THE NATIONAL PRISON PROJECT JOURNAL

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 6, NO. 4, FALL 1991 • ISSN 0748-2655

ACLU Awards Medal of Liberty to Bryan Stevenson, Stephen Bright

In June 1991, the ACLU awarded its Roger Baldwin Medal of Liberty to Stephen B. Bright, director of the Southern Center for Human Rights (formerly the Southern Prisoners' Defense Committee), and Bryan A. Stevenson, an attorney with the Southern Center for Human Rights and director of the Alabama Capital Resource Center, in recognition of their work on behalf of death row inmates. The Medal of Liberty is awarded biannually to a living American for distinguished contributions to civil liberties in the United States. It includes a stipend of $25,000 and was endowed by an anonymous donor who fled Nazi Germany in the 1930s.

Former ACLU President Norman Dorsen described the Medal as "a kind of Nobel Prize of civil liberties." The Medal of Liberty was established only recently, in 1989, and its first recipient was Anne Braden. Braden is a lifelong civil rights worker, labor organizer, and journalist.

Bright and Stevenson made the remarks printed below at the awards ceremony at the ACLU Biennial in Burlington, Vermont on June 29, 1991.

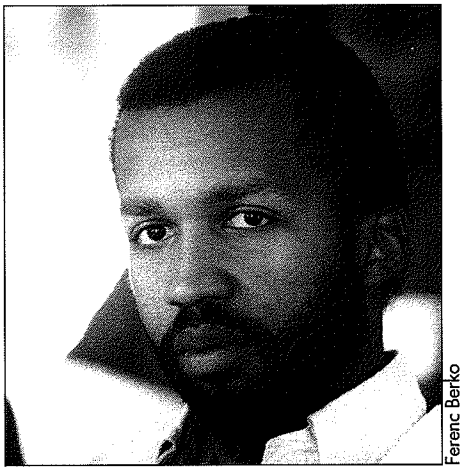
Remarks of Stephen B. Bright:

I am most grateful to the American Civil Liberties Union for this medal. I am especially grateful to the ACLU for recognizing the capital punishment work that we and others are doing. And of course, we most appreciate the financial award that accompanies this medal because we urgently need it to carry on the work.

Over twelve years ago, George Kendall and I were contacted by Patsy Morris of the Georgia ACLU and asked to prepare a petition to the Supreme Court on behalf of Donald Wayne Thomas, a poor, 18-year old African American—severely handicapped by schizophrenia—who had been sentenced to death in Georgia.

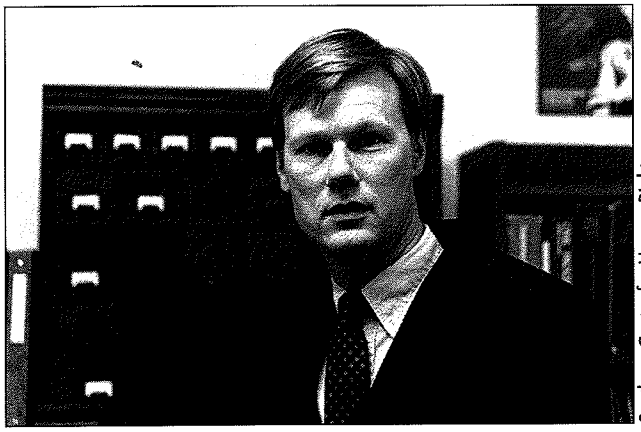
I will never forget our first look at the record in that case. We were horrified by what we saw. The entire record—all the pleadings and the transcripts of pretrial hearings, jury selection, and trial—was about an inch thick. It was less than 700 pages. The defense lawyer was terrible. The jury was never told of Donnie's mental handicap. Until that time, I, like so many others in this country, never knew that a person could be sentenced to death in such a perfunctory proceeding. It was simply a legal lynching.

We are still horrified by what we see today. The case on which I have been



Ferenc Berko

"I feel quite fortunate to be engaged in some small way in the struggle for human rights for the very least among us—to stand with those who most desperately need the protection of the Constitution. — *Bryan Stevenson*



Southern Center for Human Rights

"I can assure you that we will put [the award] to good use in a living tribute to the ideals of Roger Baldwin—to shine the light of liberty, equal rights and racial equality on some courts and communities where it has never shone very brightly." — *Stephen Bright*

INSIDE . . .

working most recently involves a battered woman, Judy Haney, sentenced to death for the murder of her husband in Alabama. Her case is one of the clearest examples which show that the death penalty is not restricted to punishing the worst criminals for the worst crimes. Ms. Haney was only a danger to the man who had abused her and her children for over 10 years. Nevertheless, she is one of several battered women on Alabama's death row.

During one morning of Ms. Haney's trial, her court-appointed lawyer came to court too drunk to go forward. The judge halted the trial for the day and sent the lawyer to jail. The next morning, he produced both Ms. Haney and her lawyer from jail and the trial continued. She was sentenced to death at the trial's conclusion.

The death sentence was vacated on appeal and the case sent back for sentencing. We received notice at 5:30 p.m. one Wednesday that Ms. Haney would be resentenced the following Friday afternoon at 1:30. Even in the People's Republic of China, the defendant gets more notice than that. She was resentenced to death.

Just a couple of years after we took Donnie Thomas' case, George Kendall and I moved from Washington to Georgia to do this work full time. George went to the Georgia ACLU and did a magnificent job bringing lawyers from all over the country into this work—showing them what we had seen in these cases, helping them master capital litigation, vindicating constitutional rights and saving lives. And we have worked closely together to this day. Any accomplishment that may be attributed to me, George Kendall had a major hand in it somewhere.

I am grateful as well for the help that Al Bronstein has given us in the last 10 years. In those first few years in Georgia, Al had more confidence in us than we had in ourselves. I have no doubt that our program would not have survived had it not been for the support and encouragement of Al Bronstein.

We are particularly grateful to the ACLU for recognizing this work at this critical time. We realize that this award does not so much recognize anything in particular that Bryan and I have done, but recognizes the importance of people taking on the death penalty and the importance of waging this battle in the trenches—in some of the most God-forsaken parts of the country.

Today so many of our most precious liberties are in jeopardy—liberties of all citizens, including those of the upper and middle classes. With the task of defending the important rights that protect us all growing every day, there is a danger that the importance of defending those parts of the Bill of Rights which apply primarily to prisoners, the condemned, and other despised members of the society may be overlooked or forgotten. Or that there will simply be no one left to defend them.

But—as the American Civil Liberties Union has so long recognized and recognizes again here tonight in presenting these medals—it is the poorest, the weakest, and the most powerless who most desperately need the protections of the Bill of Rights as a shield against the passions of the moment.

The only currency that we have to spend on behalf of those facing the death penalty is the Bill of Rights. We represent people who cannot call their Senators and Congressmen and ask them to pass legislation overruling a new Supreme Court decision. Those condemned to die cannot petition the state legislatures for protections that are no longer available from the federal government. Quite to the contrary, they are victims of the most vicious demagoguery.

This past week the United States Senate voted to enact legislation that would remove the availability of the once-great writ of *habeas corpus* from all prisoners, including those under death sentence, if there has been a hearing in state court. If passed by the House, this legislation will take away federal court enforcement of the *entire* Bill of Rights with regard to the life and liberty of the poorest and most powerless people in the land. Yet it is being suggested in the Congress that these most precious constitutional protections may be traded away for very modest gun control legislation. Surely, we cannot do that.

So we are most grateful to the ACLU for recognizing the importance of waging this effort in the trenches on behalf of poor, minority and disadvantaged persons facing the death penalty.

At our shop, the $25,000 that accompanies this Roger Baldwin Medal of Liberty will pay the salary and benefits for me or one of our lawyers for over a year. I can assure you that we will put it to good use in a living tribute to the ideals of Roger Baldwin. That we will use it to shine the light of liberty, equal rights and racial equality on some courts and communities where it has never shone very brightly before, if at all. I hope that even in these troubled times, we will help bring about a new measure of justice in those places and save some lives in the process.

Thank you very, very much.

Remarks of Bryan A. Stevenson:

Thank you very much. I am deeply honored by this award and by the very kind words and introduction from Nadine Strossen. This award from the ACLU is truly special to me and it is a bit overwhelming for me to be here to receive this.

I was talking to one of my clients on death row yesterday and it was a very difficult conversation. He was quite discouraged about the events of the past week and somewhat hopeless about the future. He had heard about the Supreme Court's decision in *Payne v. Tennessee*, a decision that permits and encourages states to introduce victim impact evidence at the penalty phase of a capital trial for consideration by juries in deciding whether to impose the death penalty. It is a very disturbing decision. This is so not only because it undermines the opportunity of capital defendants to have an impartial and rational decision made about whether their lives have sufficient purpose and value to avoid the death penalty, but also because it sanctions the already intolerable influence of race, class and societal status in determining how criminal justice is dispensed in this

THE NATIONAL PRISON PROJECT JOURNAL

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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.
The reprinting of *JOURNAL* material is encouraged with the stipulation that the National Prison Project *JOURNAL* be credited with the reprint, and that a copy of the reprint be sent to the editor.
The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

The *NPPJOURNAL* is available on 16mm microfilm, 35mm microfilm and 105mm microfiche from University Microfilms International, 300 North Zeeb Rd., Ann Arbor, MI 48106-1346.

country. A criminal justice system that already devalues crimes committed against racial minorities and poor people is expressly authorized under *Payne* to consider the tragedy of a four-year-old murdered child whose mother is a business executive differently from the murder of a four-year-old whose mother is a drug addict. This places an additional burden on the poor and powerless within the criminal justice system to prove their pain, justify their tears, and to establish that the victimization against poor and marginalized people has "impact." My client did not see how he had any hope for relief in a judicial system that was so dishonest about equal justice.

My client had heard about the Court's decision in *Coleman v. Thompson.* In *Coleman,* the Court had erected yet another procedural barrier to correcting even an undisputed violation of an individual's constitutional rights by precluding federal review of constitutional claims not adequately preserved in state court. My client appreciated that this most recent step in the march of form over substance signaled a greater willingness to tolerate gross violations of constitutional requirements out of deference to state injustice and quicker executions. My client did not see how he had any hope for fairness when fairness was so casually and effortlessly dismissed.

He had heard about the developments in Congress. He knew that the Senate had passed a bill that totally eliminates federal *habeas corpus* for death row prisoners. He didn't see how he had any hope for relief when the Senate had eliminated the only opportunity for full and fair review of his conviction and death sentence by mindlessly passing *habeas* legislation contained in the President's crime bill.

