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Our apologies to all our patient subscribers who have waited so long for this edition of the *Journal*. This is only the second edition to be published in 1996 -- and it will probably be 1997 before it reaches you. Your subscription will be automatically extended to make up for the two issues you have missed, and we will be back on a quarterly schedule for 1997, publishing in March, June, September and December.

When the Prison Litigation Reform Act was signed into law in April of this year, the Project took on the role of coordinator in a nation-wide network of litigators challenging the Act. We had to do this without any additional staff or resources so it was inevitable that some other activities would have to be cut back. The Prison Project has always sought to use its limited resources to maximum effect. It was clear after April that our time and energy would be most effectively spent in working to limit the impact of the Prison Litigation Reform Act which threatens the civil rights of all of the 1.6 million men, women and children imprisoned in the United States. Unfortunately the *Journal* had to be put on hold for sixth months as a consequence of this increased workload. It is good to be back!

Prison Litigation Reform Act Update -

The Good, the Bad and the Ugly

Since the Prison Litigation Reform Act (PLRA) was passed on April 26, there has been considerable activity in the courts and plaintiffs have been contesting the act's constitutionality with some success. Good orders and opinions have been issued on the retroactivity of attorneys' fees, special masterships as prospective relief and the automatic stay provisions of the act. On the other hand, there have been two bad decisions terminating long-standing consent decrees in New York city and South Carolina. The Fourth Circuit upheld the District Court in the South Carolina (*Plyler*) case. The Second Circuit heard the appeal against termination in the New York City case (*Benjamin*) in November but had not issued a decision by the time we went to print.

Decisions in cases involving litigants filing *in forma pauperis* have been mixed. A district court judge in Iowa found that the "three strikes and you're out" provision limiting IFP filings was unconstitutional. The courts have disagreed on the extent of to which the new IFP procedures are retroactive and the Tenth and Second Circuits reached different decisions on the application of PLRA to mandamus petitions. The next issue of the *Journal* will look at these decisions in more detail, together with some of the other provisions not reviewed in this edition.

The "ugly" award, as usual, goes to the politicians. The Department of Justice filed a brief in July in *Benjamin* which found the act constitutional but only by construing it in some ways that provided for reasonable flexibility in interpretation. However, after this brief was criticized by some members of the Senate Judiciary Committee, the DOJ hastily reversed their original stance. Still this retreat was still not enough for Senator Abraham of Michigan who held a senate hearing on PLRA in September designed primarily to pillory the Department of Justice for continuing with their suit in his home state.

Inside

The most significant PLRA decisions are summarized on the following pages according to the key provisions addressed. In order to include these key decisions we are not carrying John Boston's case notes in this edition. They will return in March. Any litigators who would like to be a part of our PLRA network and receive regular updates should contact Jenni Gainsborough. Unfortunately we cannot offer this service to prisoners as it requires fax or email access but we will continue to carry information in the *Journal*. You can also find information on PLRA and other topics on our internet website (see page 8 for details).

The National Prison Project is a special 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; and to develop alternatives to incarceration.

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Significant Decisions Under the Prison Litigation Reform Act

by Ayesha Khan

AUTOMATIC STAY --
PLRA § 802(a) (amending 18 U.S.C. § 3626(e)(2))

United States v. Michigan, No. 1:84 CV 63, Opinion (W.D. Mich. July 3, 1996) (stay denied by 6th Cir., Sept. 17, 1996); ***Hadix v. Johnson***, No. 4:92:CV:110, Opinion (W.D. Mich. July 3, 1996) (stay denied by 6th Cir., Sept. 19, 1996): Judge Enslen declared the provision unconstitutional under the principle of separation of powers and due process. ***Hadix v. Johnson***, No. 80-CV-73581-DT, Opinion and Order Denying a Stay of the Consent Decree (E.D. Mich. July 5, 1996): Judge Feikens declared the provision unconstitutional, adopting Judge Enslen's reasoning.

Carty v. Farrelly, No. 94-78, Order (D.V.Is., July 17, 1996): Judge Brotman granted plaintiffs' motion for a stay of the provision. His Order contained no analysis.

Gavin v. Ray, No. 4-78-70062, Ruling and Order Staying Automatic Stay Provision (S.D. Iowa Aug. 9, 1996): Judge Vietor declined to give effect to the automatic stay provision. The Order did not set forth any reasons but, at the hearing on the motion, Judge Vietor stated that the provision is "very likely unconstitutional" and that Judge Enslen's decision in *United States v. Michigan/Hadix v. Johnson* is "well-reasoned."

Ruiz v. Scott, Civ. Act. No. H-78-987 (S.D. Tex. Sept. 25, 1996): Judge Justice found the PLRA's 30-day and 180-day automatic stay provisions unconstitutional. (He addressed both provisions because the defendants have filed two termination motions -- one under the PLRA and the other under *Dowell/Freeman*.) He reasoned as follows:

> It is impossible for the Court to resolve defendants' motions within the 30-day period specified in 18 U.S.C. sec. 3626(e)(2)(A)(I), or the 180-day period in subsection (A)(ii). The Court believes that the status quo should be preserved pending the resolution of defendants' motions, and finds that the PLRA "automatic stay" provisions violate the Separation of Powers and due process of law, substantially for the reasons discussed in *Hadix* and *Gavin*.

McClendon v. Albuquerque, Civ. No. 95-24 MV/RLP, Memorandum Opinion and Order (D.N.M. Oct. 29, 1996): Judge Vasquez found that the automatic stay provision violates the separation of powers because it encroaches upon the uniquely judicial act of deciding to terminate relief. His reasoning drew extensively on Judge Enslen's decision in *Hadix*, and turned in part on the finding that the parties were not (and could not have been) prepared to make the requisite evidentiary presentation within the 30-day period. Although not at issue in the Order, the court stated in dicta that it "agrees that the immediate termination provision of the Act is unconstitutional as applied to final judgments." *Id.* at 7.

Inmates at the Indiana State Farm v. Bayh, Cause No. IP 82-0477-C M/S (S.D. Ind. Nov. 20, 1996): The defendants moved for termination of a consent decree pursuant to the PLRA. Two days before the 30-day automatic stay was to take effect, the plaintiffs moved for a preliminary injunction of the stay provision. Approximately one week later, Judge Larry McKinney denied the

plaintiffs' motion, stating that the stay had already gone into effect under the statute "by operation of law" and that the motion is therefore moot.

TERMINATION --
PLRA § 802(a) (amending 18 U.S.C. §§ 3626(b)(2) and (b)(3))

Plyler v. Moore, No. 96-6884 (4th Cir. 1996): In a unanimous opinion (Judges Wilkins, Williams, and Motz), the court upheld the district court's termination of a consent decree under § 3626(b)(2). The court ruled that interpreting "federal right" to include rights created in a consent decree would be "nonsensical;" that the holding of *Plaut v. Spendthrift Farm Inc.*, 115 S. Ct. 1447 (1995), is limited to retrospective relief and that the holdings of *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) ("*Wheeling Bridge*"), *System Fed'n No. 91 v. Wright*, 364 U.S. 642 (1961), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), authorize the legislative termination of prospective relief; that the provision does not run afoul of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), because Congress has amended the underlying law (which is not the Eighth Amendment, but the authority of the courts to award relief greater than that required by federal law) and because the provision provides a standard to which district courts must adhere (the Constitution sets the ceiling) but does not dictate the result that they must reach; that the provision does not burden the fundamental right of access to courts because it impairs neither the rights to bring a claim or to enforce the relief that is obtained (rather, it just limits the relief to which one is entitled); that the provisions rational serves the legitimate purpose of preserving state sovereignty by protecting states from overzealous supervision by the federal courts in the area of prison conditions litigation (a point that the inmates conceded); that the provision does not violate the due process "vested rights doctrine" because the plaintiffs have no property interest in the rights conferred by the consent decree; and that the test required of "retroactive" application of statutes need not be met because this is not a retroactive application.

