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In Pennsylvania, 200 Years of Practice Doesn't Make Perfect

BY STEFAN PRESSER

Approximately 200 years after Pennsylvania opened the world's first penitentiary, the state Department of Corrections has found itself on the verge of collapse. As a result of either riots or threats of riots, it has been forced to put one after another of its institutions on lockdown. With its third largest facility burned to the ground, Pennsylvania's acting corrections commissioner on March 7 of this year faxed the following message to his colleagues: "Please be advised that we have reached the critical point of zero available beds in the Department of Corrections," while noting that "new commitments continue to arrive at an accelerated rate."

While the Department has just recently lost control of its operation, the problems inherent in the penitentiary system are as old as the concept itself. The idea of the penitentiary was based on the Quaker belief that "the best way to reform criminals was to lock them in cells and keep them alone—in total and unrelieved solitude—day and night."[1] Accordingly:

> *The sentenced inmates were kept alone and indolent in tiny cells with small, grated windows so high atop the outside wall of the cell that they 'could perceive neither heaven nor earth;' they existed without conveniences or communication of any kind. Inmates were given work to do alone in their cell, and eventually together in small groups....There was no socialization or even communication...*
> *Each cell was itself a complete prison unto its occupant. At no time did the inmates leave their cells to work, eat, or to do anything else except to 'exercise' in their own small, attached courts. Solitary labor was to be the key to moral regeneration within prison walls.*[2]

Notwithstanding the humane motivation of its founders, this system was abandoned because, "...Instead of communing with God and becoming purified,

Stuart Leask, Harrisburg, Pa.

State police with helmets and shotguns patrol outside perimeter at Camp Hill State Prison in Pennsylvania, last October.

INSIDE . . .

T.J. Tristan, Harrisburg, Pa.

State police lining up outside the state correctional institution at Camp Hill, Pennsylvania, during the October 1989 disturbance.

the men imprisoned went insane, committed suicide, or died due to the extreme conditions. As Thomas Mott Osborne, one of our foremost prison administrators, has said, 'In attempting to reform men by forcing them to think right, by locking them in a solitary cell with a Bible, the Quakers showed a touching faith in human nature, although precious little knowledge of it.'"[3] Their successors in the Department of Corrections seem to have gleaned little more of human nature in the ensuing 200 years.

Over 19,000 individuals were being held in 13 state prisons meant altogether to hold no more than 12,000. On the night of October 23, 1989, a number of prisoners at Huntingdon refused to lock down after dinner. Whether due to double-celling, cutbacks in programs and other services, or to some other factor which will never be fully understood, on that night about 25 prisoners began a rampage. Huntingdon then went on 24-hour lockdown which lasted for much of the rest of that fall.

Two days later the Department lost control of its second largest prison. Built in 1941 with a capacity of approximately 1,800 beds, Camp Hill was by then housing over 2,600 inmates. As a result, inmates' access to medical, legal, and programmatic opportunities had diminished to a point where many prisoners remained idle for the duration of their incarceration. Inmate frustration finally exploded as word of further cutbacks in medical and visitation programs circulated. On October 25, at approximately 2:45 p.m., an inmate attack on a guard turned into a general melee. Over the course of the next several hours prisoners seized hostages and control of several buildings. From these hostages, the prisoners were able to obtain cellblock keys as well as radios which they used to begin negotiations with the Department.

Two days later the Department lost control of its second largest prison.

By mid-evening, negotiations had resulted in a commitment from the prisoners to release the hostages, and to return voluntarily to their cells in exchange for the Department's promise to continue the dialogue over inmate grievances. Even though officials knew that Camp Hill's security system had been badly damaged, they allowed inmates to return to their cells without further search. When the following day's negotiation proved fruitless from the inmates' perspective, they simply released themselves and proceeded for a second straight day to seize control of the institution. During the second melee, a large part of Camp Hill went up in flames. For the better part of a day and a half, prisoners held nearly 1,000 correctional officers and state police at bay.

To the extent that the Department had been nonchalant in its response to the first incident, officials now acted with draconian overkill to retake Camp Hill. Having quelled the riot, officers stripped prisoners to their underwear. Each was flexicuffed as well as shackled to another inmate. They remained out-of-doors in that state of undress and restraint for the next three days during brutally cold weather. When the prisoners were at last brought back indoors, they remained cuffed and shackled. They remained in these restraints for the next 14 days, despite the fact that each cell was now *triple-padlocked*, until the Pennsylvania ACLU could secure a federal court order.

The world did not learn of these conditions (or that the Department was *not* providing toilet paper, mattresses, pillows, or showers) until the first postcards began trickling out of Camp Hill. So bizarre and barbaric were these descriptions that when they were first brought to ACLU's attention, I simply refused to accept them at face value. It was only after corrections officials confirmed the shackling—intended to be of indefinite duration—that we decided to file for injunctive relief, even though the Department assured us that prisoners were not without toilet paper, clothing, mattresses, and the like.

Despite corrections officials' protestation that prisoners were not being abused, the testimony in *Arbogast v. Owens*[4] proved that the shackled inmates were being forced to sleep in a state of

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

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undress on the concrete cell floor. Moreover, unrebutted testimony established that the Department was not providing such essentials as toilet paper. While I never doubted that Judge Rambo, to whom this case was assigned, would order that basic items of civilization be afforded, it was not at all clear whether she would force the state to unshackle our clients. We were especially pleased when the court concluded:

> *The measures taken to restrain the inmates is much more a matter of institutional security. However, given the general disdain for the use of shackles to restrain inmates (see cases cited in Plaintiffs' memorandum at 4-5) and the fact that the cells at Camp Hill are locked with three different mechanisms, the court believes that the continued use of shackles is not necessary. In any event, the court cannot say that plaintiffs lack a reasonable probability of success on the merits of their claims so as to preclude them from obtaining injunctive relief.*[5]

Within days of the entry of this order, the Department put its largest facility on lockdown to avoid another Camp Hill. With 3,400 prisoners, Graterford was not only one of the nation's largest prisons but was at that time 1,000 prisoners over capacity.

As of the writing of this article, the situation is so bad that in order to alleviate overcrowding at Graterford (the population of which is now over 4,000), the Department is contemplating moving several hundred Graterford inmates to Camp Hill, which is still in the process of being put back on line.

Sadly, one can only conclude that if Pennsylvania, with its 200 years of experience, cannot make the penitentiary system work, it is time for some creative alternative forms of punishment. ■

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[1]R. Goldfarb & L. Singer, *After Conviction* (1973).

[2]*Id.* at 24-25.

[3]*Id.* at 37.

[4]1:CV-89-1592 (M.D.Pa. 1989).

[5]Memorandum And Order (November 8, 1989 at p. 4).

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The Lost Meaning of *Whitley v. Albers*

BY MARK LOPEZ AND DAVID FATHI

Traditionally, the Eighth Amendment prohibition against "cruel and unusual punishment" has meant different things in different contexts. When a prisoner complained of overcrowding and deleterious conditions, an Eighth Amendment violation was established if he could show "wanton and unnecessary infliction of pain," *Rhodes v. Chapman*,[1] to be measured by the oft-quoted "totality of conditions" test. *Hutto v. Finney*.[2] If he alleged that he was being denied medical care, or protection from assault by other prisoners, the standard used was "deliberate indifference." *Estelle v. Gamble*;[3] *Davidson v. Cannon*[4].

In 1986 the Supreme Court for the first time introduced an explicit intent requirement into Eighth Amendment jurisprudence, holding that a prisoner injured while authorities are suppressing a prison riot can recover only if officials used force "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*.[5]

Many courts, in their enthusiasm to extinguish prisoners' rights, have sought to extend *Whitley's* "malicious and sadistic" threshold far beyond the prison riot context to cover all uses of force by prison authorities and, more importantly, all Eighth Amendment claims involving prison conditions.

Whitley v. Albers[6] was brought under 42 U.S.C. § 1983 by a prisoner who had been shot by a guard in the course of quelling a prison disturbance. The prisoner alleged that the shooting violated his Eighth Amendment right to be free from cruel and unusual punishment.

The Court, by a five-to-four margin, decided in favor of the prison officials. The Court first outlined the general standard for establishing violations of the Eighth Amendment: "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock."[7] In the context of a prison riot, officers demonstrated obduracy and wantonness only if they used force "maliciously and sadistically for the very purpose of causing harm."[8] Since, according to the Court, there was no evidence in this case that prison officials had acted "maliciously and sadistically," the district court had properly directed a verdict in their favor.

Justice Marshall, in dissent, protested the majority's invention of a separate, "especially onerous" standard for Eighth Amendment violations during prison unrest.[9] But, although *Whitley* was unquestionably a step backwards, prisoner rights advocates hoped it would be confined to its facts, thus inflicting minimal damage on Eighth Amendment law.[10]

The *Whitley* court did not purport to extend the new "malicious and sadistic" standard to all Eighth Amendment claims. In fact, it specifically reaffirmed the holding of *Estelle*, that "deliberate indifference" to prisoners' serious medical needs violates the Eighth Amendment, noting that "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."[11] By its terms then, *Whitley* seemed to be limited to cases involving prison uprisings. Instead, however, lower courts hostile to prisoners have expanded *Whitley* far beyond those situations. Unless the Supreme Court reverses this trend soon, what began as a narrow exception now threatens to swallow the entire Eighth Amendment.

Indeed, the dissenters in *Whitley* foresaw this potential. "The Court imposes its heightened version of the 'unnecessary and wanton' standard only when the injury occurred in the course of a 'disturbance' that 'poses significant risks,' [citation]. But those very questions—whether a disturbance existed and whether it posed a risk—are likely to be hotly contested."[12] In *Whitley* itself, for example, the majority brushed aside evidence that the disturbance was substantially over by the time the shots were fired. Similarly, in many subsequent cases in the lower courts, "disturbance" has been very broadly construed.

For example, in *Cowans v. Wyrick*,[13] a prisoner, locked in his cell, refused to shut a food service door. A guard responded by slamming the door on the prisoner's hand. The Eighth Circuit held that the prisoner's refusal was a "distur-

bance indisputably pos[ing] significant risks to the safety of inmates and prison staff," and employed the *Whitley* "malicious and sadistic" standard to reverse a judgment for the prisoner.[14] Other courts are more candid about their expansion of *Whitley*. In *Ort v. White*,[15] the Eleventh Circuit stated its view that "[a]lthough *Whitley* was decided in the extremely volatile context of a prison riot, its reasoning may be applied to other prison situations requiring immediate coercive action." It then found that a prisoner's refusal to carry a water keg required such "immediate coercive action."

The Fourth Circuit may have gone the furthest in expanding *Whitley* to cover all use of force in prison. That court recently stated: "While the particular setting of *Whitley* involved a prison riot, the standard announced in that case is not limited to the quelling of institutional disturbances. The *Whitley* standard applies to any claim of excessive force to subdue [a] convicted prisoner, [citation] or to prophylactic or preventive measures intended to reduce the incidence of...any other breaches of prison discipline." *Miller v. Leathers*.[16] The *Miller* court affirmed summary judgment for a guard who had struck a handcuffed prisoner three times with his baton, breaking his arm, when the prisoner refused an order and insulted the guard's mother. Other courts have applied the *Whitley* "malicious and sadistic" standard to the use of force on a prisoner in the mess hall,[17] and to a guard's use of a baton on a prisoner's neck when he refused to enter his cell.[18]

Fortunately, not all courts have collapsed the distinction between quelling a prison riot and all other uses of force. In *Meriwether v. Coughlin*,[19] prisoners engaged in a nonviolent protest were beaten by guards. The Second Circuit declined to apply the *Whitley* "malicious and sadistic" standard, "because no riot was occurring..., nor was there even, according to the jury, the degree of unrest that defendants claimed."[20] The Ninth Circuit has similarly declined to apply *Whitley* to body cavity searches, where the circumstances giving rise to the searches "did not constitute an ongoing prison disturbance [and] the officers were not confronted with an instantaneous decision whether to conduct the searches in the manner described."[21] *Bolin v. Black*[22] did involve a prison riot, but prisoners were beaten after the riot was over and prisoners had been locked down. The Eighth Circuit distinguished *Whitley* and *Cowans*, because "[i]n the instant case, the beatings complained of by the prisoners occurred *after* any threat to institutional security had been quelled."[23]

It seems likely that the Supreme Court will eventually resolve this conflict in the application of *Whitley* to use of force in prisons. However, it is already clear that at least three justices are disposed to read that case expansively. Justice O'Connor has stated her belief, joined by Chief Justice Rehnquist and Justice Kennedy, that *Whitley* should not be limited only to "full-blown prison riots."[24]

These attempts to extend the *Whitley* "malicious and sadistic" standard to all use of force cases are disturbing. But far more ominous are moves to apply that standard to *all* Eighth Amendment cases, specifically those involving ongoing conditions of confinement. Under this approach, prisoners complaining of contaminated food or unsanitary conditions in their cells must show that prison officials deliberately caused these conditions, "maliciously and sadistically for the very purpose of causing harm." Obviously such a showing, requiring a probe into the psyche of prison administrators, is extraordinarily difficult to make. Nor can such a requirement be reconciled with the high Court's previous decisions in *Hutto* and *Rhodes*, which do not require such an exacting inquiry.