My client knew of Justice Marshall's resignation and he was just deeply discouraged because he could see no hope for fair review of his case, he could see no opportunity to have full constitutional consideration of the problems he encountered during his trial. I remember feeling quite sad at the sense of despair that he conveyed and I began to tell him that sometimes you have to believe things that you can't see. I told him sometimes you have to hope for things that you've never had.

I thought about that idea as I came to Vermont today to receive this award. It is quite amazing to me to receive an award for the work that I do as a lawyer, mostly because when I was a little boy I wanted to be a lawyer but I had never seen or met a real lawyer. I knew of the things that had become possible because of lawyers, like integrated school systems, which in my community meant that little black children could go to high school. Yet, to believe that I could become a lawyer was to believe that I could be something I'd never seen or experienced. I never met a lawyer until I enrolled in Harvard Law School and I must admit that I was quite horrified to find out exactly what they were.

Yet, it is this dynamic of belief and hope, sometimes in the face of great uncertainty and hopelessness, that compels us to reach out and stand with death row prisoners in this country. Death row prisoners are the most condemned, despised and hated people in our society. They have literally been rejected from the human community. They have been told their lives have no meaning, purpose or value. They have had to deal with the reality of such harsh condemnation from a society that dares to judge them while that same society accepts and fosters the poverty, bigotry and other injustices that this organization so valiantly struggles against.

I feel quite fortunate to be engaged in some small way in the struggle for human rights for the very least among us–to stand with those who most desperately need the protections of the Constitution and whose lives literally depend on the development of a wiser, more just society. Your work and your very kind recognition of our work is clearly a critical part of the effort in creating that more just society and I am very, very grateful. Thank you very much. ■

Proving "Deliberate Indifference" in the Wake of *Wilson v. Seiter*

BY ELIZABETH ALEXANDER

In the Summer 1991 issue of the *NPP JOURNAL,* John Boston presented an extensive analysis of the Supreme Court's decision in *Wilson v. Seiter,* 111 S.Ct. 2321 (1991).[1] Regular readers of the *NPP JOURNAL* undoubtedly noticed that Mr. Boston's analysis differed in tone from what they may have read elsewhere. Much of the media coverage of the *Wilson* decision misleadingly portrayed it as another 5-4 conservative victory. The real legal significance of *Wilson* is more complicated. In fact, the Supreme Court unanimously ruled that the Sixth Circuit had erred when it applied a "persistent malicious cruelty" standard to a prison conditions of confinement lawsuit. Four members of the Court would have gone further, arguing that prisoners are not required to make any showing about prison officials' state of mind in order to succeed in a cruel and unusual punishment claim.

The plaintiff, a prisoner at the Hocking Correctional Facility in Nelsonville, Ohio, contended that the Eighth Amendment was violated by conditions at the prison, including overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and mixing mentally and physically ill prisoners in dorms. The district court granted summary judgment for the prison officials, and the Sixth Circuit Court of Appeals affirmed.

The Supreme Court, in an opinion by Justice Scalia, reversed the Sixth Circuit. The Court said that the Sixth Circuit had erred by requiring that the prisoner show that prison officials acted with "persistent malicious cruelty" in order to prove that conditions of confinement violated the Eighth Amendment. Rather, prisoners need prove only that prison officials were "deliberately indifferent" in allowing unconstitutional conditions to exist.

The majority opinion noted that the prison officials in this case had not claimed that lack of funds were responsible for the failure to provide decent conditions, and the Court did not decide whether such a defense would succeed. The opinion did not explore how prison litigators could prove a deliberately indifferent state of mind.

In addition, the lower court had said that some of Mr. Wilson's claims, including those involving overcrowding and the failure to separate mentally and physically ill prisoners, did not allege

conditions bad enough to violate the Eighth Amendment. The Supreme Court, while not expressing a view on the specific claims of the prisoner, held that some conditions of confinement may establish an Eighth Amendment violation in combination with other conditions, when the conditions have a mutually enforcing effect that produces deprivation of a specific human need, such as food, warmth or exercise.

Four members of the Court concurred only in the judgment vacating the decision and remanding the case to the Sixth Circuit. Justice White, in an opinion joined by Justices Marshall, Blackmun, and Stevens, argued that it is unnecessary to examine prison officials' state of mind to determine whether the Eighth Amendment has been violated. The concurrence expressed special concern that the majority's intent requirement "likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue." 111 S.Ct. at 2330.

This case is important because the Supreme Court unanimously reversed the Sixth Circuit's application of a "malice" state of mind requirement to prison conditions lawsuits. It is also important because the Supreme Court reinstated the overcrowding and failure-to-classify claims dismissed by the Sixth Circuit on the ground that they did not rise to the level of an Eighth Amendment violation.

Although the decision was a victory, there is troubling language in the majority opinion by Justice Scalia, including the majority's failure to clarify how prison litigators will show that officials have a deliberately indifferent state of mind, particularly when officials claim that they were prevented from acting by lack of funds. In an attempt to assist prison litigators on some of the issues raised by *Wilson*, we reprint below an edited and abbreviated version of the brief that we submitted to the district court on remand in the *Wilson* case.[2]

FACTS

Pearly Wilson is a prisoner at the Hocking Correctional Facility (hereinafter "HCF") at Nelsonville, Ohio. The defendants were, at the time the complaint was filed, Richard Seiter, director of the Ohio Department of Rehabilitation and Corrections, and Carl Humphreys, superintendent of the HCF. On August 28, 1986, the plaintiff filed a complaint challenging a number of conditions of confinement, including overcrowding, excessive noise, lack of heat and warm clothing, excessive heat in summer because of a lack of ventilation, dirty and malodorous toilet facilities, unsanitary food services, and a lack of classification and the mixing of physically and mentally ill prisoners in the dormitory.

On November 10, 1986, plaintiff Wilson filed for summary judgment. In the affidavits accompanying the motion, plaintiff alleged that on July 8, 1986, or a month and a half before filing suit, he had sent defendants Seiter and Humphreys a three-page certified letter detailing the conditions of confinement challenged in the complaint. Defendant Seiter never responded to that letter. Defendant Humphreys responded but failed to take any action to alleviate the conditions; he simply referred the letter to HCF unit manager Friend. Mr. Friend did not, and could not, take any actions to correct the conditions at HCF, because he lacked any authority to do so. At no point did defendants assert that their failure to take corrective action was due to a lack of funds. *Wilson v. Seiter*, 111 S.Ct. at 2326.

ARGUMENT

I. WHETHER DEFENDANTS SEITER AND HUMPHREYS ACTED WITH DELIBERATE INDIFFERENCE CANNOT BE RESOLVED ON SUMMARY JUDGMENT

A. *The Standard for Summary Judgment*

A party requesting summary judgment has the burden of demonstrating that there is no genuine issue as to any material fact. Pursuant to Fed.R.Civ.P. 56(c), in the absence of such a demonstration, the party cannot be granted summary judgment. *See* 10A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d §2727.

For the reasons given below, if plaintiff establishes the facts alleged in his affidavits, he will have established that the defendants were deliberately indifferent and that he is entitled to an injunction against the conditions of confinement that violate the Eighth Amendment. Accordingly, summary judgment is inappropriate.

B. *The Defendants' Deliberate Indifference*

The defendants have an affirmative obligation under the Eighth Amendment to provide prisoners with the basic necessities of life. *See, e.g., DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989).

Because the consequences of the failure to perform this affirmative duty are obvious and foreseeable, such failures are deliberately indifferent under the standard set forth in *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205 (1989), the Supreme Court's leading case on deliberate indifference.

Justice O'Connor, in her concurring opinion in *City of Canton*, indicated that the deliberate indifference standard for a municipality could be satisfied "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion." 109 S.Ct. at 1209.

Consistent with this analysis, Justice O'Connor's opinion characterizes the "deliberate indifference" standard adopted by the Court in *City of Canton* as involving "tacit authorization" by city policymakers. Justice O'Connor's opinion cites four appellate decisions, described below, as properly applying the "deliberate indifference" standard. Under the standard as applied in all four of the cases, the defendants' failure to act in response to notice of a pattern of unconstitutional conditions is enough to show deliberate indifference.

In *Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319 (2nd Cir. 1986), the Second Circuit upheld a finding of liability against a city based on the city's failure to supervise the police officers who injured the plaintiff. The court held that evidence of notice of claims of police brutality demonstrated a "policy of negligent supervision rising to the level of a deliberate indifference to the violation of constitutional rights." *Id.* at 327.

Similarly, in *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985), the court stated that a municipality may be liable for failure to train or supervise its police officers if it had notice of prior misbehavior by its officers and failed to take remedial steps, amounting to deliberate indifference to the offensive acts. In *Languirand v. Hayden*, 717 F.2d 220, 226-227 n.7 (5th Cir. 1983), the court indicated that one way to demonstrate municipal liability was to show notice of prior misbehavior and a failure to act. Finally, in *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983), the court stated that a failure to supervise gives rise to §1983 liability on the part of a municipality when there is a history of widespread abuse, so that knowledge can be imputed to the supervisory personnel.

Accordingly, the four court of appeals decisions discussed above and cited by Justice O'Connor as correctly applying the "deliberate indifference" standard set forth a consistent test: knowledge of the constitutional violations and failure to act. Because Justice O'Connor's opinion in *City of Canton* argues for a narrower standard of liability

than the majority opinion, deliberate indifference indisputably includes the situations described in these four cases.

Nothing in the Supreme Court's opinion in *Wilson v. Seiter* indicates any change in the standard for demonstrating deliberate indifference on the part of prison officials. For example, in *Wilson* the Court quoted with approval from *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987). In that case, former Justice Powell, sitting by designation, found that prison officials had acted with deliberate indifference when defendants were aware that the plaintiff had inadequate toilet facilities, but it was two months before any "significant" attempt to modify the toilet facilities took place and three months before the prisoner was transferred to a room with adequate facilities.

See also Powell v. Lemmon, 914 F.2d 1459 (11th Cir. 1990). In that case, the prisoner plaintiff wrote to the Unit Manager complaining that he was being exposed to asbestos in his dormitory. The Unit Manager stated that the matter fell outside the scope of his authority, so the plaintiff sent the letter to the defendant warden, who never responded to the letter. *Id.* at 1461. The court of appeals reversed dismissal of the case, holding that the defendants were not entitled to qualified immunity for their deliberate indifference.