Gates v. Gomez, No. Civ. S-87-1636 LKK (E.D. Cal. July 23, 1996): The defendants moved under § 3626(b)(2) to terminate an Order issued by Judge Karlton on April 9, 1996. That Order found that defendants were not in compliance with the consent decree in the case and ordered defendants to take necessary action to remain in compliance. Judge Karlton denied the defendants' motion to terminate the April 9th Order, finding that the Order was necessary to "correct the violation of [a] Federal right," namely, the violation of the consent decree. That is, a final judgment of a federal court, valid at the time of entry, creates rights which can fairly be characterized as a "federal right."

The court also found that the defendants had waived their right -- a right that was existent at the time the decree was entered, and one that they retain under the PLRA -- to have plaintiffs' relief limited to statutory or constitutional minima. This finding relied in part on the fact that the decree at issue states that "the parties agree that in entering into this consent decree they waive specific findings of fact and conclusions of law and any determination whether the remedies provided are legally required." However, the court's reasoning seems applicable to decrees that do not include such a provision because such "waiver" is implicit in a consent decree.

The court stated that its rulings were based on its duty to construe statutes to avoid constitutional questions. The court also stated that "to the extent that the PLRA appears to constrain the ability of a state to settle its litigation on terms satisfactory to itself, the statute raises questions under the Tenth Amendment." (Citing *United States v. Bekins*, 304 U.S. 27, 52 (1937) ("It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power")).

Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. July 23, 1996) (stayed by 2nd Cir., Aug. 27, 1996): Judge Baer upheld § 3626(b)(2), terminating consent decrees in seven different cases involving Rikers Island and 16 other jails in New York City. He rejected the rules Enabling Act argument, finding that the termination provision is not in direct conflict with FRCP 60(b).

Separation of Powers: He rejected the finality argument, finding that the holding of *Plaut* does not apply to injunctions, pursuant to the holding of *Wheeling Bridge*. He rejected the *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), argument, finding that the PLRA does not dictate certain findings or results under old law, but changes the law governing the district court's remedial powers. He found that the termination provision does not prevent the federal courts from imposing effective relief for constitutional claims, although it does create "-cramped...new legal standards."

Equal Protection: He found that the statute is subject to "rational basis" scrutiny because it does not "implicate [prisoners' fundamental right of court access, which is limited under *Lewis v. Casey*, 116 S. Ct. 2174 (1996), to a] right of initial access to commence a lawsuit." The termination provision survives this scrutiny because it serves the legitimate interests of (1) "ensur[ing] that federal courts return control over prison management to democratically accountable state and local governments as soon as federal court supervision became unnecessary to remedy a ... constitutional violation;" and (2) "creat[ing] a uniform national standard for consent and litigated judgments based on a belief that consent judgments, even though agreed to initially,

imposed severe burdens on states and local governments and that these burdens exceeded what was constitutionally required." With respect to Congress' singling out prison conditions litigation, he ruled that "Congress may determine that the problems of prison conditions consent decrees involve unique issues that are more pressing and in need of reform."

Due Process: He found that the analysis under the "vested rights" doctrine is parallel to that under *Plaut/Wheeling Bridge*. Moreover, although consent decrees are contracts, the impairment of such contracts is subject to the rational basis review that is applied to congressional impairment of private contracts.

Judge Baer found that he lacked a record on which to make the findings that would be necessary to allow the relief to remain in effect under 18 U.S.C. § 3626(b)(3), and that the statute directed the immediate termination of an injunction in such circumstances. He denied the plaintiffs' request to postpone a decision on this motion pending an opportunity to create a factual record necessary to make such findings.

Gavin v. Ray, Civil No. 4-78-cv-70062, Order Denying Motion for Immediate Termination (S.D. Iowa Sept. 18, 1996): Judge Vietor declared the PLRA's immediate termination provisions unconstitutional under the principle of the separation of powers. He found that the holding of *Wheeling Bridge* is limited to public rights, and that the holding of *Plaut* extends to cases involving injunctive relief for constitutional claims. He also found as follows:

> Further, the PLRA undermines the court's power to decide **when** prospective relief should end. The federal judiciary is vested with the "power, not merely to rule on cases, but to **decide** them...." *Plaut*, 115 S. Ct. at 1453. Under the PLRA, however, in order to prevent immediate termination of the decree, plaintiffs must show a current or ongoing violation of a federal right. 18 U.S.C. § 3626(b)(3). As long as defendants comply with the consent decree, plaintiffs cannot prove a current or ongoing violation of a federal right. In these types of cases, there is no opportunity for the court to "decide" whether prospective relief should remain in effect.

He declined to reach the other constitutional arguments raised by the plaintiffs -- equal protection and due process. He rejected the Rules Enabling Act argument.

McClendon v. Albuquerque, Civ. No. 95-24 MV/RLP, Memorandum Opinion and Order (D.N.M. Oct. 29, 1996): In ruling on the constitutionality of the automatic stay provision, Judge Vasquez stated that "the court agrees that the immediate termination provision of the Act is unconstitutional as applied to final judgments [but] the parties disagree and the Court questions [,but does not here decide,] whether [one of the four orders sought to be terminated] constitutes a final judgment." *Id.* at 7. Although the order states that the termination motion remains to be decided by the court, this sentence seems to be a ruling (or at least a tentative ruling) on the termination question with respect to the other three orders.

Hadix v. Johnson, Case No. 80-73581 (E.D. Mich. Nov. 1, 1996): Judge Feikens ruled that § 3626(b)(2) and (b)(3) violates the separation of powers because they run afoul of *Plaut* and because they abrogate a court's power to enforce its orders, one of the most vital constitutional powers of the judiciary. This power is not one that is subject to congressional override because it derives from the Constitution, as interpreted by the Supreme Court in the line of cases from *Dowell* to *Rufo*. Judge Feikens makes the following notable point:

> The Act's use of the term "prospective relief" masks the real issue ...: can injunctive relief based on past negotiations, costs assessments, and compromises between parties be overturned by an act of Congress?
>
> I conclude that it is not prospective relief that is being altered, but the consent judgment itself.

Id. at 17. Judge Feikens did not reach the plaintiffs' other arguments, such as equal protection and due process.

Bobby M. v. Chiles, Case No. 83-7003 MMP (N.D. Fla. Nov. 6, 1996): Judge Maurice Paul terminated the remaining portions of a consent decree pursuant to the PLRA. The plaintiffs did not argue that the termination provisions are unconstitutional; rather, they asked the court to make the findings necessary to allow the relief to remain in effect under § 3626(b)(3). The court declined to do so, reasoning that even if current conditions are unconstitutional, the defendants have adopted renovation and construction plans to remedy the problem-areas. Thus, continuation of the consent decree is not a **necessary** means of correcting the violations.

Inmates at the Indiana State Farm v. Bayh, Cause No. IP 82-0477-C M/S (S.D. Ind. Nov. 20, 1996): In addressing the defendants' motion to terminate a consent decree, Judge Larry McKinney found that the present record did not provide sufficient evidence to allow him to make the findings that permit continuation of the decree under § 3626(b)(3). He then gave the parties the following obtuse

directions:

> Assuming that it was not Congress' intent to destroy valid consent decrees based on settlements that were freely reached by both sides after years of litigation, the Court now orders both sides of this controversy to do one of three things. First, they may request a hearing at which both sides will present evidence that would enable the Court to have a basis to find that the original agreed entry met the requirements of the PLRA.... Second, they could request a hearing at which each side would present evidence and defend a proposed modification of the original consent decree. If either of these first two alternatives is employed, the parties are cautioned that the Court would expect to be presented with evidence with which to make written findings that the relief remains necessary to correct a current or ongoing violation of a federal right, that it is narrowly drawn and the least intrusive means of correcting the violation. If neither of these alternatives is acceptable, the Court will have no choice but to find that non-constitutional grounds do not exist for deciding the dispute, and will turn to the constitutional issues raised by the Inmates.

