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# *Juvenile Justice: Is There a Better Way?*

Most national and local attempts to reduce juvenile criminal activity by locking kids up have failed. Young people are more alienated than ever, especially in the inner cities where economic inequality and social impoverishment are so marked. Our educational and health care systems are inadequate, we lack job training programs for disadvantaged youth, and we are in desperate need of meaningful drug treatment programs. When kids get into trouble, we send them miles away from home, cut off from family, to live in overcrowded and understaffed institutions. They are often locked in cells because there are not enough people to supervise them. Under this system, there really is no such thing as juvenile "justice."

The government offers, as *Business Week* magazine has pointed out, "too many promises, too little help" to children and families. Ironically, those candidates who run most vociferously on a "pro-family" platform are those who offer little more than rhetorical suppport.

Note these disturbing statistics:

*African American, Hispanic, and Native American youth are overrepresented at all stages of the juvenile justice system;

*African American babies die at twice the rate of white babies;

*African American, Hispanic, Asian American, and Native American youth are incarcerated in detention facilities and public training schools at rates of three to four times those of whites.

According to recent studies, more youth are being locked up in institutions in the juvenile justice, child welfare, and mental health systems than ever before. Overcrowded facilities may be linked to the increase in suicides by minors in detention.

In this issue of the *JOURNAL*, we focus on several states where advocates have sought to reform the existing system. James Bell of the Youth Law Center writes about the continuing problem of juveniles being held in adult jails, where physical and emotional abuse and lengthy periods of solitary confinement are common.

Steve Novick of Legal Aid of Western Oklahoma outlines the history of the complex and often bitter *Terry D.* litigation, which sought to deinstitutionalize the child care system in Oklahoma. Improvements have been made since the lawsuit was filed, and despite a few setbacks, a system once characterized by abuse and mistreatment of children now stands improved.

Advocates in Hawaii used a coalition approach to convince the state to adopt policies which would bring a measure of sanity to its juvenile system. Dan Macallair, former head of the Hawaii Youth Advocacy Project, tells how the state, wary of further litigation by the ACLU, cooperated in creating a model for deinstitutionalizion of juvenile detention.

*—J.E.*

***TERRY D. v. RADER***

## Bitter Legal Combat Leads Oklahoma Out of Dark Ages in Care of Juveniles

**BY STEVEN A. NOVICK**

Between 1977 and 1984, the state of Oklahoma underwent cataclysmic changes in the way it handled delinquent youth and status offenders coming into state custody. These sweeping reforms were largely wrought by *Terry D. v. Rader*, a civil rights class action challenging both the widespread abusive conditions of confinement in Oklahoma's institutions for children and the state's total failure to develop a system of less restrictive community-based services for youth.

Lawyers from the National Prison Project of the ACLU joined with Legal Aid of Western Oklahoma and the National Center for Youth Law to co-counsel this landmark piece of litigation.*

### Historical Background

Prior to 1961, Oklahoma operated a constellation of eight large, congregate care juvenile institutions with a total bed capacity of approximately 1,200. *De jure* racial segregation was enforced at these facilities until 1969. Although the institutions were designated as training schools and children's homes for delinquent and dependent children, respectively, youthful offenders and dependent

INSIDE . . .

children were routinely commingled.

Early deposition testimony in *Terry D. v. Rader* confirmed that these pre-1961 institutions were custodial warehouses for children where abuse and neglect were severe and common.

The institutions acted with complete autonomy, developing their own policies and maintaining final authority over release decisions.

In 1961, the operation of the state's juvenile institutions was transferred to the Department of Public Welfare (DPW)—now the Department of Human Services (DHS). This transfer was made necessary by the unique funding mechanism of DPW. By state constitutional law, DPW was funded by earmarking the state sales tax. While state revenues from other sources were declining, state sales tax collections were soaring. Since DPW did not have to compete in the legislative appropriations process, it was able to evade legislative scrutiny and control.

Child advocates hailed the transfer of these institutions to DPW as progressive. Indeed, it signalled the state's first effort to bring professional child care to these facilities. Unfortunately, there was no break with the past in child care philosophy—the institutions remained the primary service delivery system for troubled youth. Rather than redirect resources into less restrictive community services, DPW committed millions of dollars to a massive institutional rebuilding campaign. The forces preventing real reform were institutional jobs, the interests of local suppliers, and the political power attendant to these interests.

Over the next ten years, conditions at the state children's institutions worsened. DHS administration believed its rebuilding campaign had solved the institutional problems, and therefore took a hands-off attitude toward institutional administration. Notwithstanding the addition of social work staff to the institutions, the "old guard" was still firmly in control and able to exercise its historical autonomy due to the lack of agency and legislative oversight.

During the 1970s, a small contingent of professionals began to examine the state's service delivery system for children. A study entitled "Youth in Trouble—A Shared Concern" was completed in 1971 and designated as the blueprint for children's services during the decade. It strongly recommended the expansion of community-based programs, a recommendation largely ignored by DHS. A second study completed by the Oklahoma League of Women Voters in 1977 echoed many of the earlier recommendations.

Legal Aid of Western Oklahoma

**Girls who broke rules were locked in these 8′ x 5 ′ cells for periods ranging from one to 20 days.**

Legal Aid of Western Oklahoma (LAWO), as a result of these studies and its own disturbing litigative experiences in juvenile court, undertook the representation of institutionalized youth in 1977. This led to a nine-month investigation of the state's juvenile institutions, revealing shocking abuses: children held in barren solitary confinement cells for 30 days; widespread physical abuse; excessive shackling and restraint, including a bizarre practice known as hog-tying (tying feet and hands behind the back and joining them with a chain); the use of tranquilizers for punishment (children were also sedated for staff convenience); the proliferation of illegal drugs brought in by staff; and sexual encounters between children and staff. It was later learned that the staff at one institution were involved in a prostitution ring using girls from the institution. Well over 50% of the incarcerated youth had been convicted of no offense, but were abused, neglected, runaway, and truant children.

After DHS failed to respond meaningfully to these reports of abuses, litigation was viewed as the only possible course. On January 4, 1978, *Terry D. v. Rader* was filed in the United States District Court in Oklahoma City.

## The Litigation

From the outset, the litigation was bitter. Every inch of ground was contested. The defendants fought class certification, our access to children, the use of experts, and virtually every discovery request. In its order awarding attorneys' fees, the district court would later comment that "plaintiffs were confronted with the largest, most expansive bureaucracy in the state which, under the guidance of its then director, had assumed the vestiges of an administrative empire," and that "much of the delay, conflict and concomitant expense was occasioned by defendants' intransigence."

At the same time that the state was engaging in hand-to-hand combat, it was making coerced efforts to clean up what it perceived to be the most egregious abuses. The state's strategy quickly

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**Editor: Jan Elvin**
**Editorial Asst.: Betsy Bernat**

**Alvin J. Bronstein, Executive Director**
**The National Prison Project of the American Civil Liberties Union Foundation**
**1616 P Street, N.W.**
**Washington, D.C. 20036**
**(202) 331-0500**

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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became clear—meaningful systemic change through federal court intervention could be averted if trial could be delayed long enough to correct the most serious abuses.

This strategy pervaded the entire case. When plaintiffs moved for preliminary relief from solitary confinement practices at the Helena State School, defendants sought to avoid a hearing by bulldozing the confinement building. When plaintiffs again sought a preliminary injunction to stop abusive restraint practices, the defendants responded with expansive new policies curtailing those practices.

Although plaintiffs were never able to secure an evidentiary hearing, defendants' responses to plaintiffs' claims ultimately worked to plaintiffs' advantage by actually securing positive relief from the most abusive practices during the pendency of the litigation.

When the defendants realized that their strategy of "delay and correct" was beginning to crumble under what the district court termed "the relentless pressure" of plaintiffs' efforts, they embarked on a new strategy that sought to publicly discredit plaintiffs' counsel. Using the media, the agency mounted vicious and unfounded attacks on counsel's conduct. Welfare director Lloyd Rader used his enormous political power to prompt an investigation of the activities of plaintiffs' counsel by the United States Justice Department. The defendants' attacks were all found to be meritless.

After three years of litigation, several realities emerged. First, the state was unwilling to undertake meaningful systemic change to redirect resources from institutional to community-based services. Second, DHS was learning that it could not control institutional abuses within the current constellation of facilities. Third, it seemed unlikely that the federal court would order the closure of any juvenile institutions, which was one of plaintiffs' primary remedial goals.

To meet these realities, plaintiffs decided that maximum relief would be obtained from a consent order, and that such an order would only be possible if the full litany of institutional abuses could be made the responsibility of welfare director Rader. If Rader could be shown unable to control these abuses, then new directions in youth services might be successfully negotiated as an alternative to a costly and embarrassing trial.

Plaintiffs exploited this option by conducting extensive depositions beginning with line level workers and progressing through the ranks of staff to Rader himself. Each level of staff tended to blame the next higher level for the inadequacies and abuses of the system. Rader's two-day deposition was perhaps the ultimate confrontation. Time after time, Rader condemned the practices plaintiffs had documented as child abuse; time after time, Rader denied such practices now existed; and time after time, Rader was forced to recant his testimony when confronted with substantiating documentation. Less than a month later, negotiations began at defendants' insistence.

A consent order was hammered out over the next five months. All abusive practices were to be eliminated, status offenders would be deinstitutionalized, community-based services would be developed, individualized treatment programs would be instituted, and at least three more institutions would be closed (one facility had been closed earlier in the litigation).

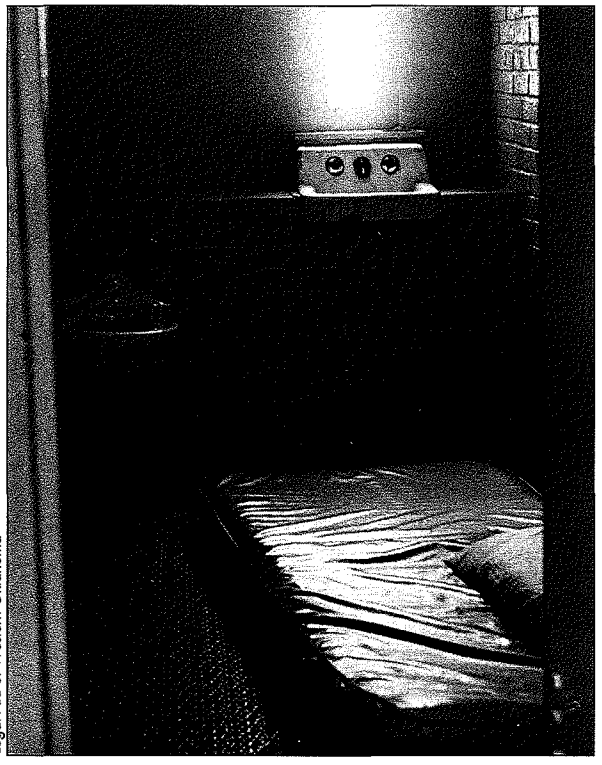
Despite the best efforts of plaintiffs' counsel to control the course of the events that followed, there were times when those events simply assumed a life of their own.

Just weeks after the parties had concluded five months of very difficult negotiations, but before the court had signed the resulting consent order, the Gannett News Service published a nationwide seven-part newspaper series proclaiming "child abuse hidden by state cover-up." The Oklahoma legislature, which had largely ignored the litigation, now took particular interest. After reviewing the proposed consent order, however, legislative leaders felt the order provided too much relief and instructed the state attorney general to withdraw from the agreement.

While the district court was still considering approval of the consent order, the Juvenile Justice Subcommittee of the U.S. Senate Judiciary Committee commenced hearings to inquire into Oklahoma's institutional abuses.

In the midst of all this activity, the district court refused to approve the consent order. The court reasoned that implementation of the order was improbable with the executive and legislative branches of state government in disagreement over its terms. In other words, the children would once again be penalized by the ineptitude of the state.

That summer, the Oklahoma legislature enacted sweeping juvenile justice reform legislation that incorporated much of the relief sought by plaintiffs. Thereafter, Rader announced his resignation. Even though no consent order had yet been approved, the next two years saw a flurry of activity in juvenile justice. Four more institutions were closed, reducing bed capacity from over 1,000 down to 250; group homes and foster homes for adolescents were developed; and the use of abusive practices all but disappeared from the remaining state institutions.