In this case, plaintiff's affidavits specifically contend that defendants had knowledge of the conditions denying the basic necessities of life because plaintiff notified the defendants about the conditions more than six weeks before the complaint was filed, yet defendants took no action to change the conditions.

Accordingly, the defendants had knowledge of the facts constituting a denial of the basic necessities of life.[3] They also had an affirmative obligation, as a matter of law, to supply those necessities. By virtue of their positions as director of the Department and superintendent of the facility, they had the power to remedy the complaints. For example, the Superintendent had the power to enforce sanitary procedures regarding food services and the toilet facilities, to repair the windows so that they would open in summer, to install fans sufficient to provide ventilation, to assure that the heat was working and that prisoners had warm clothing in the winter, and to patch the holes in the walls. The director of the Department necessarily had the power to order prisoners classified by mental illness and infectious disease status, so that such prisoners would not be placed without screening in the dormitories at HCF. In particular, the defendants never suggested, nor could they, that they lacked the power to make the changes that would have rendered the facility constitutional.[4]

Plaintiff's affidavits necessarily created an issue of material fact regarding defendants' deliberate indifference. Moreover, continuing conditions of confinement differ in fundamental ways from incidents of police brutality. Police misconduct involves individual acts, and these individual acts are generally not continuing in nature. Thus, when a municipality ultimately receives notice regarding a continuing practice of police brutality requiring action, that notice consists of information about a number of past individual acts; municipal liability cases never involve situations in which policymakers received actual notice of an incident of police misconduct that was still in progress. Proof of deliberate indifference in such circumstances requires that policymakers have notice of a pattern of incidents because otherwise policymakers do not have compelling reasons to assume that objectionable conduct will recur. In contrast, the conditions of confinement challenged in plaintiff's complaint are intrinsically continuing conditions; the sanitation and the ventilation violations, for example, will not abate until someone takes affirmative action to change the conditions.

The conditions challenged by plaintiff are also obvious conditions. All the defendants had to do was walk through the institution for which they are responsible to see the problems. Accordingly, the plaintiff's actual notice to the defendants, coupled with the defendants' failure to act, was more than enough to establish deliberate indifference under the standard endorsed by the Supreme Court.

Finally, the plaintiff's complaint was filed in August 1986. It makes no practical sense, for the purposes of injunctive relief, to determine whether or not the defendants were deliberately indifferent in 1986. At this point, defendants have had five years of notice of the conditions of confinement alleged by plaintiff, and failure of the defendants to remedy any of the conditions that the Sixth Circuit characterized as "suggest[ing] the type of seriously inadequate and indecent surroundings necessary to establish an eighth amendment violation"[5] would clearly demonstrate deliberate indifference. Accordingly, the appropriate procedure is for this Court to deny summary judgment and to reopen discovery so that the parties can present their proof as to the current realities of the conditions at the HCF.

SUMMARY JUDGMENT SHOULD BE DENIED ON PLAINTIFF'S CLAIMS

In vacating the judgment of the Sixth Circuit, the Supreme Court vacated the dismissal of plaintiff's claims regarding excessive heat, failure to classify so that mentally and physically ill prisoners were mixed in the dormitories, and overcrowding. *Wilson* at 2327. Although the Supreme Court expressed no opinion on the Sixth Circuit's discussion of the specific Eighth Amendment claims, the Court did give some guidance in application of the Eighth Amendment test to the totality of prison conditions:

> *Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise, for example, a low cell temperature at night combined with a failure to issue blankets.*
>
> *Id.*

The claims in this case do interact so that none of the claims should have been dismissed. For example, the claims that the dormitory is overcrowded cannot be evaluated without considering the claims of filth, lack of ventilation, and mixing of physically ill prisoners into the general population. Certainly the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory. Minimally adequate ventilation for 143 prisoners is different from the ventilation necessary for the smaller number of prisoners that could be accommodated were the dormitory not double-bunked. Similarly, the overcrowding may have caused the lack of sanitation in the dormitory. Sanitation procedures that may have been barely adequate before overcrowding may have been overwhelmed by the numbers of prisoners. Accordingly, the allegations of filth, vermin infestation, and build-up of urine around the toilets and urinals may well be related to the greater pressure on the sanitation of the facility resulting from the increase in population. Thus, the overcrowding has a "mutually enforcing effect" with the sanitation procedures that in combination may result in a deprivation of sanitation. Plaintiff also alleged that prisoners recovering from surgery, including prisoners with open sores, were put into the dormitories as a result of a shortage of space in the infirmary. Again, this allegation suggests an interrelation between overcrowding and the other claims of the plaintiff.

In addition, the plaintiff alleged that defendants were planning steps that would exacerbate the lack of adequate ventilation,

(cont'd on page 12)

THE NATIONAL PRISON PROJECT

JOURNAL

Case Law Report

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 6, NO. 4, FALL 1991 • ISSN 0748-2655

BY JOHN BOSTON

Highlights of Most Important Cases

What difference does *Wilson v. Seiter* make? "Not much," we suggested in the last issue of the *JOURNAL*. We argued that the Supreme Court's adoption of "deliberate indifference" as an element of all Eighth Amendment conditions of confinement claims simply ratified existing lower court practice. This is true both for medical care and inmate assault cases, in which deliberate indifference has long been the governing standard, and for other conditions cases, in which the courts have in practice required proof of deliberate indifference without invoking that phrase.

Logical enough, but do the courts agree? The first post-*Wilson* opinions give divergent answers.

In *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984 (5th Cir. 1991), the twenty-year effort to ensure constitutional conditions in the jails of Houston, has collided with the "epic struggle" of Texas with its prison populations, and specifically with the order in *Ruiz v. Estelle* limiting crowding in Texas prisons. The backup of "ready-felons"—inmates sentenced to state custody but remaining in local jails—threatened to frustrate the jails' substantial progress toward compliance with a 1975 consent judgment and with subsequent orders designed to ensure humane conditions. At one point, 2,800 to 2,900 prisoners were sleeping on the floor at night, largely because of the ready-felon backup.

In previous proceedings, state officials were joined as third-party defendants, and the Fifth Circuit directed traffic between the *Alberti* and *Ruiz* courts by transferring to the *Ruiz* court any request for relief requiring the transfer of prisoners into state custody or otherwise intervening in the state prison system. *In re Clements*, 881 F.2d 145 (5th Cir. 1989). In subsequent joint proceedings in what the appeals court called an "intricate fracas," the *Alberti* and *Ruiz* courts entered orders requiring population reductions in the jails, by means of releases of inmates if necessary. The *Alberti* court later ordered additional relief, including payments by the state to the county for housing ready-felons. Both state and county appealed from the findings of a continuing constitutional violation, reached in late 1989, and all the subsequent remedial orders.

Wilson v. Seiter was decided while the appeal was pending. In supplemental briefs, the state and the county each argued that the other, and only the other, had acted with deliberate indifference towards the "objectively cruel" conditions in the jails. Since the district court had made no findings concerning deliberate indifference, the appellate court remanded so those findings could be made, but not without commenting on the parties' contentions. It observed that *Wilson* itself, as well as lower court cases on which *Wilson* relied, support the view that knowledge of objectively cruel conditions can support a finding of deliberate indifference. Here, the conditions were well known and undisputed. The Court also observed that the state had means to accept the backed-up prisoners without violating the *Ruiz* decree: building new prisons, contracting with other suitable facilities, or releasing inmates early pursuant to state statute. Thus,

> *[t]here is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state chose to leave them in the jails. This is strong if not compelling evidence of deliberate indifference to the plight of these ready-felons, and it is only accented by the alternatives available to the state.*

The state's argument that it was thwarted by the state legislature's failure to provide funding was rejected for lack of factual support; the appeals court thus did not reach the question whether such a defense has merit under *Wilson*.

In short, the Court concluded, a finding of deliberate indifference by the state "would be virtually unassailable" on this record; it remanded the case only because "[f]actfinding is a province of the district court."

The Court found the case less clear-cut with respect to the county's liability. On one hand, the county was faced with a huge increase in the ready-felon population in a short period of time. On the other, there also were significant problems in the jails' plumbing, ventilation, fire safety, supplies, food service and medical care, and the jail would have been overcrowded even without backed-up ready-felons.

In its deliberate indifference analysis, the most striking aspect of the *Alberti* opinion is its consistent focus on the actual behavior of state and county governments when confronted with "objectively cruel" conditions. It neither explores the actual state of mind of any of the defendants nor directs the district court to do so. For this court—as for most courts before *Wilson v. Seiter*—deliberate indifference remains as much a state of fact as a state of mind.

A smaller-scale illustration of this approach appears in *Arce v. Miles*, 1991 WL 123952 (S.D.N.Y., June 28, 1991), an unreported magistrate's opinion. The plaintiff alleged that for a four-month period he was subjected to construction noise so injurious that he now requires a hearing aid. The court held that the plaintiff's allegation "that prison authorities supplied ear plugs to guards and workers but not to inmates, if true, would satisfy the 'deliberate indifference' standard" by establishing "either actual knowledge, or constructive knowledge as a supervisory official," of the dangerous conditions.

A different approach was taken by the Seventh Circuit in *Steading v. Thompson*, 1991 WL 158070, No. 90-2588 (7th Cir., August 19, 1991), a challenge by an asthmatic prisoner to exposure to environmental tobacco smoke. Two federal circuits have recently held that such exposure can violate the Eighth Amendment. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991); *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990), *rehearing and rehearing en banc granted*. The *Steading* court stated that these holdings are effectively overruled by *Wilson v. Seiter*'s requirement that a "culpable mental state" be shown to establish "punishment."

This approach establishes a hurdle Steading cannot surmount. Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world. No one supposes that restaurateurs who allow smoking are subjecting their other patrons to "punish ment," or desire to harm them. The guards and administrators who breathe smoky air in the prison are not punishing themselves. No one would suppose, either, that the gentlemen tobacco farmers who wrote and adopted the eighth amendment could have conceived of smoke as punishment ....