Order at 12-13 (citation and paragraph breaks omitted). To muddle matters further, the Court added the following footnote (without any citations to the legislative history or to anything else):

> The Court acknowledges the logic of the Inmates' argument that for the PLRA to require a finding that the defendant has actually violated the prisoners' federal rights it would have to have a full-blown trial. It would be highly unlikely that a defendant would stipulate to that fact during a settlement. Moreover, conducting a trial to determine the existence of a violation would defeat the purpose of a settlement. Apparently, something less than a full adversarial hearing was contemplated by Congress. All that is needed, in fact, is a finding that the remedy sought would be aimed at correcting a violation.

Order at 12 n.3.

Hazen v. Reagan, No. 4-75-CV-80201, and ***Dee v. Brewer***, No. 4-77-CV-80102 (S.D. Iowa): Judge Charles R. Wolle denied the defendants' motion to terminate consent decrees in two cases pursuant to the PLRA, stating as follows:

> I have compared the issues, the briefs, and the theories presented here and in *Gavin*. The arguments presented by counsel are essentially the same. Judge Vietor's reasoning is sound. Judges of this court have usually followed decisions of other district judges in cases with facts and applicable law that are not readily distinguishable.
>
> For the reasons set forth by Honorable Harold D. Vietor in *Gavin v. Ray*, Civil No. 4-78-CV-70062 (S.D. Iowa Sept. 18, 1996), the court denies the defendants' motion for termination of relief in these two cases.

ATTORNEYS' FEES --

PLRA § 803, subsection (d) (amending 42 U.S.C. § 1997e)

Retroactivity

Jensen v. Clarke, 1996 WL 498960, 1996 U.S. App. LEXIS 23219 (8th Cir. Sept. 5, 1996): The Eighth Circuit ruled that the fee provisions do not apply retroactively. The opinion does not indicate whether the ruling is limited to work performed before passage or extends to work performed **after** passage in cases pending at the time of passage. However, the plaintiffs' attorney told me that all of the work at issue in the fee award was done before the PLRA's passage.

Cooper v. Casey, USCA No. 95-2324 and 95-3529, 1996 U.S. App. LEXIS 26009 (7th Cir. Oct. 2, 1996): Judge Posner held that the PLRA's attorney fee provisions are inapplicable to work performed before the Act's passage.

Alexander S. v. Boyd, C/A No. 3:90-3062-17, Order Awarding Attorneys' Fees (D.S.C. May 29, 1996): Judge Anderson found that the fee provisions are inapplicable to work performed before passage of the Act. The decision does not address the question of the applicability of the provisions to work performed after passage.

Hadix v. Johnson, Civ. Action No. 80-73581, Opinion and Order Regarding Plaintiffs' Motion for Attorney Fees (E.D. Mich. May 30, 1996): Judge Feikens ruled that the fee provisions are inapplicable to work performed before passage of the Act. The decision does not address the question of the applicability of the provisions to work performed after passage.

Weaver v. Clarke, 1996 U.S. Dist. LEXIS 9682 (D. Neb. June 18, 1996): The court found at a preliminary injunction hearing that the plaintiff was likely to succeed on the merits but denied the request for a preliminary injunction because of the lack of irreparable injury. Thereafter, the defendants "voluntarily" ceased the practice

that plaintiff was challenging and then successfully moved for summary judgment. The plaintiffs then filed for attorneys' fees. The defendants argued that the PLRA's requirement that fees can only be awarded to the extent that they are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" abolished catalyst theory. The judge ruled in plaintiff's favor, finding that the fee provisions are not applicable retroactively to cases in which "all the events that triggered entitlement to attorney's fees took place prior to the date of enactment of the PLRA." The court also ruled that "at the very least Plaintiff established a presumptive violation of the Eighth Amendment [at the preliminary injunction hearing]. Consequently, ... the requested attorney's fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights."

Chappell v. Gomez, No. C 93-4421 FMS (N.D. Cal. Aug. 8, 1996): Judge Fern Smith ruled that the fee provisions are inapplicable to a case that was reduced to judgment before the passage of the PLRA. This is so even for fees incurred **after** passage.

Miller-Bey v. Stiller, No. 93-CV-72111-DT (E.D. Mich. Aug. 20, 1996): A Magistrate recommended that the fee provisions be found inapplicable to work performed before passage of the Act.

Anderson v. Kern, No. CIV F-90-0205 GEB JFM P, Order at 2 n.1 (E.D. Cal. Sept. 30, 1996) (adopting Magistrate's Order of Aug. 20, 1996): Judge Burrell adopted a Magistrate's recommendation that the fee provisions be found inapplicable to work performed before or after the PLRA's passage in a case in which an injunction was issued, and plaintiffs' counsel were found to be entitled to a fee award (although the amount of the fee award has been the subject of dispute since that time) before the Act's passage. (The decisions do not squarely address whether the triggering date for retroactivity analysis is the date of the district court's decision on the merits or the district court's decision that plaintiffs' counsel are entitled to fees.)

Webb v. Ada County, Case No. CV 91-0204-S-EJL (D. Idaho Sept. 30, 1996): Judge Lodge held that the PLRA's attorney fee provisions are not applicable to a case in which plaintiffs "prevailed" before the statute's passage and all of the work at issue was performed before passage.

Browning v. Vernon, Case No. CV 91-0409-S-BLW, Report and Recommendation (D. Idaho Oct. 2, 1996): A Magistrate recommended that the fee provisions be found inapplicable to work performed before passage. The plaintiffs had prevailed, and the Magistrate had recommended a fee award, before passage. However, the language in the Recommendation would support a claim that the PLRA's attorney fee provisions should not be applied to cases that were filed before the PLRA's passage, regardless of whether the plaintiffs prevailed before passage or the award relates to work performed before passage.

Gates v. Deukmejian, No. CIV S-87-1636 LKK JFM P, Findings and Recommendations (E.D. Cal. Nov. 25, 1996): In a case involving a 1989 consent decree, Magistrate Judge Moulds has recommended that the PLRA's attorney fee provisions be found inapplicable to work performed by plaintiffs' counsel before the Act's passage. The Magistrate declined to reach the question of the applicability of the provisions to work performed after passage.

Hadix v. Johnson, Civ. Action No. 80-73581, Opinion and Order (E.D. Mich. Dec. 4, 1996): In a case involving an eleven-year-old consent decree, Judge Feikens ruled that PLRA rates -- $112.50 per hour -- are applicable to work performed after April 26, 1996, the date of the statute's passage. Finding congressional intent unclear, the court reasoned that the prospective application of the statute was not "retroactive" under *Landgraf* and would not create a manifest injustice.

Application to Juvenile Plaintiffs

Alexander S. v. Boyd, C/A No. 3:90-3062-17, Order Awarding Attorneys Fees for the Period February-July 1996 (D.S.C. Aug. 30, 1996): Judge Anderson ruled that the fee provisions are inapplicable to actions filed by juvenile plaintiffs. His conclusion rests on the distinction between adult and juvenile facilities in the definitional sections of 42 U.S.C. § 1997, which were not amended by the PLRA.

SPECIAL MASTERS --

PLRA § 802(a) (amending 18 U.S.C. § 3626(f))

The omnibus appropriations bill signed by the President on September 30, 1996 contains a provision prohibiting the use of funds appropriated to the judiciary for the payment of masters appointed before the PLRA's passage. The precise text of the provision is as follows:

> None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, for costs related to the appointment of Special Masters prior to April 26, 1996.

P.L. No. 104-208, Title III, § 306 (Sept. 30, 1996) (reprinted at 142 Cong. Rec. H 11656 (Sept. 28, 1996)). The provision

strongly supports the view that the other provisions regarding masters are also inapplicable to masters appointed before the Act's passage.