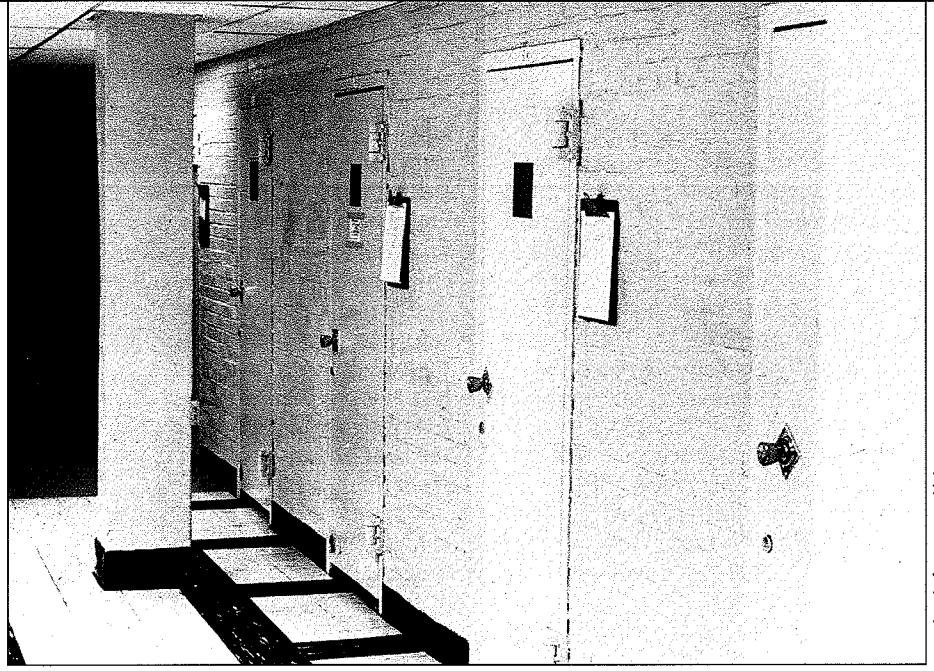
Legal Aid of Western Oklahoma

**A view into a Dodge House detention cell at the Helena State Training School. Children slept on mattresses on the floor.**

In May 1984, after two years of ongoing negotiations, the district court finally approved a consent order that was substantially the same as the one it had rejected two years earlier.

## Post-settlement

Once the consent order was approved, everyone involved in the juvenile justice system breathed a collective sigh of relief—the nightmare was over. As institutional litigators are well aware, however, the nightmare was only beginning.



Legal Aid of Western Oklahoma

**Dodge House detention cells held boys for up to 30 days, although sometimes even longer. Dodge House was later razed to the ground.**

Although the state had closed institutions and had made great strides toward eliminating institutional abuses, it was never really able to turn the corner on redirecting resources into community-based programs for youth. After the economic excesses of Oklahoma's oil boom had passed, the state faced the hard realities of recession. The money saved from closing four institutions never made its way back into children's services. Funding for children's programs was reduced at the time it most needed to be increased.

In addition, Lloyd Rader's successors had failed to bring new blood to the agency's division for youth. Thus, those who were most invested in the old institutional programs were still in control of youth services. Those individuals have to this day been largely unable to even conceptualize a community-based system of child care.

One of the state's biggest post-consent order failings has been its inability to develop programs for status offender youth. It is true that the problems of drugs and youth violence have posed challenging new issues for juvenile justice professionals. While the debate over the need for more secure detention and training school beds has been rekindled, it is what to do with emotionally damaged and incorrigible children that has sparked the greatest dilemma.

When the state institutions were closed to abused, neglected, and runaway youth, the state was ill-equipped to respond to the needs of these youngsters in the community setting. Many of these children suffered from emotional disturbance.

The same economy that prevented any investment of new funding for program development gave rise to a new market—in-patient mental health and drug treatment programs for youth. Hospitals suffering from declining occupancy rates found that there were substantial sums of money to be made in mental health care for kids.

The state of Oklahoma, like many other states, sat by and watched as judges rushed to relabel chronic petty offenders and incorrigible youth as mentally ill. In-patient mental health commitments of children in Oklahoma rose from 75 in Fiscal Year 1982 to 375 in FY 1989. The cost for this care: a staggering $25 million in FY 1989 and growing.

Despite these enormous costs, there is little or no evidence that in-patient mental health care is of any appreciable benefit to most of the children. Many of these children languish for months and even years in mental health institutions that are equally, if not as overtly, abusive as the state institutions from which they were removed.

LAWO went back to court for the appointment of an advisory panel of juvenile justice experts to study and identify the specific community-based program needs of Oklahoma's adolescent youth. The experts were to examine whether or not the state needed any additional detention or training school facilities. The district court has granted plaintiffs' request for a study panel to be funded by the defendants, and plaintiffs' counsel will seek to have the findings and recommendations of the panel incorporated into a court-ordered implementation plan.

LAWO has worked with DHS and the legislature to formulate strategies to curtail the number of in-patient mental health commitments.

Finally, LAWO has sought to enforce the private provider terms of the consent order against the mental health institutions, requiring that the state funding of private care providers be contingent upon compliance with the order. The private provider clause has been very effective in extending an enforceable minimum standard of child care into the private sector.

Where, then, is Oklahoma in its development of a community care system for youth? Has the *Terry D.* litigation been successful or has it merely created new problems to replace the old ones?

The consensus among DHS personnel, legislators, and juvenile justice professionals is that the litigation was an essential chapter in the development of Oklahoma's child care system.

Although the debate over the need for more secure beds rages, it seems that the book has been closed on the large, congregate care institutions of the past. Even as judges, legislators, and law enforcement personnel advocate for more beds, they speak in terms of 20-bed facilities.

The level of institutional scrutiny that now exists will continue to keep institutional abuses relatively in check. Indeed, it is the heightened level of visibility and public scrutiny of the institutions that may be one of the greatest achievements of the *Terry D.* litigation. What was once hidden from view is now very much in the public eye.

Problems of over-institutionalization remain, and the community-based system of care envisioned in the litigation lags in development. All in all, however, the *Terry D.* litigation represents a quantum leap forward for child custody in Oklahoma.

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*See,* Ed Koren, "Dramatic Change in Oklahoma Juvenile Justice System," *NPP JOURNAL,* Number 2, Winter 1984, pp. 3-4.

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*Steven A. Novick is the deputy director of Legal Aid of Western Oklahoma. He is the 1982 recipient of the Oklahoma Civil Liberties Union's Angie Debo Civil Liberties Award. In 1986, he received the prestigious Durfee Award which is granted for "enhancing human dignity through the law."*

# ACLU's Demands Trigger Change in Hawaii's Juvenile System

## *Youth Shifted to Community Programs*

**BY DAN MACALLAIR**

After decades of neglect and abuse in their juvenile training school, the state of Hawaii has initiated steps to restructure and deinstitutionalize most of its young population. This action followed a series of scathing reports on conditions at the youth facility which led to the intervention of the American Civil Liberties Union's (ACLU) National Prison Project together with its Hawaii affiliate. Following a two-year investigation, ACLU attorneys informed state policy-makers that a lawsuit was imminent if immediate action was not taken to improve the situation. Acting under the advice and pressure of the ACLU, the Hawaii Department of Corrections (DOC) contracted with the National Center on Institutions and Alternatives (NCIA) to establish the Hawaii Youth Advocacy Project in July 1989.

Funded by grants from the Edna McConnell Clark Foundation and the Public Welfare Foundation, the DOC formed the Youth Advocacy Project in response to the ACLU's demand for drastic reductions in the number of youth unnecessarily held in the antiquated Hawaii Youth Correctional Facility (HYCF). Its purpose was to offer an alternative to the state's plan to build a new 150-bed training school by developing and implementing release plans for youth who could be managed in community settings—90% of the HYCF population, by some estimates. If successful, the project would bolster the position of advocates for expansion of community-based programming and would demonstrate the potential effectiveness of outside agencies in moving the state toward deinstitutionalization.

ACLU and state policy-makers recognized, in deciding to contract with NCIA, that entrenched correctional bureaucracies are unlikely to implement meaningful and long-term reductions in institutional populations. For instance, the department's staff at the HYCF had long been unable to design and develop new policies that would expedite community readjustment and speed up the release process.

Despite a number of highly critical reports and studies that found conditions at the facility to be destructive and inhumane, little had changed in the 30 years since its opening. HYCF staff relied almost solely on incapacitation, and youth were given little preparation for returning to the community. For example, at the time the project began there were only seven youths on parole, despite the presence of three full-time parole officers. In 1987, juvenile justice consultant and researcher Paul DeMuro[1] had observed an inexplicable reluctance on the part of the HYCF parole staff to use the parole option and provide adequate aftercare planning and community follow-up. Instead, the more common practice was to retain wards until their 18th birthday and then simply release them. One HYCF staff member recalled a recent case of a girl who turned 18 and was released from the facility with 45 cents, a bag lunch, and virtually no place to go.

*"Warehousing is, of course, the easiest of all strategies."*

Hawaii's legislative auditor decried this policy of warehousing youth at the HYCF in a 1986 report. He wrote:

> *Warehousing is, of course, the easiest of all strategies. As the line of least resistance, it takes no extra effort and forces no one to stand up for change. It simply allows things to go on, largely as they have been, each agent (even the most conscientious of state employees) restricted to a mere segment of what is in reality an extremely complex, interrelated, and hence difficult range of tasks and difficulties (Tanimura, p.17).*[2]

As a result of this situation and the insistence of the ACLU for immediate and decisive change, the Department of Corrections contracted with NCIA to establish the Hawaii Youth Advocacy Project.

When the project began in July 1989, NCIA's strategy was to target those youth who were considered by institution staff to be the more difficult management problems. If the project was successful with this population then it would certainly be applicable to the more tractable population, strengthening the argument for further deinstitutionalization.

Targeted youth were assigned a case manager who was responsible for designing and implementing an individualized release plan specific to the needs of the youth. Each plan included provisions for housing, school, individual counseling, drug treatment, recreation, family therapy, employment, and third-party supervision. Prior to release the staff person tried to foster a close and trusting relationship with the youth. This was vital since the project's success depended on the youth's willingness to call upon the case manager when the inevitable crisis arose. Case managers assisted youths in developing positive social support networks and helped them secure community resources and services. Case managers had to establish themselves as advocates and be recognized as supportive by the youth and his/her family.

As a direct result of this program, the population of the HYCF has declined every month that the project has been in operation. For example, in July 1989 the institution held 75 youths. By early December, the final month of the project, the population had fallen to 32. According to the HYCF administrator, who had been employed at the facility for 25 years, this was an all-time low. In addition, an expanded array of community programs now serves HYCF youth, including residential drug treatment, in-home family therapy, out-patient counseling, and therapeutic foster care. Of the 27 youth released during the six-month period, three were rearrested. One arrest was for "drunk in public" and another was a theft charge that was dropped on the recommendation of the prosecutor. The only arrest that resulted in reincarceration was for the theft of a Moped. That youth was subsequently placed in a residential drug treatment program. Due to its success, the program was moved over to the John Howard Association, a local criminal justice advocacy agency, and extended until July 1990. At that time the state legislature is expected to fund it on a permanent basis.

The Hawaii Youth Advocacy Project is an example of how private agencies can be used by correctional reformers to further organizational change. The role of outside agencies in correctional reform rests on the following assumptions:

1. Existing bureaucracies are unable to

reform themselves to any significant degree because of their natural reliance on past practices and procedures which dictate professional attitudes and philosophies. In addition, correctional reforms foster institutional resistance because they often invalidate many accepted professional beliefs and standards.

2. The organizational structure of correctional agencies discourages innovation and creativity. This is partly attributable to civil service protections and union restrictions that render organizational structures and job assignments extremely difficult to alter. In contrast, a contracted program allows for greater flexibility because it can be more easily redirected or dismantled based on the momentary need. Also, the outside agency is not vested in the status quo and therefore may offer a greater commitment to change.

3. Private sector agencies can provide a vehicle for swift and immediate action. By placing the essential tasks of organizational reform with outside agencies, the administrator can reduce the impact of institutional sabotage and resistance on program implementation.

4. Perhaps the most vital assistance that the outside agency provides is essential expertise and experience that may not exist in a tradition-bound correctional bureaucracy. Community-based correctional systems are founded on radically different concepts and practices than institution-based systems. For example, in recent testimony before the Hawaii State Legislature, the director of the Department of Corrections stated bluntly that he was unfamiliar with the operation of community-based programs.

With the increase in juvenile incarceration during the 1980s, the need for reformers to devise strategies to reverse this trend is more urgent than ever. Reformers must develop methods that can effectively confront and overcome those vested interests which seek to preserve the present system. The Hawaii Youth Advocacy Project is an example of how an outside agency can foster and ease juvenile correctional reform without building more institutions. Through the use of community-based programs, it has demonstrated that there are viable alternatives to incarceration, and it has provided a further basis for the dismantling of Hawaii's institution-based system. As a result of this experience, other states and jurisdictions should examine the Hawaii Youth Advocacy Project as a possible means for reducing their institutional populations.

[1] Paul DeMuro. "Hawaii's Juvenile Justice System: Opportunity for Reform," Honolulu, HI: Hawaii Department of Corrections (1987).

[2] Clinton T. Tanimura. Management Audit of the Hawaii Youth Correctional Facility. (Report No. 86-15). Honolulu, HI: Legislative Auditor for the State of Hawaii (1986).

For further information, see, Naneen Karraker, Daniel Macallair, Vincent Schiraldi. "Public Safety with Care: A Model Juvenile Justice System for Hawaii," San Francisco, CA: National Center on Institutions and Alternatives (1988).

