivations.

The foregoing holdings were affirmed on appeal.

Access to Courts—Punishment and Retaliation/Medical Care—Denial of Ordered Care/Prison Records

Lowrance v. Coughlin, 862 F.Supp. 1090 (S.D.N.Y. 1994). The plaintiff was transferred repetitively—17 times in seven years, nine times after being at a prison less than 90 days, etc.

Retaliatory transfer and segregation claims are governed by the *Mt. Healthy* standard, under which once the plaintiff has shown that constitutionally protected conduct was a substantial motivating factor, the defendants must show that they would have taken the same action without the improper motivation.

The court finds that nine out of 17 transfers and four of six placements in segregation were retaliatory, sometimes motivated by speculation about protected activity the plaintiff might engage in, and sometimes based pretextually on expunged misconduct reports.

The Commissioner is found liable for some transfers that he had notice were retaliatory (1104, 1108, 1112, 1113).

The failure over two years to provide surgery for the plaintiff's knee, and subsequently to provide physical therapy, in the face of actual knowledge of a serious medical need, violated the Eighth Amendment.

Although there was no evidence of permanent injury, the plaintiff is entitled to recover for additional pain and suffering during the period of delay.

At 1119: "Plaintiff has a clearly established constitutional right to have accurate information in his prison file when such information is relied on in a parole hearing." Violation of this right entitles the plaintiff to a new parole hearing.

Damages are awarded of $98,000 for retaliatory transfers, at $6000 per defendant per transfer, with an additional $2000 for transfers that were "particularly egregious because of the core rights at stake." (1120) The court awards $100 a day for 115 days in segregated confinement, $2500 for a retaliatory cell search, and $20,000 for pain and suffering from delayed medical care. Punitive damages of $25,000 are awarded jointly and severally against the Commissioner and various Superintendents.

Disabled/Qualified Immunity

Torcasio v. Murray, 862 F.Supp. 1482 (E.D.Va. 1994). The "morbidly obese" plaintiff (5'7", 460 pounds) asserted that numerous conditions of confinement violated his rights under the Eighth Amendment, the Rehabilitation Act, and the Americans with Disabilities Act.

Under the ADA, the Department of Corrections "is required to make its facilities and programs readily accessible to individuals with disabilities" and "make reasonable modifications in policies, practices or procedures" unless it can demonstrate that these would "fundamentally alter the nature of the service, activity or program." (1492) There was a question of fact whether the defendants had made reasonable accommodations with respect to showers (no chair), housing unit tables (no appropriate chair), narrow cell doors, inadequate recreational opportunities, lack of non-skid matting in the building lobby and dining hall, inadequate chairs and tables and long waiting times in the dining hall, inadequate medical transportation, lack of personal aid, lack of seating at commissary and pill line, placement in a housing unit too far from services, an inadequately large cell, and inadequate infirmary conditions.

The court assumes that qualified immunity applies to these claims without discussion of who the defendants are or whether they are sued in their individual or official capacities. The defendants' summary judgment motion is granted as to several claims on the ground that they could reasonably have believed that their accommodations were reasonable, and denied as to others.

NON-PRISON CASES

Modification of Judgments

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994). At 1563:

> Rufo *normally permits modification of a consent decree only to accommodate new factual or legal circumstances. The sorts of factual changes that may qualify include unanticipated developments that render continuation of the decree "inequitable," ...or that, "for reasons unrelated to past discrimination or to the fault of the parties," make it extremely difficult or impossible to satisfy obligations that, while imposed by the decree, are not part of its fundamental purpose...However, a district court*

should not modify "long-standing goals in consent decrees merely because the goals have not been achieved." [Citations omitted]

At 1564: "The court may not modify a decree in a way that would 'violate the basic purpose of the decree,' and must under no circumstances 'create or perpetuate a constitutional violation.'" [Citation omitted]

Modification of Judgments

Juan F. by and through Lynch v. Weicker, 37 F.3d 874 (2nd Cir. 1994). A § 1983 class action challenging aspects of the Connecticut child-welfare system was settled by a consent judgment. The consent judgment called for the preparation of a manual for each section of the decree. The manuals were negotiated under the aegis of a court-appointed mediation panel and were then adopted as court orders. Their features included timetables, staffing requirements, qualifications, and caseload standards for investigative and treatment staff. (876)

The plaintiffs moved for further relief as a result of budget cuts that threatened the defendants' ability to comply; in response, the court set timetables for the hiring of staff and for other actions required by the manuals. At 879: This action, which "simply ensured compliance with the time frame originally established," was within the district court's discretion. Relief that is directed towards enforcing a prior order is not a modification of that underlying order and need not meet the standards applied to motions for modification under Rule 60, Fed.R.Civ.P. (879) The court cites but does not make its holding dependent on the existence of "continuing jurisdiction" language in the consent decree.