Perhaps the most unequivocal statement to date is the decision of the Sixth Circuit in *Wilson v. Seiter*.[25] Ohio prisoners mounted an Eighth Amendment challenge to numerous conditions of their confinement, including overcrowding, excessive noise, inadequate heating and cooling, and unsanitary eating conditions. Purporting to follow *Whitley*, the court of appeals affirmed the trial court's grant of summary judgment for the defendants.

The court first noted that "at least in this circuit, the *Whitley* standard is not confined to the facts of that case; that is, to lawsuits alleging use of excessive force in an effort to restore prison order."[26] It then proceeded to make the standard even more onerous than *Whitley* had done: "the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty."[27] Since the defendants' affidavits stated that they had made some attempts to remedy the conditions complained of, they could not have acted with the requisite "persistent malicious cruelty;" thus, summary judgment was appropriate.

The Eighth Circuit has taken a similar tack. In *Cody v. Hillard*,[28] that court, sitting *en banc*, reversed the district court's order ending double-celling at the South Dakota State Penitentiary. The court noted the officials' "sincere efforts to maintain a healthful environment," and concluded that "[t]his hardly reflects 'obduracy and wantonness.'"[29] The focus on prison officials' state of mind, rather than on the objective conditions faced by prisoners, is consistent with the intent requirement of *Whitley*.

The implications of the *Wilson* and *Cody* decisions are not difficult to predict. Under the standard announced in those cases, almost no Eighth Amendment claim involving conditions of confinement can be successful, because the test focuses on the defendants' state of mind rather than the objective harm to prisoners. Obviously no administrator houses prisoners in filthy, overcrowded conditions without access to medical care out of malicious cruelty; it occurs as a result of underfunding, inadequate staffing, or administrative incompetence. To require prisoners to prove otherwise is to impose an almost impossible burden and essentially to read the Eighth Amendment out of the Constitution.

Moreover, whatever reasons might arguably support the "malicious and sadistic" standard in the prison riot context are attenuated or nonexistent when continuing conditions are at issue. First, the interest in avoiding the second-guessing of prison officials is at its zenith when they are making split-second, life-and-death decisions during an emergency. This is not the case with conditions that have persisted essentially unchanged for months or years. Second, prison officials are experts in prison security; deference to them is and should be at its height when they make security judgments regarding the use of force. Where they make judgments about medical care, nutrition, and environmental health and safety, they have no special competence and deference is less appropriate.

It should be emphasized that the decisions in *Wilson* and *Cody* do not represent the unanimous view in the circuits. Indeed, several sister circuits have expressly refused to apply the "malicious and sadistic" standard to conditions cases. Thus, in *Foulds v. Corley*,[30] the Fifth Circuit explicitly rejected the trial court's application of *Whitley* to a conditions case involving solitary confinement. "The facts of the instant case markedly differ. There was no imminent danger. We decline the invitation to extend the rule of *Whitley*

to cover all prison disciplinary actions, ostensibly under the guise of achieving prison security."[31] A different panel of the Fifth Circuit has similarly stated that the heightened *Whitley* standard does not apply to continuing conditions of confinement. "Prison conditions may violate the eighth amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain."[32]

Similarly, in *LaFaut v. Smith*,[33] a handicapped prisoner claimed he had been denied the basics of personal hygiene. The Fourth Circuit, in an opinion by Justice Powell, sitting by designation, rejected attempts to apply the heightened *Whitley* standard to this claim. "Whether one characterizes the treatment received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle* to this case."[34]

Finally, in *Morgan v. District of Columbia*,[35] the District of Columbia Circuit likewise rejected application of the *Whitley* standard, and applied the "deliberate indifference" standard to a prisoner's claim that officials had failed to protect him from assault by a fellow prisoner:

The exigencies and competing obligations facing prison officials while attempting to regain control of a riotous cellblock, which led the Court to conclude that the "deliberate indifference" standard was inadequate in Whitley, *are not present in this case. The gravamen of* Morgan's *claim is the District's overcrowding of the Jail; the conduct* Morgan *challenges is the municipality's operation of the Jail generally. In this context, unlike in the prison riot setting, there can be no legitimate concern that liability will improperly be based on "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."* Whitley, *106 S.Ct. at 1085. The District's practice of overcrowding has endured since at least 1971. We therefore conclude that "deliberate indifference" was the appropriate standard by which to judge the District's conduct in this case.*

The National Prison Project has filed a petition for a writ of *certiorari* in *Wilson v. Seiter*, urging the Supreme Court to review and reverse the Sixth Circuit's decision in that case. If *certiorari* is granted, the Supreme Court's decision will almost certainly determine the course of prison litigation for years to come. The *Wilson* court and others have served notice of their intention to make it virtually impossible for prisoners to successfully challenge the conditions of their confinement. Unless the Supreme Court takes this opportunity to reverse this alarming trend, there will once again be an "iron curtain drawn between the Constitution and the prisons of this country."[36] ■

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[1]452 U.S. 337, 347.

[2]437 U.S. 678, 687-688 (1978).

[3]429 U.S. 97, 104 (1976).

[4]474 U.S. 344, 347 (1986).

[5]475 U.S. 312, 320-321 (1986).

[6]475 U.S. 312 (1986).

[7]475 U.S. at 319.

[8]475 U.S. at 320-321.

[9]475 U.S. at 328 (Marshall, J., dissenting).

[10]According to the *Whitley* majority, the case involved a "prison riot" at the Oregon State Penitentiary. One officer was assaulted, and another taken hostage. Prisoners were armed and had set up barricades, and "the cellblock remained in the control of the inmates." One prisoner warned officials that a prisoner had already been killed and other deaths would follow (in fact, there were no deaths). Faced with this situation, prison authorities mounted an armed assault to quell the disturbance. Several prisoners were wounded by gunfire, including the plaintiff, who had not participated in the uprising. 475 U.S. at 314-316, 322-323.

[11]475 U.S. at 320.

[12]475 U.S. at 329 (Marshall, J., dissenting).

[13]862 F.2d 697 (8th Cir. 1988).

[14]862 F.2d at 699-700. Judge McMillian, concurring specially, questioned whether the incident constituted a "prison disturbance." *Id.* at 701.

[15]813 F.2d 318, 323-325 (11th Cir. 1987).

[16]885 F.2d 151, 153 (4th Cir. 1989), internal quotation marks omitted.

[17]*Corselli V. Coughlin*, 842 F.2d 23, 25-26 (2d Cir. 1988).

[18]*Brown v. Smith*, 813 F.2d 1187, 1188-1189 (11th Cir. 1987).

[19]879 F.2d 1037 (2d Cir. 1989).

[20]879 F.2d at 1048.

[21]*Vaughan v. Ricketts*, 859 F.2d 736, 742 (9th Cir. 1988).

[22]875 F.2d 1343 (8th Cir. 1989), *cert. denied*, ___U.S.___, 110 S.Ct. 542, 107 L.Ed.2d 539 (1989).

[23]875 F.2d at 1350, emphasis in original.

[24]*Dudley v. Stubbs*, — U.S.—, 109 S.Ct. 1095, 1097, 103 L.Ed.2d 230 (1989) (O'Connor, J., dissenting) (mem.).

[25]893 F.2d 861 (6th Cir. 1990), *cert.* pending.

[26]893 F.2d at 866.

[27]893 F.2d at 867.

[28]830 F.2d 912 (8th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 906, 108 S.Ct. 1078, 99 L.Ed.2d 237 (1988).

[29]830 F.2d at 915.

[30]833 F.2d 52 (5th Cir. 1987).

[31]833 F.2d at 54.

[32]*Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987), *partially vacated on other grounds*, 858 F.2d 1101, 1103 (5th Cir. 1988) (*en banc*).

[33]834 F.2d 389 (4th Cir. 1987).

[34]834 F.2d at 391-392.

[35]824 F.2d 1049, 1057-58 (D.C. Cir. 1987).

[36]*Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974).

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Forging Justice After 200 Years

200 Years of the Penitentiary: Breaking Chains, Forging Justice, is a year-long project of the American Friends Service Committee (AFSC) designed as a springboard for renewed analysis and debate on national criminal justice policy.

The Project coincides with the 200th year since the building of the first penitentiary in the United States in 1790. The Religious Society of Friends (Quakers) and others developed the idea as an alternative to corporal and capital punishment.

AFSC was founded in 1917, as the service arm of the Religious Society of Friends. The Committee felt that it was appropriate to use this 200th year after the founding of the penitentiary as a time for reassessment of a model that Quakers helped create.

The Project's goals are:

■ To broaden public debate by focusing on root causes of crime, drug abuse, violence and on the increased imprisonment of people of color and poor people;

■ To involve in the debate those most affected by crime and imprisonment—African Americans, Latinos, Native Americans, Asian Americans and poor people;

■ To change public policy on economic and social issues connected to the crisis in the criminal justice system;

■ To plan both long-term, fundamental changes in the criminal justice system as well as immediate reform.

The Project will sponsor and participate in a variety of community action projects. It will organize a series of hearings; conduct public education tours of prisons; and act as an information clearinghouse offering speakers and research on model state and national criminal justice legislation.

October 20, 1990 will be a day of nationally coordinated activities to dramatize the issues, generate debate and develop strategic solutions.

For more information, contact Linda Thurston, Project Coordinator at AFSC, 1501 Cherry Street, Philadelphia, PA 19102, 215/241-7130.

Instead of Death: Alternatives to Capital Punishment

BY RUSS IMMARIGEON

Until we give up the illusion that putting people to death is a solution to the crime problem, we will never develop alternatives that will protect us and enhance the value of human life in a civilized, just society.
–The Fellowship of Reconciliation

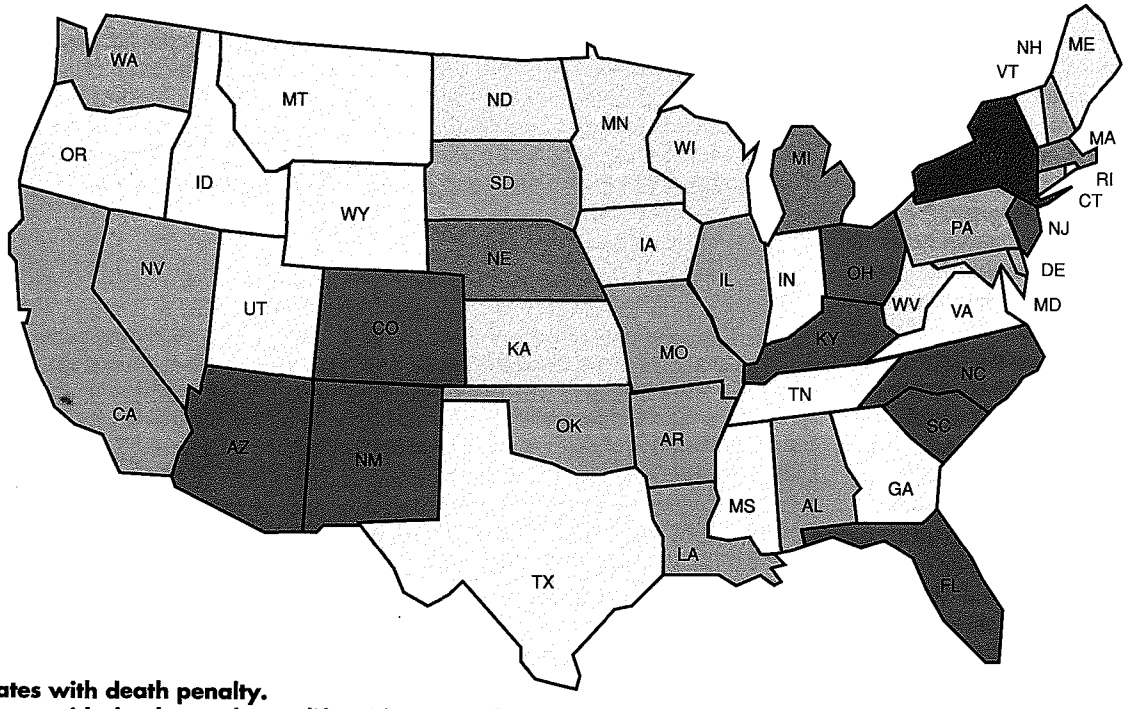
In 1952, sociologist Arthur Lewis Wood, in one of the few published examinations of substitutes for the death penalty, observed that the use of life sentences "has caused an excessive accumulation of inmates in many of our state prisons. The pressure of this condition and perhaps the increasing acceptance of individualized treatment have encouraged, at least in some states, the more frequent use of the traditional powers of executive clemency and court discharge by selective release of these prisoners."[1]

More recently, the Fellowship of Reconciliation's Capital Punishment Program probed more deeply into specific actions society could take when confronted by violent behavior instead of the death penalty. Life imprisonment, they suggest, "provides for something that death does not—an opportunity for the natural maturation process to occur and for society to re-examine its responses to behavior."[2] The Fellowship concluded that hospitalization and medical treatment for some capital offenders and restitution and compensation for victims merit further examination.