Casey v. Lewis, Nos. 90-0054 and 91-1808 PHX CAM (D. Ariz. May 15, 1996); ***Gluth v. Arizona Dep't of Corrections***, No. CIV 84-1626-PHX CAM (D. Ariz. May 15, 1996); ***Hook v. Arizona***, No. CIV 73-97 PHX CAM (D. Ariz. May 16, 1996): Judge Muecke ruled in three separate cases that the appointment of a special master is not "prospective relief" and that, consequently, the automatic stay provisions are not applicable to a motion to modify an appointment.

Coleman v. Wilson, No. Civ. S-90-520 LKK (E.D. Cal. July 11, 1996); ***Gates v. Gomez***, No. Civ. S-87-1636 LKK (E.D. Cal. July 12, 1996): Judge Karlton found in two separate cases that: (1) the appointment of a special master is not "relief" within the meaning of the statute such that the PLRA's special master provisions are not applicable to masterships created before passage of the Act; and (2) a "mediator" whose appointment was a "creature of an agreement between the parties" (rather than a creature of FRCP 53 or the "inherent power of the court"), and whose powers and duties resemble and overlap with, but differ from, a Rule 53 master, is not subject to the special master provisions of the PLRA.

Madrid v. Gomez, No. C90-3094-TEH, Order (N.D. Cal. Aug. 23, 1996): Judge Henderson ruled that the special master provisions are inapplicable to masterships created before passage because the appointment of a master is not "relief" and the application of the provisions to such masterships would have a "retroactive" effect under the holding of *Landgraf*.

Williams v. Edwards, 87 F.3d 126, 133 (5th Cir. 1996): Judge Henderson cited this case in *Madrid* as implicitly reaching the same conclusion. *See Madrid* Order at 7 n.6.

PRISONER RELEASE ORDERS -- PLRA § 802(a) (amending 18 U.S.C. § 3626(a)(3))

Doe v. Younger, Civ. Action No. 91-187, Opinion and Order at 10-12 (E.D. Ky. Sept. 4, 1996): Judge Bertelsman ruled that an injunction that forbids the county from housing juveniles in the Kenton County Detention Center (KCDC) for a period of more than 15 days is not a "prisoner release order" under the PLRA. The county argued that the order "has the purpose or effect of reducing or limiting the prison population" under 18 U.S.C. § 3626(g)(4), so that the order cannot go into effect without invoking the procedural mechanisms set forth in § 3626(a)(3). The Court disagreed, finding that the text of the statute and the House Judiciary Committee's Report indicated that "prisoner release orders" are limited to "prison caps, i.e., orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons."

EXHAUSTION -- PLRA § 803(d) (amending 42 U.S.C. § 1997e(a))

Handeberry v. Thompson, No. 96 Civ. 6161 (KMW) (Dec. 10, 1996): Magistrate Francis recommended that the PLRA's exhaustion requirement be found inapplicable to a class action in which the available grievance system did not provide an "adequate and speedy" remedy for the plaintiffs' claims; in such a case, exhaustion would be "futile." In reaching this ruling, the Magistrate drew on the general body of law regarding exhaustion of administrative remedies.

MENTAL OR EMOTIONAL INJURY WITHOUT PHYSICAL INJURY -- PLRA § 803(d) (amending 42 U.S.C. 1997e(e))

Taifa v. Bayh, 1996 WL 441809 (N.D. Ind. June 6, 1996), *report and recommendation approved sub nom., Isby v. Bayh*, 1996 WL 441820 (N.D. Ill. July 24, 1996): The court conclusorily applied the provision in rejecting a claim that was filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.

Markley v. DeBruyn, 1996 WL 476635 (N.D. Ind. Aug. 19, 1996): The court conclusorily applied the provision in rejecting a claim that had been filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.

Adams v. Hightower, No. 3:96-CV-2683-G (N.D. Tex. Sept. 25, 1996): The plaintiff sought compensation for mental stress caused by an invasion of his privacy. The court dismissed the action after finding that the plaintiff had failed to show physical injury, without any discussion about the breadth of the application of the provision or its constitutionality.

Barnes v. Ramos, 1996 WL 599637 (N.D. Ill. Oct. 11, 1996): Judge Coar found this provision inapplicable to the plaintiff's due process challenge to a prison disciplinary proceeding:

> Barnes has not brought this suit to recover damages for mental or emotional injuries suffered as a consequence of defendants' actions. Rather, he alleges that his constitutional rights were violated because he was denied due process, because false charges were filed against him, and because he was subjected to cruel and unusual punishment.

> For none of these claims does Barnes assert that he suffered emotional or mental harm, nor do any of these causes of action require such an allegation. For example, a § 1983 action alleging a procedural due process clause violation requires proof of three elements, none of which include emotional, mental, or physical harm: 1) a deprivation of a constitutionally protected liberty or property interest; 2) state action; and 3) constitutionally inadequate process. Therefore, the PLRA does not require dismissal of Barnes's claims.

Id. at 2 (citation omitted).

THREE STRIKES YOU'RE OUT -- PLRA § 804(d) (amending 28 U.S.C. § 1915(g))

Lyon v. Van De Krol, No. 4-96-CV-10356 (S.D. Iowa): Judge Longstaff struck down the "three strikes you're out" provision of the PLRA, 28 U.S.C. § 1915(g), as violative of equal protection because it treats those who proceed IFP differently from those who do not. He subjected the provision to strict scrutiny because it burdens the fundamental right of prisoners to file constitutional claims in federal court. He found that the standards of review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), *Procunier v. Martinez*, 416 U.S. 396 (1974), and *Thornburgh v. Abbott*, 490 U.S. 401 (1989), are inapplicable because they involved "prison administration and security matters," while § 1915(g) relates to "federal court administration and legal issues." In applying strict scrutiny, he found that, even if the interest in deterring frivolous lawsuits is compelling, § 1915(g) only stops **indigent** inmates. Furthermore, the provision's application is **not** limited to frivolous lawsuits. That is, the provision is both under- and over-inclusive, rather than narrowly tailored.

ACLU Announces New Director for the NPP

The ACLU's Legal Director, Steven Shapiro, announced in June that Elizabeth Alexander had been appointed director of the National Prison Project to succeed Alvin J. Bronstein, who had been director since the start of the Project in 1972. (See NPP *Journal*, Vol. 10 No. 3, Summer 1995.)

"Elizabeth Alexander is one of the premier prison litigators in the country," said Shapiro. "She brings to the National Prison Project a unique combination of courage, commitment and intellectual savvy. I look forward to seeing her guide the Project through this difficult time when the rights of prisoners are under unprecedented attack. This is a critical juncture in the Project's mission: incarceration rates are at an all-time high, while the three branches of government are cutting back on long-held safeguards for prisoners."

"Public officials need to be reminded that prisoners are entitled to fair and humane treatment," said Alexander. "Under my leadership, the National Prison Project will redouble its efforts to ensure that the Constitution's prohibition against cruel and unusual punishment is honored."

Ms. Alexander is a graduate of Yale Law School. She has worked on behalf of prisoners' rights since the early 1970s, when, as an attorney in Madison, Wisconsin, she served as chief staff counsel at Corrections Legal Services Program, and then as assistant state public defender responsible for conditions of confinement litigation. Ms. Alexander joined the Project as a staff attorney in 1981, and was promoted to associate litigation director in 1990. During that time, she argued several major prisoners' rights cases before the U.S. Supreme Court, including *Farmer v. Brennan*, *Wilson v. Seiter*, and *Lewis v. Casey*, as well as litigating many of the project's cases before other courts. Currently, she is lead counsel in the *Shumate* case challenging medical care in California's two women's prisons which is due to go to trial early in 1997, in addition to cases in Arizona, Michigan, South Dakota, Pennsylvania.