The order would have been proper even under the Rule 60 standards, since the budget cuts "constitute[d] a significant enough factual change to justify the changes ordered by the district court. Those modifications were necessary to ensure timely implementation of the decree and provide for the plaintiff class the protections and services originally agreed to by the parties and ordered by the court." (879)

Contempt

National Organization for Women v. Operation Rescue, 37 F.3d 646 (D.C.Cir. 1994). An injunction barring "trespassing on, blockading, impeding or obstructing access to or egress from" abortion clinics as well as "[inciting], directing, aiding or abetting others in any manner, or by any means," to do so, was a "complex injunction" under *Bagwell* and prospective fixed contempt fines were therefore criminal in nature, except to the extent that parts of them may have been compensatory. The district court must make "an express determination as to the existence, nature, and extent" of any compensable damages for such fines to be compensatory; any other fines must be assessed after a criminal proceeding. At 661: "And a mixed civil and criminal contempt proceeding must afford the alleged contemnor the protection of criminal procedure."

Class Actions—Certification of Classes

Comer v. Cisneros, 37 F.3d 775 (2d Cir. 1994). The court notes the district court's delay in addressing the plaintiffs' class certification motion and notes that this practice is likely to result in mootness in cases involving fluid classes. The court directs class certification and holds that it relates back to the time of filing the complaint. Voluntary cessation of the challenged conduct does not moot the plaintiffs' claims. The defendants did not meet their burden of "demonstrating (1) with assurance that there is no reasonable expectation that the conduct will recur,... and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation..." (800, citations omitted, emphasis in original)

FEDERAL RULES DECISIONS

Class Actions—Certification of Classes/Pre-Trial Detainees

Hiatt v. County of Adams, Ohio, 155 F.R.D. 605 (S.D.Ohio 1994). The court certifies a class of all inmates held in a county jail at present or in the future. The average population of the jail is about 38, but the population is fluid, with a length of stay of about 15 days, yielding over 900 persons passing through in a year. At 608: "The transient and fluctuating nature of the jail population makes joinder impracticable." Also, the short terms of incarceration means that individual plaintiffs would soon lose standing, making the claim capable of repetition yet evading review.

Contempt/Modification of Judgments

Benjamin v. Malcolm, 156 F.R.D. 561 (S.D.N.Y. 1994). At 574: "A change in circumstances does not ordinarily warrant modification if it was actually anticipated at the time the consent decree was entered into, or if the change of circumstances was deliberately brought about by the moving party." The city's change of heart about the economic merits of a plan it had put forward to meet its obligation under a court order did not justify modifying the order.

Under an order providing *per diem* fines for violations of court-ordered "work plans," the proper measure of the fine is the delay that the city's actions cause in providing cook/chill food service to the plaintiff class.

The city is held in contempt because it has "not diligently attempted in a reasonable manner to comply" with the obligation to consummate the original plan. In addition, the court cites the city's failure to inform the court until after the decision even though it had been under consideration for two months. This failure "violated the consultative compliance process which the parties to this case and the court have created with arduous effort." At 568: "This litigation, which has endured for longer than either of the parties or the court desires or believes is healthy, will never reach its objective if either of the parties unilaterally disregards its commitments."

Contempt/Modification of Judgments

Hurley v. Coughlin, 158 F.R.D. 22 (S.D.N.Y. 1993). A consent decree placed limitations on strip search practices. The plaintiffs documented "wholesale violations" of it. They moved for contempt and the defendants moved to modify.

The defendants' belief that the law permitted them more discretion in strip searching than does the consent decree is irrelevant, since "nothing prevents parties from waiving their rights to secure some other objective, ...and settlement of this protracted controversy seemed more attractive than the cost and burden of continuing the litigation, and once entered the consent decree became binding and conclusive." (29)

Neither subsequent changes in the law, nor lack of foresight, "nor the expansion of DOCS, which makes compliance with the decree more onerous, justify noncompliance." (30) The defendants' proposed modification is denied. The plaintiffs' proposed modifications, however, are designed to monitor more efficiently. The court appoints a master, since the defendants had broken away from their previous cooperative attitude, ignoring some provisions and interpreting others so as to render them null and void or superfluous. The defendants are given "one last opportunity" to show that monetary sanctions are not necessary.