The trouble with this construction of *Wilson* is that it has little to do with what *Wilson* actually said, expressing instead the Court's own idiosyncratic view of what constitutes punishment. The *Wilson* Court stated that in prison conditions cases, the punishment inquiry is to be guided by "the 'deliberate indifference' standard articulated in *Estelle*." 111 S.Ct. at 2327. Insofar as *Wilson* defines deliberate indifference, it relies on the large body of lower court interpretation of *Estelle*. These cases generally hold that deliberate indifference "encompasses *acts or omissions* so dangerous (in respect to health and safety) that a defendant's knowledge of [a large]...risk can be inferred." *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988), *cited in Wilson v. Seiter*, 111 S.Ct. at 2327 (internal quotation marks omitted, emphasis supplied); *accord, Canton v. Harris*, 489 U.S. 378, 389-90 (1989) ("the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

The factors cited in *Steading* have little relationship to the deliberate indifference standard as developed in the federal courts. The prevalence of second-hand smoke outside prison certainly has little relevance. After all, assaults and bad medical care are also prevalent in some places outside prison; that fact does not undermine *Estelle v. Gamble* and *Cortes-Quinones v. Jiminez-Nettleship*. Similarly, the generations of builders who insulated prisons and other buildings with asbestos had no intention to inflict punishment; that hardly absolves present-day prison officials who knowingly fail to abate a hazardous asbestos condition. *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (exposure of prisoners to asbestos constituted deliberate indifference).

It is particularly striking that *Steading* was dismissed, and the dismissal affirmed, on the pleadings. Despite the appeals court's statement that *Wilson* "establishes a hurdle *Steading cannot* surmount" (emphasis supplied), the deliberate indifference inquiry is usually factual in nature, involving some assessment of the degree of risk posed to the plaintiff and the defendants' knowledge of the risk (or its obviousness). Here, the factual inquiry was apparently limited to the appellate court's judicial notice of contemporary restaurant conditions and the Founders' mind-set and agricultural practices.

Other Cases Worth Noting

U.S. SUPREME COURT

Attorneys' Fees and Costs

West Virginia University Hospitals, Inc. v. Casey, 439 U.S. ____, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Expert witnesses appearing at trial are compensated at $30 a day under 28 U.S.C. §§1821(b) and 1920. Nontestimonial expert services are not compensable at all under these statutes. Neither testimonial nor nontestimonial services are compensable under 42 U.S.C. §1988.

Cruel and Unusual Punishment

Harmelin v. Michigan, 501 U.S ____, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). A statutorily mandated sentence of life without possibility of parole, with no consideration of mitigating circumstances of the crime or the criminal, did not violate the Eighth Amendment. There is no majority opinion. Justices Rehnquist and Scalia conclude that "the Eighth Amendment contains no proportionality guarantee" and that the 1983 case of *Solem v. Helms* should be overruled.

U.S. COURT OF APPEALS

Administrative Segregation/ Financial Resources/Cruel and Unusual Punishment

McCord v. Maggio, 927 F.2d 844 (5th Cir. 1991). In this pre- *Wilson v. Seiter* decision, the plaintiff spent months in a "Closed-Cell Restriction" cell that was flooded with sewage and foul water with a bare mattress to sleep on. These conditions violated the Eighth Amendment. "[L]ack of funds is not a sufficient justification for neglect of a citizen's constitutional rights." (847) The possibility that inmate vandalism was a partial cause of sewage backup was not dispositive of the plaintiff's claim.

The conditions of the plaintiff's confinement constituted a "clear violation of the Eighth Amendment" and the defendants are not entitled to qualified immunity unless they can show some "extraordinary circumstances." (848) This standard may be met if budgetary constraints prevent constitutional compliance, though the defense carries a "difficult burden" on this point. The magistrate should determine the truth of the claim and whether there was any feasible alternative for housing the plaintiff.

To recover damages, the plaintiff must be found to have endured "pain, suffering, and/or mental anguish sufficiently significant to justify monetary relief," but not "lasting harm." (849) The court presents this as an extension of the "significant injury" requirement it has imposed in use of force cases which is now before the U.S. Supreme Court in *Hudson v. McMillian*, #90-6531 (argument scheduled for November 13, 1991).

Protection from Inmate Assault

Moore v. Winebrenner, 927 F.2d 1312 (4th Cir. 1991). Inmate assault cases are governed by a deliberate indifference standard and not a negligence standard, and the two standards are not the same thing. The question is whether the warden acted "obdurately or wantonly." In making the last statement, the court quotes *Whitley v. Albers* but ignores *Whitley*'s holding that, in effect, deliberate indifference can constitute obdurate and wanton conduct. (This point was reaffirmed in *Wilson v. Seiter*.) The court also states incorrectly that *Whitley* rejected the contention that its holding is limited to the prison riot context.

Assuming that there was a pervasive risk of assault, the warden could not be held liable where he "embarked on a persistent campaign to rectify the situation" (1316) and "did the best he could under a regrettable set of circumstances and considerable handicap" (1317). His campaign of renovations and staffing enhancements was begun before the plaintiff was assaulted but was not completed until afterwards.

Use of Force

Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991). Damages were properly awarded against the county for misuse of force by sheriff's deputies where lack of training amounting to deliberate indifference was shown and the Sheriff was the policymaker with respect to use of force training.

Remedial measures by the municipality did not bar punitive damages against the individual defendants. Punitive damages may be awarded despite the absence of compensatory damages.

Contempt/Consent Decrees/Mental Health Care

Langton v. Johnson, 928 F.2d 1206 (1st Cir. 1991). Inmates of a hospital for "sexually dangerous persons" alleged constitutional violations and contempt of a prior consent judgment.

The district court properly refused to consider the constitutional claims because the

consent judgment set a standard for treatment higher than constitutional requirements. "[I]f a court can resolve a dispute without confronting an unsettled constitutional issue, it should proceed in that fashion." (1217)

The district court properly exonerated the defendants of contempt even though it appears that they were not in compliance with all its requirements. Perfection is not required; "progress, after all, should not be reduced to a mere numbers game." (1220) The decree is "susceptible to satisfaction by diligent, good faith effort, culminating in substantial compliance." (1220) The district court properly concluded that "in light of the defendants' notable progress, there was substantial compliance with the overall mandate of the consent decrees, and hence, no contempt...."

In private law litigation, appellate courts have "greater freedom" in reviewing the interpretation of consent decrees than in public law litigation, where "the district court's construction of a consent decree should be accorded considerable deference, because broad leeway is often necessary to secure complicated, sometimes conflicting, policy objectives." (1220-21) The court goes on at some length about the trial judge's "pivotal role in the conduct of public law litigation."

Use of Force/Qualified Immunity

Street v. Parham, 929 F.2d 537 (10th Cir. 1991). Where the jury found that the force used by police officers was unreasonable, there was no basis for finding the officers entitled to qualified immunity. At 540: "No officer could reasonably believe that the use of unreasonable force did not violate clearly established law....This is one of the rare instances where the determination of liability and the availability of qualified immunity depend on the same findings."

Medical Care—Denial of Ordered Care/Qualified Immunity

Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991). Defendants were not entitled to summary judgment on qualified immunity grounds in a prison medical care case in which there were disputed factual issues that would "seriously undermine their argument that it was objectively reasonable for them to believe their acts lawful" if decided in plaintiff's favor. The disputed allegations were whether there was a five-day delay in acting on a recommendation for immediate hospitalization, whether the Superintendent and the medical administrator knew of the prisoner's deteriorating medical condition during an unexplained three-month gap in his medical treatment, and whether they were aware of previous allegedly inadequate medical care.

Use of Force—Beating

Hudson v. McMillian, 929 F.2d 1015 (5th Cir. 1991). Force that was unreasonable, malicious and sadistic did not violate the Eighth Amendment in the absence of "significant injury." The plaintiff alleged that his lip was split, his dental plate was cracked, and he was bruised, but the court does not consider this significant.

The Supreme Court has granted *certiorari* in this case. (Note: In April 1991, the Court appointed Alvin J. Bronstein of the National Prison Project to represent petitioner. Argument is scheduled for November 13, 1991. See *Highlights*, p. 20.)

Food/Qualified Immunity

Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991). The plaintiff's allegation that he was denied food for 12 consecutive days should not have been dismissed as frivolous. The officials responded that they had a rule that an inmate who refuses to "fully dress" for a meal "voluntarily rejects" the meal, but the plaintiff denied this, there was no copy of the regulation in the record, and in any case the existence of such a regulation "is not an automatic shield against a civil rights suit." It is "questionable" whether meals are a "privilege" that can be taken by regulation. (1083)

"Because depriving a prisoner of adequate food is a form of corporal punishment," the Eighth Amendment imposes limits on it. Due process also forbids deprivation of food without due process.

The plaintiff's allegation that the defendants acted outside their authority because the regulation did not permit their actions was sufficient to overcome qualified immunity at the pleading stage. The right to "reasonably adequate food" has long been established.

Searches—Person—Visitors/Procedural Due Process—Visiting/Qualified Immunity

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991). In the mid-1980s, it was not clearly established that visitors had the right to be free from strip and body cavity searches without probable cause, but it was clearly established that they had the right to be free of such searches without reasonable suspicion.

Prison regulations stating that prisoners "shall" have visitation rights "limited only by the institution's space and personnel resources" and that they may be suspended only with "good cause" created a liberty interest protected by due process. Threats to remove it in retaliation for refusing an illegal search, without procedural protections, violated clearly established rights.

Protection from Inmate Assault

Andrews v. Siegel, 929 F.2d 1326 (8th Cir. 1991). The plaintiff and another inmate had an argument at work and were separated by other prisoners; the incident was witnessed by staff. The next day the other inmate stabbed the plaintiff.

To prevail in an inmate assault case, the plaintiff "must show that he was faced with a 'pervasive risk of harm' and that the prison officials failed to respond reasonably to that risk." Although the court uses the phrase "pervasive risk," most often found in cases alleging a generalized lack of safety rather than a risk from a specific inmate, the court analyzes the specific risks posed by the assailant in the usual fashion of individual-threat cases, concluding that neither a single prior argument nor the assailant's history of mental illness was sufficient to place defendants on notice of the danger of assault.

Medical Care—Denial of Ordered Care/Qualified Immunity

Boretti v. Wiscomb, 930 F.2d 1150 (6th Cir. 1991). The plaintiff was returned to prison after surgery for a gunshot wound with orders for daily dressing changes and Motrin. He was then transferred to a local jail, where he was placed in a holding cell with no beds for five days and received no dressing changes or medication. He stated that he repeatedly asked the nurses for help and they refused to call the doctor or provide any treatment.

Defendants were not entitled to summary judgment. "[I]nterruption of a prescribed plan of treatment" is one of the forms of deliberate indifference identified in *Estelle*.