For NPP news, PLRA updates and other significant events check the NPP's website--

We have updated our website and have a new address -- www.npp.org. We now have a much more comprehensive section on the PLRA that includes a summary of all significant decisions. The address to the PLRA section is www.npp.org/plrahome.htm, and the listing of cases is at www.npp.org/cases.htm. The website will be revised with each update. If you have comments or suggestions for the website, please e-mail Kelly Gardner at kellygard@aol.com.

Case Law Report -- Highlights of Most Important Cases by John Boston

If *Lewis v. Casey*, 116 S.Ct. 2174 (1996), were a self-help book, it might be titled "Plaintiffs Who Win Too Much". *Lewis* was a class action challenge to the provision of court access to prisoners by the State of Arizona. After a trial, the district court entered a comprehensive remedial order that was affirmed in most respects by the Court of Appeals. *Casey v. Lewis*, 834 F.Supp. 1553 (D.Ariz. 1992), *aff'd in part and vacated and remanded in part*, 43 F.3d 1261 (9th Cir. 1994). Now that order has provided a platform, if not a poster child, for those Justices who are most hostile to modern civil rights litigation and to prisoners' rights.

Justice Scalia's opinion asserts several major propositions about the nature of the right to court access, and substantially restricts the scope of that right as articulated in *Bounds v. Smith*, 430 U.S. 817 (1977), and its lower court progeny. *Bounds* held that states are obligated to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. Justice Scalia, however, emphasized that the right at issue is the "right of **access to the courts**" and not "the right to a law library or legal assistance." *Lewis*, 116 S.Ct. at 2179 (emphasis in original). Therefore, he stated, a plaintiff must show that shortcomings in the prison's library or assistance program caused "actual injury"—that it "hindered his efforts to pursue a legal claim," e.g., by causing a complaint to be dismissed because the plaintiff was unable to research pleading requirements or was unable to file a complaint at all. *Id.* at 2180.

The "actual injury" requirement is not novel, but *Lewis*' formulation is significantly less favorable to prisoners than were prior lower court decisions. Most courts had adopted some variation of the Ninth Circuit rule, under which substantial denial or interference with the "core requirements" of court access, i.e., access to an adequate law library or to legal assistance, required no specific showing of prejudice. *See Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989), *citing Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988). *Lewis* appears to leave no room for such views. *See Lewis*, 116 S.Ct. 2181 at n. 4.

With the right of court access defined narrowly, the Court had little difficulty in finding the record below—made under a very different view of the actual injury standard—grossly inadequate to sustain a finding of denial of court access encompassing the entire Arizona prison system.

> ***"Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of everything from shareholder derivative actions to slip-and-fall claims." Justice Scalia.***

The Court went on to say that actual injury is not defined as stringently as it could have been. A plaintiff must show that the pursuit of a legal claim was "hindered," *id.* at 2180, or "had been frustrated or was being impeded." *Id.* at 2181. He need not show that he lost a case that he would have won but for the deficiencies of the legal access system. Thus, it appears that significant delays in pursuing a claim will meet the injury requirement. *Allen v. Sakai*, 48 F.3d 1082, 1091 (9th Cir. 1995) (holding that prisoner whose papers were rejected by the court showed prejudice even though he had been permitted to refile them later). Moreover, *Lewis* does not appear inconsistent with the view that "'injury' includes . . . allegations left out of the complaint, legal theories not pursued, and cases not cited in the briefs that plaintiff did manage to file." *Canell v. Bradshaw*, 840 F.Supp. 1382, 1391 (D.Or. 1993).

There are two important categories of court access cases not directly addressed in *Lewis* and likely to result in differing applications of *Lewis* in the lower courts. One is cases involving retaliation by prison officials for legal activity by prisoners. In such cases, it is the retaliation itself, and not the actual effect, if any, on the prisoner's legal activity, that constitutes the actual injury required by Article III. *See Lowrance v. Coughlin*, 862 F.Supp. 1090 (S.D.N.Y. 1994) (awarding damages for retaliatory transfers and segregation). The second category involves the privacy of communications with counsel, courts, and others concerning legal issues or proceedings. Courts may be tempted to hold that scrutiny of one's legal communications does not sufficiently affect the conduct of litigation to establish actual injury. Some pre-*Lewis* decisions held that the "chilling effect" of lack of confidentiality of legal mail meets the "injury in fact" requirement of Article III as well as the requirements of an access to courts claim. *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994); *Proudfoot v. Williams*, 803 F.Supp. 1048 (E.D.Pa. 1992). Nothing in *Lewis* overrules these decisions. However, it is probably prudent to rely also on the Sixth Amendment when a criminal proceeding is at issue, and in all cases to raise claims under the First Amendment, *see Chinchello v. Fenton*, 763 F.Supp. 793 (M.D. Pa. 1991), and the Fourth Amendment, which may be better adapted to the protection of privacy interests than any other legal theory. At a minimum, the values underlying the attorney-client privilege should suffice to render surveillance of legal mail, at least without a warrant, an unreasonable search.

Nonetheless, *Lewis* clearly raises the

evidentiary stakes for plaintiffs in systemic court access challenges, and does so in a way that will value anecdotes over analysis of the system. Counsel in systemic challenges will probably be well advised to devise systematic means of presenting evidence of actual obstructions to court access rather than simply proving the systemic deficiencies by expert testimony and adding such prisoner testimony as is handy at the time of trial.

Lewis holds that, to be actionable, restrictions on legal access must affect a "nonfrivolous" or "arguable" claim. *Lewis*, 116 S.Ct. at 2181 and n. 3. Justice Souter's concern in his concurring and dissenting opinion that district courts now "may be required to examine the merits of each plaintiff's underlying claim," resulting in "a lot of preliminary litigation over nothing," 116 S.Ct. 2204, seems exaggerated, at least as applied to federal constitutional claims, given the non-rigorous scrutiny applied by courts in determining frivolousness.

More troubling is *Lewis'* narrow definition of the proceedings to which the right of court access extends: "The tools [*Bounds*] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any **other** litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." 116 S.Ct. at 2181-82.

This holding is both ambiguous and theoretically dubious. The ambiguity lies in the difference between "civil rights actions" and "challenge[s to] the conditions of their confinement." Many such challenges are not litigable as federal civil rights actions but only as state law claims in state court. *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986). In some instances, the availability of state law remedies is part of the federal constitutional analysis. *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981). Are these state proceedings then within the scope of the *Bounds* right? Justice Scalia states that "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." 116 S.Ct. at 2182. But this derisive remark, without more, cannot be taken to exclude a slip-and-fall claim based on negligence by prison officials, like *Daniels v. Williams*, even though that claim might involve only state law.

The theoretical problem is exposed by asking the question: why must prison officials provide **any** assistance to prisoners seeking to bring lawsuits? Non-prisoners are not entitled to such assistance except in proceedings where there is a constitutional or statutory right to counsel. Presumably, the reason for the *Bounds* right is that prisoners are, in practice, disabled by their incarceration from helping themselves by using public research facilities, asking questions at the clerk's office, or, in most cases, from obtaining the assistance of legal services agencies or private lawyers. After all, the practical disabilities of imprisonment are the reason that government must provide food, medical care, and protection from assault to prisoners but not other citizens. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200 (1989). This rationale seems equally applicable to a prisoner's efforts to preserve his family relationships or his property interests from termination under state law.

Moreover, insofar as the right of court access is founded on the First Amendment right to petition for redress of grievances, *Lewis'* restrictive holding seems to have little basis in principle. The Supreme Court has observed generally that the right to petition for redress of grievances protects "[g]reat secular causes, with small ones," and not solely religious or political grievances, *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (addressing labor organizing), and that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (addressing means of providing counsel for suits over occupational injuries).