The defendants are held in contempt. ■

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DRUG TESTING • *continued from page 6*

U.S. 757, 760-61 (1960), the Supreme Court held that the State could force a defendant to submit to a withdrawal of blood, and the use of its analysis at a criminal trial did not violate the Fifth Amendment privilege to "be compelled in any criminal proceeding to be a witness against himself." Similarly, in *Ferguson v. Cardwell*, 392 F.Supp. 750, 752 (D. Ariz. 1975), the court held that the taking of blood samples from prisoners to test for the presence of narcotics did not violate the Fifth Amendment.

Furthermore, the courts have held that introducing a defendant's refusal to submit to a blood-alcohol test, or to a breathalyzer, does not violate his or her Fifth Amendment right. *See Welch v. District Court of Vermont Unit, Etc.*, 594 F.2nd 903 (2d Cir. 1979), and South *Dakota v. Neville*, 459 U.S. 553 (1983).

In view of these rulings it seems clear that the privilege against self-incrimination provides no constitutional basis to object to either drug tests, or to their use in disciplinary proceedings.

B. *Fourth Amendment*

The Fourth Amendment ensures "the right of the people to be secured in their person against unreasonable searches and seizures." In asserting their Fourth Amendment rights, prisoners usually allege that the State did not have probable cause to require a urine sample, that the seizure and the use of the test results intruded on a prisoner's reasonable expectation of privacy, that the test itself is unreliable, or that prisoners were arbitrarily chosen to provide a sample.

Prisoners have limited Fourth Amendment rights. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court held that Fourth Amendment protections do not extend to prison cells. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court upheld body-cavity searches of prisoners after every contact visit without the support of probable cause.

In *Storms v. Coughlin*, 600 F.Supp. 1214 (S.D.N.Y. 1984), the court questioned whether the taking of a urine sample was more "offensive and degrading" than the visual body-cavity searches in Bell and thus would require Fourth Amendment protection. The court found that urinalysis was not entitled to a higher scrutiny than body-cavity searches, and prison officials were allowed to obtain urine samples without probable cause or reasonable suspicion.

In *Forbes v. Trigg*, 976 F.2d 308 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1362 (1993), the court ruled that urine tests are searches for Fourth Amendment purposes; however, noting the widespread use of narcotics in prisons, the court said the use of urine testing was a reasonable means to combat this, and a prisoner's refusal to participate when given adequate notice is punishable by loss of good time. Even though a prisoner retains an expectation of privacy, this privacy interest is limited by the security needs of the institution. Furthermore, random testing of prisoners is acceptable if adequate notice is provided, and if the person who chooses which inmates to test is unaware of their identity. *Storms v. Coughlin*, 600 F.Supp. 1214 (S.D.N.Y. 1984).

C. *Due Process*

The major challenges concerning due process as it relates to drug testing in prison include the reliability of the urinalysis, confirmation of the test result, "chain of custody," loss of good time, and the failure of prison officials to preserve the urine sample for possible independent testing by the prisoner.

Manufacturers of immunoassay technologies and toxicologists recommend that positive results be confirmed using an analytically different technology. Unfortunately, most courts have accepted retesting of positive specimens a second time using the same technology. See *Harmon v. Auger*, 768 F.2d 270 (8th Cir. 1985); *Jensen v. Lick*, 589 F.Supp. 35 (D.N.D. 1984); *Vasquez v. Coughlin*, 499 N.Y.S. 2d 461 (Sup. Ct. App. Div., 1986); *Peranzo v. Coughlin*, 608 F.Supp. 1504 (S.D.N.Y., 1985).

In *Wykoff v. Resig*, 613 F.Supp. 1504, 1513 (D.C. Ind. 1985), and *Higgs v. Wilson*, 616 F.Supp. 226, 232 (W.D. Ky. 1985), the courts held that disciplinary punishment could not be imposed based only on the results from a single EMIT test. However, in *Peranzo*, the court stated that while prisoners have a substantial due process interest in the accuracy of the drug testing procedures used by prison officials, "due process is not synonymous with a requirement of scientific exactitude or error-free procedures." 608 F.Supp. at 1507. Furthermore, prison officials had a legitimate penological interest in denying the request of the inmate for an additional test at his own expense, because alternate tests would involve the use of prison personnel and not every inmate can afford such tests. *Pella v. Adams*, 723 F. Supp. 1394 (D. Nev. 1989).

"Chain of custody" encompasses procedures that govern (1) the collection, handling, storage, testing and disposal of a urine specimen in a manner that ensures that the specimen is correctly matched to the person who was required to provide it and is not tampered with or substituted in any way, and (2) the documentation that these procedures have been carried out.