In the mid-1970s, the prestigious Committee for the Study of Incarceration boldly proposed that sentences longer than five years should be abolished except for certain types of murder or in exceptional instances requiring predictive restraint. In the case of murder, the committee outlined the following sentencing scheme:

Murder, the most serious of crimes, presents special problems because of the diverse circumstances under which it is committed. Having a single presumptive penalty might require unduly wide discretionary variations to accommodate killings of varying degrees of gravity. It may be preferable to prescribe separate presumptive penalties for distinct kinds of murder: (1) murders stemming from personal quarrels, (2) unprovoked murders of strangers, (3) political assassinations,

There are various alternatives to the death penalty. Most state laws provide for life sentences for capital murder which severely limit or eliminate the possibility of parole. At least 10 states have life sentences under which parole is not possible for 20, 25, 30 or 40 years and at least 18 states which have life sentences with no possibility of parole *at all*.



States with death penalty.
States with death penalty, or life without parole.
States with death penalty, or life without parole for at least 20 years.
States with *no* death penalty.
States with *no* death penalty, with life without parole.
States with *no* death penalty, with life without parole for at least 20 years.

Alaska and Hawaii have no death penalty and no life without parole.

Source: Ronald J. Tabak and Mark J. Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 Loyola of Los Angeles, L. Rev., 126-127 (1990).

and (4) especially heinous murders, such as those involving torture or multiple victims. Five years might be the norm for the personal-quarrel situation, with longer presumptive sentences for the other three categories. This approach would have the additional advantage that the homicides that cause the most public outrage—those in the last three categories—would be dealt with separately: were there only a single presumptive penalty, it would tend to become inflated to accommodate the more shocking homicides.[3]

Except for these and several other proposals, abolitionists have given inadequate attention to what should replace capital punishment. Instead, they have largely focused, justifiably, on restricting and ending its use. Unfortunately, in the absence of detailed discussion of alternatives to the death penalty, life without parole, currently the most politically acceptable alternative, overshadows more humane options. In the absence of broader discussion, the tendency is to define penalties by their equivalency with the capital penalties they are supposed to replace. Life without parole as an alternative to the death penalty is but one example of the way "reform" proposals are shaped in reaction to, instead of as a challenge to, conservative crime control strategies.

A Historical Dilemma

Capital punishment's greatest strength—for those who support it—is the clarity of its retributiveness, the sense that capital offenders got what they deserved or, at least in the case for murderers, they got what they gave. As with the clanging of the prison cell door, the clarion call for capital punishment is that the death penalty is concise in its finality not only for the executed but also for those who apply it or approve its application. Once done, justice is done. For death penalty proponents, justice is more a specific action than a process. Once done—proponents like to think—there's nothing more to think about; society no longer bears any responsibility.

In times past, the death penalty was meted out for a wide variety of offenses. Nineteenth and twentieth century advocates against the death penalty succeeded in whittling away the number of capital crimes. Their ally was the inherent disproportionality of killing someone who did not kill someone else. Ever since the death penalty was abolished for rape, however, the major focus of anti-death penalty strategies has been to eliminate death penalty statutes for people who have killed.

Historically, death penalty abolitionists have been weak in suggesting alternatives. Generally, they've taken one of two approaches. First, some argue that it simply isn't necessary to propose an alternative. The primary struggle is to abolish the death penalty. This is a handy device because in fact it would be a nice step forward if we simply abandoned capital punishment regardless of whether we knew what to implement in its place. Nonetheless, it begs an important question, namely, what do we do when people kill other people? Moreover, it leaves the door open for unsatisfactory alternatives, e.g., life without parole.

For proponents of the death penalty, justice is more a specific action than a process.

Second, others have accepted less-than-ideal alternatives. Frequently, these alternatives are bleak and problematic in themselves. In the mid-1800s, for instance, reformers such as Robert Rantoul Jr. in Massachusetts succeeded in reducing the number of offenses for which one could receive a death sentence. But the alternatives offered were draconian. Rantoul suggested placing offenders in a deep dark pit (only years before Connecticut and Maine had built prisons at former mining sites).

Current initiatives by anti-death penalty governors, such as Michael Dukakis of Massachusetts or Mario Cuomo of New York, to garner support for life without parole can be seen in this same dim light. What they offer is a political ameliorative, a strategy to convince enough legislators to keep the death penalty from becoming state law. Unfortunately, there is much to be said in favor of this approach—it may indeed keep people from being executed—but it nonetheless also begs the question—what do we do when people kill other people?

Seeking Alternatives to the Death Penalty

Historically, despite periods of waning public support for capital punishment, the level of public support has long confronted death penalty opponents. University of California historian Louis P. Masur, in his new study, *Rite of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, observes that antebellum anti-death penalty activists, buoyed by successes in reducing the number of capital offenses but nonetheless confronted by seemingly strong public support for capital punishment, feared that "the total abolition of the death penalty was still a long way off."[4]

Public sentiment favoring the death penalty is often basted over the gristle of political debates on capital punishment. But political leaders frequently overestimate the retributiveness of the public. Political leaders commonly fail to understand what the public wants when it raises its voice in capital cases, and rarely use their leadership positions to inform and influence public understanding.

According to criminologist Roger Hood, "the suggestions that attitudes to the death penalty are so deeply embedded that they are impervious to the impact of information about its administration and effects has to be placed alongside the fact that in many countries opinions have changed, and quite markedly, over relatively short periods of time."[5]

Hood, who directs the Centre for Criminological Research at Oxford University, turns to recent American history for proof. In 1953, he writes, 66% of Americans were said to favor capital punishment. This figure was to fall to 40% in 1966 before rising to 71% in 1986.

"This would seem to indicate," Hood surmises, "that there is a substantial body of non-ideologically committed opinion that can be affected in one direction or another by information about crime and the impact of punishment."

Indeed, sociological studies raise several issues: first, they show that people feel that American courts are more lenient than they actually are; second, given information about capital offenders, the costs of execution, and alternatives to the death penalty, people are less inclined to support it.

In recent years, Amnesty International and other reform groups have begun to describe the complexities of public opinion on the death penalty. At a time when newspaper articles lazily refer to what appears to be overwhelming citizen support for capital punishment, Amnesty has sponsored research surveys in California, Connecticut, Florida, Georgia, Kentucky, Maryland, and Oklahoma that have found a groundswell of support for alternatives.

A brief review of several of these

research projects suggests that public support for the death penalty is not as strong as proponents assert.[6]

■ Californians prefer life without parole plus restitution over the death penalty by a margin of two to one. Respondents to a December 1989 survey believe that this addresses their concerns that murderers remain in prison and that something is done for victims. The survey found that the public has many misconceptions about what capital punishment "achieves." Finally, Californians were less supportive of the death penalty when they learned specific information about offenders' backgrounds. Only one-fourth of those polled, for instance, supported executing the mentally retarded.[7]

■ Support for the death penalty among Oklahomans would be reduced by 40% if life without parole were substituted. Support also diminishes among Oklahomans when the offender is a juvenile, is mentally retarded, or has a history of being abused as a child. Finally, Oklahomans are in a mitigating mood when someone kills in a "moment of rage" or is under the influence of alcohol or drugs.[8]

When the state kills someone, there are also victims with equivalent relationships to the executed.

A Public Information Campaign Against the Death Penalty

In May 1990, the National Coalition Against the Death Penalty (NCADP) received a one-year grant from the J. Roderick MacArthur Foundation in Chicago to establish a National Death Penalty Information Center (NDPIC). NDPIC's primary purposes, according to Leigh Dingerson, NCADP's executive director, are "to help develop proactive media strategies against capital punishment and to collect and provide information about the death penalty to the press."

Pessimistic views of public opinion pervade much writing about the death penalty and other criminal policy issues. Several years ago, criminologists Franklin E. Zimring and Gordon Hawkins observed that "public opinion, political pressures, the abdication of federal courts, and the undisciplined performance of other decision-making institutions all combine to create a climate in which there will probably be more, not fewer, executions in the near future."[9]

The public opinion surveys done by Amnesty International and other reform groups suggest that, like the Berlin Wall, the notion of a vengeful public has cracks and is crumbling. What these studies clearly identify is the need for public education; they show that public opinion is both ill-informed and open to alternatives to the death penalty. If the NCADP's National Death Penalty Information Center and state and local anti-death penalty groups use this information to help shift media and policymaker perceptions, it is possible that other factors identified by Zimring and Hawkins—political pressures, etc.—would become more fertile ground for developing criminal policies that do not rely on death as an anchor.

Interestingly, Zimring and Hawkins do not mention any specific alternative as a pre-condition for abolition, including life without parole. In part, they conclude that enlightened leadership will guide public opinion. They also argue that once capital punishment is abolished, people (they refer to victims' families) will continue to call for the harshest penalty available. To the extent that this is true—Zimring and Hawkins neglect the views of murder victim families that oppose the death penalty—it behooves us as a civilized society to temper people's choices.

However, the central questions remain. What instead of death? And what role do these alternatives play in helping to abolish the death penalty?

The simplest, most direct approaches to a particular problem, business leaders say, are most likely to succeed at producing results. An honest accounting of the "benefits" of capital punishment in this country gives us nothing to brag about: botched, painful, supposedly "painless" executions; increased isolation as a nation willing to kill as a matter of state policy; and a Supreme Court that is more willing to speed up the pace of executions than to probe the realities of what Yale law professor Charles Black once called the "inevitability of arbitrariness and caprice" in the adjudication and administration of the death penalty.

Like earlier discussions of alternatives to the death penalty, this article is far from complete, but perhaps it can be used as a foundation for exploring future alternatives.

Victim Services: When a person kills someone, regardless of mitigating or aggravating factors, there are victims. These victims may be spouses, family members, friends, neighbors, or co-workers. Similarly, when the state kills someone, there are also victims with equivalent relationships to the executed person. Heretofore, the needs (to express anger, to receive counseling, etc.) of these victims, on either side of the crime victim/criminal offender equation, rarely receive attention. Some victim support groups have specific projects working with murder victim families and at least one state has developed guidelines for working with family and friends of murder victims. But more needs to be done.[10] In particular, services to victims should be available regardless of whether an offender has been arrested, convicted, or sentenced. Furthermore, these services should be provided not as part of a sentencing scheme but simply because they are needed.

Demystifying Violence: Murder is a violent crime. Regrettably, especially in the United States, it is not all that uncommon. Still, the violence associated with homicide is frequently spoken about in extraordinary terms. In the process, we seem to disempower ourselves from being able to do anything sensible to address it. But, with exceptions, many capital murders—even sometimes the worst of them—derive from cumulative or immediate circumstances that have more comprehensible roots. We are now becoming more aware, for instance, of the role that physical and sexual child abuse have in shaping violent behavior in some people.[11] We need to increase our understanding of these root causes of violence and how we can develop social policies and programs to prevent, not simply respond to, crime.