Lewis' holding appears inconsistent with the broad sweep of these decisions. However, *Bounds v. Smith*, the case that announced prisoners' "fundamental constitutional right" of court access, did not place it on any clear analytical footing. Subsequent cases perfunctorily rationalized it as a "consequence" of due process, as an "aspect" of equal protection, *Murray v. Giarratano*, 492 U.S. 1, 11 n. 6 (1989), or as included in the First Amendment right to petition, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984), without engaging in any further analysis. *See Lewis*, 116 S.Ct. at 2187 (Thomas, J., concurring). Thus there is no doctrinal basis for resistance to a seemingly arbitrary restriction such as proposed by *Lewis*. In effect, *Bounds* is hoist with its own penumbras.

The other troublesome limitation in *Lewis* involves the reach of the *Bounds* right within the compass of a particular legal controversy. Justice Scalia states that the *Bounds* right is "a right to bring to court a grievance that the inmate wished to present," and disclaims other statements that "appear to suggest that the State must enable the prisoner to **discover** grievances and to **litigate effectively** once in court." 119 S.Ct. at 2181 (emphasis in original).

This holding is troublesome because of its ambiguity, which arises at least in part from the Court's complete failure to describe the factual context to which it is intended to apply. At least one court has already characterized it as limiting the *Bounds* right to a "right of initial access to commence a lawsuit," *Benjamin v. Jacobson*, 935 F.Supp. 332, 352 (S.D.N.Y. 1996), *appeal docketed*, No. 96-7957 (2d Cir., argued November 15,

1996), relying on the above quoted phrase "a right to bring to court a grievance that the inmate wished to present." But closer examination of *Lewis*' text does not support this interpretation. Justice Scalia adds at the end of the quoted passage: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires." *Lewis*, 119 S.Ct. at 2181. This reference to "sophisticated legal capabilities" suggests that Justice Scalia's quarrel with the phrase "litigate effectively once in court" is not with the notion that the right of court access survives beyond the clerk's office, but with any obligation on the part of government to make uneducated prisoners "effective[]" litigators.

The contrary conclusion makes no sense. As Justice Scalia states, "It is the role of courts to **provide relief** to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm...." 119 S.Ct. at 2179 (emphasis supplied). A court does not "provide relief" based on a complaint, no matter how meritorious. "Presenting" a claim to court requires the claimant both to defend the claim (e.g., through responding to motions to dismiss and for summary judgment) and to move it toward judgment (e.g., through discovery, motion practice, and ultimately trial). A plaintiff who files a complaint and does nothing more will receive only a dismissal for want of prosecution. For these reasons, it would appear that a prison law library with a "complaints and petitions only" policy would violate *Bounds*.

Justice Scalia's disclaimer of any *Bounds* obligation to help prisoners "**discover** grievances" is equally murky. If he meant that prisoners with grievances have no right to assistance in determining whether their legal rights have actually been violated, that position would be hard to square with the view that prisoners, like other litigants, are obliged to determine the legal merits of their claims before they file them. *See Lewis*, 116 S.Ct. at 2181 n. 3 (noting risk of sanctions to prisoners who file frivolous actions).

It should be kept in mind that *Lewis* addresses only the *Bounds* right to affirmative assistance from prison officials, and not the right to be free from active obstruction of litigation. In one recent case, the plaintiff had (perhaps wrongly) "acknowledge[d] that prisons do not have to provide inmates with affirmative help to litigate their cases once they have gotten in the court house door.... [*Lewis*] cannot, however, be read to give officials license to thwart that litigation once it is filed." *Rhoden v. Godinez*, 1996 WL 559954 (N.D.Ill. 1996). That holding should logically apply as well to prison officials' interference with cases outside the criminal conviction/ conditions of confinement circle drawn by *Lewis*.

Lewis' actual injury holding is set emphatically in the framework of Article III standing doctrine. It would seem that a simple holding that the plaintiffs' proof was insufficient to support the district court's judgment would have sufficed, and would have been preferable as the narrower ground of decision.

Justice Scalia began his Article III discussion in a context of suspicion about the scope of institutional reform litigation. He states that it is the courts' role to provide relief to prisoners subject to present or imminent harm, but the role of the other branches of government to "shape the institutions of government in such fashion as to comply with the laws and the Constitution." 116 S.Ct. at 2179. These roles "briefly and partially coincide" when a court remedies such actual harm by directing changes in institutional organizations or procedures.

> But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If—to take another example from prison life—a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Id. at 2179.

By contrast, in *Helling v. McKinney*, 113 S.Ct. 2475 (1993), which involved an Eighth Amendment challenge to exposure to environmental tobacco smoke, the Supreme Court rejected the proposition that future harm to prisoners' health is not actionable, and did not restrict its holding to "imminent" harms:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is **sure or very likely** to cause serious illness and needless suffering the next week **or month or year**....
>
> That the Eighth Amendment protects against future harm to inmates is not a novel proposition.... We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

113 S.Ct. at 2480-81 (citation omitted, emphasis supplied).

This holding as to what risk actually violates the Eighth Amendment applies *a fortiori* to the question what risk is sufficient to confer standing to pursue an Eighth Amendment claim. While *Helling*'s "sure or very likely" is a stringent standard, it is a far cry from *Lewis*' "imminent," and *Helling*'s choice of words is not accidental. *Helling* went on to observe that prisoners may obtain relief "even though it was not alleged that the likely harm would occur immediately and even though the possible [harm] might not affect all of those [at risk]." 113 S.Ct. at 2480, *citing Hutto v. Finney*, 437 U.S. 678 (1978).

One might distinguish *Helling* on the ground that the rights of court access and to medical care are similar in that they are relevant only to a restricted group—respectively, those individuals with legal claims and those with illnesses or injuries. By contrast, the kinds of risks cited by *Helling*—not only second-hand smoke, but also exposure to communicable disease, unsafe drinking water, exposed wiring, deficient firefighting measures, and the risk of assault—may endanger everyone in a particular prison or part of a prison. But this distinction goes only so far. While it may be true that only those who are HIV-infected are at risk from lack of adequate HIV care, other kinds of medical problems—such as injury from accident or assault—can happen to anyone on short notice. Is it consistent with *Helling* to hold that healthy prisoners lack standing to challenge the complete absence of any measures for emergency injury care in a prison with a significant rate of such injuries? *Compare Farmer v. Brennan*, 114 S.Ct. 1970, 1982 (1994) (". . . [I]t does not matter . . . whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.") (*citing Helling*). *Lewis* seems to assume that "actual injury" requires an imminence and specificity of risk that is inconsistent with the holding of *Helling*—a case Justice Scalia does not cite, although it is cited by Justice Souter for precisely this point. *Lewis*, 116 S.Ct. at 2204 n. 2 (concurring/dissenting opinion).

> **Lewis** ***seems to assume that "actual injury" requires an imminence and specificity of risk that is inconsistent...with*** **Helling.**

Justice Scalia's discussion of remedy is also rooted in part in Article III: "The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established." 116 S.Ct. at 2183. This proposition is as applicable in class actions as individual lawsuits, and inadequacies that "have not been found to have harmed any plaintiff" in a class action may not be the subject of remedial relief. This assertion immediately raises a serious problem of definition, illustrated by the Court's own example. Where the only actual injury shown involved illiterate inmates, "we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English-speakers, by prisoners in lockdown, and by the inmate population at large." *Id.* But what is the difference between illiterate inmates and non-English-speaking inmates for purposes of this controversy? For both, the problem is that they can't read the materials in the library and write legal pleadings readable by an English-speaking court. Aren't these variations of the same problem? Perhaps not, if the supposed solution to the language problem is interpretive services and to the illiteracy problem is to have trained assistants actually do the research and writing. But that answer would make litigants' standing contingent on the nature of the relief to be awarded—a question that is usually not reached (and indeed **cannot** be reached under *Lewis*) until after liability has been determined.