*Dan Macallair is the former head of NCIA's Hawaii Youth Advocacy Project.*

# Kids in Adult Jails: Still a Problem in 1990

**BY JAMES BELL**

Since the early 1960s, advocates for children have called for removal of all children from adult jails. In 1974, as a result of these efforts, Congress enacted the Juvenile Justice and Delinquency Prevention Act (Juvenile Justice Act),[1] which severely limited instances in which children could be placed in adult jails. Yet, more than 15 years after the passage of this statute children are still being held in jails in unacceptable numbers nationwide.[2] Why is the removal of children from adult jails taking so long, and how successful have advocacy efforts and litigation in some jurisdictions been?

In order to properly analyze the practice of using adult jails for detention of children, it is critical to look at the social and legal policies which drive this practice. Judges, sheriffs and prosecutors often maintain that placing children in adult jails gets their attention, teaches them a lesson, and may act as a deterrent to future delinquent behavior.

Ensuring community safety and protecting youth from themselves are among the legal justifications given. Inherent in these legal justifications is the idea that placing a child in an adult jail is better than no placement at all. Indeed, in many rural areas adult jails are seen as viable places for detention because juvenile detention facilities are far away or non-existent.

Estimates vary regarding the actual number of children being detained in adult jails annually. In 1974, Rosemary Sarri conducted one of the first studies on this issue and estimated the numbers to be approximately 500,000.[3] Five years later another study estimated the numbers at about 120,000.[4] A 1985 Department of Justice study estimated that approximately 479,000 children were detained in adult jails annually.[5] Of this number, only 10% were being held for serious offenses.[6] Incredibly, approximately 20% are held for behavior which is not criminal at all.[7] These figures include some of the over one million runaway and homeless children. Additionally, 10% of children held in jails are under 13 years of age.

These statistics clearly demonstrate that the removal of children from adult jails will not happen by chance. By using a combination of legal and social policy arguments, advocates have been able to reduce, and in some cases eliminate, the numbers of children being subjected to the abusive environments of adult jails.

## Legal Background

The first case to directly proscribe the practice of holding children in adult jails was *D.B. v. Tewksbury*.[8] In *Tewksbury*, attorneys challenged the constitutionality of youth detention in the St. Helen's Jail in Columbia County, Oregon.

Specifically, they claimed that defendants failed to provide them with adequate exercise, education, recreation, medical care, visits, and adequate nutrition. Plaintiffs also claimed that defendants placed intoxicated and drugged children in isolation cells without medical attention. In addition, plaintiffs challenged the level of staffing at the facility.

In response, defendants contended that the jail was constitutional and that state law allowed holding children with adults. Indeed, in espousing the social policy arguments often used to justify detention, the sheriff responsible for the jail stated, "Detention is punishment and I try to make it as unappetizing as possible. The last place a child wants to be."[9]

The district court, in holding that the Columbia County Jail conditions violated the children's constitutional rights, said:

*The supervisors at jails are guards—not guardians. Jails hold convicted criminals and adults charged with crimes. Jails are prisons with social stigmas. Children identify with their surroundings. A jail is not a place where a truly concerned natural parent would lodge his or her child for care and guidance. A jail is not a place where the state can constitutionally lodge its children under the guise of* parens patriae.

Thus, even if a state statute allows the detention of children in adult jails, advocates may challenge the conditions of confinement as violative of the Constitution with *Tewksbury* as support for such a challenge.

### Efforts in Two States: Alabama and Indiana

A look at Alabama illustrates how courts, legislatures, and advocacy groups can effect institutional change by using legal and social policy arguments.

In the northwestern corner of Alabama, some counties routinely detained children in adult jails. Not only were children placed in jail while awaiting a hearing before the juvenile court judge, some were actually *sentenced* to the jail as punishment for misbehavior. In the minds of the judges and sheriffs, two factors made such treatment appropriate. First, state statutes allowed children to be held in adult jails only if the jail was licensed to hold children, if youths were physically separated from adults, and if no other placement existed. Second, only Alabama's Department of Youth Services could license an adult jail to hold children.

The Youth Law Center, a San Francisco-based legal advocacy center specializing in juvenile justice issues, filed suit challenging the constitutionality of this practice. Lawsuits are a critical weapon for advocates because the underlying policy issues are never reached unless officials feel some pressure to change their practices. A lawsuit can force an official or a system to examine these practices and determine if it is important enough for them to spend the money to litigate.

The legal challenges in the Alabama litigation were premised upon the U.S. Constitution and the Juvenile Justice Act.

After *Tewksbury*, the second challenge brought against Alabama's practice of detaining children in adult jails relied on the Juvenile Justice Act. The Act requires that states remove children from adult jails and lock-ups in return for federal funding designed to assist states in finding alternatives. Since the Act's passage, many states have received these funds, yet have not significantly decreased the number of children in their jails.

Advocates in Iowa brought suit on behalf of a young man detained in an adult jail, claiming both a violation of the Act and plaintiff's constitutional rights.[10] Specifically, the plaintiff alleged that the state had done nothing to comply with the mandates of the Act yet continued to accept funds under the statute.

The district court agreed with the plaintiff and issued an injunction prohibiting the state from detaining any more children until they submitted a plan explaining what measures would be taken to remove children from adult jails. In support of its finding, the court noted:

*Whether this Court likes it or not, Congress has consistently valued*

## The following are significant cases involving the rights of juveniles:

### Due Process

*Application of Gault*, 387 U.S. 1 (1967), holding that the Fourteenth Amendment to the Constitution requires that when a juvenile is charged with a delinquent act which could result in some substantial deprivation of liberty, the state must give adequate notice to parents and the youth, provide counsel for indigent youth, afford the youth an opportunity to cross-examine witnesses and inform the youth of their right against self-incrimination.

*In Re Winship*, 397 U.S. 358 (1970), holding that the standard of proof needed for a finding of delinquency was "beyond a reasonable doubt."

*McKiever v. Pennsylvania*, 403 U.S. 528 (1971), holding that juveniles accused of committing a delinquent act do not have a right to a jury.

*Kent v. U.S.*, 383 U.S. 541 (1966), holding that there must be a hearing and written findings justifying transferring a juvenile to adult court.

*Stanford v. Kentucky and Missouri v. Wilkins*, 109 S.Ct. 2969 (1989), holding that it does not *per se* violate the Eighth Amendment prohibition against cruel and unusual punishment to impose the death penalty on juveniles who commit a capital crime at age 16 or above.

### Detention

*D.B. v. Tewksbury*, 545 F.Supp. 896 (D. Ore. 1982), holding that children detained in adult jails are *per se* subjected to unconstitutional conditions of confinement and cannot be given the rehabilitative services inherent in the juvenile justice system.

*Schall v. Martin*, 467 U.S. 253 (1984), holding that a child charged with a delinquent offense may be detained prior to a finding of probable cause if the juvenile court judge reasonably believes the child will commit another crime before returning to court.

*Smith v. Wade*, 461 U.S. 30 (1983), holding that punitive damages can be recovered from security staff when a security staff member deliberately encourages one detainee to assault another, and then does nothing about the assault once it occurs.

*Inmates of Boys Training School v. Southworth*, No. 4529 (D.R.I., consent decree entered 1973)

*Terry D. v. Rader*, Civ. No. 78-004-T (W.D. Okla. 1982)

*Robert K. v. Bell*, Civ. No. 83-287-0 (D.S.C. 1984)

*F.E. v. Hensley*, Civ. No. 73 CV 43-W-1 (W.D. Mo. 1978). Cases that established rights for children in detention to adequate medical care, nutrition, education, exercise and recreation.

*Youngberg v. Romeo*, 457 U.S. 307 (1982), Case that established the right of detained children to be free from the arbitrary and punitive use of shackles.

*Lollis v. New York State Dept. of Social Services*, 322 F.Supp. 473 (S.D.N.Y. 1970)

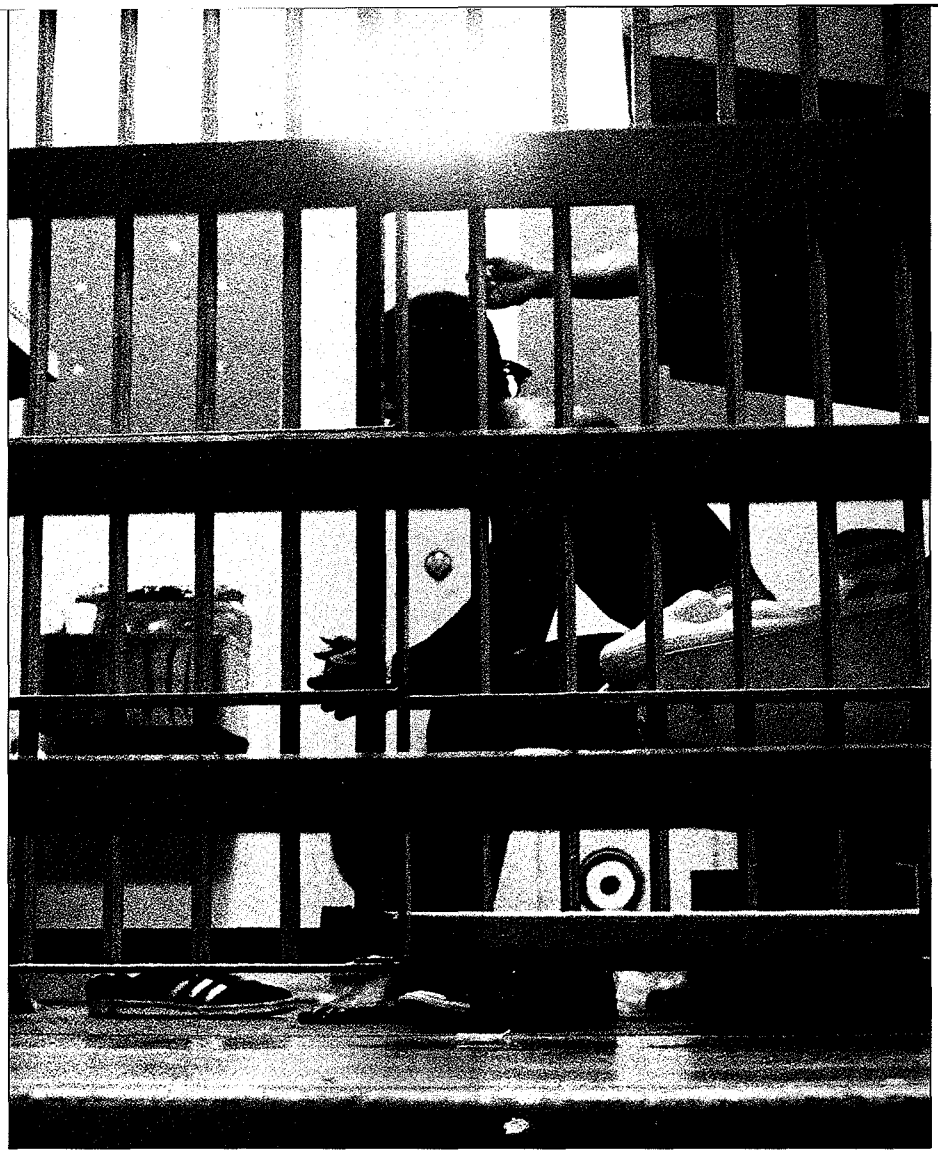
*H.C. v. Jarrad*, 786 F.2d 1080 (11th Cir. 1986). Cases that established the right of detained children to be free from arbitrary and punitive use of isolation.

### Child Protection

*DeShaney v. Winnebago County Dept. of Social Services*, 109 S.Ct. 998 (1989), holding that Department of Social Services' social workers could not be held liable under 42 U.S.C. §1983 for the permanent brain damage suffered by the child plaintiff, as a result of severe beatings by the child's father, even though the Department social workers knew the child was being severely beaten.

### Child Victim Witnesses

*Coy v. Iowa*, 108 S.Ct. 2798 (1988), holding that defendant's Sixth Amendment right to confrontation was violated when children who were victims of sexual assault testified about defendant's action from behind a screen which blocked defendant from view during testimony.



L.A. Times Photo

**In 1977, minority youth represented 45% of those in custody. Today, according to recent studies, the number is close to 55%.**

*the removal of juveniles from adult jails over administrative, protective and penological advantages of placing them. It makes little difference at this stage that these values were embodied in a funding program rather than a nationwide prohibition. If the state did not share Congress' priorities or did not wish to implement them, it could have merely refused to seek OJJDP funding.*[11]

The *Tewksbury* and *Hendrickson* decisions have been potent legal weapons used against the state of Alabama in challenging its practice of jailing children.

By using many of the same advocacy tactics that were successful in Alabama, advocates in Indiana persuaded their Supreme Court in March 1989 to establish an innovative project to address the issue of children in jail. The project requires local public defenders to notify the juvenile court judges whenever a child is placed in an adult jail, and promises that a writ of *habeas corpus* will be filed unless the child is placed in an acceptable alternative. The state Public Defender reports that the project has reduced the incidence of children in adult jails by 60 to 80%.