In *Wykoff*, the court was presented with the issue of whether chain of custody proof was required in the handling of a urine sample. The court held that *Wolff v. McDonnel*, 418 U.S. 539 (1974), created a legitimate liberty interest for prisoners in the processing and handling of their samples. This liberty interest created for a prisoner a "right to expect minimal due process safeguards to insure that samples are not mishandled by correctional officers." *Wykoff*, 613 F.Supp. at 1513.

The Supreme Court also recognizes that prisoners have a liberty interest in good time and that the revocation of good time must follow some due process guidelines. The Supreme Court held in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 454 (1985), that the disciplinary record must contain for the federal court's review "some evidence to support the decision to revoke good time." The definition of "some" is very little in reality. A single positive EMIT test was "some evidence," sufficient to satisfy due process and support a finding of guilt. *Harrison v. Dahm*, 911 F.2d 37 (8th Cir. 1990).

Finally, the inability to produce a urine sample cannot be punished with the loss of good time. *Kingsley v. Bureau of Prisons*, 937 F.2d 26 (2nd Cir. 1991). Whether a prisoner might be incapable of urinating in view of a correctional officer was also discussed in *Storms*. After four hours of trying to urinate, prison officials sent the inmate for a psychiatric evaluation. The psychiatrist stated that "it was wholly understandable that a prisoner might be unable to urinate in the presence of others." 600 F.Supp. at 1222 n.6. As a result, the prison officials dropped the disciplinary charges. ■

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THE NATIONAL PRISON PROJECT

AIDS Update

BY JACKIE WALKER

Florida to Open Prison AIDS Care Unit

The Florida Department of Corrections recently unveiled plans for an AIDS Care Unit. Since the segregation of prisoners with HIV/AIDS is often hidden behind the premise of providing better health care, I viewed the plans with a skeptical eye. Many county jails, in fact, still practice segregation based on ignorance of transmission routes. Therefore, a healthy amount of suspicion of the motives behind a unit which houses only AIDS prisoners is well-founded.

On the other hand, few prison doctors are prepared to handle the acute needs of end-stage prisoners with AIDS. In many cases access to an infectious disease specialist is preferable to being shuttled between the prison infirmary and local hospitals. Availability of properly trained medical personnel along with the spiraling medical costs for HIV/AIDS treatment within the system sparked the development of Florida's proposed AIDS Care Unit.

According to John Burke, chief of Health Services Administration for the Department of Corrections in Florida, AIDS has been the leading cause of death among Florida prisoners since 1987. It is estimated that of the current prison population of 60,000, 7.9% of men and 14.4% of women prisoners are HIV-positive. Over time, the number of actual AIDS cases within the system has reached a high of 1.1% and now hovers around 1%.

The Florida Department of Corrections utilizes a four-level system to categorize and track prisoners with HIV/AIDS. This system ranges from Level 1 (HIV-positive, asymptomatic) to Level 4 (AIDS with acute care needs). Both Levels 2 and 3 are intermediate, where patients are symptomatic, usually without serious complications.

Currently, most Level 4 AIDS patients receive care and treatment at the North Florida Reception Center hospital. Prisoners with AIDS who reach Level 4 status will be identified in two ways: either through screening at the North Florida Reception Center or after an unexpected crisis at the institution; these prisoners may have short-term life expectancy. Prisoners with a consistent Level 4 status indicating terminal care will be housed permanently.

According to Burke, the AIDS Care Unit would also offer the possibility for better implementation of the state's conditional medical release law. Data provided by Merle Davis, director of Parole Services at the Florida Parole Commission, indicate that the release law has been implemented fairly conservatively: since being signed into law in 1992, 40 of 150 conditional medical release applications have been approved.

"AIDS is the single biggest problem," says Burke. "We're attacking the largest problem first. We're already moving forward to consolidate services within the system with six clinics specializing in chronic illnesses. The idea is to have two or three institutions designated for chronically ill prisoners."

Women prisoners have been overlooked in the hospice plans. In Florida prisons, as in many other state systems, the HIV seroprevalence rates for women prisoners are considerably higher than those for men. Despite these figures the AIDS Care Unit was conceptualized as a hospice for male prisoners. "We average one female death a year," according to Burke. "Women usually get out of the system earlier. If these projections double we'll have to make adjustments. As of now the Unit will only house male prisoners."