The defendant is not entitled to summary judgment based on qualified immunity because this defense is available only to persons exercising "discretionary functions." "Complying with a doctor's prescription or treatment plan is a ministerial function, not a discretionary one." (1156)

Contempt/Consent Decrees/Judicial Disengagement/Searches—Living Quarters

Kendrick v. Bland, 931 F.2d 421 (6th Cir. 1991). A statewide prison conditions case was resolved by consent decree and was placed on the inactive docket after a finding of substantial compliance. The district court ruled that it would take "major violations of the consent decree" to reinstate it.

Several class members later moved for contempt. The court held that "major violations" meant "institution-wide violations."

Medical Care—Standards of Liability—Deliberate Indifference/Summary Judgment

Hughes v. Joliet Correctional Center, 931 F.2d

425 (7th Cir. 1991). The plaintiff arrived in prison with a spinal injury; he complained for six weeks about weakness in his legs and pain in his back before he saw a neurologist, by which time he was paraplegic.

If the defendants "were merely careless in their diagnosis and treatment...—being honestly convinced that he was a malingerer," the plaintiff should be pursuing a malpractice action. If they were "trying to cripple" him, the Eighth Amendment would be violated. An Eighth Amendment claim was also stated by the "less egregious" misconduct alleged by the plaintiff: that the defendants

were treating Hughes not as a patient, but as a nuisance;...that although they doubtless underestimated the severity of his injuries, at the same time they were insufficiently interested in his health to take even minimum steps to guard against the possibility that the injury was severe. Such words and deeds as telling Hughes he was full of bullshit, shifting him to the psychiatric ward where he would not be allowed to have his crutches and leg brace, and ordering the bed moved away from the toilet so that Hughes would have to get up and walk to it...suggest more than mere neglect suggest hostility, brutality, even viciousness.

Medical records showing that the plaintiff received "more or less continuous medical attention, of sorts" and that the defendants genuinely thought he was malingering "greatly undermine an inference of deliberate indifference." The records were the only evidence submitted on summary judgment. However, the district judge, whose policy was not to appoint counsel unless an evidentiary hearing was scheduled, gave insufficient thought to appointing counsel to help prepare an affidavit to get the complainant's allegations into the summary judgment record.

Qualified Immunity

Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991). At 627:

The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct....If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards.

The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue....The first two inquiries... present pure issues of law....The third, although ultimately a legal question, may require some factual determinations as well. [Citations and footnote omitted.]

If the analysis reaches the third stage, the court may permit limited discovery concerning the reasonableness of the conduct.

Procedural Due Process—Disciplinary Proceedings

Taylor v. Wallace, 931 F.2d 698 (10th Cir. 1991). The failure of a hearing committee to make an independent determination of the reliability of confidential informant testimony (on "[a]ny reasonable basis") denies due process. At 702: "Without sufficient indicia of reliability, the testimony of the confidential informants can be given no weight, and the requirements of due process as set forth in [*Superintendent v.*] *Hill* are not satisfied."

Procedural Due Process—Disciplinary Proceedings

Campbell v. Henman, 931 F.2d 1212 (7th Cir. 1991). The court reaffirms the holding of *Chavis v. Rowe* (7th Cir. 1981) that *Brady v. Maryland*, requiring the disclosure of material exculpatory evidence, applies to prison disciplinary proceedings. The disclosure "may be limited to its substance in situations where disclosure of the entire report could create security problems." (1214) A finding that information provided by confidential informants is reliable does not end the analysis; even if there is sufficient evidence to support the conviction, the question whether there was exculpatory evidence must be answered.

Work Assignments

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991). The Fair Labor Standards Act is an exception to the Eleventh Amendment and any claim for back wages against the state was therefore not barred by that Amendment.

Prisoners who worked for a private company at a lab site inside the prison were not "employees" entitled to the minimum wage under the Fair Labor Standards Act. One judge thinks that prisoners are *per se* not covered by the Act. He goes on to write, and the concurring judge agrees, that these prisoners do not meet the "economic realities" test because neither the prison nor the company was an "employer" within the statutory definition.

Correspondence—Legal and Confidential

Lemon v. Dugger, 931 F.2d 1465 (11th Cir. 1991). An officer opened and read a letter from the plaintiff's attorney. A jury found for the plaintiff. The fact that the letter contained a photograph, arguably contraband, did not constitute probable cause to read the letter as a matter of law, and the issue was properly submitted to the jury.

Prison Records/Procedural Due Process

Monroe v. Thigpen, 932 F.2d 1437 (11th Cir. 1991). Due process is denied by denial of parole relying on admittedly false information even if the parole statute does not create a liberty interest in obtaining release.

DISTRICT COURTS

Attorneys' Fees/Contempt

Morales Feliciano v. Hernandez Colon, 757 F.Supp. 139 (D.P.R. 1991). Private attorneys pursuing systemwide litigation over prison conditions without institutional support were entitled to monthly fee payments from contempt fines paid into court for violations of population orders. The court notes in the course of the opinion that the fees can be paid from the *interest* on the accumulated fines (over $30 million dollars) and that it does not intend to give the money back to the defendants in any case. The court also notes that the defendants have fought all prior fees motions "tooth and nail" and delayed payment until the last possible moment.

Medical Records/Use of Force/Use of Force—Restraints/Protection from Inmate Assault

Jackson v. Fort Stanton Hospital and Training School, 757 F.Supp. 1243 (D.N.M. 1990). At 1306: Medical care at schools for the developmentally disabled is found not "minimally adequate" because of "significant lapses" in medical records. They

demonstrate an incomplete medical analysis and understanding of the residents. The records lack broad descriptions of a resident's clinical status. Instead, the records contain repetitive listings which reflect a lack of individualized analysis. These matters may affect a resident's health and long-range outlook. They may lead to the loss of necessary interventions.

The institutions also fail to provide reasonable safety from physical abuse and accidents. The court cites "unexplained" acts of violence and the failure to terminate a staff member who repeatedly kicked a resident. With respect to accidents, "the evidence showed that there are a number of injuries occurring repeatedly with no attempted pattern analysis and no intervention...to make changes...to prevent further accidents or injuries."

At two of the institutions, physical restraints are used to constitutional excess because of insufficient staffing.

Medical Care/Pendent Claims; State Law in Federal Courts

Rosen v. Chang, 758 F.Supp. 799 (D.R.I. 1991). The prisoner's estate alleged that his repeated complaints of abdominal pain were treated with Metamucil while in reality he was dying of acute appendicitis. Those allegations, combined with the phrases "deliberate indifference" and "so outrageously indifferent as to amount to wanton recklessness," stated a constitutional claim.

The court entertains supplemental (formerly pendent) jurisdiction over a negligence claim under the state wrongful death statute. Any possibility of jury confusion based on different legal standards is outweighed by the economies of trying both claims in one suit.

Medical Care—Standards of Liability—Deliberate Indifference

Brown v. Coughlin, 758 F.Supp. 876 (S.D.N.Y. 1991). The plaintiff came to the city jail system with a broken leg, was eventually transferred to state prison, and had his leg amputated as a result of an infection that was allegedly not properly treated.

The municipal defendants, including the City, were not entitled to summary judgment on the merits, given evidence of

> *repeated instances of denied treatment, excessively delayed care, substantial delays in follow-up appointments and diagnostic testing, incorrect medications, improper or inadequate treatment, failure to transfer necessary medical records in a timely fashion, noncompliance with medical orders, and failure to prioritize [the plaintiff's] status for placement in a larger tertiary care facility upon learning of the festering infection. This adequately indicates or constitutes a systemic failure to follow minimum professional standards in the delivery of care*. (882)

The pendent malpractice claim against the state defendants individually is barred by Correction Law §24, which prohibits personal suits against correctional employees. However, the claim can be pursued against the defendants in their official capacities.

Evidence of "elemental and systemic" deficiencies in delivery "or lack thereof" of medical care support the inference that the Commissioner and the Superintendent of Downstate "could be charged with knowledge of the unconstitutional conditions." (889) Their claim that they relied on medical personnel's judgment is unavailing. "Each defendant must be held to a standard of reasonable judgment for someone within the range of professional competence in his or her particular official position." (889) The Commissioner and Superintendent had personal duties to ensure adequate delivery of medical services.

Rights of Staff/Color of Law

Corrente v. State of Rhode Island, Dept. of Corrections, 759 F.Supp. 73 (D.R.I. 1991). Several officers alleged that they reported other officers' misuse of force and were subjected to harassment and threats.

Allegations that these threats were "reported" to the Governor were insufficient to show that he actually "knew" of the harassment. More specific allegations that the Director of Corrections knew of the harassment but failed to investigate or take disciplinary action stated a claim under §1983.

The Federal Rules of Civil Procedure authorize suit against the unincorporated officers' association for violation of federal rights despite state law that did not permit such suit. Allegations that the association defendants "acted together with or obtained significant aid from state officials," e.g., by the latter's tolerating the association defendants' conduct, sufficiently alleged action under color of state law.

Damages/Pendent Claims/Indemnification

Hankins v. Finnel, 759 F.Supp. 569 (W.D.Mo. 1991). The plaintiff won a judgment of $3,000 in punitive damages in a §1983 case alleging sexual harassment by a prison employee. The State moved in state court to enforce the Missouri Incarceration Reimbursement Act, which authorizes forfeiture of 90% of a prisoner's assets. The prisoner moved in federal court to stay the state proceedings and enforce the judgment.

The federal court has authority to enforce its judgment through the mechanisms of state law and has jurisdiction over the State of Missouri because the State agreed to pay the judgment that it is now trying to have forfeited. The State also waived its Eleventh Amendment immunity by agreeing to indemnify the individual defendants.

The Missouri statute is pre-empted under the Supremacy Clause insofar as it applies to a damage award under §1983 because it conflicts with the deterrent purpose of such damages.

Personal Involvement and Supervisory Liability/Use of Force

Martinez Correa v. Lopez Feliciano, 759 F.Supp. 947 (D.P.R. 1991). The court grants summary judgment as to some supervisors but not others in a police shooting case. At 954:

> *Failure of the supervisor to take remedial action against an individual officer after numerous complaints; employment by the supervisor of a wholly inadequate and impotent disciplinary system that permitted officers to continue to violate citizens' rights; ...and demonstration of a pattern of violations "so striking as to allow an inference of supervisory encouragement, condonation, or even acquiescence,"... all have been bases for finding supervisors liable under section 1983*.