In any case, *Lewis*' holding potentially turns the Article III question into a semantic war over the level of generality at which questions are stated. For example, suppose in a medical care case, several diabetic prisoners show that disorganization of the medical care program results in the repeated loss of their medical records, the failure to dispense prescribed medication consistently, the failure to deliver therapeutic diets, the lack of ability to respond to emergencies such as diabetic comas, and the general inability to track and treat prisoners with chronic diseases. One would think that this proof would entitle the plaintiff class to an injunction addressing the medical records system, medication dispensation, therapeutic diets, emergency care, and chronic illness care. Will defendants then argue that the court may only require a protocol for diabetics? Under *Lewis*, much time is likely to be wasted on such distinctions that should not make a difference. In practice, the potential for such debate may place a heavy burden on plaintiffs' counsel to have a comprehensive remedial theory before trial, and to tailor their proof accordingly.

Justice Scalia's discussion of remedy and standing also includes some puzzling references to the **named** plaintiffs in this class action, e.g., noting that the district court "found actual injury on the part of only one **named** plaintiff." 116 S.Ct. at 2183 (emphasis supplied). Whatever the significance of such references, the Court does not hold that only evidence received from the named plaintiffs in a class action may confer standing to seek injunctive relief. Once a class is properly certified, the Article III inquiry is addressed to the class, not the named plaintiffs; upon certification, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (footnote omitted). Although there must be a continuing case or controversy, it may exist "between a named defendant and a member of the class represented by the

named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna*, 419 U.S. at 402; *accord, Franks v. Bowman Transportation Co.*, 424 U.S. 747, 753-54 (1976); *Moss v. Lane Company, Inc.*, 471 F.2d 853, 855 (4th Cir. 1973); *Wilson v. Sullivan*, 709 F.Supp. 1351, 1355-56 (D.N.J. 1989) and cases cited.[1] Justice Scalia also objected to the geographical scope of the injunction: even if two illiterate inmates proved a *Bounds* violation, that is "a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief."
119 S.Ct. at 2184.

It is a relief... that the Court does not find* Bounds *to be satisfied by giving books to people who cannot read them.

If a policy or practice is, however, shown to be systemwide—either through evidence or because it is dictated by systemwide policies—there is no apparent reason why prisoners from one institution cannot obtain systemwide relief. *Cf. Thornburgh v. Abbott*, 490 U.S. 401 (1989) (adjudicating constitutionality of national regulations applying to entire Federal Bureau of Prisons).

Citing *Turner v. Safley*, 482 U.S. 78 (1987), Justice Scalia found several additional grounds for objecting to the district court's remedy under the principle of deference to prison authorities' discretion. He asserts that delays in court access resulting in actual injury are not of constitutional stature if they result from the application of rules that pass the *Turner* reasonableness test. He adds that the injunction was "inordinately—indeed, wildly—intrusive" and the *ne plus ultra* of enmeshment in prison minutiae. And finally, he condemns the failure of the district court to give the defendants the initial responsibility for devising a remedy; "on that ground alone this order would have to be set aside." 119 S.Ct. at 2186

Is there any good news in this opinion? Well, yes, sort of. The state had argued that as long as it provides access to law libraries with clerks and assistants, it has discharged its duty under *Bounds*, even to the illiterate and the non-English-speaking. The Court disagreed, finding that it is the capability of actually filing nonfrivolous claims, "rather than the capability of turning pages in a law library, that is the touchstone." 119 S.Ct. at 2182. In light of the rest of the opinion, it is a relief to see that the Court does not find *Bounds* to be satisfied by giving books to people who cannot read them.

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[1] In *Sosna*, the claim was by nature "capable of repetition, yet evading review," 419 U.S. at 399-401, but the Supreme Court subsequently made clear that the *Sosna* holding was by no means restricted to such situations. *Franks v. Bowman Transportation Co.*, 424 U.S. at 753-54.

Sosna was about mootness, but its principle is equally applicable to standing. *Lynch v. Dawson*, 820 F.2d 1014, 1016 (9th Cir. 1987); *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985); *see East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 406 n. 12 (1977) (dismissal of class claims would be inappropriate after trial even if named plaintiffs proved not to be members of the class). Indeed, standing versus mootness is a distinction without a difference in this context; mootness amounts to "the doctrine of standing set in a time frame." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980), *quoting* Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973).

John Boston is Director of the New York Legal Aid Society's Prisoners' Rights Project

New Publications

The National Prison Project has published a new edition of the *Prisoners' Assistance Directory* - the 11th Edition. The *Directory* lists national, state, and local organizations and sources of assistance for prisoners, including, legal, AIDS, family support and ex-offender aid. The *Directory* is recommended for prison libraries and for organizations providing assistance to prisoners and their families. Copies are $30 each, prepaid, from the NPP. The price includes shipping and handling.

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The 1996 edition of *A Jailhouse Lawyer's Manual* (*JLM*) is now available. The 989-page legal self-help guide completely updates previous *JLM* editions and supplements. Written and edited by members of the Columbia Human Rights Law Review, the *JLM* provides assistance to prisoners pursuing appeals, post-conviction relief, civil rights actions, and parole. While a good source of information for all prisoners, it is especially valuable to anyone pursing cases in New York. (**Note** - the *JLM* went to press prior to passage of the PLRA, so does not cover the changes to prison litigation resulting from the Act.) The *JLM* costs $35 per copy, with a special price of $13 for prisoners ordering directly. All prices include shipping and handling.

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CURE (Citizens United for Rehabilitation of Errants) has published a 40-page *Prisoners' Directory to Earning College Degrees* which provides information on courses available by correspondence and guided independent study. Copies are $8 each, including shipping and handling, from CURE, PO Box 2310, National Capital Station, Washington, DC 20013.

On December 7, Human Rights Watch Women's Rights Project released a report, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*. According to the report, male officers in state prisons from Georgia to California are sexually abusing female prisoners with near total impunity. State and federal officials in a position to address such misconduct often deny that it exists or fail to take adequate steps to prevent it. As a result, sexual misconduct in U.S. state prisons for women is emerging as an explosive national problem. Human Rights Watch calls on all states to adopt and enforce prison rules that clearly define and prohibit all forms of sexual misconduct, including sexual intercourse and touching, inappropriate visual surveillance, and verbal degradation and harassment. They also call on states to make all sexual contact by officers with prisoners a crime and to ensure that correctional employees who engage in such misconduct are prosecuted to the fullest extent of the law. The United States has the dubious distinction of incarcerating the largest known number of prisoners in the world, of which a steadily increasing number are women. Since 1980, the number of women entering U.S. prisons had risen by almost 400 percent, roughly double the incarceration rate increase of males. Fifty-two percent of these prisoners are African-American women who constitute only fourteen percent of the total U.S. female population. According to current estimates, at least half of all female prisoners have experienced some form of sexual abuse prior to incarceration.

One of the main factors contributing to sexual misconduct in U.S. state prisons is that the U.S., in violation of international norms, allows male officers to serve in positions that involve constant physical contact with female prisoners. Thus, the increased number of women in U.S. state prisons are more often than not being guarded by men. In fact, in many women's facilities male officers outnumber their female counterparts by two, and sometimes three to one.

All Too Familiar reflects research into sexual abuse of women in U.S. state prisons conducted by the Human Rights Watch Women's Rights Project and other Human Rights Watch staff from March 1994 to November 1996. It is based on interviews with the U.S. federal government, state departments of corrections and district attorneys, correctional employees, civil and women's rights lawyers, prisoner aid organizations, and over sixty prisoners formerly or currently incarcerated in eleven women's prisons in California, Georgia, Illinois, Michigan, New York, and the District of Columbia (D.C.). It finds that male officers vaginally, anally, and orally rape and sexually assault and abuse female prisoners. They use mandatory pat-frisks to grope women's breasts, buttocks, and vaginal areas, view them inappropriately while in a state of undress, and engage in constant verbal harassment of female prisoners, contributing to a custodial environment that is often hostile and highly sexualized. In some cases, women have been impregnated as a result of sexual misconduct and some of these prisoners have faced additional abuse in the form of inappropriate segregation, denial of adequate health care, and/or pressure to seek an abortion. In committing such gross misconduct, male officers have abused their nearly absolute power over female prisoners to force them to have sex, either through actual or threatened physical violence or through the provision or, by implication, threat to deny goods and privileges. In other cases, male officers have offered or provided goods and privileges to female prisoners as a form of reward for engaging in sexual relations or have violated their most basic professional duty and engaged in sexual contact with female prisoners absent the use or threat of force or any material exchange.