Sentencing Advocacy: Both legal and popular articles on defense work in capital cases are replete with references to the inadequacy of legal counsel in many instances. Less discussed, but perhaps equally important, is the inadequacy of sentencing advocacy. The problem is two-fold: First, what are the alternatives? Second, what process should be used to develop appropriate alternatives? In recent years, defense-based sentencing advocacy services, like those used in non-capital cases, have been used in Illinois, New Jersey, and other states. These services must develop sentencing plans that consider broader concerns, including those of victims and their

families, than is the case in most court proceedings. If there is a penalty more humane and appropriate than life without parole, for instance, these plans can give substance to these claims. They provide the court with a concrete method of meting out less drastic, more constructive penalties.

Death penalty abolitionists have been weak in suggesting alternatives...begging the question, what do we do when people kill other people?

New Penalties: It isn't necessary or politically wise to take convenient shortcuts while fashioning a better response to violent crime. Several years ago, a New Jersey court suggested victim restitution as a condition of parole for a murderer in that state. The victim's family had not been consulted on the plan and raised a furor. The parole was quashed.

Justice is a process as much as it is individual actions. Accordingly, in looking for alternatives to the death penalty, we need to examine broader concerns than the standard justifications for punishment: rehabilitation, incapacitation, deterrence, and retribution. The Safer Society Program of the New York State Council of Churches, for instance, proposes a community safety/restorative model for communities wishing to protect themselves against violence. The basic principles are: safety is the first consideration of the community; offenders must be made responsible and accountable for their behavior; victims, survivors, and the community have been harmed and need restoration; the basic conflict which caused this harm needs resolution when possible; a continuum of service and treatment options is necessary in a variety of settings; and a coordinated systems approach is needed to encourage cooperation between public and private resources.[12] ■

[1]Arthur Lewis Wood, "The Alternatives to the Death Penalty," The Annals of The American Academy (Vol. 284), (November 1952), p.71.

[2]The Fellowship of Reconciliation, *Instead of the Death Penalty*, Nyack, NY: Capital Punishment Project, n.d.

[3]Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, Boston, MA: Northeastern University Press, (1986), p.139.

[4]See, Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, New York, NY: Oxford University Press, (1989).

[5]Roger Hood, *The Death Penalty: A World-Wide Perspective*, Oxford University Press, New York, (1990), p.155.

[6]Other studies include: "Capital Punishment in Connecticut," (Archdiocese of Hartford, 1987); "Attitudes in the State of Florida on the Death Penalty: Executive Summary of a Public Opinion Survey," (Amnesty International, USA, 1986); "Georgia Residents' Attitudes Toward the Death Penalty" (Southern Coalition on Jails and Prisons, 1987); "New York Public Opinion Poll: The Death Penalty: An Executive Summary," (Amnesty International, USA, 1989). For a review of the findings of the earlier of these reports, see Russ Immarigeon, "Public Supports Alternatives to Executions," *Jericho*, No. 43, (Spring 1987), p.11.

[7]Craig Haney and Aida Hurtado, *Californians' Attitudes About the Death Penalty: Results of a Statewide Survey*, New York, NY: Amnesty International, (1989).

[8]Harold G. Grasmick and Robert Bursick Jr., *Attitudes of Oklahoma Toward the Death Penalty*, Oklahoma City, OK: University of Oklahoma, (1988).

[9]Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda*, New York, NY: Cambridge University Press, (1986), p. 149.

[10]For example, see Lyn Brown, Ruth Christie, and David Morris, *Families of Murder Victims Project: Final Report*, London, England: National Council of Victim Support, (April 1990).

[11]See, Andrew Vachss, "Today's Abused Child Could Be Tomorrow's Predator," *Parade Magazine*, (June 3, 1990).

[12]Rev. Virginia Mackey, *Restorative Justice: Toward Nonviolence*, Louisville, KY: Presbyterian Church (USA), (1990).

Russ Immarigeon, a legislative associate with the New York State Assembly, writes regularly for the NPP JOURNAL. He is the co-author (with Meda Chesney-Lind) of the report, Women's Prisons: Overcrowded and Overused, *that will be available (for $3.50) in September from the National Council on Crime and Delinquency, 685 Market St., Suite 620, San Francisco, CA 94105, 415/896-6223.*

FOR THE RECORD

■ A recent report by the Correctional Association of New York suggests that New York State could save millions of dollars a year in prison operation and construction costs by expanding its use of alternative punishments for those convicted of nonviolent crimes.

The report, "Anti-Crime Strategies at a Time of Fiscal Constraint," shows that the state could save as much as $120 million a year in operation and $600 million in construction costs if they re-allocated their resources by diverting nonviolent offenders (roughly 61% of those sent to state prison) into rigorous alternative programs.

A typical program for nonviolent offenders would include mandatory employment or vocational/educational training, drug or alcohol treatment programs, community service, curfews and strict supervision. The Association also proposed early release of selected inmates to intensive parole supervision, community-managed residential programs, and an amendment to the law to allow good-time credits off minimum prison sentences.

For information on how to obtain the report, please write or call the Correctional Association of New York, 135 East 15th St., New York, NY 10003, 212/254-5700.

■ Nearly one in four young Black men between the ages of 20 and 29 is under some type of correctional supervision according to the report, "Young Black Men and the Criminal Justice System: A Growing National Problem." The report, published by the Sentencing Project, also points out that the number of young Black men under correctional supervision is greater than the number of Black men of all ages enrolled in college. The 12-page report is available for $2.50 from The Sentencing Project, 918 F St., Suite 501, Washington, D.C. 20004, 202/628-0871.

■ Alvin J. Bronstein, executive director of the National Prison Project, received a Doctor of Laws degree, *honoris causa*, from New York Law School on June 10, 1990. Mr. Bronstein, who is an alumnus of the law school, also delivered the commencement address to an audience of over 3,000. Bronstein urged the law school graduates to "proceed with a commitment to moral reasoning...with a feeling of social responsibility," noting that "you can still make a difference." He concluded the speech by quoting James Baldwin: "We must continue to be witnesses of our time; We must speak out against institutionalized and individual tyranny wherever we find it; Because if left unattended, it threatens to engulf and subjugate us all."

THE NATIONAL PRISON PROJECT

Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

Mental Health Care/Medical Care

Prisoners have a substantive due process right to avoid the involuntary administration of antipsychotic drugs, according to the Supreme Court's recent decision in *Washington v. Harper*, 58 U.S.Law Week 4249 (February 27, 1990). But that right may be overcome if medical personnel find that the prisoner suffers from a mental disorder which is likely to cause harm if not treated and as long as the medication is prescribed and reviewed by psychiatrists. As a procedural matter, the prisoner need not be found incompetent in a judicial proceeding and court authorization to medicate need not be obtained. A psychiatrist's decision is sufficient as long as it is reviewed by medical professionals who are not involved in the prisoner's current treatment or diagnosis.

In reaching these conclusions, the Court cited the special characteristics of the prison environment and prison officials' interest in and duty to protect the safety of prison personnel and other prisoners. It also relied explicitly on the "reasonableness" standard applied to prison regulations since *Turner v. Safley*. Thus, it appears that the Court would approve the compulsory use of antipsychotic medications on prisoners in situations in which civilly committed persons could not be forcibly medicated.

The Court assumed that "the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." 58 U.S.Law Week at 4253. In so assuming, the Court glossed over its own prior realization that prisons' institutional and security considerations "can, and most often do" impinge on prison medical services. *West v. Atkins*, 487 U.S. ____, n. 15, 101 L.Ed.2d 40 (1988). The Court also ignored the fact that what is in a person's "medical interest" is often a matter of opinion and of values and not of technical judgment—especially when the proposed treatment affects the patient's mental processes and poses significant risks of serious and irreversible side effects, as do most anti-psychotropic medications.

The practical result of *Harper* will likely be to shift most challenges to involuntary medication to state courts applying state law. Many states require some sort of judicial authorization for coerced medication, either by statute or under interpretations of state constitutions, and some states' law makes no distinction between prisoners and civilly committed persons. *See* dissenting opinion of Justice Stevens, 58 U.S.Law Week at 4262 n. 11. Others—including *Harper*—provide for judicial review of medication orders. In fact, Mr. Harper may ultimately win his case; the lower courts have not yet ruled on his state law arguments.

In *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990), decided a few days before *Harper*, a federal appeals court ruled more generally on a prisoner's right to refuse medical treatment, holding that such a right exists but that it may be overcome "when prison officials, in the exercise of professional judgment, deem it necessary to carry out valid medical or penological objectives.... [T]he judgment of prison authorities will be presumed valid unless it is shown to be such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." 897 F.2d at 113.

In *White*, the plaintiff alleged that he refused a course of treatment for an ear infection because the doctor would not tell him if the medication contained penicillin (to which he was allergic), that the doctor subjected him to disciplinary charges (later dismissed), and that there was no medical or penological justification for this conduct. The court held that these allegations were sufficient to state a constitutional claim. But this decision does not suggest what kinds of medical or penological justifications might suffice to overcome the right to refuse treatment. There is little prior case law on this subject, and the cases that do exist deal mostly with anti-psychotic medications (see *Washington v. Harper* discussion above), examinations and vaccinations for communicable diseases, *Zaire v. Dalsheim*, 698 F.Supp. 57, 60 (S.D.N.Y. 1988) (diphtheria-tetanus injection); *Ballard v. Woodard*, 641 F.Supp. 432, 436-37 (W.D.N.C. 1986) (tuberculosis test); *Smallwood-El v. Coughlin*, 589 F.Supp. 692, 699-700 (S.D.N.Y.) (intake examination for communicable diseases), or with threats to the prisoner's life, where most courts have upheld compulsory treatment based on the dangers to prison order if a prisoner is allowed to die, or on the danger that prisoners may use the threat of death to manipulate the prison administration.

Procedural Due Process—Disciplinary Proceedings

A recent Supreme Court decision in a mental health case may affect the extent of liability in prisoners' due process suits. In *Zinermon v. Burch*, 58 U.S.Law Week 33 (February 27, 1990), the plaintiff alleged that he was denied procedural safeguards required by state law and due process in his admission to a mental hospital. Hospital officials argued that their acts, which violated state law, were "random and unauthorized" and that the plaintiff's only remedy was a tort suit in state court. They cited the 1981 decision in *Parratt v. Taylor*, which held that prison officers' negligent loss of property did not deny due process as long as the state provided a post-deprivation remedy in the form of a state court damage suit.

The Supreme Court rejected the officials' argument and held that *Parratt* did not apply. Admission to mental hospitals and failures to follow required procedures are not "unpredictable," and providing pre-deprivation due process is not "impossible"—in fact, state law already made it mandatory. Therefore, the Court held, a post-deprivation remedy did not satisfy the Due Process Clause, and denial of proper pre-deprivation procedures would be unconstitutional. The Court also emphasized that the defendant officials were the people to whom the State had delegated both the power and authority to confine citizens in mental hospitals and the duty to observe procedural safeguards. In effect, for due process purposes, they are the State.

The same principles presumably apply to prison disciplinary proceedings, administrative segregation hearings, and other proceedings in which a pre-deprivation hearing is required. Thus, prison officials who violate due process requirements will continue to face personal liability under 42 U.S.C. § 1983 regardless of whether there is a state remedy and regardless of whether the State has created procedures on paper that would satisfy due process when followed.

Zinermon also clarifies who may be held

liable for due process violations: those whom the State grants the power to restrict liberty and the duty to provide procedural protections. An example of this reasoning—decided before *Zinermon* but fully consistent with it—is *Scott v. Coughlin*, 727 F.Supp. 806 (W.D.N.Y. 1990). There, a prisoner was twice "keeplocked" (detained in his own cell) by officers who then failed to write misbehavior reports. State regulations permit officers to keeplock inmates when they write them up; a "review officer" scrutinizes their misbehavior reports and keeplock decisions daily pending the formal disciplinary hearing. See *Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989). The court in *Scott* granted summary judgment for the plaintiff, noting that the officers' failure to write misbehavior reports was a factor in the due process violation, since the filing of the report is what triggers all the other procedural protections. Thus, the responsibilities placed on low-level staff by the state regulations ultimately form the basis for personal liability for the due process violation.

Prisoners' right to witnesses in disciplinary hearings has been severely limited in two recent decisions of federal courts of appeals. In *Brown v. Frey*, 889 F.2d 159 (8th Cir. 1989), the court held that prison officials could refuse to call an officer as a witness "because to do so would undermine prison authority by having one guard testify against another guard" and could refuse to call another prison official "because he refused to offer any testimony helpful to Brown's case and was therefore irrelevant." *Id.* at 168.