Social policy arguments have also been effective when advocating for jail removal. Jails are inappropriate for children for a myriad of reasons. Many sheriffs and jailers do not want children in their facilities because there is nothing for the children to do during the day. They become bored and often request attention or destroy property. There is also the possibility the children will be physically and/or sexually abused at the hands of the jailers or other inmates.

In order to protect children while in the jail, jailers often isolate them from the general population. This frequently results in increased fear and depression for the child, as evidenced by suicide rates that are eight times higher for juveniles in adult jails than in juvenile detention centers. Further, many children exposed to a jail environment view themselves as criminals and begin to act accordingly, increasing the likelihood of reincarceration.

Finally, it is simply not cost-effective to incarcerate children in adult jails. Studies show that the use of alternatives to incarceration are less expensive. Among other things, holding children in adult jails requires additional insurance coverage.

The above-mentioned legal and social policy arguments are powerful and not likely to be ignored by a jurisdiction that routinely jails children. In Alabama, the Department of Youth Service has changed its policy and refuses to license any adult jail in the state to detain children.

While there are many problems in corrections that require time and attention, the problems of children in our adult jails should never be far away from our consciousness. We at the Youth Law Center will always be vigilant in redressing this most basic violation of children's rights. We urge those who encounter this problem to challenge it aggressively in order to force states to totally remove children from adult jails. Alabama and Indiana are examples of how this can become a reality.

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[1]42 U.S.C. § 5601 et seq.

[2]*See,* Russ Immarigeon, "Despite New Laws, Juveniles Still Locked in Adult Jails," *NPP JOURNAL,* Number 17, Fall 1988, pp. 21-24.

[3]Rosemary C. Sarri. *Under Lock and Key: Juveniles in Jails and Detention.* Ann Arbor, Michigan: National Assessment of Juvenile Corrections, University of Michigan. (1974).

[4]John E. Poulin, John L. Levitt, Thomas M. Young, Donnell M. Pappenfort. *Juveniles in Detention Centers and Jails.* Chicago, Illinois: National Center for the Assessment of Alternatives to Juvenile Justice Processing; The School of Social Service Administration; University of Chicago.

[5]U.S. Department of Justice; Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Adult Jails and Lockups, It's Your Move.* (February 1985).

[6]Id.

[7]Id.

[8]545 F. Supp. 896 (D. Ore. 1982).

[9]Id at 903.

[10]*Hendrickson v. Griggs,* 672 F.Supp 1126 (N.D. Iowa 1987).

[11]*Id.* at 1140.

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*James Bell is a staff attorney with the Youth Law Center in San Francisco, a legal advocacy center specializing in juvenile justice issues.*

THE NATIONAL PRISON PROJECT

# Case Law Report

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BY JOHN BOSTON

## Highlights of Most Important Cases

### Medical Care/Mental Health Care

The Eighth Amendment forbids "deliberate indifference" to prisoners' serious medical needs. Most often, that phrase has been construed to mean the failure to get a sick or injured prisoner to a medical practitioner capable of evaluating his or her condition, or failure to carry out the instructions of that practitioner. Incompetence, bad judgment or neglect by doctors or nurses has generally been viewed as mere malpractice or negligence, not rising to a constitutional level.

Recent cases suggest that the definition of "deliberate indifference" may be subtly expanding and that courts may be more willing to scrutinize the actions of medical personnel under the Eighth Amendment. In *Ortiz v. City of Imperial*, 884 F.2d 1312 (9th Cir. 1989), a prisoner fell and hit his head. When he began displaying symptoms of a serious head injury, jail personnel did not take him to an emergency room; they called a doctor who prescribed sedatives (contraindicated for persons with head injuries) over the telephone. The prisoner later died of a subdural hematoma related to a skull fracture.

The court held that the claim could not be dismissed as "mere malpractice." The prisoner's estate had raised factual issues entitling it to a trial under the deliberate indifference standard. "Because the nurses and Dr. Reid knew of Ortiz's head injury but disregarded evidence of complications to which they had been specifically alerted and, without an examination, prescribed sedatives that were contraindicated, we cannot say as a matter of law they were not deliberately indifferent...." (1314)

These decisions are consistent with a series of recent cases in which bad judgment or bad treatment by medical personnel have been held to state an Eighth Amendment claim. As one court put it, treatment "so grossly incompetent, inadequate, or excessive as to shock the conscience" or "so inappropriate as to *evidence* intentional maltreatment" (emphasis supplied) violates the Eighth Amendment. It added, "Whether an instance of medical misdiagnosis resulted from deliberate indifference or negligence is a factual question requiring exploration by expert witnesses." *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986). What this means in practice is that if medical personnel make a bad mistake and someone is hurt badly or dies, the case will probably go to a federal court jury and not get dismissed before trial. *See also, Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990) (arbitrary discontinuance of anti-depressants leading to suicide); *Carswell v. Bay County*, 854 F.2d 454 (11th Cir. 1988) (treatment of diabetic's catastrophic weight loss with laxatives and pain-killers); *Wood v. Sunn*, 865 F.2d 982 (9th Cir. 1988) (disregard of complaints because defendants assumed the plaintiff's pain was psychological); *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989) (arbitrary discontinuance of psychotropic medication leading to patient's blinding and castrating himself); *Medcalf v. State of Kansas*, 626 F.Supp. 1179 (D.Kan. 1986) (failure to order tests suggested by "the elemental and classic symptoms of a brain tumor").

Bad judgment and bad treatment may also cross the line from malpractice to deliberate indifference if they happen repeatedly. This point was made explicitly in *Langley v. Coughlin*, 715 F.Supp. 522 (S.D.N.Y. 1988), a case about allegedly inadequate psychiatric treatment of punitive segregation inmates in a women's prison. The court held that the plaintiffs were entitled to a trial under the deliberate indifference standard, citing evidence of "repeated and systemic failures" including "the failure to take a complete medical history, failure to keep adequate records, failure to take into account the inmate's prior psychiatric history, failure to see inmates suffering from seeming mental crises, failure to properly diagnose mental conditions, failure to prescribe proper medication and prescription of inappropriate medication, failure to provide any meaningful treatment other than medication, failure to justify decisions as to diagnoses or treatment or termination of treatment, and seemingly cavalier refusals to consider that an inmate's bizarre behavior could conceivably be the result of a genuine mental disorder, even though in some cases [mental health staff] had previously diagnosed the inmate as suffering from such a disorder." (540) Failures of these kinds have often been dismissed as mere negligence in prior cases. *See, e.g., Chambers v. Ingram*, 858 F.2d 351 (7th Cir. 1988) (inadequate initial examination, inadequate records, improper medication). But the *Langley* court held that "even if none of the numerous individual failings themselves established a violation of constitutional rights on the basis of the prison officials' indifference, the *pattern of consistent and repeated failures of this sort* over an extended period of time would permit a trier of fact to conclude that the responsible officials were in fact deliberately indifferent." (541; emphasis supplied)[1]

If deliberate indifference is found on the basis of such widespread and repeated deficiencies, it is likely that supervisory officials will be held liable, instead of or in addition to the (mal)practitioners involved. In *Langley*, the court held that the plaintiffs were entitled to go to trial against the psychiatric unit chief, the warden, the deputy warden, and the commissioner of the Department of Correctional Services. After the Court of Appeals dismissed the defendants' appeal from the denial of qualified immunity, 888 F.2d 252 (2d Cir. 1989), they settled for a payment of almost one million dollars in damages and attorneys' fees rather than risk a trial, subject to trial court approval. Previously, the injunctive claims in the case had been settled with an extensive consent judgment and several hundred thousand dollars in attorneys' fees. *See also, Greason v. Kemp*, 891 F.2d 829, 857 (11th Cir. 1990) (prison's clinical director could be found liable for arbitrary discontinuation of anti-depressants based on a prior similar case involving the same practitioner).

Deliberate indifference is also taking on a broader meaning in injunctive cases. It has long been clear that deliberate indifference is established by "systemic deficiencies in staffing, facilities, or procedures [which] make unnecessary suffering inevitable." *Todaro v. Ward*, 565 F.2d 48, 52 (2nd Cir. 1977), quoting *Bishop v. Stoneman*, 508 F.2d 1224 (2nd Cir. 1974). Courts are gaining a better understanding of what is administratively necessary to operate a system of prison medical care, especially in large institutions, and this understanding is reflected in their decisions. Thus, in *Tillery v. Owens*, 719 F.Supp. 1256 (W.D.Pa. 1989), prison officials were directed to employ not only doctors and nurses but also a full-time medical director to deal with quality assurance, record-keeping, evaluation of services, protocols, in-service education, and budgetary matters. In *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 867 (D.D.C. 1989), the court noted the lack of a follow-up system for

treating chronic conditions as part of its finding of a constitutional violation. Both of these opinions, and other recent decisions, also acknowledge the importance of an adequate system of medical record-keeping. *See Fambro v. Fulton County, Ga.*, 713 F.Supp. 1426, 1429-31 (N.D.Ga. 1989); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1055 (8th Cir. 1989) (damage case).

## Rights of Staff

Several recent appellate decisions have explored prison officials' obligation to safeguard civilians from violent acts committed by prisoners. In *De Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989), several jail guards were injured or killed during an escape attempt. They (or their estates) alleged that their injuries were caused by the deliberate indifference of the sheriff and the county. The court cited the recent Supreme Court decision in *DeShaney v. Winnebago County Department of Social Services*, ____ *U.S.* ____, 109 S.Ct. 998 (1989), which held that county child welfare officials had no constitutional obligation to protect a child from his father's violent acts even if they were on notice of the danger. Such duties on the part of the state arise only from "limitations which it has imposed on [the individual's] freedom to act on his own behalf," e.g., by incarcerating him. The *Benavides* court, citing *DeShaney*, held that the guards had no constitutional claim. "Although these cases seem to present an anomaly in that they appear to afford greater protection to prisoners than to prison guards, the affirmative duty to protect a prisoner (as well as a mental patient or other incarcerated person) arises only because of and 'when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself.'" (388; citation omitted) After all, the guards were free to quit whenever they wanted; therefore the fact that they were forbidden to carry guns and required to be present at certain locations when they were on the job did not sufficiently limit their freedom to make the officials responsible for what happened to them. A federal district court reached the same conclusion in *Smith v. Dodrill*, 718 F.Supp. 1293 (N.D. W.Va. 1989), a case brought by guards abused and injured during a prison riot. The court observed, "...[P]rison employees are not in custody nor compelled to be guards; they enlist, and the State is, therefore, not obligated to shield them from private actors." (1295)

A different result was reached in *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989). Mrs. Cornelius was a town hall clerk who was abducted and terrorized by prisoners assigned to a community work squad program. The court held that prison and town officials could be held liable for assigning an inmate with a violent history to an outside work squad and providing inadequate supervision if there was a "special relationship" between the state and the injured plaintiff or if the plaintiff faced a "special danger" greater than that of the general public. The court held that there was sufficient evidence of a "special relationship" to go to trial against town officials where the plaintiff had to work in proximity to the inmate work squad in order to keep her job and where (unlike *DeShaney*) the officials had arguably created the dangerous situation and increased the vulnerability of the plaintiff, whose freedom was substantially controlled by the defendants. There was also sufficient evidence that prison officials created a "special danger" to the plaintiff by assigning dangerous prisoners to the work squads and entrusting their supervision to town officials with no training in handling prisoners.

Mrs. Cornelius, of course, could have quit her job, just like the guards in *Benavides* and *Smith*, both ending the relationship between her and the defendants and removing herself from the "special danger." It is difficult to understand why she should have a constitutional claim based on her mistreatment by prisoners if prison employees can never have such a claim even if their employers act with deliberate indifference to their safety. Perhaps there is an implicit assumption that people who go to work in prisons somehow assume the risk of injury caused by official mismanagement—i.e., that they are "asking for it." This view is strongly suggested by one pre-*DeShaney* case in which the court observed, "The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state's circus, the state need not separate Daniel from his charges with an impenetrable shield." *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986).

In any case, the fundamental question left open by *DeShaney*, and now disputed in the lower courts, is whether a public employee's desire or need to stay employed sufficiently limits that person's freedom to invoke constitutional protections.