The U.S. is clearly bound under constitutional and international law to prohibit all forms of custodial sexual misconduct. Yet, according to the Human Rights Watch report, neither the nation's capital nor any of the five states they investigated are adequately upholding these national and international obligations. All of them have prison rules concerning sexual misconduct, but they often refer only vaguely to "overfamiliarity" or "fraternization." Where criminal laws exist, they are inadequately enforced.

The Prison Project shares Human Rights Watch's concern over the sexual harassment and abuse of women prisoners. We have heard reports of problems from our own clients, from other women and from attorneys who have been asked to represent individuals and groups of victims. In order to address the problem in a more systematic manner, we are asking anyone involved in a case of sexual harassment or abuse, or who is aware of this problem in a particular facility, to contact us. We would like to establish a clearing house to provide information and technical assistance to anyone dealing with this issue, and to collect briefs that could be shared with others who are bringing lawsuits. We are particularly interested to know if anyone has been deterred from bringing a case to court by the PLRA's provision barring suit for mental or emotional injury without a prior showing of physical injury.

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Please send information by mail to Karen Bower at the National Prison Project.

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Copies of the Human Rights Watch report are available for $20 from HRW at 485 Fifth Avenue, New York, NY 10017. Phone (212) 972 8400. For further information, check their website at www.hrw.org.

NPP AIDS Education Project Update

The NPP's AIDS Education Project continues to serve as a resource for prisoners, family members, community based organizations and attorneys. In 1996 we received over 600 requests for information and assistance. Among the emerging issues we heard about during the year were new policies requiring co-payments for doctor visits and the impact of managed health care.

Jackie Walker the NPP's AIDS Education Project Coordinator, is a member of the National Organizations Responding to AIDS Working Group on Incarcerated Populations. During its first year, working Group activities have included meetings with staff from the National AIDS Policy Office, the Health Resources and Services Administration and the Centers for Disease Control to address the needs of prisoners living with HIV/AIDS. Individuals and Organizations interested in being members should contact the AIDS in Prison Project.

Some useful resources:

An updated publication, *The 1996 Bibliography AIDS in Prison*, will be released by the NPP in February. The bibliography includes citations to over 200 articles in criminal justice, medical and legal journals and a list of community based organizations that provide services and advocacy for prisoners living with AIDS/HIV.

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Compassionate release programs analyzed. The American Bar Association has released a set of recommendations and model legislation on compassionate release. The report—*ABA Report with Recommendations Concerning Compassionate Release from Prisons and Alternatives to Sentencing for Nonviolent Terminally Ill People*— is available from the ABA AIDS Coordinating Project at (202) 662-1025.

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The American Public Health Association update *Standards for HIV/AIDS Care in Prisons & Jails*, includes recommendations on a variety of topics from women prisoners to discharge planning. To receive copies contact the American Public Health Association Publications Department at (202) 789-5600.

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Prisoner peer educators profiled! A new video documenting the AIDS Education and Counseling Program (ACE) at Bedford Hills Correctional Facility in New York is available. The video, *ACE Against The Odds*, by Debra Levine, is available from Rubyrae Productions, (718) 965-9536.

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Looking for an analysis of African-American and Latino prisoners and the AIDS/HIV epidemic? The recently released *Prisons and AIDS: A Public Health Challenge* devotes a chapter to the impact on these communities. Co-authored by Ronald Braithwaite, Theodore M. Hammett and Robert M. Mayberry the book addresses a range of subjects from education and prevention to legal issues. Contact Jossey-Bass Publishers (415) 433-1740 for orders.

Friends mourned in 1996

The Prison Project and the wider civil rights community lost some good friends during the past year.

In April, **Haywood Burns** died in an automobile accident in Cape Town where he was attending a conference on democracy and international law. Haywood was a longtime civil rights advocate who worked with the Rev. Dr. Martin Luther King, Jr., represented Angela Davis against charges of kidnaping and murder, coordinated the defense for prisoners indicted in the Attica prison riot, and helped found the National Conference of Black Lawyers. Haywood described the Attica rebellion and its aftermath as an "indelible experience" and he remained committed to the cause of prisoners' rights throughout his life as a friend and advisor to the National Prison Project and a member of its steering committee.

In June, **Henry Schwarzschild** died of cancer in New York. Henry was a major figure in the civil rights movement of the 1960s, heading the Lawyers Constitutional Defense Committee which provided lawyers to assist civil rights workers in the south. He spent the last several decades of his life fighting against the death penalty, for part of that time as director of the ACLU's Capital Punishment Project.

In July, **Steven Donaldson**, executive director of Stop Prisoner Rape, died in New York. He had AIDS. Steven was a civil rights activist, starting in the gay liberation movement in the 1960s. In 1973, during a peaceful Quaker protest against the bombing of Cambodia outside the White House, he was arrested and held in the D.C. jail where he was gang-raped repeatedly over a two-day period. He later testified about his experience at hearings in the District and went on to become a prominent public spokesperson on the issue of prison rape, as well as working to help prisoners who had been raped. The work of the organization he headed—Stop Prisoner Rape—continues. SPR can be reached at P.O. Box 264, Stafford, CT 06075.

Highlights from the Prison Project's Docket

Following are some new developments in our non-PLRA litigation over the past few months.

Young v. Harper—The U.S. Supreme Court asked the NPP to represent the respondent in his case against the state of Oklahoma. Harper is an Oklahoma prisoner who challenged the constitutionality of the process by which he was terminated from the Oklahoma Pre-parole Conditions Supervision Program. He successfully took part in the prerelease program for five months, living at home and working at two jobs. Then his participation in the program was abruptly terminated and he was returned to prison because the governor decided that he was not eligible for parole (although parole eligibility was not a requirement for taking part in the program at the time he entered). Harper maintains that the circumstances of the prerelease program (living in the community, working, etc.) created a liberty interest protected under the 14th Amendment which entitled him to a due process hearing. He lost his case in the district court but won on appeal, representing himself at both stages. The state was granted *certiorari*. The Supreme Court heard argument on December 9.

Redwoman v. Cook—The Oregon Department of Corrections has an administrative rule which bans any religious activity unless a chaplain or qualified religious volunteer conducts the activity. This rule effectively ended Native American religious activities because of the shortage of such religious personnel to conduct them. A *pro se* complaint was filed in June 1995 and amended in November 1995 by a *pro bono* attorney. The district court judge found against the plaintiffs on August 1. The case has now been joined with three others brought on the same issue. Two of the cases involve restrictions on Native American religious activity and one on Nation of Islam members. The NPP is representing the plaintiffs on appeal to the Ninth Circuit and our brief will be filed at the end of January.

Amos v. Maryland Department of Public Safety—In 1991, physically disabled prisoners in Maryland filed suit seeking injunctive relief and damages to remedy violations of the Rehabilitation Act the Americans with Disabilities Act (ADA) and alleging unconstitutional standards of medical care. The prisoners claimed that they were denied access to pre-release, work release and other programs because of their handicaps, and that the facility's cells, bathrooms and showers were not physically accessible. The district court granted summary judgment to the defendants and found that the ADA was not applicable to prisons. The NPP is representing the prisoners in their appeal to the Fourth Circuit. Briefs were filed in December.

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