We think this holding is incompatible with fundamental fairness and with the entire purpose of due process protections, which is to ensure the factual correctness of the hearing officer's decision. Cases in which staff witnesses disagree are precisely those in which there is the greatest likelihood of inaccurate, false or vindictive accusations by officers, and therefore the greatest need for a thorough inquiry into the facts. Moreover, staff witnesses are of crucial significance in such cases, because inmate witnesses are almost never believed when they contradict staff accusations without non-inmate corroboration. As the Supreme Court has acknowledged, when credibility is at issue between inmates and staff, hearing officers "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985).

The notion that prison authority is "undermined" by effective inquiry into the truthfulness of staff members' accusations reduces due process to a nullity. As one court put it, in striking down a rule that effectively prohibited the calling of staff witnesses, "If there is preclusion of an entire class of witnesses...the right is dissipated in a cloud of verbiage." *Dalton v. Hutto*, 713 F.2d 75, 76 (4th Cir. 1983).

The right to call witnesses was impaired in a different way in *Francis v. Coughlin*, 891 F.2d 43 (2d Cir. 1989), in which the court held that calling the prisoner's own witnesses out of his or her presence does not deny due process. The court relied on one of its own prior decisions, *Bolden v. Alston*, which in turn relied on the Supreme Court's language in *Baxter v. Palmigiano* concerning issues of confrontation and cross-examination. In both *Bolden* and *Francis*, the court simply assumed without discussion that the same rules govern the calling of the prisoner's witness and the right of confrontation of adverse witnesses. In so holding, it created a conflict between federal courts of appeals, see *Bartholomew v. Watson*, 665 F.2d 915, 917-18 (9th Cir. 1982), and effectively overruled well-considered district court precedent.

In our view, both *Brown v. Frey* and *Francis v. Coughlin* illustrate a growing tendency toward perfunctory and one-sided analysis in prison due process cases. Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), all procedural due process questions require balancing the individual's interest, the likelihood that existing procedures will yield erroneous decisions and that other safeguards will help avoid them, and the governmental interest in avoiding additional safeguards. Decisions like *Brown* and *Francis* contain little or no discussion of the practical reality of prison disciplinary proceedings: the overwhelming tendency toward institutional bias of prison staff against inmates. As the Supreme Court observed, "It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truely adjudicatory performance." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985). In these circumstances, the danger of erroneous decisions is enormous and the need for additional safeguards great. Yet this essential element of the *Mathews v. Eldridge* test is ignored by many courts.

A more careful approach to an important due process question is evident in *Lenea v. Lane*, 882 F.2d 1171 (7th Cir. 1989), in which the court held that polygraph results may be used in prison disciplinary proceedings. But the court was careful to warn that due process may require careful limits on their use. In *Lenea*, the prisoner had been convicted of aiding an escape based in part on two polygraph answers alleged to be deceptive. The court held that the polygraph results were admissible as evidence and that in general they may serve to corroborate other evidence or may exculpate the prisoner.

Perhaps more importantly, the *Lenea* decision suggests that prison officials must carefully consider exactly what the polygraph results actually prove. In *Lenea*, the evidence against the prisoner consisted of the polygraph results and the facts that he knew the escapees and had spoken with one of them on the day of the escape. The court concluded that these facts did not add up to "some evidence" of guilt. Knowing an escapee and being legitimately in an area where the escape may have occurred do not support guilt of aiding the escape. Polygraph evidence might be relevant to the prisoner's credibility, but it did not excuse prison officials from coming up with some evidence that the prisoner actually committed the offense, and a conviction without such evidence denied due process.

Searches—Person/State Constitutions

Vermont's constitution gives more protection to prisoners' privacy than does the Fourth Amendment, according to the Vermont Supreme Court. In *State v. Berard*, No. 87-564 (Jan. 19, 1990), the state court rejected the holding of *Hudson v. Palmer*, 468 U.S. 517, 530 (1984), that prisoners have no legitimate expectation of privacy whatsoever in their living quarters.

Although Vermont constitutional law generally "import[s] the 'reasonableness' criterion of the Fourth Amendment," the *Berard* court stated that "we seek to give effect to the design of Article Eleven and decline to follow parallel federal law, such as *Hudson v. Palmer*, which tends to derogate the central role of the judiciary in [state search and seizure] jurisprudence." Slip op. at 3, 5 (citation omitted). The court agreed that prison life presents "special needs" that make a warrant and probable cause requirement impracticable, but it set conditions for random searches: "(1) the establishment of clear, objective guidelines by a high-level administrative official; (2) the requirement that those guidelines be followed by implementing officials; and (3) no systematic singling out of inmates in the absence of probable cause or articulable suspicion." Slip op. at 9.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Medical Care/Mental Health Care/ Women/Qualified Immunity

Langley v. Coughlin, 888 F.2d 252 (2d Cir. 1989). In the Second Circuit, "the standards concerning deliberate indifference to medical needs and toleration of inhumane conditions have been delineated to a significant degree" (citing *LaReau* and *Todaro*), and the plaintiffs' allegations of widespread violations of these standards are not subject to qualified immunity as a matter of law. Even if defendants were immune as to some aspects of the challenged conduct, "we conclude that the allegations are so interrelated that precise determination of the extent to which the immunity defense is available must await fact-finding."

Procedural Due Process—Disciplinary Proceedings/Procedural Due Process—Work Assignments/Grievances and Complaints about Prison/ Injunctive Relief—Preliminary/Class Actions—Certification of Classes/ Standing/Appeal

Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989). Inmate "advisors," who assisted other

inmates in disciplinary proceedings, were appointed for six-month terms, with reappointment at the discretion of prison officials. Several of them were not reappointed and alleged that this was because of their complaints about the performance of the Chairman of the Disciplinary Board.

The district court properly granted the advisors a preliminary injunction reinstating them. At 375: "It is well recognized that it is constitutionally impermissible to terminate even a unilateral expectation of a property interest in a manner which violates rights of expression protected by the First Amendment." The district judge's credibility judgments (i.e., believing the prisoners) are entitled to deference. Even minimal infringements upon First Amendment rights constitute irreparable harm.

The district court should not *sua sponte* have converted the proceeding into a class action and directed defendants to draft and submit plans for training of the Disciplinary Board and future inmate advisors. Whether to seek class certification is up to the plaintiffs and not to the court. The training relief applied to new inmate advisers and the present named plaintiffs lacked standing to assert their rights.

The order to submit a plan, while not itself appealable, could be considered in connection with the other injunctive relief, which was appealable.

Procedural Due Process—Disciplinary Proceedings/ Searches—Urinalysis/ Class Actions—Effect of Judgments and Pending Litigation/Attorneys' Fees and Costs

Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989). The EMIT urinalysis test may constitute "some evidence" to support a disciplinary conviction (apparently without any form of confirmation, although the opinion is not completely clear).

Statements in an opinion denying relief that it would be "helpful" to produce the original test results at hearings and that defendants are "caution[ed]" to maintain the integrity of the urine samples did not alter the parties' legal relationship and could not support an award of attorneys' fees. However, under a consent judgment providing for compensation for all work done except for matters that are "frivolous and totally ungrounded," defendants were liable for fees.

Attorneys' Fees and Costs

Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989). Expert witness fees are reimbursable under 42 U.S.C. 1988. The court notes a division among circuits on the point.

Procedural Due Process—Visiting

Taylor v. Armontrout, 888 F.2d 555 (8th Cir. 1989). The plaintiff's son rode his motorcycle from Florida to Missouri to visit him and was refused for no reason that is explained in the opinion.

A liberty interest was created by a Missouri prison regulation that provided, "Visiting lists shall be approved by the institution head or designate in accordance with the individual inmate need and personal choice. Those persons whose names appear on the inmate's visiting list *shall* be allowed to visit." (557; emphasis supplied) This rule is different from that in *Kentucky Dept. of Corrections v. Thompson*, which enumerated the circumstances under which visits "may" be denied.

Class Actions—Certification of Classes/Modification of Judgments/ Appeal/Attorneys' Fees and Costs

Jeff D. v. Andrus, 888 F.2d 617 (9th Cir. 1989). After the entry of a consent judgment, the district court issued a "clarification order" excluding certain class members from the benefits of the judgment.

The clarification order was not a modification of the settlement reviewed for abuse of discretion. At 622: "...[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by the parties.... [The court] may only approve or disapprove the proposal." Rather, the order is a "reinterpret[ation]" of the settlement's terms, subject to de novo review. The settlement should be interpreted like a contract and its terms viewed as a whole. The settlement agreement on its face contemplated that most of the disputed class members have its benefits and the district court was wrong to exclude them.

Post-judgment compliance monitoring is compensable under 1988.

Modification of Judgments

Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696 (10th Cir. 1989). "In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under Fed.R.Civ.P. 60(b)(6)."

Medical Care—Staffing—Qualifications of Personnel/Medical Care—Standards of Liability—Serious Medical Needs, Deliberate Indifference/Municipalities/Damages

Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989). The plaintiff fell off a truck and broke his hip. The only medical care at his "road prison" was provided by a physician's assistant. For over two months he did not receive an X-ray and was given (after considerable delay) palliative treatment for "bone inflammation" and "muscle inflammation." The physician's assistant claimed to be a doctor and dismissed the plaintiff's parent's complaints about his treatment as "interference," and their complaints to the chairman of the county Board of Commissioners were fruitless. The plaintiff eventually required a complete hip replacement. A jury awarded $500,000 in damages against the county after all the individual defendants were dismissed by stipulation.

The plaintiff's medical need was serious, as shown by his pain and by his visible disability. The PA's conduct amounted to deliberate indifference. "When the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference." (789) The plaintiff also offered "expert evidence that the treatment afforded him failed to meet appropriate professional standards." (790)

In Forma Pauperis

In re Epps, 888 F.2d 964 (2d Cir. 1989). Mandamus was an appropriate remedy by which a *pro* se litigant could test the requirement that he pay a partial filing fee.

At 967: "All circuits that have considered the issue have upheld the authority of district courts to require prisoners to pay partial filing fees." It is appropriate to fashion special partial fee requirements for prisoners and no one else because most of the necessities of prisoners' lives are provided by the incarcerating jurisdiction.

Courts may require prisoners to supply available information concerning prior lawsuits concerning their incarceration. Prisoners should not be barred from court because of faulty memory. It is sufficient if they provide their "best good-faith recollection" of the prior suits.

Modification of Judgments/ Crowding/Classification/Release of Prisoners

Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989). A consent decree forbade double celling, then was modified to permit limited double celling of nonviolent sentenced misdemeanants and to require classification. The district judge then granted a further modification to permit male detainees and felons to be double celled but refused to relax the violence criteria or permit double celling of women.

At 1109: "We agree...that consent decrees which regulate institutional conduct are fundamentally different from consent decrees between private parties.... They affect more than the rights of the immediate litigants. [They] impact on the public's right to the sound and efficient operation of its institutions. Broader judicial discretion to modify the parties' agreement is required so that the agreed upon solution...may be fine-tuned to accomplish its goal." At 1110: "To modify [institutional reform] consent decrees, the court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties."

The modification is upheld. At 1110: "Because the class of those eligible for double-celling was unnecessarily restrictive, inmates were being released in order to stay within the population caps even though there were many cells available which could accommodate two

inmates. The District Court reasonably concluded that the modification of the consent decree would further the goal of the original order and would not disrupt the essence of the parties' agreement.

Administrative Segregation—Death Row/Procedural Due Process—Disciplinary Proceedings

Solomon v. Zant, 888 F.2d 1579 (11th Cir. 1989). The denial to a death row inmate of an attorney visit because of his non-compliance with a "no beard" rule did not violate the Constitution even though other inmates had been permitted to have legal visits without shaving and disciplinary committees could not deny legal visits as a form of punishment. The rule, which stated that death row inmates could not leave their cells without shaving, was justified by security concerns. Enforcement of a valid security regulation does not constitute punishment implicating procedural due process rights.

Procedural Due Process—Disciplinary Proceedings/Urinalysis

Thompson v. Owens, 889 F.2d 500 (3d Cir. 1989). Evidence of chain of custody need not be submitted in order for a urinalysis result to constitute "some evidence" to support a disciplinary conviction.