## AIDS

Courts remain highly deferential to prison officials' policy decisions concerning inmates with AIDS or HIV infection. In *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989), the court upheld widespread compulsory HIV testing in state prisons as having a "reasonable relationship" to the strong correctional interest in "responding to the threat of AIDS." (1195) Even if there is no evidence of widespread AIDS infection, "an attempt to ascertain the extent of the problem is certainly a legitimate penological purpose." The fact that everyday contact does not spread the infection does not diminish the interest in testing, since the prison may wish to segregate infected prisoners and has an interest in diagnosing and providing adequate health care to them. The court acknowledged that "[t]he prisoner's privacy interest in the integrity of his own person is still preserved under *[Bell v.]Wolfish*...in which the Supreme Court applied traditional fourth amendment analysis to a constitutional challenge by prisoners to personal body searches." However, under *Schmerber v. California*, the Supreme Court decision concerning blood alcohol tests of drivers, there is only a limited privacy interest in avoiding blood tests, and it is further diminished in prison.[2]

Similarly, in *Feigley v. Fulcomer*, 720 F.Supp. 475 (M.D. Pa. 1989), the court held that the failure to test all inmates and employees for HIV on entry into the prison system and to segregate all HIV-positive inmates did not violate the Eighth Amendment, and that the failure to test other inmates on request did not violate the plaintiff's Eighth Amendment rights. The court left open the possibility that the failure to test the plaintiff on his own request might violate the Eighth Amendment, but the court did not decide the question because the plaintiff did not actually allege that he had requested the test and been denied it. The prison policy, which officials did not explain or justify, provided for testing on a doctor's order based on recent medical history, current clinical signs and symptoms, or past sexual or drug abuse behavior at the doctor's discretion.

The court also dismissed the allegation that prison officials did not take adequate steps to prevent, and in fact tacitly condoned, homosexual conduct and IV drug abuse among inmates in the absence of any concrete allegation concerning the conduct of supervisory officials at the prison.

In *Hawley v. Evans*, 716 F.Supp. 601 (N.D.Ga. 1989), the court held that denial to HIV-positive inmates of AZT until they became symptomatic and met other medical criteria did not constitute deliberate indifference; the policy was "similar to that of other reputable national and local agencies." Nor are prisoners constitutionally entitled to access to their own private physicians (as long as the prison provides adequate medical care), or to experimental drugs.

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[1] The *Langley* court also suggested that the *Youngberg v. Romeo* "professional judgment" standard for treatment of the civilly committed may be applicable to prison medical claims in addition to the deliberate indifference standard. A violation of the professional judgment standard could be shown by evidence that decisions were made by untrained personnel that should have been made by psychiatrists or by other better-trained and supervised personnel, that some decisions were motivated by personal hostility and not professional standards, that some decisions represented substantial deviations from professional standards, and that the administrator was professionally unqualified "and thus by definition incapable of exercising 'professional judgment' to which deference might be due under *Youngberg*." (542)

[2] The *Dunn* case was prosecuted *pro se* and the court of appeals did not appoint counsel for the plaintiff. It is questionable whether a decision that is reached without benefit of a professional presentation on the plaintiff's side should be given the usual precedential weight. In our opinion, it is even more questionable whether appellate courts should decide major constitutional questions involving important issues of public policy without appointing counsel for indigent litigants.

Outside the policy realm, considerably less deference is due prison officials, especially when the challenged conduct is actionable under the established "deliberate indifference" standard for prison medical care. In *Maynard v. New Jersey*, 719 F.Supp. 292 (D.N.J. 1989), a prisoner had died of AIDS after allegedly receiving only palliative treatment for five months (culminating in his collapse, after which he was given throat lozenges). His condition was diagnosed only 11 days before death. The court held that the allegations stated a constitutional claim; medical personnel may not opt for an easier and less efficacious treatment with deliberate indifference to the prisoner's serious medical needs. This holding is of considerable significance for prison medical staff, since some of the life-threatening infections associated with AIDS may cause symptoms such as persistent headaches and respiratory distress that prison clinics are accustomed to shrugging off or treating with over-the-counter medications and nothing more.

In the injunctive case of *Tillery v. Owens*, described above, the court stated that defendants are "expect[ed]" to devise an AIDS protocol. "When prison officials have refused even to recognize that such a problem exists, the court is well within its province to intervene." 719 F.Supp at 1309.

A Connecticut federal court has issued a number of orders governing the conduct of a statewide challenge to prison AIDS and HIV care. In *Doe v. Meachum*, the court's rulings included:

Limitations on prison officials' disclosure of inmate identities obtained through discovery from the plaintiffs. 126 F.R.D. 437 (D.Conn. 1988). The plaintiffs had submitted evidence that such information had been widely disseminated, resulting in "harassment and sometimes violence" (439). The court upheld a finding that plaintiffs "have a significant privacy interest in their identities as HIV victims, when revealed in their own responses to discovery." (439) The court later granted defendants permission to disclose the identities of HIV-positive persons to the wardens of the prisons and to other prison employees in connection with trial preparation, subject to a protective order barring further disclosure. 126 F.R.D. 456 (D.Conn. 1989).

Five named plaintiffs who are or were "incarcerated at correctional institutions scattered across the state" could represent a statewide class of prisoners. "Class certification ...is proper in actions brought by HIV victims with respect to the scope of their treatment." 126 F.R.D. 442 (D.Conn. 1989).

Defendants must produce minutes of the Correctional Health Care Committee (but not individual participants' notes) and "Budget Options" documents must be produced that pertain to a "proposed reorganization of employee responsibilities with respect to HIV matters." 126 F.R.D. 444 (D.Conn. 1989).

Medical and mental health records of the named plaintiffs, all HIV-infected inmates currently incarcerated, past HIV-infected inmates who died, attempted suicide, or were hospitalized, and HIV-infected inmates identified in various incident reports, are to be produced by defendants to plaintiffs without any requirement of individual releases. State statutory privileges are not binding. 126 F.R.D. 444 (D.Conn. 1989).

The protective order itself is published at 126 F.R.D. 450 (D.Conn. 1989). It permits plaintiffs' counsel to disclose identifying information about HIV-positive persons only to their expert consultants and "only to the minimum extent necessary to litigate this case." Other disclosure is permitted only upon notice to defense counsel and court approval if contested.

The plaintiffs' witnesses at a preliminary injunction hearing would not be permitted to testify in chambers and have the record sealed, but they would be permitted to testify under fictitious names, "and there shall be no testimony of a sufficiently detailed nature to compromise their identities." Those who wish to may wear disguises. A requirement of narrow tailoring applies to requests to close hearings to press and public. The court notes that "plaintiffs, for whatever reasons, have a greater fear of disclosure of their identities within the prison walls than in the outside community." 126 F.R.D. 452, 455 (D.Conn. 1989); 126 F.R.D. 458 and 459 (D.Conn. 1989).

# Other Cases Worth Noting

## U.S. COURT OF APPEALS

### Protection from Assault/Res Judicata/Class Actions—Effect of Judgments and Pending Litigation/Personal Involvement and Supervisory Liability

*Pool v. Mo. Dept. of Corrections and Human Resources*, 883 F.2d 640 (8th Cir. 1989). A damage suit based on an inmate assault in 1985 was not barred by *res judicata* as a result of a 1978 class action focusing on crowding and sanitation unless the defendants could show that staffing issues were actually litigated.

The plaintiff was not required to seek relief under the earlier class action judgment; even if the prior action had dealt with protection from violence issues, the plaintiff would retain the right to seek damages for subsequent "individual constitutional wrongdoing."

At 645: "To hold supervisors liable under section 1983, a plaintiff must show that a superior had actual knowledge that his subordinates caused deprivations of constitutional rights and that he demonstrated deliberate indifference or 'tacit authorization' of the offensive acts by failing to take steps to remedy them." An allegation that a prison supervisor (probably the warden) knew about the numerous assaults and their connection with inadequate supervision stated a claim against him.

### Searches—Person—Prisoners

*Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989). In a punitive segregation unit, inmates were strip-searched twice daily, when their mattresses were removed in the morning and returned in the evening, regardless of whether they had left their cells or had had unsupervised contact with anyone. Double-celled inmates were searched in each other's presence and then made to stand outside the cell in view of other inmates while their cells were searched. In an administrative segregation barracks (pre-hearing segregation and 48-hour relief from punitive segregation), inmates were strip-searched whenever they entered the unit (twice a day in the case of working inmates), in groups of four. In a protective custody unit, inmates were searched once a day in a manner similar to the punitive segregation inmates.

The searches were constitutional because of legitimate security concerns and "because the record does not support a finding that a less public means of searching exists that would not compromise those security concerns.... Our holding is, of course, limited to the facts established in this case and should not be read to constitute a carte blanche approval of all visual body cavity searches." (656-57)

### Transportation to Courts/Searches—Person—Prisoners/Access to Courts

*Penny v. Shansky*, 884 F.2d 329 (7th Cir. 1989). The plaintiff was being brought to court for a hearing but refused to submit to a strip search that was to be conducted, contrary to prison regulations, in view of the entire roll call of the officer staff. The district court should not have dismissed the plaintiff's complaint *sua sponte* with prejudice based on its view that the search was constitutional. At 330: "Inmates have a claim to be treated with minimum dignity, and the indignity of an unlawful and humiliating strip search was compounded here by the magistrate's abrupt use of Penny's refusal to be searched as a lever to expel him from federal court without notice and without considering the merits of his suit." The magistrate's action in conjunction with those of the prison officials may have also obstructed the plaintiff's constitutional right of access to courts.

### Procedural Due Process—Disciplinary Proceedings/Negligence, Deliberate Indifference and Intent

*Earl v. Norris*, 884 F.2d 362 (8th Cir. 1989). The plaintiff's retention in punitive segregation for six days after the expiration of his disciplinary sentence did not state a constitutional claim where the allegations showed no more than negligence. The plaintiff must show "something more than negligent prison administration," but the court does not say what.

### Correspondence—Non-Legal/Religion/Summary Judgment

*Holloway v. Pigman*, 884 F.2d 365 (8th Cir. 1989). Summary judgment was properly

granted against a Native American prisoner who alleged that he was denied access to religious items (sage and sweet grass) because he did not detail what his religious practice required or assert facts showing he was deprived of *all* opportunity to practice his religion. A factual dispute over whether the prison warden had confiscated his sage and sweet grass was therefore not material.

Summary judgment was properly granted upholding a prison practice of returning to sender mail that violates prison policy without providing a procedure for the inmate to protest the rejection where the plaintiffs "presented no evidence showing that prison administrators drew distinctions between incoming mail based on anything other than implications for prison security, as alleged by prison officials." (367) In other words, this court construes *Thornburgh v. Abbott* as overruling the procedural portions of *Procunier v. Martinez* as well as the substantive standard, completely failing to apply any sort of procedural due process analysis.

### Women/Administrative Segregation—High Security/Federal Prisons and Officials/Social and Political Expression/Transfers

*Baraldini v. Thornburgh*, 884 F.2d 615 (D.C.Cir. 1989). Inmates transferred to a high security unit for women challenged their placement on First Amendment grounds. The district judge found that they were placed there "solely for their 'subversive' statements and thoughts." The court of appeals holds that that finding is clearly erroneous and that defendants' focus was on the propensity and ability of organizations that the plaintiffs were associated with to bring about escapes. At 620: "A reviewing court must always be careful to make certain that prison administrators are not pretextually using alleged concerns in order to punish an inmate for his or her political or other views, or for past or present membership in organizations espousing anti-establishment or even governmental overthrow philosophies."

The right of the plaintiffs to hold violent or revolutionary views or belong to organizations that espouse them do not require prison authorities to ignore those views in assessing the dangers that they may escape. The fact that they had behaved during their several years of incarceration did not preclude prison officials from relying on information about their behavior before they were incarcerated.

### Access to Courts/Correspondence—Legal and Official/Postage and Materials/Non-Constitutional Rights/Transfers

*Smith v. Erickson*, 884 F.2d 1108 (8th Cir. 1989). An allegation that prison officials refused to provide any free postage for legal mail stated a constitutional claim.

An allegation that prison officials refused to mail legal mail that was not in envelopes purchased in the prison canteen should not have been dismissed where the defendants advanced no specific penological interest justifying it. The district court also failed to address the plaintiff's claim that the policy was applied to him in a retaliatory manner.

The district court should have considered and not ignored the plaintiff's claim that he was entitled to reasonable amounts of free paper, envelopes and legal postage under the Interstate Corrections Compact because he would have had these things in Kansas, from which he had been transferred.

### Procedural Due Process—Disciplinary Proceedings/Federal Officials and Prisons/Habeas Corpus

*Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989). Federal prisoners may utilize *habeas corpus* to seek return of good time, release from disciplinary segregation, or expungement of a disciplinary finding that is likely to affect parole eligibility.

Postponement of a disciplinary hearing did not deny due process when the hearing was held within eight days of the incident; even if prison regulations had a shorter limit, failure to follow it would not deny due process.

Conviction of possession of contraband when the incident was described in the notice as stealing did not deny due process where the prisoner was placed on notice of the facts underlying the charge.

### Pre-Trial Detainees/State, Local and Professional Standards/Personal Involvement and Supervisory Liability/Pendent Claims/State Law in Federal Courts

*Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989). A North Carolina statute requires state officials to develop minimum standards for local jails and to visit and inspect them semi-annually. It also provides that in the event of noncompliance state officials "*may* order corrective action or close the facility" (emphasis supplied). In the absence of a mandatory duty, the state officials' inaction is not a "cause" of alleged constitutional violations, and relief may not be ordered against them under § 1983. Nor may they be held liable under more conventional notions of supervisory liability. At 132: "The legislative policy is clearly aimed at assisting localities, not at controlling or overseeing them.... [The state defendants] cannot be considered supervisors because they are not in control of local jails and do not have the responsibility to remedy substandard conditions."