Personal Property

Muhammad v. Moore, 760 F.Supp. 869 (D. Kan. 1991). The plaintiff, a federal prisoner, refused to cooperate with the Inmate Financial Responsibility Program and was consequently limited to maintenance pay of $5 a month. "The IFRP clearly serves valid penological interests of rehabilitation, and the requirement that an inmate choose between participation in the program or risk significant reduction in his employment or income potential does not violate constitutional rights." (871) The statute that permits discharge of court-ordered obligations where a prisoner is incarcerated solely because of inability to pay had no application. The fact that the plaintiff's family had had to provide funds for his personal use did not state a constitutional claim.

Publications

Beckford-El v. Toombs, 760 F.Supp. 1267 (W.D.Mich. 1991). Another inmate sent the plaintiff a brochure from a correspondence school; prison officials refused to deliver it, citing a rule prohibiting inmates from entering into certain contractual arrangements.

The brochure "is presumptively within the First Amendment's protection" since it is "not pornographic or obscene, does not contain escape plans, incitement to violence, or any other matter obviously inimical to prison order or safety." Since the sender did not solicit the plaintiff's enrollment and there was no application form in the brochure, the use of the contract rule "is a farfetched interpretation of the rule and is wholly arbitrary." (1271) "No possible penological justification exists for confiscating an educational brochure under the pretext that its mere receipt constitutes a forbidden contractual relationship." (1272)

Protection from Inmate Assault/Use of Force

Williams v. Blackburn, 761 F.Supp. 24 (M.D.La. 1991). The plaintiff alleged that he was twice attacked with scalding water by another inmate and later beaten by an officer, resulting in blisters and bruises, respectively. The Eighth Amendment was not violated because there was no "significant injury" in either case. At 26:

> *The court feels compelled to note, however, that the "significant injury" standard...seems destined to encourage venal prison guards in their deliberate use of force upon inmates. [By this standard] the courts in effect pronounce an "open season" upon inmates which is likely to encourage unrestrained correctional officer use of force and violence in penal institutions*.

Pre-Trial Detainees/Crowding/Class Actions—Settlement/Remedies/ Release of Inmates

Harris v. Reeves, 761 F.Supp. 382 (E.D.Pa. 1991). A new consent judgment in the Philadelphia jail conditions case obligates the city to develop ten-year population projections; develop a "population management plan" consistent with the projections; promulgate "Physical and Operational Standards for existing and any new prison facility that comply with constitutional and correctional industry standards," and comply with them; and implement a Capital Projects Management Plan, an Operational Management Plan, and a Management Information Service Plan. A Criminal Justice Project Coordinator is to be appointed to supervise this process.

The plan also provides short-term relief, requiring the City to provide at least 250 alcohol and substance abuse beds and to submit to the Special Master the names of 35 pre-trial detainees for early release per day, five days per week, whenever the overall population cap is exceeded. The District Attorney will get notice and have 72 hours to object in writing and to propose someone else to be released.

A Special Master is to be appointed to monitor compliance with these provisions and provide quarterly plan compliance reports.

A fine of $100 a day is imposed for each inmate admitted in violation of the population limits or not released pursuant to the early release provisions

Medical Care—Standards of Liability—Deliberate Indifference

Lynsky v. City of Boston, 761 F.Supp. 858 (D.Mass. 1990). A jail doctor who failed to order additional diagnostic tests for heart disease based on EKG abnormalities, but who treated the patient continuously for his other complaints, was not deliberately indifferent. "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgment and to constitutionalize claims which sound in state law." (864, *quoting Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 [6th Cir. 1976]) However, the doctor was not entitled to summary judgment on the state law gross negligence claim.

Law Libraries and Law Books/ Mootness/Mental Health Treatment

Murray v. Didario, 762 F.Supp. 109 (E.D.Pa. 1991). Prisoners held in mental hospitals have a right of access to courts as set out in *Bounds v. Smith*. When the court threatened to appoint counsel for the *pro se* plaintiff, the defendants agreed voluntarily to establish a law library consisting of constitutions, statutes, and evidence and criminal treatises, with case reporters available through inter-library loan. The court characterizes this as a "reasonable accommodation," with no reference to any evidentiary proceedings or further inquiry on the question, and declares the case moot, noting that the plaintiff is no longer incarcerated at the hospital.

Pre-Trial Detainees/Injunctive Relief—Preliminary

Young v. Ballis, 762 F.Supp. 823 (S.D.Ind. 1990). At 827: "In cases such as this, claims that jail conditions are so poor that they are constitutionally violative, money damages are inadequate." However, the plaintiffs are denied a preliminary injunction on the merits. The court cautions that this ruling is not dispositive of the outcome of the trial on the merits.

Medical Care (830-31): Medical care was not constitutionally inadequate. A physician was on call within walking distance, a nurse visited the jail three times a week, a county nurse located across the street was available during business hours, and emergency cases were transported to a local hospital. A single incident of apparent inadequate treatment did not establish a pattern supporting relief.

Crowding, Classification, Financial Resources (831-32): The plaintiffs did not show irreparable harm even though there was evidence of prisoners sleeping on mattresses on the floor and failure to segregate local prisoners from state prisoners. "Further, the defendants would bear great expense and difficulty if required to change these conditions."

Ventilation (832): The ventilation is poor and the plaintiffs likely to succeed at trial, but there is insufficient evidence of irreparable harm to support a preliminary injunction.

Exercise and Recreation (833): The prisoners get outdoor recreation four times a *year* because of lack of staff; there is no exercise equipment; exercise is limited to calisthenics in the day room. These facts did not establish irreparable harm.

Medical Care

Rivera v. Dyett, 762 F.Supp. 1109 (S.D.N.Y. 1991). The plaintiff obtained a settlement of his preliminary injunction motion providing that he would be medically evaluated by outside physicians and that if they found he required hospitalization, they would hospitalize him and not remove him until he was discharged by the hospital staff or by court order.

FEDERAL RULES

Transfers/Discovery

Green v. District of Columbia, 134 F.R.D. 1 (D.D.C. 1991). The plaintiffs challenged conditions of confinement of District of Columbia prisoners transferred to institutions outside the District in which District prisoners are held by contract (e.g., the Zavala County, Texas Detention Center).

After the defendants' blatant failure to comply with discovery requests over a period of months, the court imposes sanctions including ordering that the facts as asserted in plaintiffs' complaint be held as true.

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

To the readers:

■ A heartfelt thanks to all of you who took the time to complete the reader survey we recently sent out. The results are still being tabulated so we won't be able to publish them until the next issue. From what we have seen, though, you all had many positive comments and suggestions and we intend to look at them all carefully. Again, thank you for taking the time to let us know how we are doing.

—Jan Elvin, editor

Prison Project Releases New Bibliography on Women in Prison

■ The National Prison Project has released a newly-revised *Bibliography of Materials on Women in Prison*. The 35-page bibliography lists materials, by category, contained in the files of the National Prison Project. The 22 categories cover health care, drug treatment, incarcerated mothers, juveniles, legislation, parole, sex discrimination, death penalty, race and other issues. Most publications listed, which are not available from a publisher or library, are available from the Prison Project for a copying fee. The *Women's Bibliography* is available for $5, prepaid, from the National Prison Project, 1875 Connecticut Avenue N.W., Suite 410, Washington, DC 20009.

(cont'd from page 5)
including further increases in population and the installation of cubicle divisions in the dormitory. These changes, if they occurred, would also be relevant in judging the constitutionality of the resulting conditions.

Similarly, the claims of excessive heat cannot be viewed in isolation from the other claims raised by plaintiff. The degree of potential harm from air that is 95° Fahrenheit depends on the relative humidity of the air, the presence or absence of ventilation, the general health of the persons exposed to this condition, and the duration of exposure. In this case, the plaintiff alleged that the air was damp because of nonfunctioning windows.

This Court should also deny summary judgment on the claim of mixing psychotic and general population prisoners in the dormitory. Plaintiff alleged that this lack of classification caused stress because other prisoners could not predict the behavior of the mentally ill prisoners. A fear of psychotic prisoners is not an unreasonable fear, and this Court should allow an evidentiary inquiry into whether psychotic, dangerous prisoners are actually mixed into the general population as a result of overcrowding, creating an unreasonably dangerous situation.

For the above stated reasons, the Court should deny summary judgment on all issues and reopen discovery so that the parties can present evidence as to current conditions of confinement at the HCF. ■

[1] John Boston, "Highlights of Most Important Cases," *NPP JOURNAL*, pp. 6-8 (Summer 1991).
[2] The Supreme Court remanded the case to the Sixth Circuit. That court, in turn, remanded the case to the federal district court on July 29, 1991.
[3] Because plaintiff's affidavits specifically aver that defendants had actual notice of the conditions, there is no need to infer notice on the part of the defendants.
[4] As the Supreme Court noted, the defendants never attempted to raise a funding defense in this case. *Wilson* at 2326. Nor would a funding defense make any sense in a case in which the allegations included a failure to attend to basic sanitation and safety.
[5] *Wilson v. Seiter*, 893 F.2d 861, 865 (6th Cir. 1990), *vac. and remanded*, 111 S.Ct. 2321 (1991).

Elizabeth Alexander is the NPP's associate director for litigation.

Prisoners Need Protection From Environmental Hazards

BY JAN ELVIN

■ *Prisoners and staff at the State Prison in Jackson, Michigan have been exposed to Agent Orange and DDT, stored illegally by prison officials.*

■ *In an Arizona prison, a sign in the visiting room warns friends and families of prisoners, "If you are pregnant or of childbearing age, do not drink the water."*

■ *Occupational Safety and Health standards, which exist to ensure the safety of all workers in the U.S., exempt state and federal prisons. In addition, many state prisons are exempt from state employee right-to-know laws, so prisoners are unable even to determine what hazards they may face.*

All of us, including prisoners, face the environmental consequences of our culture's predominant industrial age values—cultural values that prize consumption, competition and conquest.

In the race toward acquisition, our materialism and greed have nearly ruined the earth and have brought about a gross disparity of wealth, opportunity and basic human rights. The losers in the race are rounded up and herded into overcrowded prisons. Our national criminal justice policies are too bankrupt to address the real issues of poverty and racism.

Making the Connection: Prisons and the Environment

Research has shown that communities of color are most often targets for toxic dumping and for placement of many hazardous industries. It is only a short jump, then, to make the connection between prisons and environmental hazards. Most of society thinks of prisoners as garbage, so why should they not go hand in hand with other "hazardous waste": the prison and the toxic waste dump, the prison and the landfill.