Clothing/Emergency/Use of Force/Damages

Campbell v. Grammer, 889 F.2d 797 (8th Cir. 1989). After a search during a lockdown in an administrative and disciplinary segregation unit, the prisoners were left without jumpsuits for about a week, contrary to the warden's orders. The deprivation of clothing did not violate the Eighth Amendment because it was not "obdurate or wanton" but "more readily ascribed to misunderstanding, inexperience, oversight, inadvertence, and fecklessness" of the newly appointed supervisor. (802)

The spraying of three inmates with a high-powered fire hose violated the Eighth Amendment. The district court had found that the sprayings were intentional and not accidental and there was "absolutely no justification" for them. At 802: "Although the injuries were not especially severe, they were sufficient to support the district court's finding of an eighth amendment violation." Damages of $750 were awarded for several months' back pain, $100 for temporary blurred vision, and $50 for a day's pain in ribs and thighs.

Protection from Inmate Assault/Pre-Trial Detainees/Qualified Immunity/Legislative Immunity/Crowding/Class Actions—Effect of Judgments and Pending Litigation/Personal Involvement and Supervisory Liability

Ryan v. Burlington County, N.J., 889 F.2d 1286 (3d Cir. 1989). The plaintiff, who had been arrested for a traffic violation, was rendered quadriplegic in an inmate assault by a cellmate with a history of violence. The jail population was not properly classified because of overcrowding.

The members of the county Board of Freeholders, which had assumed control of the jail from the Sheriff to effectuate a class action settlement agreement, were not entitled to absolute legislative immunity because their actions, or lack of them, in managing the jail were not legislative in nature. They did not follow the state law procedures for local legislative actions and the challenged actions did not involve ordinances or legislation or the "line-drawing" activity that is characteristic of legislation.

The Freeholders were not entitled to qualified immunity. Detainees' right to be free from overcrowded conditions was established by § 1983. Nor did a backup of state inmates excuse them from liability where they knew the jail was overcrowded and there was a lack of supervision. The right to a classification system was also established by § 1983 and there is a question of fact whether it was possible to implement one.

The right to be housed in a "reasonably safe prison environment" was clearly established by § 1983 and testimony by the warden that he repeatedly requested additional security staff from the Freeholders and did not get them presented a question of fact whether the Freeholders could reasonably have believed their actions lawful.

At 1294: "The most disturbing aspect of this tragic case is that the Freeholders sat idly by in the face of a two year violation of a consent decree and apparently did *absolutely nothing*." (Emphasis in original)

Work—Assignments/Religion—Practices

Franklin v. Lockhart, 890 F.2d 96 (8th Cir. 1989). An allegation that assignment to a "hoe squad" was per se cruel and unusual punishment was frivolous. An allegation that the work was beyond the plaintiff's physical capacity stated an Eighth Amendment claim. An allegation that he was required to handle manure and dead animals in violation of his Muslim beliefs stated a First Amendment claim.

Attorneys' Fees and Costs

Clark v. Township of Falls, 890 F.2d 625 (3d Cir. 1989). The plaintiff's jury verdict was reversed on appeal, but he might still be a prevailing party based on a post-verdict settlement of his injunctive claim. The Supreme Court's recent decision in *Texas State Teachers v. Garland Independent School District* does not "eviscerat[e]" the pre-existing "catalyst" theory. The district court's inquiry on remand "entails, but is not limited to, a consideration of the binding nature of the township's agreement." (628)

Medication/Medical Care—Standards of Liability—Serious Medical Needs, Deliberate Indifference/Medical Care—Denial of Ordered Care, Access to Outside Services

Ellis v. Butler, 890 F.2d 1001 (8th Cir. 1989). Negligence or disagreement with the course of medical treatment do not state constitutional claims.

A painful swollen knee is treated as a serious medical need, although it is a "close question," because it is difficult to assess its seriousness on the basis of the pleadings alone.

The district court engaged in improper speculation in labelling a nurse's failure to deliver pain medication as mere negligence and not deliberate indifference. An allegation that a doctor cancelled an appointment made by another doctor with a knee specialist might constitute deliberate indifference. An allegation that a doctor and a nurse refused to see the plaintiff for any reason except an emergency might also constitute deliberate indifference.

Judicial Disengagement

Dowell v. Board of Education of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989).

The district court dissolved a 17-year-old injunction in this 28-year-old school desegregation case. Its action is reviewed under the *Swift* "grievous wrong/attenuated to a shadow" standard, "from which this circuit has not wavered." (1489-90). At 1490-91:

> *When the relief has been fashioned and the decree entered, "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." [Law review citation omitted.] For this reason, the court's jurisdiction extends beyond the termination of the wrongdoing... because an injunction seeks to stabilize a factual setting with a judicial ordering and maintain that condition which the order sought to create. The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the Swift showing.... To do otherwise is to return the beneficiary of injunctive relief to the proverbial first square. It is for this reason that Swift remains viable.*

Use of Force/Fire Safety/Emergency/Hygiene/Cleaning of Cells and Common Areas

Johnson v. Pelker, 891 F.2d 136 (7th Cir. 1989). Allegations that one officer threw an unidentified liquid on the plaintiff while trying to throw it elsewhere and a second officer threw water on him trying to put out a fire in the adjoining cell did not state constitutional claims because the first was not "deliberate" and the second was justified by an emergency.

The failure to provide dry clothing to the plaintiff was a "temporary inconvenience" that did not violate the Constitution.

An allegation that the plaintiff was placed in a cell with feces smeared on the wall and that for three days the water was not turned on and his requests for cleaning supplies were ignored stated an Eighth Amendment claim

and "warrant an expanded response."

Procedural Due Process—Temporary Release

Merritt v. Broglin, 891 F.2d 169 (7th Cir. 1989). Denial of the plaintiff's request to attend his stepfather's funeral did not deny due process. The state statute and directives provide some "substantive predicates" for the grant of temporary leave but not "mandatory language"; they provide that leave *may be* granted under specified circumstances.

The court reiterates its previously stated view that only statutes and "*binding* regulations" (i.e., formally approved and published ones) can establish a liberty interest and that prison regulations standing alone cannot do so. It appears to be in conflict with several other circuits on this point. See *Clark v. Brewer*, 776 F.2d 226, 232 (8th Cir. 1985) (employees' manual); *Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 844-45 (9th Cir. 1985); *Lucas v. Hodges*, 730 F.2d 1493, 1501-05 (D.C.Cir. 1984), *vacated as moot*, 738 F.2d 1392 (D.C.Cir. 1984).

Medical Care—Standards of Liability—Deliberate Indifference

Sanchez v. Vild, 891 F.2d 240 (9th Cir. 1989). A prison doctor at one point advised the plaintiff that surgery was necessary for his recurring, chronic perirectal abscess. The failure to provide this surgery, which was not recommended by subsequent practitioners, at most constituted a difference of medical opinion regarding his treatment. In instances where he got a lot of medical attention, there was no deliberate indifference.

Suicide Prevention/Mental Health Care/Psychotropic Medication Qualified Immunity/Personal Involvement and Supervisory Liability/Summary Judgment

Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990). The decedent committed suicide after his anti-depressant medication was abruptly discontinued by the same doctor who a year earlier did the same thing to another inmate who then blinded and castrated himself. *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989).

The right to psychiatric care in prison was established by 1985. The court rejects the argument that there must have been a precedent holding that "discontinuing psychotropic drugs under circumstances materially similar to these amounted to deliberate indifference" because this would "add an unwarranted degree of rigidity to the law of qualified immunity." (N. 3)

The psychiatrist who stopped the medication based on a single interview of a few minutes without reviewing his clinical file or conducting a mental status examination could be found deliberately indifferent. The court reiterates its view that psychiatric care that is "grossly inadequate" by professional standards is actionable and expert opinion to that effect is sufficient to defeat summary judgment.

The clinical director of the prison could "easily" be found deliberately indifferent based on expert evidence that the psychiatric staff was "clearly inadequate" and that he failed to act on his subordinates' complaints to this effect. (837) Liability could also be based on his knowledge of the decedent's history and the earlier medication incident of *Waldrop v. Evans*.

The director of mental health for the state prison system could be found deliberately indifferent because he was "aware of," but did nothing to remedy, conditions that could "lead to grossly inadequate mental health care," e.g., inadequate recreation time, lack of mental health treatment plans, lack of policies and procedures for suicide prevention, and inadequate psychiatric staff.

The prison warden could also be found deliberately indifferent because he was "responsible for ensuring that all services...were properly provided" and he knew or should have known about the inadequacy of psychiatric staffing.

Handicapped/Municipalities/Personal Involvement and Supervisory Liability/Color of Law/Pre-Trial Detainees Pendent Claims/State Law in Federal Courts/Damages

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989). The paraplegic plaintiff was left for ten days on a steel cot, initially without a hospital mattress, was not bathed for several days, lay in his own urine because of inadequate catheter supplies, and was given inadequate aid for his bowel training needs, resulting in sores on his ankles and buttocks. Other inmates had been similarly mistreated. The district court properly found deliberate indifference to the plaintiff's serious medical needs on the part of the Sheriff in his official capacity. Evidence that the Sheriff "knew or should have known" of the deprivations but failed to correct the situation established deliberate indifference.

An official capacity suit is the same as a suit against the governmental entity. It is a "wise course" to name the entity directly to make sure that it has notice and an opportunity to respond.

Liability is supported by state statutes giving the Sheriff the "custody and charge" of the jail, requiring him to provide adequate bedding, cleanliness and showers.

Defendants could not escape municipal liability (though they might have escaped personal liability) based on a state statute permitting them to contract medical care to an outside provider.

The district court awarded $10,000 in damages.

Protection from Inmate Assault/Qualified Immunity/Pendent Claims/State Law in Federal Courts

Arnold v. Jones, 891 F.2d 1370 (8th Cir. 1989). The plaintiff was beaten with a metal pipe by another inmate. Unarmed prison guards had no constitutional duty to intervene physically in a prison fight that might cause them serious injury or worsen the situation. (They did tell the assailant to stop. The second time they told him, he did.) Defendants are entitled to qualified immunity. The court invokes qualified immunity even though it has actually decided the merits because this is an interlocutory appeal and qualified immunity is the jurisdictional prerequisite.

A prison department policy stating that prison officials must take immediate action to stop inmates from harming other inmates does not establish a constitutional right.

Class Actions—Settlement of Actions

Foe v. Cuomo, 892 F.2d 196 (2d Cir. 1989). A settlement that was not as beneficial to the plaintiff class as that in a similar case in another district was properly approved by the district court; "the ultimate question is whether *this* settlement was reasonable under the circumstances...." (198)

DISTRICT COURTS

Procedural Due Process—Disciplinary Proceedings/Damages

Patterson v. Coughlin, 722 F.Supp. 9 (W.D.N.Y. 1989). A prisoner wrongfully confined in punitive segregation for 53 days is awarded $100 a day in damages without an evidentiary hearing. (Liability had been determined separately.) Visits to the Attica Special Housing Unit and other litigation such as *Eng v. Smith* have made the court "all too familiar" with the conditions, which include humiliating strip searches, 23-hour lockup in a small space, limited exercise and interaction, and "[h]ostility, oppression and a feeling of isolation." (11) Punitive damages are denied because the defendants made some efforts to comply with the law.

Use of Force/Municipalities

Mosier v. Robinson, 722 F.Supp. 555 (W.D.Ark. 1989). A municipality could be held liable for a beating administered by a sheriff who repeatedly worked while drunk where there was evidence that various county officials were aware of his habits and did nothing.

Rehabilitation/Equal Protection

Russell v. Eaves, 722 F.Supp. 558 (E.D.Mo. 1989). The requirement that the plaintiff complete the Missouri Sexual Offender Program to be eligible for parole did not violate his rights. He had no liberty interest in obtaining parole. There was no equal protection violation because there is no indication that sex offenders and other prisoners are similarly situated. At 560: "Treating prisoners differently based upon the nature of their crimes does not violate the equal protection clause." The program is not an *ex post facto* law because it is not penal in nature and does not affect the length of his sentence. Nor does it violate the Fifth Amendment by requiring participants to "accept responsibility" for their crimes.

Attorneys' Fees and Costs

MacLaird v. Werger, 723 F.Supp. 617 (D.Wyo. 1989). The plaintiffs' attorney filed a contempt motion for violation of a consent judgment governing jail conditions. The defendants acknowledged that "genuine problems" existed and listed the remedial actions that they had taken. The plaintiffs voluntarily dismissed the motion because its goal had been achieved.