### Use of Force

*Miller v. Leathers*, 885 F.2d 151 (4th Cir. 1989). Where a guard knew a close custody prisoner had a proclivity for violence and the prisoner had earlier directed a racial insult and threats of physical harm, it was not "wanton or unnecessary" to hit him three times with a baton, breaking his arm, when the prisoner refused an order, turned to confront the guard, and sexually insulted his mother. (The inmate was handcuffed at the time.) Summary judgment was properly granted to the defendant. The court ignores evidence favorable to the plaintiff, such as threats made by the defendant and the allegation that the defendant repeatedly poked the plaintiff in the back with his stick before the actual altercation.

The allegation that the officer violated prison regulations by removing him from his cell without supervision is at most "a matter between Leathers and his supervisors." (154) The dissenting judge points out that this fact could well support an inference of intent to harm on the part of the defendant. The majority adds, "While restraint in the face of provocation may still have remained the course of wisdom, we cannot say that the measured force employed on Miller's handcuffed wrists was of a wanton and obdurate kind." (155)

This opinion reads *Graham v. Connor* as holding that the *Whitley v. Albers* standard of "obduracy and wantonness" applies to all prison use-of-force cases.

### Communication and Expression/Telephones/Visiting/Pre-Trial Detainees

*United States v. DeSoto*, 885 F.2d 354 (7th Cir. 1989). The district court properly ordered that a criminal defendant indicted for trying to kill a prosecution witness, her children, and the prosecutor, be denied all telephone calls except to counsel and all visits except from counsel and be isolated from any conversation or other contact with other inmates.

### Typewriters

*Jackson v. State of Arizona*, 885 F.2d 639 (9th Cir. 1989). An allegation that prisoners were not allowed to carry personal typewriters to the law library did not state a claim because there is no constitutional right to the use of a typewriter.

### Municipalities/Searches—Person—Arrestees/Crowding

*Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989). Municipal liability may be premised on a "custom" (i.e., a "'permanent and well-settled' practice") irrespective of whether official policymakers actually knew about it. "The existence of custom as a basis for liability under § 1983 thus serves a critical role in insuring that local government entities are held responsible for widespread abuses or practices that cannot be affirmatively attributed to the decisions or ratification of an official government policymaker but are so pervasive as to have the force or law." (1444)

A county policy requiring all new jail admittees to undergo a strip search was constitutional as applied to the plaintiff, who had been arrested for grand theft of an automobile, an offense "sufficiently associated with violence to justify a visual strip search." (1447)

The requirement of an x-ray and blood sample on admission was also constitutional; "the County's interest of diagnosing severe medical problems to prevent transmission of serious disease among the general population"

renders them reasonable under the Fourth Amendment. (1447) Such tests might violate the Fourth Amendment "if conducted in an unnecessarily cruel, painful or dangerous manner." (N. 7)

"[S]everal courts have held that a jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment." (1448) The plaintiff's undisputed allegation that he had to sleep on the floor for two nights stated a constitutional claim.

### Consent Decrees/State Officials and Agencies

*Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. 1989). The district court properly declined to vacate parts of a consent decree. Prison officials argued that much of the relief was based on state law and was therefore barred by the Eleventh Amendment under the holding of *Halderman v. Pennhurst State School and Hospital.* However, the challenged provisions "[a]rguably...relate to, or tend to vindicate, federally protected rights" (especially under a "totality of conditions" analysis) and the defendants waived their right to make plaintiffs prove this at trial by settling the case. The relevant limit is not *Pennhurst* but *Local No. 93 v. City of Cleveland,* which holds that consent judgments are valid if they spring from and serve to resolve a dispute within the district court's subject matter jurisdiction and their terms come within the "general scope" of the complaint and further its objectives. The court relies on the Second Circuit decision in *Kozlowski v. Coughlin.*

### Monitoring/Attorneys' Fees

*Duran v. Carruthers*, 885 F.2d 1492 (10th Cir. 1989). Attorneys' fees may be awarded for post-judgment monitoring activities despite the existence of a Special Master and defendants' "internal monitoring structure." (Ed. note: On January 22, 1990, the Supreme Court denied the defendants' petition for a writ of *certiorari* in *Duran.*)

### Pre-Trial Detainees/Suicide Prevention/Municipalities/Mental Health Care

*Cabrales v. County of Los Angeles*, 886 F.2d 235 (9th Cir. 1989). The Supreme Court decision in *Canton v. Harris*, imposing a "deliberate indifference" standard for claims of unconstitutional application of a constitutional policy, does not require modification of the court's previous decision (vacated and remanded after *Canton*). In this jail suicide case, the policy of understaffing the jail with psychiatrists was itself alleged to be unconstitutional under a deliberate indifference standard and there was no need to determine separately whether the county could be held liable for an unconstitutional application of the policy.

### Federal Officials and Prisons/Good Time/Equal Protection

*Moss v. Clark*, 886 F.2d 686 (4th Cir. 1989). District of Columbia prisoners in federal prison do not get the benefit of the D.C. Good Time Credits Act as do prisoners in D.C. institutions. The distinction does not deny equal protection of the laws.

### Classification—Race/Procedural Due Process—Disciplinary Proceedings

*Propst v. Leapley*, 886 F.2d 1068 (8th Cir. 1989). A black inmate and a white inmate got into a prolonged fight; the white inmate was found guilty and punished and the black inmate was found not guilty. The district court's finding of no discrimination was clearly erroneous in view of the evidence.

### Access to Courts/Typewriters

*Sands v. Lewis*, 886 F.2d 1166 (9th Cir. 1989). In cases involving indigent prisoners' right to supplies for court access, "we have not hesitated to reject constitutional claims of entitlement to resources which *no* prisoner could possibly require to have 'meaningful' access." These include typewriters and "free and unlimited photocopying." The "maximum or even the optimal level of access" is not required. "[T]he Constitution does not require the elimination of all economic, intellectual and technological barriers to litigation." (1169)

The court adopts the Third Circuit's rule that actual injury must be shown in court access cases *unless* they involve the "core requirements" of adequate law library or legal assistance. Denial to the plaintiff of his own memory typewriter and carbon paper did not deny court access.

### Contempt/Crowding/Financial Resources

*Morales-Feliciano v. Parole Board of Commonwealth of Puerto Rico*, 887 F.2d 1 (1st Cir. 1989). Imposition of fines of $50 per excess inmate per day, increasing by $10 per inmate each month thereafter, was a proper means of enforcing a 35-square-foot per inmate crowding limit. The court rejects defendants' claim of "substantial" compliance where up to 700 inmates were held in violation of the order. The court also rejects defendants' claim of "good faith" efforts to comply. The test is impossibility, and rapid growth in prison population does not satisfy the test in view of the long time (almost two years) defendants have had to comply.

### Sanitation/Laundry/Damages/Length of Stay/Personal Involvement and Supervisory Liability/Qualified Immunity

*Howard v. Adkison*, 887 F.2d 134 (8th Cir. 1989). The plaintiff was placed in a protective custody cell with walls covered with human waste and a torn mattress stained with urine and feces. He was denied access to cleaning supplies and was forced to use a sock and water to clean his cell. This went on for two years. He was also denied laundry services for five months, allegedly because he did not have a laundry bag, and his laundry was returned wet and dirty. He was given only a dirty blanket and half a sheet. A jury found an Eighth Amendment violation and awarded the plaintiff $500 in compensatory damages, $750 in punitive damages and several thousand dollars in punitive damages against the warden and two other supervisors. The court upholds these awards against supervisory personnel, who should have known about them in view of their long duration and the plaintiff's complaint.

### Qualified Immunity

*Haynes v. Marshall*, 887 F.2d 700 (6th Cir. 1989). There is no merit to defendants' argument that they are entitled to qualified immunity for any use of force that occurred before the Supreme Court decision in *Whitley v. Albers.* The contours of the right were sufficiently clear that they should have known that beating a prisoner to near death and leaving him to die violates the Eighth Amendment.

### Pre-trial Detainees/Unsentenced Convicts and Convicts Held in Jails/Monitoring and Reporting/Crowding/Class Actions—Effect of Judgments and Pending Litigation/Judicial Disengagement/State, Local and Professional Standards

*Roberts v. Tennessee Dept. of Correction*, 887 F.2d 1281 (6th Cir. 1989). In a dispute between county jail officials and state prison officials over state-ready backups in the jail, the appellate court approves a settlement and recommends that it be used as a model in similar cases in the state. It provides for removal of a set number of state-ready inmates, the designation of an "Implementation Coordinating Committee" to "facilitate cooperation and to resolve technical and procedural problems," the transfer of state-ready inmates to state prison based on their length of stay in jail after sentencing, and the transfer of remedial issues pertaining to population limits to the court in which statewide prison crowding litigation (*Grubbs v. Norris*) is pending. "That judge shall resolve competing constitutional claims of prison and jail inmates regarding population issues" and "shall have jurisdiction of all matters pertaining to the setting, modification and enforcement of population limits in local jails." (1284)

The *Grubbs* court will appoint a Consultant for Local Corrections under Rule 53, to be paid by the defendants. The Consultant will recommend population limits and a limit on state ready inmates for each jail and will make recommendations on how to achieve those limits. The Consultant and the Implementation Coordinating Committee "will not recommend the immediate release of inmates at a state or local level unless all other measures have been considered." (1284) If the recommended population limit is different from the standards of the Tennessee Corrections Institute, reasons shall be given.

The terms of the order shall terminate in three years or when the *Grubbs* state prison population limit is removed, if both district

## New Design for *JOURNAL*

**By now you've noticed that the *JOURNAL* has a new look. Our objective, as always, is to bring you up-to-date information on correctional legal issues, in a format that makes it as readable and helpful to you as possible. I believe the new design by Wickham and Associates furthers that goal.**

**I want to say thanks to Jim True, our former graphic designer. His assistance over the last six years amounted to no less than mentorship.**

**—J.E.**

courts involved "are satisfied that the unconstitutional conditions which were linked to overcrowding have been corrected." (1286)

In a companion case, after a district court finding of unconstitutional jail conditions, the court directs the transfer of crowding-related remedial issues to the *Grubbs v. Norris* court. *Carver v. Knox County, Tenn.*, 887 F.2d 1287 (6th Cir. 1989).

### DISTRICT COURTS

**Medical Care—Standards of Liability—Deliberate Indifference/Sanitation, Hygiene/Recreation and Exercise, Length of Stay, Mootness/Classification, Protection from Inmate Assault; Negligence, Deliberate Indifference and Intent/Staffing—Surveillance, Prisoners as Staff/Law Library and Law Books, Inmate Legal Assistance**

*Gilland v. Owens*, 718 F.Supp. 665 (W.D.Tenn. 1989). "Sanitary living conditions and personal hygiene are among the necessities of life protected by the Eighth Amendment.... Courts are extremely reluctant, however, to find constitutional violations based on temporary deprivations of personal hygiene and grooming items." (684) The lack of opportunity for exercise violated the Constitution. Crowding and lack of staff do not provide a penological justification. (685)

Lack of classification is not unconstitutional, but classification relief may be ordered if the classification system is determined to contribute to an unconstitutional level of violence. (686)

A "pervasive and constant threat of personal harm to inmates from attacks by other inmates" is found based on testimony about gang activity, fights involving large numbers of inmates, and large numbers of serious injuries. (686-89)

Deficiencies in staffing, exercise opportunities and classification contribute to violence in the jails, as did the "pod man/phone man" system by which some inmates exercised supervision over others. Crowding also contributes to violence, if not directly, then by impairing the classification system, recreation opportunities, and the disciplinary system. (688)

The availability of two untrained jailhouse lawyers did not excuse the inadequacy of the law library, nor did the availability of visits with criminal attorneys address the right of access with respect to matters other than their current criminal matters. (688-89)

**Remedial Principles/Use of Force/Protection from Inmate Assault/Modification of Judgments/Classification/Protective Custody/Crowding**

*Fisher v. Koehler*, 718 F.Supp. 1111 (S.D.N.Y. 1989). The court previously found that inmate-inmate and inmate-officer violence violated the Eighth Amendment and now enters judgment after a year-long remedial process.

Defendants must establish a classification system reflecting inmates' history of violence and must keep records of violent infractions for use in classification. Defendants will be required "to remove from dormitory housing those with a history of particularly violent and predatory behavior." Protective custody inmates may be held in dormitories as long as those with a history of violence are kept out and those "whose vulnerability or history of violence requires their separation" are placed in cells. Protective custody inmates shall not be commingled in a housing area with other categories of inmates.