Calls for the segregation of all prisoners with HIV/AIDS have come from correctional officer unions and legislators in a number of states, but Burke is quick to admit that a separate facility for non-acute cases of HIV/AIDS would not be cost-effective. "The intent is to provide high quality treatment at the minimum cost. All around the country there are specialty facilities for cancer, diabetes and other illnesses. People will have to take a 'wait and watch' attitude. There will always be doomsayers."

Prisoner rights advocacy groups are taking a cautious approach. Peter Siegel, staff attorney for the Florida Justice Institute, says, "In general, if this specialized facility is not used to quarantine people, but is used to provide medical care, I think it's a good idea. The fear is it will be used for people who don't need to be there." ■

Jackie Walker is the Project's AIDs Information Coordinator.

Juan Guerrero Burciaga

1929 -1995

Staff of the National Prison Project learned with regret of the death of U.S. District Judge Juan Guerrero Burciaga in Albuquerque, New Mexico, on March 5, 1995. Burciaga had been the judge in the Project's lawsuit against the New Mexico Department of Corrections, *Duran v. Johnson*, since 1982 when the original judge was recused.

Judge Burciaga, a graduate of West Point and the University of New Mexico law school and a former Air Force fighter pilot, was named to the bench in 1979 by President Jimmy Carter. Although Burciaga took senior status last December, he maintained his responsibility for the prison conditions litigation. NPP director Alvin Bronstein who is the NPP's lead counsel in the Duran case, spoke warmly of Burciaga as a man who had "a deep concern for the Constitution and an equally profound concern for the human rights of the most powerless members of our society".

THE NATIONAL PRISON PROJECT Publications

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

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

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

QTY. COST

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

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

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

QTY. COST 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

Fill out and send with check payable to:

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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 December 31, 1994. Further details of any of the listed cases may be obtained by writing the Project.

Lambert v. Morial–The NPP filed suit last July against the city of New Orleans on behalf of women detained at the South White Street jail (SWS). The complaint alleged severe overcrowding, dangerous environmental conditions, grossly inadequate fire safety precautions, deficient medical and mental health care and obstruction of legal access to attorneys and courts. In December, the sheriff stipulated to the extension of all the remedial orders in the original conditions case against the city's Parish Prison *(Hamilton v. Morial)* to the female facilities. Accordingly there is no need to litigate medical, psychiatric, or many security/operational and conditions claims resolved by the *Hamilton* litigation. These issues are being monitored for compliance, and enforcement motions have been filed. The remaining claims challenge legal access and conditions unique to the female population and their environment. These include privacy and sexual misconduct issues which are expected to go to trial later this year. The issues of sexual misconduct include accusations from many of the women about correctional officers extracting sexual favors from female prisoners, sexually assaulting and harassing them, and inappropriately fraternizing with prisoners. In addition, the women claim that correctional officers allow male inmate trustees to extract sexual favors from female prisoners. The privacy issues raised by the women include the placement of closed-circuit cameras in shower areas with monitors visible to all visitors to the facility, male correctional officers and other staff entering the dormitory areas without warning and being permitted to observe the women nude or partially nude.

Austin v. Lehman–The settlement agreement in the state-wide Pennsylvania prison case was approved by U.S. District Judge Jan DuBois on January 17 (see the *JOURNAL*, Vol.9, No.4 for details of the agreement). In his Memorandum, the judge described the settlement as "an outstanding accomplishment by counsel and...of manifest importance to all citizens of the Commonwealth of Pennsylvania."

Duran v. Johnson–In December, plaintiffs' attorneys in the New Mexico case asked the court to hold the state in contempt over living conditions at the Main Facility at the Penitentiary of New Mexico in Santa Fe, and sought fines against the state of $10,000 for every day that prisoners continued to be housed in substandard conditions. In March, they agreed to drop the motion in return for an agreement from the state to replace the aging Main Facility by October 1997. The state has also agreed to make fire safety, sewer and other improvements by October of this year as interim measures to improve living conditions while the new prison is being built.

Kay Many Horses v. Racicot–This case was filed in April 1993 on behalf of female prisoners in Montana alleging that the women were denied adequate medical and mental health care, discriminated against because of their disabilities, denied comparable programming and services offered to male prisoners, denied meaningful access to courts, denied sanitary and safe housing, and denied due process. While preparations for trial, were taking place the defendants announced a plan to transfer the women to a new facility. Our expert toured the new facility and reported that it would offer much improved environmental conditions. The women have now been transferred. The parties negotiated about the timetable to implement necessary programs at the new facility, and they have now stipulated to an interim agreement on the health care, environmental safety and access to courts issues. ■

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