It begins to make sense. What else do we want to ignore, put out of sight and out of mind, as much as these two? As state and local governments search out sites for new prisons, their profit-seeking counterparts in the toxic waste industry are doing exactly the same thing: Where do we dump it?, they both ask.

All this wreckage, both environmental and human, must, of course, eventually return to us. Do we treat it responsibly, or do we ignore it, poison it, and leave it to rot?

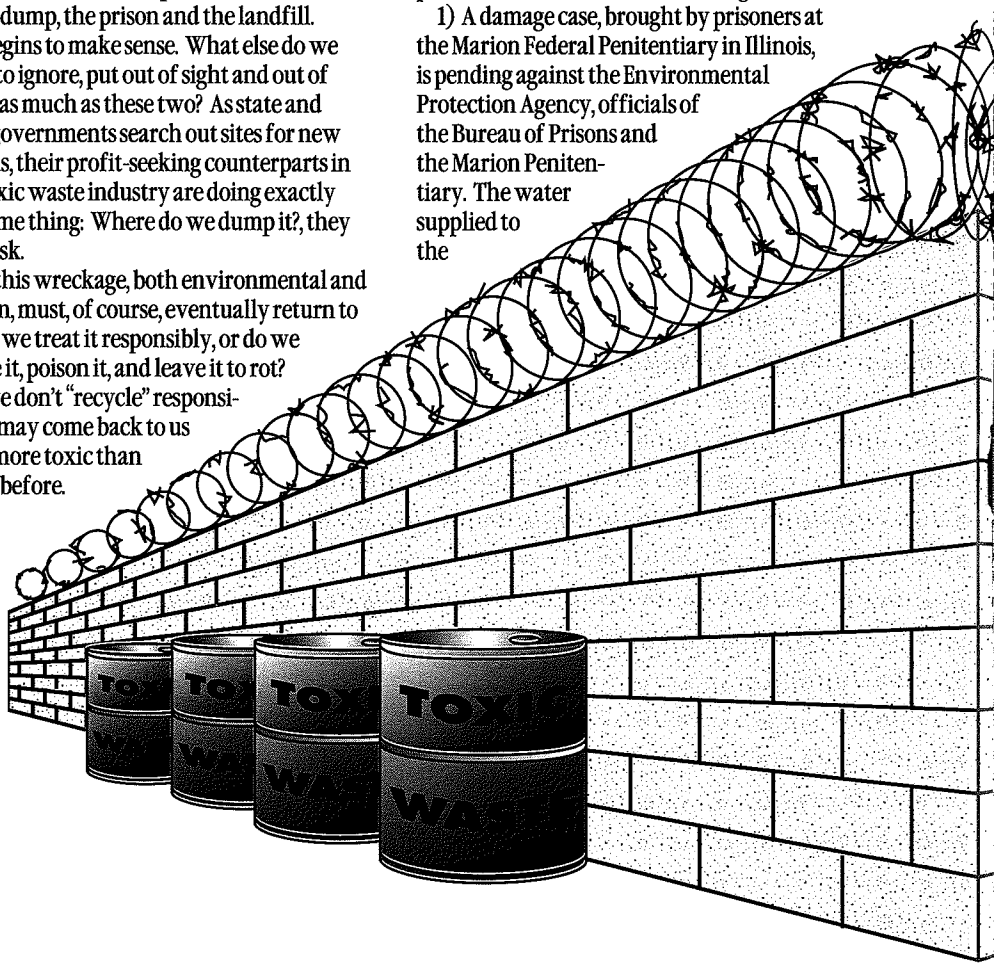
If we don't "recycle" responsibly, it may come back to us even more toxic than it was before.

Potential Environmental Problems in Prisons

- Indoor pollution;
- Groundwater contamination;
- Pesticide use on prison farms;
- Exposure to and removal of asbestos;
- Faulty or non-existent evacuation plans in case of an accident during transportation of hazardous wastes, a toxic spill, or a fire;
- Lack of protection of workers in prison industries.

Here is a "snapshot" look at some of the problems uncovered in researching this issue:

1) A damage case, brought by prisoners at the Marion Federal Penitentiary in Illinois, is pending against the Environmental Protection Agency, officials of the Bureau of Prisons and the Marion Penitentiary. The water supplied to the



staff and prisoners at Marion comes from Crab Orchard Lake. The lake lies next to a chemical waste dump and was designated a Superfund site in 1984 by the EPA as one of the nation's worst toxic hot spots. There is currently a stay of discovery in the case, pending a judge's ruling. [1]

2) The Georgia Department of Corrections succeeded in obtaining an exemption from the state Employee Hazardous Chemical Right-to-Know Law of 1988. The law protects state employees by requiring that they be notified if they are working with hazardous chemicals. In addition, it requires that they receive proper training in the safe usage of such chemicals and that they be given proper equipment. Prisoners in Georgia manufacture all the solvents and cleaning products used by the state, many of which are considered highly toxic.[2]

3) In Butner, North Carolina, a citizen's group succeeded this year in stopping construction of a hazardous waste treatment facility near its communities. Thermal-KEM, a for-profit company, wanted to build a five-state incinerator designed to burn 50,000 tons of hazardous chemical waste per year.

The incinerator would have affected an additional 3,000 people, either housed in or employed by ten state institutions located within three to ten miles of the incinerator site. The facilities include homes for the retarded, juvenile institutions, minimum security prisons and others, plus the Federal Correctional Institution. Besides concern for the surrounding communities, local citizens were concerned about evacuation in case of an accident either at the incinerator itself or a spill during the transportation of hazardous waste to or from the incinerator.[3]

4) It was also discovered that Butner—the town, not the prison—is the site of a "cancer cluster." The rate of non-Hodgkin's lymphoma, a type of cancer, in the Butner area is 50% higher than in the rest of the state. Studies have linked herbicides such as Agent Orange to this type of cancer.[4] The ground upon which the prison now sits was defoliated at one point, although reports differ over exactly when that occurred. Some say that Camp Butner was defoliated with herbicides for experimental purposes during World War II. Meanwhile, the editor of the local newspaper told the *NPPJOURNAL* that 400 acres were defoliated much more recently in order to build the prison.

5) In 1989 a fire broke out at the hazardous waste incinerator in Rock Hill, South Carolina. The incinerator was run by Thermal-KEM, the same company that tried to open the five-state incinerator in Butner. Rock Hill is also the site of a prison. In addition to the fire, state and federal officials cited numerous explosions and excessive arsenic emission levels among the violations. The company had long ignored warnings about these problems.[5]

6) The EPA recently fined the State of Florida $100,000 for pollution violations at the Florida State Prison near Starke. Violations involved operation of the prison sewage plant.[6]

7) The Michigan State Prison in Jackson houses the state's largest assortment of toxic messes. A local newspaper's investigative report uncovered violations which included illegal storage of DDT and Agent Orange. The prison was fined $160,000 by federal officials. The State Attorney General's office, however, persuaded the federal officials to drop $33,000 of the fines. [7]

8) In 1985, Buckingham Security Ltd., a private corrections firm, tried to build a private prison on a toxic waste site in Pennsylvania which they had purchased for one dollar. They later tried to sell the property for $790,000, without cleaning it up.[8]

9) At the Arizona State Prison in Florence, a sign in the visiting room warns visitors, "If you are pregnant or of child-bearing age, do not drink the water." Staff bring bottled water to drink. [9]

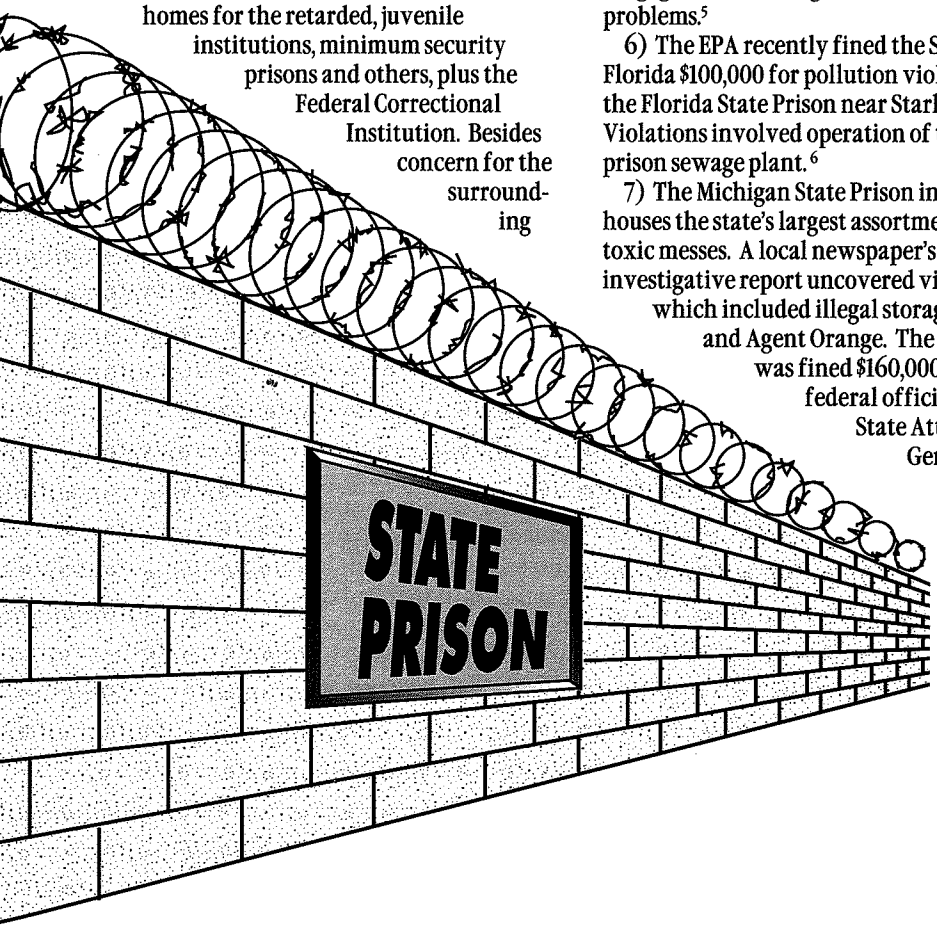
10) The Florida Environmental Regulation Commission has approved a 200-acre site for a hazardous waste facility in Raiford, near the Florida State Prison and two other prisons. Any accident either at or en route to the facility would require the evacuation of thousands of prisoners. When prison officials expressed concern over lack of evacuation procedures, they were told by state officials that no plan would be needed.[10]

More general areas of interest to environmental justice advocates are:

1) *Former military bases set to be used for prisons.* President Bush has signed legislation authorizing the turnover of some former military bases and buildings for use as minimum security correctional facilities. Ships, airplanes, tanks and maintenance yards generate a variety of solid and liquid paints, solvents, petroleum products, propellants, explosives, obsolete chemical weapons, and radioactive wastes.