The court sets an outer population limit of 2,600 rather than the limit of around 1,800 sought by plaintiffs; the defendants "persuasively argued" that they should have the chance to show that they can reduce violence by other means, particularly classification. The use of double bunks is not prohibited, but they may not interfere with or obstruct sight lines from the officer's station. The housing of inmates in receiving rooms, gymnasiums and other common areas is prohibited.

The court rejects the plaintiffs' proposals to take use of force investigations away from jail supervisors and give them to independent investigators. Various other reporting, investigation and training requirements are set out.

Disciplinary proceedings against officers accused of brutality or cover-ups are subjected to a 90-day time limit for processing.

**Access to Courts—Assistance of Counsel—Legal Assistance**

*Houtz v. Deland*, 718 F.Supp. 1497 (D.Utah 1989). A system of providing "contract attorneys" to state prisoners rather than a law library met constitutional standards, and a two-month delay in having his case reviewed did not violate the plaintiff's rights, especially where there was no evidence of prejudice.

**Juveniles/Pre-Trial Detention**

*Doe v. Borough of Clifton Heights*, 719 F.Supp. 382 (E.D.Pa. 1989). The Juvenile Justice and Delinquency Prevention Act, which provides that a state obtaining certain kinds of funding must not incarcerate juveniles with adults, provides a private right of action enforceable under § 1983 only against state and local agencies eligible for funding, and not against the officers who arrest the juvenile.

**Pre-Trial Detainees/Municipalities/Medical Care—Standards of Liability—Deliberate Indifference/Training**

*East v. City of Chicago*, 719 F.Supp. 683 (N.D.Ill. 1989). An allegation that another arrestee told the police that the decedent, just arrested for a drug offense, had swallowed some cocaine, and that the police ignored the warning, stated a claim under the deliberate indifference standard, as does an allegation that another officer looked at the decedent, concluded he was asleep, and did nothing.

The need for use-of-force training for police officers is "'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." (694) The same is not true of the failure to recognize and respond to symptoms of cocaine ingestion.

**Visiting**

*Ross v. Owens*, 720 F.Supp. 490 (E.D.Pa. 1989). A claim that the plaintiff's 16-year-old son was not allowed to visit him because the son did not have any identification was frivolous. Prison officials could not prevent the son from visiting without the consent of his legal guardian because state law said that members of a prisoner's "immediate family" did not require such permission.

**Women/Monitoring and Reporting/Contempt/Equal Protection/Programs and Activities**

*Glover v. Johnson*, 721 F.Supp. 808 (E.D.Mich. 1989). The court of appeals had reversed the district court's appointment of an "administrator" to enforce orders concerning equal prison program opportunities for women. Defendants are held in contempt, but the court concludes that a remedy designed by experts, not a punitive remedy, is more likely to result in parity.

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*John Boston is a staff attorney at the Prisoners' Rights Project, Legal Aid Society of New York.*

# Resolved: High Schoolers Should Debate Prison Overcrowding

**BY CHUCK MORTON**

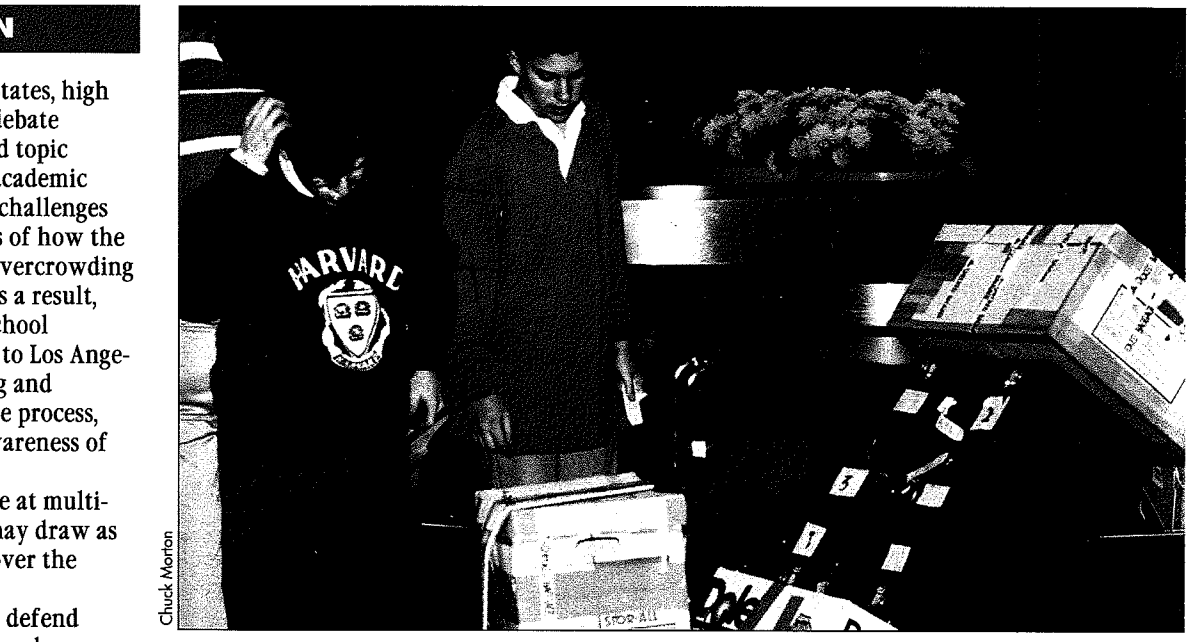
Each year in the United States, high school inter-scholastic debate focuses on a single broad topic called "the resolution." This academic year, 1989-90, the resolution challenges students to develop examples of how the government could decrease overcrowding in federal prisons and jails. As a result, approximately 50,000 high school students from Bangor, Maine to Los Angeles, California are researching and discussing prison issues. In the process, they are gaining a greater awareness of this important topic.

The competition takes place at multi-debate tournaments which may draw as many as 200 teams from all over the country.

Students are called upon to defend examples of the resolution they have chosen and to attack those chosen by their opposition. As a result, the debaters need to be well-versed on both sides of the topic. Novel argumentative positions are likely to catch opponents off-guard and are, therefore, eagerly sought by advocates on both sides.

As a debate coach during this season, it has been exciting to see students wrestle with creative ideas to decrease overcrowding. While many teams advocate decriminalization of drugs, reforms in sentencing or bail laws, many others, primarily for strategic reasons, try to think of ways to only nominally decrease the numbers of those incarcerated.

Competitive debate occurs in the context of an intellectual exercise, not a litigative forum. Thus, in the "real" world, a federal judge may be compelled to uphold a position if it were to show that certain conditions resulted in deprivation of Eighth Amendment rights.




Chuck Morton

**Debaters often gather thousands of pages of evidence in support of their position. Here, debaters seem at a loss as to how to carry it all.**

**BY REBECCA TUSHNET**

When arguing for the overturning of *U.S. v. Salerno*, a controversial 1987 Supreme Court decision against the rights of the accused, one debater regularly tells judges that "[Chief Justice] Rehnquist is the Antichrist." The ACLU wrote an *amicus* brief in this case, and debaters often mention it, calling the ACLU either "crazy liberals" or brave defenders of vital civil liberties.

Some ideas to decrease overcrowding get pretty wild. One team advocated ending the extradition of Colombian drug dealers—all 12 of them. The opposing team quickly pointed out that this had very little relevance to most prisoners.

Many students have become much more aware of how the trend towards increasing sentences has affected the prison system. At the Dartmouth summer debate camp, Chuck Morton visited and showed the students pictures of the disgusting conditions in which prisoners are too often kept. Most were shocked and horrified; they wondered how the system could be so callous. A few argued that criminals were completely evil and deserved such punishment, but the majority tried to convince them that some punishments are inhumane and only degrade the prisoners.

Another case calls for abolishing prison for all but the most depraved of crimes, and flogging or using electro-shock on all other offenders. The defenders claim that prisons are inherently dehumanizing, and that a short, sharp shock is a better punishment that the long, drawn-out torture and degradation inflicted in prisons. Although it's intuitively ridiculous, judges vote for it more often than not, since it's such an unusual idea that opponents rarely know what to say.

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*Rebecca Tushnet is a junior at Georgetown Day School in Washington, D.C. where she competes on the debate team. She is the daughter of Georgetown University Law School professor Mark Tushnet and Elizabeth Alexander, chief staff counsel at the National Prison Project.*

Chuck Morton

**Rebecca Tushnet (right) and her partner, Daniel Nexon, nationally ranked debaters from Washington, D.C., advocate the legalization of drugs or the expansion of community corrections to solve overcrowding.**

In the "debate" world, however, a judge might share that conclusion, but still decide that it is worth a violation of constitutional rights to accomplish a greater good.

High school debate is intensely competitive and grueling. These young adults travel all over to argue against the most challenging opponents. While their friends at home go to football games and pizza parlors, the debaters shout about the public's likely reaction to a policy of early release of prisoners.

In return for this investment, students develop critical thinking and enhance their research and organizational skills. And, this year, students are learning about the plight of the more than 700,000 people imprisoned in this country. Their collective voice is another in the growing chorus of those who realize that prisons are in crisis, and solutions need to be found soon through thoughtful dialogue.

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*Chuck Morton, a third-year law student at the University of Maryland, worked as an NPP law clerk in summer 1989. That summer he also lectured at several debate camps and is currently debate coach at Georgetown Day School. He debated in college at the University of Vermont.*

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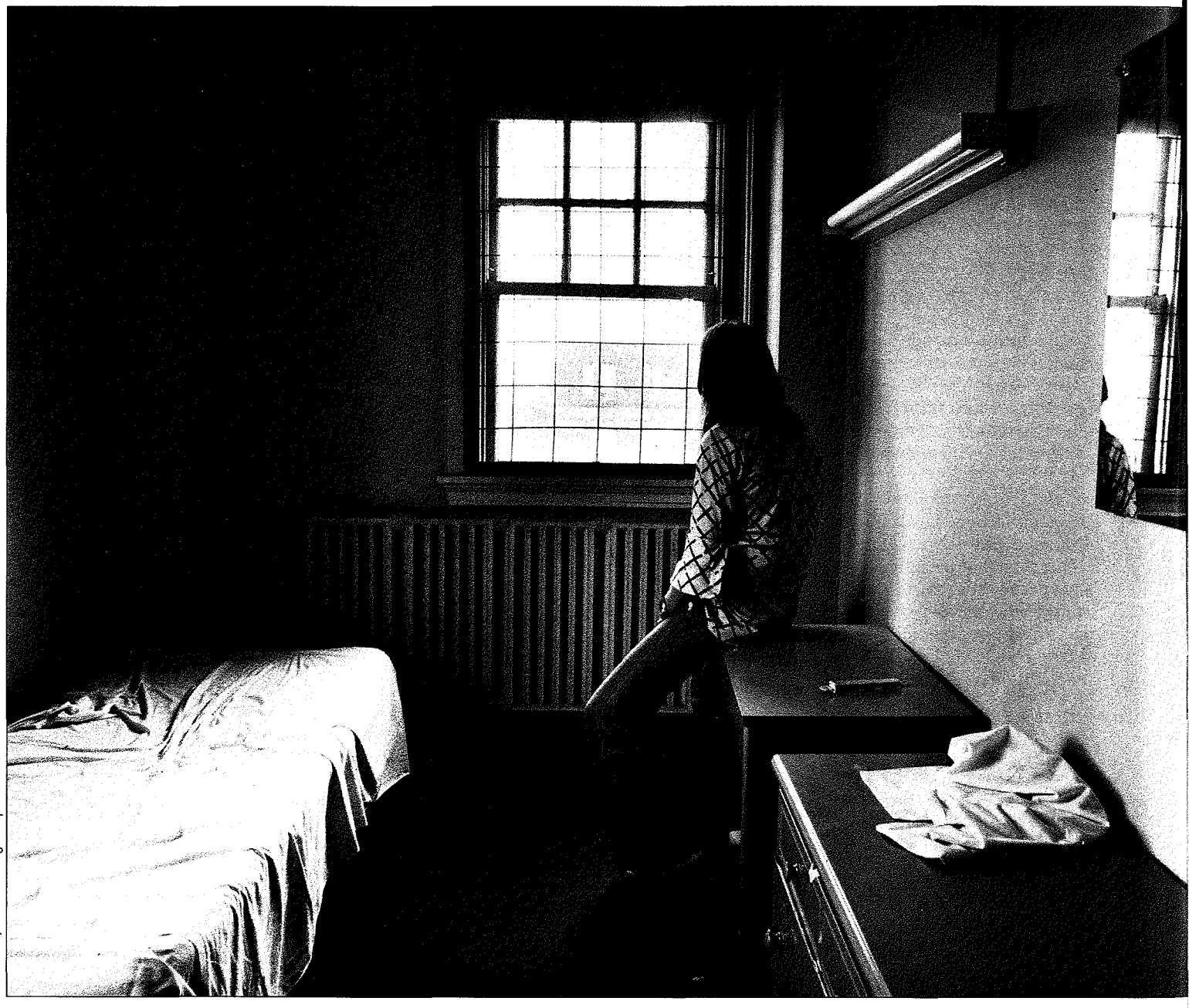
**Childrens' rights advocates would like to see training schools closed and care for youthful offenders shifted to community-based programs.**



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# AIDS Update

**BY JUDY GREENSPAN**

**Book Review: *Preventing AIDS, A Guide to Effective Education for the Prevention of HIV Infection*, Nicholas Freudenberg DrPH, American Public Health Association, 1989.**

In late 1986, amid underfunded yet heroic efforts by the young AIDS activist community and the public health sector to tackle the growing AIDS epidemic, Dr. Nicholas Freudenberg undertook an important project: writing a book for AIDS educators. Reasoning that education was the key factor in fighting AIDS, Dr. Freudenberg interviewed instructors from over 135 grassroots AIDS education programs to enable people "to learn from each other and to discuss their successes and failures." *Preventing AIDS, A Guide to Effective Education for the Prevention of HIV Infection*, is an important tool for AIDS educators in or outside of prisons and jails. It is critical reading for those setting up AIDS or public health education programs in the communities hit hardest by the epidemic.