Plaintiffs were entitled to attorneys' fees. Post-judgment monitoring of a consent decree is compensable. Moreover, plaintiffs were prevailing parties because it is "clear" that their contempt motion was a "substantial factor" in obtaining action and the action taken—compliance with the consent judgment—was legally required.

Procedural Due Process—Disciplinary Proceedings/ Searches—Urinalysis/ Qualified Immunity

Rucker v. Johnson, 724 F.Supp. 568 (N.D.Ill. 1989). An EMIT test with a confirming TLC test is sufficiently reliable to entitle prison officials at least to qualified immunity, if not to judgment on the merits of the claim, for relying on it to support disciplinary sanctions.

The failure to provide the prisoner with a copy of the EMIT report did not deny due process because he was told of the substance of the report and it was not "material" in the sense that there was no reasonable probability that turning it over would have changed the outcome of the hearing. (The latter argument is how the court gets around a prior Seventh Circuit holding that *Brady v. Maryland* applies in prison disciplinary hearings.)

Damages/Evidentiary Questions/ Suicide Prevention/AIDS

Bird v. Figel, 725 F.Supp. 406 (N.D.Ind. 1989). After the plaintiff won a damage judgment against various jail guards, he "became the object of an inordinate amount of police attention" and was jailed; he made statements that the defendants thought admitted perjury at the trial. The court does not buy this interpretation and adds that under the circumstances, the plaintiff would probably have said anything to get out of jail but that doesn't prove he lied under oath.

A jury could properly find that a "suicide watch" policy was unreasonable where the plaintiff was denied a change of clothing, mattress and bedding, personal hygiene materials (soap, towel, wash cloths, toothbrush, toothpaste, shaving items, toilet paper), commissary, visiting, papers, pencils, postage, correspondence, all reading material, telephone use and drinking water. (The plaintiff had AIDS; the guards said they did not have disinfectant to clean the telephone after he used it, and he could drink out of the toilet—the health hazard didn't matter since he would die anyway. They also discussed his medical condition publicly, ridiculed him for being gay, etc.)

The plaintiff was awarded $600 and $200 in compensatory damages for periods under these conditions (the latter 13 days long) and $1000 in punitive damages against two guards for the first period. Punitive damages need only be proved by a preponderance of the evidence and not by clear and convincing evidence (state law to this effect is rejected). An act "oppressively" done is sufficient to support punitive damages.

State Officials and Agencies/Equal Protection

Santiago v. New York State Department of Correctional Services, 725 F.Supp. 780 (S.D.N.Y. 1989) (Patterson, J). An action for damages may be brought directly under the Fourteenth Amendment's Equal Protection Clause, without benefit of § 1983, against a state agency, because Congress intended Section 1 of the Fourteenth Amendment to be a direct limitation on the states and to be enforceable despite the doctrine of sovereign immunity embodied in the Eleventh Amendment.

Now this is serious business. Section 1 of the Fourteenth Amendment also contains the Due Process Clause and there is no principled basis in this decision for distinguishing between the two clauses. The substantive provisions of the Bill of Rights are applicable to the states via the Due Process Clause according to the incorporation doctrine. Thus, Judge Patterson has just abolished the Eleventh Amendment defense for all constitutional damage claims against the state. Stay tuned for appellate reversal.

Access to Courts—Law Libraries and Law Books

Kness v. Sondalle, 725 F.Supp. 1006 (E.D.Wis. 1989). A 20-day denial to a segregated inmate of the opportunity to perform legal research did not state a constitutional claim. When the delay is so short, the plaintiff must show prejudice, and the plaintiff did not allege that he had missed any court dates, had a suit dismissed, or suffered any other detrimental effect in any legal proceeding. The court ignores the plaintiff's argument that he needed law library access to obtain release from segregation.

Attorneys' Fees

Wilder v. Bernstein, 725 F.Supp. 1324 (S.D.N.Y. 1989). Intervenors can be prevailing parties under § 1988 even if they did not assert their own civil rights.

The requirement of contemporaneous time records is satisfied by verbatim transcripts of diary entries without production of the actual diaries.

Fees are awarded up to $250 an hour for attorneys in practice for over 30 years.

Conferences among counsel and between parties need not all be compensated by the defendants, and the participation of both lead counsel at the same time could be discounted as duplicative. The court reduces the amount of the request by 20% for these reasons.

Religion—Services Within Institution

Matiyn v. Commissioner Department of Corrections, 726 F.Supp. 42 (W.D.N.Y. 1989). The plaintiff, a Sunni Muslim, was not denied his free exercise rights by the lack of services separate from Shia Muslims. The joint services were held in the Sunni manner by a Sunni chaplain. At 44: "Creation of a separate Sunni community would have imposed an administrative burden disproportionate to the imperfections of the existing situation as determined by plaintiff."

Pre-Trial Detainees/Crowding/ Recreation and Exercise/Contempt Bail Projects/Monitoring and Reporting

Essex County Jail Inmates v. Amato, 726 F.Supp. 539 (D.N.J. 1989). The court imposes fines of $100 a day per inmate in excess of population limits in a prior crowding consent judgment and $20 a day per inmate affected by noncompliance with a requirement of one hour daily exercise and the provision of exercise equipment. The former sanctions had been agreed to in settlement of a previous enforcement motion and the latter are newly imposed. The total amount is almost $2 million for crowding and $1.5 million for the recreation violations.

The plaintiffs' motion was for contempt but the court does not explicitly rule on contempt, citing instead its power to enforce the sanctions agreed to and to enforce orders providing for constitutional jail conditions.

"[G]ood faith verbal efforts" are not a defense, nor is the creation of a bail fund with the last set of sanction monies. Nor can defendants claim impossibility, since compliance was not physically impossible and defendants had consented to a limited definition of "emergency" that was not met. The court notes that defendants "have not yet spent a single dime" to alleviate overcrowding and have only proposed a new jail four or five years in the future.

Attorneys' Fees and Costs

Dunn v. The Florida Bar, 726 F.Supp. 1261 (M.D.Fla. 1988). The plaintiffs were not prevailing parties because they did not really have a constitutional right despite the defendants' capitulation. But if they did, the court would award fees on a catalyst theory where the district judge had stated his views that a change would be in everyone's "best interests," these views were reported to the defendants, and progress toward a change was reported to the court.

A high-powered Washington, D.C. attorney is paid the highest Jacksonville, Florida rate, a little less than the D.C. rate, without clarifying whether he is being limited to a local rate or the D.C. market is being considered. The out-of-town counsel was entitled to "travel time expenses." ■

John Boston is a staff attorney at the Prisoners' Rights Project, Legal Aid Society of New York. He regularly contributes this column to the NPP JOURNAL.

Early Prison Reforms Give Way to Present-Day Crowding

BY BETSY BERNAT

In the summer of 1787, prisoners at the Walnut Street Jail in Philadelphia found new faces in their front yard: delegates working to draft the United States Constitution in the State House opposite the jail. When delegates appeared in the yard, prisoners extended begging poles through the windows and cried out for attention.

But the prisoners, in fact, were getting attention that year from the newly formed Philadelphia Society for Alleviating the Miseries of Public Prisons (known today as the Pennsylvania Prison Society). The Society was concerned about conditions at the jail: prisoners lacked adequate food, clothing, and bedding; first-timers shared space with habitual criminals; there were no programs or vocational training; and the jail keeper was not above selling liquor to prisoners who could afford it.

Through the Society's efforts, the jail soon had medical care and a classification system, prison industry, educational programs and religious services.

Society members persuaded the legislature to declare a wing of the penitentiary a solitary confinement block for all convicted felons except those sentenced to death. Prisoners served their entire terms in private cells because, reformers believed, quiet reflection was the path to true repentance.

This was the ideological cornerstone of the Western Penitentiary in Pittsburgh which opened in 1818, and the Eastern Penitentiary in Philadelphia which opened in 1829. The "Pennsylvania system" had attracted global attention, but not all visitors were impressed. In 1842, Charles Dickens made these comments about the Eastern Penitentiary in his book, *American Notes*:

> *...looking down these dreary passages, the dull repose and quiet that prevails is awful...[The prisoner] is led to the cell from which he never again comes forth until his whole term of imprisonment has expired. He never hears of wife or children; home or friends.... He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and despair.*

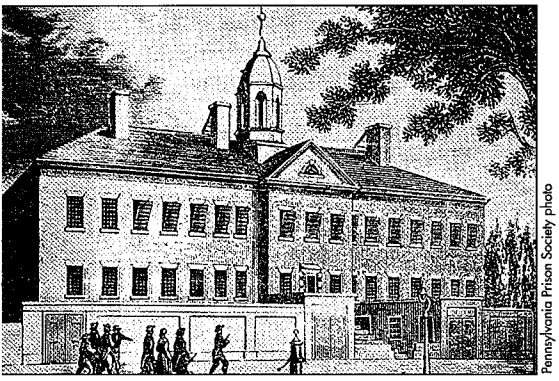
Compare Dickens' observations with the 1989 findings of the district court in *Tillery v. Owens*, which challenges conditions and overcrowding at the Western Penitentiary:

> *Due to the lack of staffing, the auditorium and gymnasium are virtual dens for violence. Assaults, stabbings, rapes, and gang fights occur in the auditorium. During peak times, several hundred inmates may be present in these facilities with only one corrections officer assigned to each facility at any time. The corrections officers...wisely choose to stand at the door, next to the riot button.*[1]

Tillery is just one of many prison conditions cases bearing testimony that the penitentiary, in all its evolutions, has failed to deliver. Court involvement in prison operations has steadily increased over the years. But perhaps that's destiny. Since that first encounter between the State House delegates and the Walnut Street prisoners, the Constitution and the prisons have never been entirely free of each other. ■

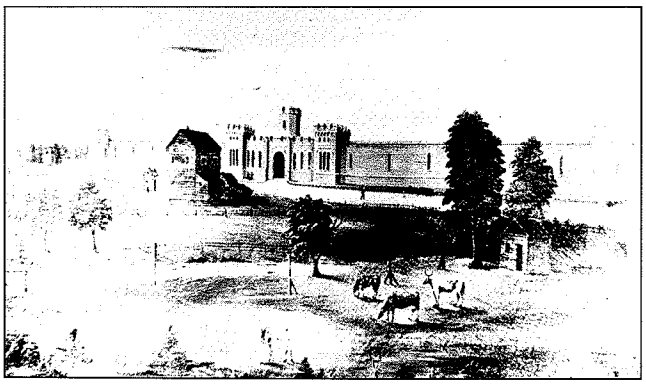
[1] *Tillery v. Owens*, 719 F.Supp. 1275.

Betsy Bernat is the editorial assistant for the NPP JOURNAL.



Pennsylvania Prison Society photo

The Walnut Street Jail, the first true "correctional institution" in America, opened in Philadelphia in 1790.

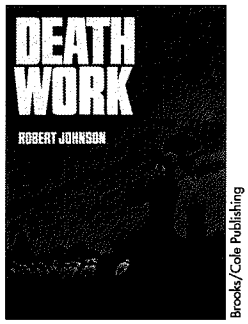


"In the outskirts stands a great prison, called the Eastern Penitentiary: conducted on a plan peculiar to the State of Pennsylvania. The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong."
—Charles Dickens

Illustration provided by the American Correctional Association from the book *The American Prison: from the beginning...A Pictorial History.*

Book Review

BY RICHARD BURR



Brooks/Cole Publishing

***Death Work: A Study of the Modern Execution Process*, by Robert Johnson (Brooks/Cole Publishing Co., Pacific Grove, CA, 1990. 170 pp. $15.95.)**

One of the most profound insights of Marxist theoreticians has to do with the process some have called "naming the world." The theory is that oppressed people cannot begin to throw off the yoke of oppression until they come to understand it in critical terms—until they can articulate not just the experience of oppression, but also the forces which maintain it and the vulnerability of those forces to change. With this kind of understanding comes the raising of consciousness that is a precursor to liberation.