AIDS struck initially at two stigmatized communities, gay men and IV drug users, a fact which contributed to the slow public health response to the epidemic. In the early days, AIDS activists received little or no assistance from established public health organizations to stem the tide of the disease. For this reason, grassroots AIDS activists and educators became suspicious of people from professional backgrounds. Dr. Freudenberg knew that the grass roots activists were the real "experts" in this new movement but that public health still held some of the analytic tools and knowledge necessary to make these educational programs successful. His book attempts to bring together these two necessary elements.

*Preventing AIDS* provides the political and social context necessary to interpret this crisis. As Freudenberg travelled around and talked with such groups as the Minority AIDS Project in Los Angeles, the Up Front Drug Information Project in Miami, Florida, the New Orleans AIDS Task Force in Louisiana, and People Concerned about AIDS in Salt Lake City, Utah, he realized that educators had to be prepared for the political implications of the AIDS epidemic, and be prepared for political battle. "For AIDS educators," writes Freudenberg, "the social and political forces that surround and permeate the epidemic make their daily work seem like walking through a minefield."

The author tackles all of the difficult political issues which must be examined in AIDS education programs: homosexuality, racism, drugs, and sexual behavior.

The first part of the book demonstrates how communities can set up their own AIDS education programs. "Educating for Health: A Framework for AIDS Educators" (Chapter 3), provides models for health education planning and a sample checklist for assessing the community's needs for AIDS education. This section is key for educators attempting to set up relevant programs in the Black and Latino communities and in prisons.

Dr. Freudenberg discusses the controversy surrounding testing for the Human Immunodeficiency Virus (HIV) and the role that the AIDS counselor plays in the testing process. HIV testing in prison may unfortunately lead to discrimination against the HIV-positive prisoner. Test results may become general knowledge, subjecting the prisoner to threats by miseducated prisoners and corrections staff.

However, knowledge of test results can be an important factor in inhibiting high-risk behavior such as unprotected sex or needle sharing. Dr. Freudenberg believes that the role of the counselor/educator is to "help clients change the behaviors that put them at risk of HIV infection."

The second part of the book is divided into chapters exploring AIDS education programs in communities of gay and bisexual men, intravenous drug users, African Americans, Latinos, youth, women, prisoners and homeless people. There is a great deal of frank discussion about the problems faced by AIDS educators in reaching their particular communities.

A valuable listing of resources is located at the back of *Preventing AIDS*, which includes a reading list as well as a guide to organizations currently involved in AIDS education efforts. This book is available from the American Public Health Association, 1015 Fifteenth Street, N.W., Suite 300, Washington, D.C. 20005 at the cost of $22 plus $4/postage and handling for non-APHA members, and $17.50 for APHA members.

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*In the next issue of the JOURNAL, Greenspan will report on her interview with Dr. Freudenberg and her travels to New York City's Rikers Island, where she witnessed firsthand the AIDS education efforts being made there.*

## FOR THE RECORD

■ More than 200 judges, lawyers, police, probation officers, detention personnel, social workers, mental health professionals, social workers, and educators convened in Missouri last June for a National Forum on the Disproportionate Incarceration of Minority Youth in America. The Forum, sponsored by the National Council of Juvenile and Family Court Judges (NCJFCJ) under a grant from the State Justice Institute, was held to examine issues raised by statistics from the U.S. Census which report that African American, Hispanic, Asian American, and Native American youth are incarcerated in detention facilities and public training schools at a rate of four to one of their general population.

The Forum made policy recommendations to NCJFCJ, which in early 1990 will publish a "Judicial Response to the Disproportionate Incarceration of Minority Youth in America." For more information, contact David Gamble at NCJFCJ, 702/784-6012.

■ The National Coalition of State Juvenile Justice Advisory Groups has

called upon President Bush to appoint a task force to investigate why African-Americans, Hispanics, Native Americans and other minorities are overrepresented at all stages of the juvenile justice system.

"In 1977," the Coalition reported, "minority youth represented 45% of those in custody. Today, the figure is closer to 55%."

The State Advisory Groups urged Congress to hold public hearings on race issues in juvenile justice, and called upon the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to fund research on the effects of "police surveillance practices, offender demeanor, and police apprehension practices," as well as the criteria used by judges to decide whether to detain youths accused of crimes, and dispositional guidelines used to impose sanctions on those found guilty.

For a copy of the Coalition's report contact Marion Mattingly, 8801 Fallen Oak Drive, Bethesda, MD 20817, 301/469-6580.

■ Despite mandates of the Juvenile Justice and Delinquency Prevention Act which forbid the confinement of status offenders in locked facilities, a new study by the Center for the Study of Youth Policy has found that hundreds of youths, especially girls, are being held. Offenses include running away, truancy, and "incorrigibility."

On a given day in 1987, 2.2% of the 26,000 youths held in public training schools were held for status offenses. The percentage of male status offenders was 1.1%, compared to 10.9% for females. According to the Center, the paternalistic attitudes of judges are responsible for the disparity in incarceration rates.

The report, entitled "The Incarceration of Girls: Paternalism or Juvenile Crime Control?", is available at no cost from the Center for the Study of Youth Policy, University of Michigan School of Social Work, 1015 E. Huron St., Ann Arbor, MI 48104, 313/747-2556.

■ The National Center on Crime and Delinquency (NCCD) released a recidivism study last December showing that the Massachusetts Department of Youth Services has been more successful at reducing crime among juveniles than other states studied. Massachusetts incarcerates only the violent offenders, a policy which saves taxpayer money without compromising public safety, according to the report.

"Unlocking Juvenile Corrections" cites the growing number of juveniles imprisoned last year—53,000—as the highest number in American history.

"This data," said Dr. Barry Krisberg, president of NCCD, "puts to rest the notion that public safety is at risk or that juveniles are more likely to offend if placed in a community-based system. States relying on institutions alone to handle violent and nonviolent offenders are costing their citizens more money, and returning to society a youth who is virtually unchanged."

In the 1970s, Massachusetts closed its large training schools and developed a network of small (15-bed) secure programs for serious offenders, and a wide range of community-based supervision programs for the remainder of its 1,700 committed youth.

"Unlocking Juvenile Corrections" is available from NCCD for $8 per copy. To order, send a check, noting the name of the publication, to NCCD Publications, 685 Market St., Suite 620, San Francisco, CA 94105, 415/896-6223.

■ *The Veterans Advocate*—A new monthly publication, successor to *Veterans Rights Newsletter* and *Veterans Law Reporter*, is concerned with veterans' law and advocacy; offers timely information on changes in VA laws, regulations and procedures; covers current developments in matters related to veterans' benefits, such as the Court of Veterans Appeals, Agent Orange, discharge upgrading, military records corrections, VA overpayments, actions for medical malpractice and pending legislation in veterans' law; includes advocacy tips and practical advice to those representing veterans and their dependents.

Free of charge to certain veterans' service organizations, including incarcerated veterans organizations and self-help groups. $30 per year to private attorneys, government. National Veterans' Legal Services Project, 2001 S St. NW, Suite 610, Washington, D.C. 20009-1125, 202/265-8305

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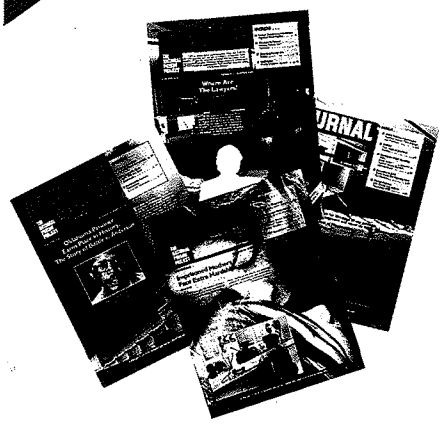
# Publications



QTY. COST

____ **The National Prison Project JOURNAL**, $25/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, library, medical, education, employment and financial aid. 8th Edition, published December 1988. Paperback, $25 prepaid from NPP.

____ **Offender Rights Litigation: Historical and Future Developments.** A book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). Traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (many case citations). 24 pages, $3 prepaid from NPP.

QTY. COST

____ **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 only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Periodically updated. $3 prepaid from NPP.

____ **Bibliography of Women in Prison Issues.** A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $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.) $15 prepaid from NPP.

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____ **The Jail Litigation Status Report** gives a state-by-state listing of cases involving jail conditions in both federal and state courts. The **Report** covers unpublished opinions, consent decrees and cases in progress as well as published decisions. The **Report** is the first nationwide compilation of litigation involving jails. 1st Edition, published September 1985. $15 prepaid from NPP.

____ **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.

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**The National Prison Project**
1616 P Street, NW
Washington, D.C. 20036

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THE NATIONAL PRISON PROJECT

# Highlights

The following are major developments in the Prison Project's litigation program since December 1, 1989. Further details of any of the listed cases may be obtained by writing the Project.

**Casey v. Lewis**—This new case was filed in January 1990 and challenges medical care, legal access and due process procedures in the entire Arizona state prison system. We have also moved to reopen an old case, *Black v. Lewis*, which challenges conditions in CB6, the administrative segregation unit of the Arizona State Prison. *Black* settled in 1985 and was dismissed in 1988. In response to reports of deteriorating conditions in CB6, we conducted extensive prisoner interviews which confirmed those reports and prompted the motion to reopen.

**Duran v. Carruthers**—This is a totality of conditions case against the entire New Mexico state prison system. In response to an important Tenth Circuit decision in September denying defendants' motion to vacate or modify the terms of the consent decree, the defendants filed a petition for *certiorari* with the Supreme Court of the United States. Attorney generals from 40 other jurisdictions joined in requesting that *certiorari* be granted. We filed our opposition to *cert.* the last week of December 1989. On January 22, 1990 the Supreme Court denied defendants' petition and the lower court has now begun issuing favorable opinions and orders on long-pending fee applications.

**Harris v. Thigpen**—This case challenges the AIDS testing and segregation policies of the Alabama Department of Corrections. On January 8, 1990, the trial court issued an opinion denying relief to the plaintiffs on all claims and dismissed the case. He also rejected plaintiffs' § 504 claim seeking reintegration or at least separate but equal programming. He rejected Eighth Amendment medical care and mental health claims as well, basing his decision on financial considerations, noting that Alabama is a poor state. We have filed a notice of appeal with the Eleventh Circuit.

**Inmates of Occoquan v. Barry**—This case challenges conditions at the District of Columbia's Occoquan prison facilities. In December, the judge held a hearing to elicit an adequate plan to remedy constitutional violations. The defendants agreed to approximately 90% of the items in what we considered to be an effective plan. The judge will consider remaining issues.

**Palmigiano v. DiPrete**—This case challenges conditions in the Rhode Island state prison system. On December 5, 1989, the judge held a hearing on the current state of compliance. The hearing also covered our request for additional sanctions beyond the contempt fines already imposed per the court's April 6, 1989 order. In February 1990, the court appointed a prominent "court expert" to assist it in current proceedings after the defendants moved to modify the various court orders which led to the earlier contempt holdings.

**Plyler v. Nelson**—This is a statewide conditions case in South Carolina. On February 15, 1990, the district court issued a favorable opinion denying the defendants' motion to modify or vacate double-celling restrictions at the state's main women's prison.

**Tillery v. Owens**—This case challenges conditions at the Western Penitentiary in Pittsburgh. Defendants filed a notice of appeal in response to the district court's September 15 decision. The September decision found in favor of the plaintiffs on almost all issues and ordered the cessation of double-celling.

**U.S. v. Michigan/Knop v. Johnson**—This is a statewide Michigan prison conditions case. At our request, the trial court scheduled a contempt hearing dealing with defendants' interference with the monitoring process. On January 16, the trial court found the defendants in contempt for failure to execute their monitoring responsibilities appropriately. In *Knop*, on December 11, the Sixth Circuit scheduled briefing on the appeal of the attorneys' fees order.

**National Prison Project**
American Civil Liberties Union Foundation
1616 P Street, NW, Suite 340
Washington, D.C. 20036
(202) 331-0500