In his new book, *Death Work*, Robert Johnson has helped "name" an important part of the world of capital punishment. He has examined the passing of daily life on death row, the short period called "deathwatch" which immediately precedes execution, and the execution itself. As with any good pedagogy of the op-

pressed, Dr. Johnson has not been content to document these experiences, though he has documented them poignantly. One is brought face to face with the relentless deadening process of death row—characterized by powerlessness:

> *Close confinement combined with almost constant surveillance renders death row inmates powerless to alter or influence their daily existence in any meaningful way. Their lives are monotonous and lonely, and they are predictably bored, tense, and depressed.... The enduring difficulty is that on death row...everything remains the same. 'It's continuously having the same walls, the same bars, the same papers, the same books,' said one condemned prisoner. 'Nothing changes. Only the outside, the light. We have day and we have night, we have day and then we have night.'*

by loneliness:

> *Almost to a man, condemned prisoners feel abandoned by the prison staff, denied simple human compassion, treated 'as if already dead.' '[Twelve] members of your community have [already] determined that you are a worthless person who should no longer be permitted to exist'.... As time passes and they gradually exhaust their appeals, prisoners may feel further removed from the world of the living... [F]ewer people are apt to write or visit.... Officials discourage visits through a variety of restrictive rules and regulations... [And when rare visits do occur], [t]he empty existence on death row may...render prisoners mute. They and their loved ones live in utterly different worlds, with little or no common ground to draw on to sustain communication.*

and by vulnerability:

> *Alone and defenseless when in their cells, living at all times in harsh and deprived conditions, convenient objects of contempt, condemned prisoners feel vulnerable to abuse from their keepers....Their stark vulnerability may be apparent from the moment prisoners set foot on death row. One prisoner put the matter like this:*
>
> > *'The biggest fear is when you walk onto this place. I've seen one man walk out there and he stood right there and he broke down and cried. I've seen more come in here and live three days and start praying. I've seen them come in here and cuss the day they was born because of fear. I've seen grown men come in here and get down and pray like kids. And cry.'*

But Dr. Johnson has not stopped here. He has gone on to put the process of death row into critical perspective. He has explored why with each passing day, the inhabitants of death row are made to feel more powerless, more lonely and isolated, and more vulnerable. The reason is to facilitate their executions.

It would be very difficult to carry out the execution of a fully human human being. "Such executions would exact a heavy psychological toll on executioners...and perhaps on prisoners as well, because killing and dying do not come easily to full human beings." Accordingly, death row gradually dehumanizes its inhabitants. Piece by piece, the humanity of each condemned person is peeled away. In Dr. Johnson's view the "essence of personhood or humanity" is comprised of three elements:

> *...some degree of (1) autonomy, defined as the capacity to influence one's environment and hence shape one's fate; (2) security, defined as the capacity to find or create stability in one's world and hence shelter oneself from harm; and (3) relatedness to others, defined as the capacity to feel for oneself and others and hence to have caring and constructive relationships.*

The conditions of life on death row assault each one of these elements.

Autonomy is lost through the control of every aspect of daily life—the monotony of the cell, the intrusive and constant surveillance of correctional officers, the interposition of authority between the prisoner and any contact with the outside world. Security is lost through the gnawing sense of fear that at any time one can be assaulted with impunity by correctional officers, moved anywhere, taken to the death chamber—a sense that one is always vulnerable, never sheltered from harm.

Relatedness to others gradually fades, as visitors become less frequent, visits become punctuated by more and more silence, connections to those outside become loosened—until, like a boat set adrift from its moorings, the prisoner drifts alone in a vast uncharted sea. By the time a condemned person's life is actually taken, his humanity has been under assault for so long that he is in most respects already dead—and the killing of this less-than-human being can be accomplished by the execution team without being confronted by the awful and awesome realization that a human being's life is one moment in one's hand, and the next moment gone.

Dr. Johnson's final contribution to naming this aspect of the oppression of capital punishment is to demonstrate how it constitutes torture. It is torture precisely because it is the infliction of immense pain—the grinding away of a person's humanity—that is unnecessary to the infliction of the legally imposed punishment. The condemned do not have to be stripped of their humanity to be executed. It just makes it much easier for the executioners to carry out the punishment if they are. But surely the anguish of the executioner is no ground for inflicting suffering on the condemned. Under any proscription against torture, including the Eighth Amendment's, this is intolerable.

In the context of today's struggle against the death penalty, Dr. Johnson's contribution is a substantial one. When the Supreme Court prohibited execution of incompetent prisoners in *Ford v. Wainwright* in 1986, it recognized that the condemned still maintained some claim to humane treatment in the course of carrying out their sentence. Another case now pending in the Court, *Michael Owen Perry v. Louisiana*—involving forcible medication solely for the purpose of restoring enough competence to be executed—will test the Court's commitment to the claim of the condemned to humane treatment. If the Court passes that test, Dr. Johnson's insights may provide the basis for a new and productive litigation strategy.

But even without that, his insights provide a new, powerful response to those—particularly in Congress—who now seek to deepen, broaden, and hasten the use of the death penalty. At bottom, their fervor is based upon the view that the death penalty is the just desert of the person upon whom it is imposed. Dr. Johnson's insight challenges them to rethink their own morality and their duty to honor the evolution of public morality, for there can be no justification—even under a just deserts rationale for the death—for rubbing out the humanity of the condemned as a prelude to killing them. No human being deserves that, not even, in the rhetoric of today's champions of death penalty, if the person has "forfeited his right to live." ■

Richard Burr is the director of the Capital Punishment Project at NAACP Legal Defense and Educational Fund in New York City.

BY JUDY GREENSPAN

New AIDS Education Program for Rikers Women

After reporting on Dr. Nicholas Freudenberg's book, *Preventing AIDS, A Guide to Effective Education for the Prevention of HIV Infection*, in the last issue of the *NPP JOURNAL*, I went to Hunter College in New York City to learn more about his AIDS education project at Rikers Island, the city's jail complex. I interviewed Dr. Freudenberg and two associates about the innovative program for women, and then traveled to Rikers Island to witness it in practice.

The Rikers Island AIDS education project, only months old, is Dr. Freudenberg's first foray into the arena of jails and prisons. It is only one of many projects currently being administered by the Center for Community Action to Prevent AIDS, founded by Freudenberg at Hunter College in 1987.

Dr. Freudenberg established the Center in recognition that the best educators are community people. It provides training, technical assistance and consultation to 8-10 community AIDS education projects in New York City. Staff has been hard at work on projects in predominately African-American communities in East New York, and in Latino neighborhoods in the South Bronx.

In September 1989, the Center expanded its services to Rikers Island, which houses over 16,000 prisoners—the largest jail in the country. Also involved in this program are Isobel Rodriguez, a medical student and health educator, and Beth Richie, who has a background in social work and has worked for years with battered women.

Ms. Rodriguez spends one day a week at Hunter College and four days at Rikers visiting and holding informal education sessions with incarcerated women there. Using a detailed questionnaire, she has asked a cross-section of the women what their AIDS education needs are. Richie, in consultation with Rodriguez, is currently working to develop an AIDS education curriculum for use at the jail.

One of the reasons Rikers Island was chosen, according to Freudenberg, is that it provides an excellent opportunity to reach a large portion of the high-risk populations of New York City: over 100,000 men and women pass through its gates each year.

Rodriguez and Richie want to develop an "empowerment model." Their goal is to enable women to educate themselves about AIDS (and other health problems) as well as to change the behavior that puts them at risk for the disease. They affirm the need for the women to take control of their lives; both admit that this is hard for women in prison to do. Ms. Richie believes, from her experience in battered women's shelters, that when women are in crisis the opportunity presents itself to reassess a life situation and make changes. The crisis nature of life in prison and in battered women's shelters is, to some extent, similar.

Dr. Freudenberg explained that this program will try to "create an environment and structure discussions where women can learn from each other." This is certainly a more innovative approach than the typical AIDS education program in prison where an inmate is handed a pamphlet, sees a video and perhaps attends a lecture. The Center's approach calls for the women's active involvement through small group question-and-answer sessions.

On the journey out to Rikers Island with Ms. Rodriguez, she explained the inadequacies of public health AIDS education. "When the women go in for orientation, they're given a packet of information but no one explains to them what's in the packet. There is little or no bilingual literature. In effect, many women are left out of the AIDS education process."

Ms. Rodriguez conducts her informal talks in either English or Spanish, depending on the need. She talks about whatever issues concern the women, including pregnancy, sexually-transmitted diseases, birth control complications and AIDS. She has also begun to conduct informal sessions for the correctional officers and staff, encouraging them to read the material she brings in for the prisoners.

After getting through the seemingly interminable bureaucratic obstacles to entering Rikers Island, I was able to attend an AIDS education session held in the jail nursery led by an educator from Montefiore Hospital. At Rikers Island, many women who give birth while incarcerated are allowed to live with their children in the nursery for a year. They held and played with their small children while the Montefiore AIDS educator discussed and demonstrated how to use condoms. The women were urged not to tolerate a sex partner who says no to condoms. "Say no to men who say no," was the recurring theme.

After lunch, Ms. Rodriguez led two AIDS education sessions, which came about by request from prisoners. Despite competition from the television in the background, about 10 women attended each session.

If all this program set out to do was to conduct a few of these informal sessions it would be accomplishing a lot. However, the Center has a much bigger plan in mind—establishing a multi-session AIDS education program with a curriculum that will actively involve the women prisoners. Isobel Rodriguez, who established an easy rapport with all of the women she spoke to, is an excellent pioneer for this project. Backed by the knowledge and experience of two other hard-working educators, Nick Freudenberg and Beth Richie, this program has the potential for becoming an excellent model for AIDS educators in jails and prisons across the country. ■

Judy Greenspan is the AIDS information coordinator for the National Prison Project, and contributes a regular column to the NPP JOURNAL.

THE NATIONAL PRISON PROJECT

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.
		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
		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.

Fill out and send with check payable to:

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 February 15, 1990. Further details of any of the listed cases may be obtained by writing the Project.

Henry v. DeLand—This case challenging medical and mental health care provided to prisoners of the Utah State Penitentiary was originally brought by the ACLU of Utah and a Salt Lake City law firm. At their request, we have joined as co-counsel. A complaint was filed on December 18, 1989; the class has been certified.

Inmates of Occoquan v. Barry—This case challenges conditions at the District of Columbia's Occoquan prison facilities. Judge Green entered a final order, requesting defendants to implement procedures to comply with the fire safety and environmental requirements of her June 30, 1989 order. In addition, following a hearing on February 21, 1990, she denied defendants' motion to modify the population cap.

Jackson v. Addison—On March 14, 1990, the Prison Project filed a notice of appearance in this ongoing challenge to conditions of confinement in the Milwaukee County Jail. Plaintiffs have a pending motion for preliminary injunction on crowding, sanitation and medical issues. Parties reached a settlement agreement which was approved on June 21, 1990.

Nolasco v. Romer—At the request of the Colorado ACLU, the Prison Project has joined this challenge to conditions in three Colorado prisons not covered by the earlier *Ramos v. Lamm* decision. Plaintiffs filed a complaint in February 1990; discovery is underway.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island prison system. A contempt hearing was held in the district court on May 10, 11 and 14. On May 22, the court issued an opinion and order finding defendants in contempt of its previous orders and ordered them to release prisoners to meet the population cap; pay money into a bail fund; and implement various medical and environmental remedies.

Plyler v. Nelson—This is a statewide conditions case in South Carolina. In March 1990, defendants appealed the district court decision denying their motion to modify or vacate double-celling restrictions at the state's main women's prison. The court of appeals granted their request for a stay. On May 7, the court of appeals affirmed a favorable district court decision awarding fees to plaintiffs.

Tillery v. Owens—This case challenges conditions at the Western Penitentiary in Pittsburgh. Argument was heard in the Third Circuit on June 25 and on June 29 the court of appeals affirmed the district court's decision which found in favor of the plaintiffs on almost all issues and ordered an end to double-celling.

Thomas v. Kidd—At the request of local counsel, we have filed an appearance in this case challenging conditions and overcrowding in the Mecklenburg County Jail (N.C.). Defendants have requested the court to stay the proceedings in order to correct problems at the jail.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. Plaintiffs filed their brief in *Knop* on the cross-appeal on fees with the Sixth Circuit on January 22, 1990. On April 20, the Sixth Circuit upheld the district court's August 1988 decision and refused to dismiss the *Knop* class from the *U.S. v. Michigan* litigation.

Wilson v. Seiter—We have agreed to represent a prisoner of Ohio's Hocking Correctional Facility in seeking *certiorari* from the Supreme Court in his *pro se* case. The case challenges various conditions of confinement. The petition for writ of *certiorari*, filed in May, argued that the Sixth Circuit applied the wrong standard in finding in favor of corrections officials and that the standard conflicts with the standard for Eighth Amendment violations applied by other circuits. The Supreme Court ordered defendants to file a response to our petition by June 25.

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