2) *Prison farms and the use of pesticides.* Pesticides are commonly used by prison farms which grow their own food and raise livestock for prison consumption. Some prison farms, such as Angola, Louisiana, and Parchman, Mississippi imprison many long-termers whose exposure over the years to these chemicals in their air, water and food is great. In addition to the risk from breathing pesticides, prisoners may risk health hazards from eating the fish, livestock and produce which have been subjected to herbicides. Overexposure to pesticides has been linked to various forms of cancer. [11]

3) *Exposure to asbestos.* Not only are prisoners put in proximity to asbestos in antiquated buildings, they are sometimes required to clean up the asbestos without proper protective gear. Lead poisoning from paint and old pipes and fixtures presents another danger in outdated prisons.



What Can be Done?

We know that prisoners are subject to higher incidences of exposure to toxic

Proposed Pennsylvania Legislation Looks at Evacuation Problem

Some positive legislation has been introduced in Pennsylvania. The proposed bill requires that a certain distance be maintained between hazardous waste facilities and prisons.

Current Pennsylvania law requires that hazardous sites be located at least one mile from airports, schools, community parks, nursing homes, hospitals and churches, but not prisons. In testimony before the 1991 session of the state legislature, Rep. Russ Fairchild (R-85), who introduced H.B. 1252, said, "Anyone with any common sense can easily see that these facilities could be evacuated more easily than a prison....I've said it before and I'll say it again. Prisoners are incarcerated for wrongdoing and must repay their debt to society. But at the same time, it is unfair and inhumane to entrap them in a potentially dangerous situation....If the incinerator were constructed and an accident occurred, it could make the disaster in Bropah [*sic*], India, look like a picnic, when compared to a potential accident involving thousands of persons locked in cells behind walls."

substances, yet their legal and political remedies are more restricted than other citizens'.

What can be done to ensure that the rights of prisoners to clean air and water and to be free from toxics are upheld?

In the coming years, prisoners' rights lawyers, jailhouse lawyers, and other advocates should develop some expertise in environmental issues. Interdisciplinary study will be needed to meet these challenges.

Action Advocates Can Take

Here are a few things to do if you become aware of a serious environmental problem in prison:

1) Contact a local newspaper editor or reporter. They can be good sources of information and, of course, you may want to interest them in writing a story. Any information on the manufacturer of the toxic substance in question, or the chemical waste company, that you can offer the reporter will be helpful. Make sure your sources are reliable and accurate.

2) Contact a lawyer. Attorneys may see the advantage in linking prison litigation to violations of state or federal environmental laws. Contact one of the growing number of environmental law groups.

3) Connect with the local community, especially in the case of a landfill or hazardous waste incinerator. Air and water are not static. They move. If the problem affects the air and the water in the prison, chances are it affects the greater community. Certainly it will affect the prison staff and probably the nearby townspeople.

We have seen some of the interconnections between race and environment, and prisons and the environment. Now it is time to form new partnerships to accommodate a broader agenda. The new agenda already has a name, "environmental justice." We know how "criminal justice" is dispensed among racial minorities and the poor in the United States. We are now beginning to see how "environmental justice" is allocated. Like toxic waste, it's not a pretty sight. ■

Jan Elvin is editor of the NPP JOURNAL.

[1] Linda Rocawich, "Toxins on Tap?" *The Progressive*, pp.24-27, (May, 1989).
[2] Georgia Environmental Project, Atlanta, Georgia.
[3] Numerous newspaper articles from the Butner Creedmore *News* and the Oxford *Ledger*, (May, June, and July, 1990).
[4] "Reversing Twelve-Year Old Policy, VA Agrees Agent Orange Linked to Cancer," *The Veteran's Advocate*, Vol.1, No.1, (June, 1990).
[5] "S.C., Federal Officials Discuss Action Against Waste Company," Durham *Morning Herald*, (May 10, 1990).
[6] "EPA Fining Florida Prison," *Corrections Digest*, (May 2, 1990).
[7] Jeff Alexander, "Officials Shrugged as Prison Became a Pollution Hot Spot," The Grand Rapids *Press*, (Sept. 3, 1989).
[8] Jody Levine, "Private Prison Planned on Toxic Waste Site," *NPP JOURNAL*, No.5, pp.10-11, (Fall 1985).
[9] Observations by NPP staff.
[10] "Waste Site Poses Penal Evacuation Controversy," Florida *Times Union*, (October 3, 1988).
[11] "Cancer in Humans and Potential Occupational and Environmental Exposure to Pesticides: Selected Abstracts," Prepared by Marion Moses, M.D., San Francisco, CA, (May 31, 1988).

NPP Lawyer Discusses *Wilson*, Legal Trends

BY BETSY BERNAT

Elizabeth Alexander, associate director for litigation at the National Prison Project, has been practicing prisoners' rights law since the early 1970s when, as an attorney in Madison, Wisconsin, she served as chief staff counsel at Corrections Legal Services Program, and then as assistant state public defender responsible for conditions of confinement litigation.

Alexander joined the National Prison Project in 1981 as a staff attorney and has since been responsible for, or been involved in, some of the Project's most important cases. In January 1991, she argued Wilson v. Seiter *before the United States Supreme Court. She discussed the Court's decision and other corrections issues in an August interview with Betsy Bernat, editorial assistant of the NPP JOURNAL.*

NPPJ: You began practicing prisoners' rights law in the '70s in Wisconsin. What kinds of cases did you handle, what was the legal climate then, and how does it compare with the work you're doing now?

Alexander: I was extraordinarily fortunate because at the time, the federal district judge who sat in Madison was James E. Doyle, who was really a saint of a person, a scholar, and someone extraordinarily sensitive to the issues that prison law raised. In one of his well-known opinions, he said he was convinced that someday the institution of prison would end. He had a real vision of what prison law ought to look like.

So, it was an era in which we entertained hopes that we could move forward to a society that had a more rational idea about the criminal justice system. That vision of the future is hard to maintain these days when Willie Hortonism dominates the public dialogue on corrections issues. Even people on our side who are working for prison reform have far more modest hopes about what we can accomplish. Ultimately, our goal ought to be not just barely constitutional prisons but a re-examination of the basics of criminal justice policy.

NPPJ: Which of the cases that you've worked on do you feel have been

most important?

Alexander: In importance to the future of prisoners' rights, the *Wilson v. Seiter*[1] case is the most critical. *Wilson* extended the "deliberate indifference" standard to all conditions of confinement cases. It was, in formal terms, a victory for prisoners' rights because it rejected the even heavier burden on prisoner-plaintiffs that had been imposed by the Sixth Circuit.

We had no choice but to seek *certiorari* in *Wilson*. We have other very important litigation from Michigan pending in the Sixth Circuit and those cases would have been seriously affected if the Sixth Circuit's decision in *Wilson* had been allowed to stand. Even so, we did consider withdrawing the petition for writ of *certiorari* after Justice Brennan resigned.

If Justice Brennan had remained on the Supreme Court when *Wilson* was decided, *Wilson* would have held by a five to four majority that there is no state of mind requirement under the Eighth Amendment. That would have been a tremendous victory.

Even so, *Wilson* is a decision that prison litigators can live with. The "deliberate indifference" standard is the standard that federal courts have been applying to medical care claims since 1976. The standard hasn't had any negative impact on plaintiffs pursuing injunctive medical care claims.

The concerns that prison litigators have about *Wilson* stem from the nasty language that Justice Scalia inserted in the decision. I wish that Justice Scalia and Chief Justice Rehnquist had dissented, and agreed with the defendants. In that case, if someone nearer the center of the Court such as Justice O'Connor had written the decision, the decision would not have had any significant negative impact.

NPPJ: What about some of the other cases?

Alexander: An extraordinarily rewarding case was the Mecklenburg Correctional Center case.[2] It was a hard case, but overall the litigation was just about as successful as any in the Prison Project since I've been here. We turned Virginia's version of a supermax--Virginia's version of Marion Federal Penitentiary--into just an ordinary bad prison. That was a terrific accomplishment and I've always felt proud about that.

Even though the appellate litigation was disappointing, the South Dakota case[3] was rewarding because we had an excellent judge and we made a lot of difference in the South Dakota system.

NPPJ: There were some strange practices going on there, as I recall, before the litigation was filed.

Alexander: Prisoners drilling other prisoners' teeth; inmates taking X-rays of other prisoners. There were areas in which, because South Dakota had not been the subject of major prison litigation before, they had some practices that were inconsistent with contemporary correctional practices. On the other hand, as defendants go, after they lost the case they were not particularly recalcitrant. In many ways, I've had a good relationship with the State of South Dakota. In contrast, some of the states with more progressive reputations, such as Michigan, have made a decision to fight everything tooth and nail.

NPP Photo

Elizabeth Alexander (center) conducts a recent NPP legal staff meeting attended by Adjoa Aiyetoro (left) and David Fathi.

NPPJ: Why do you think that is?

Alexander: It's not clear. How states react to litigation seems to reflect local politics. There are not many generalizations that can be made about it.

Another satisfying case to litigate is *Duran v. Carruthers*[4] from New Mexico. As a result of the riot, in which a large number of people were killed, the state signed a comprehensive consent decree which was excellent. I became involved in the litigation at a much later stage. A very prestigious Washington, D.C. law firm had been hired by the State of New Mexico to break the consent decree. It was a professionally rewarding experience to do battle with a top D.C. firm and beat them in the district court and the court of appeals and to have *certiorari* denied by the Supreme Court.

NPPJ: I wanted to talk about *Duran* because of the renegotiated settlement in that case. How do you tie up these cases that have been going on for so long in a way that will guarantee the prisoners continued reforms? Did we establish a model in *Duran* that can be used in other cases?

Alexander: That's a very interesting question. As you know, coming up in the United States Supreme Court this term is a case called *Rufo v. Inmates of the Suffolk County Jail*,[5] out of the First Circuit. In that case, the district court refused to modify an old consent decree requiring Boston to keep its new jail single-celled. The new jail was built as a result of a consent decree that was entered after the old jail was found to be unconstitutional. The Supreme Court this year may overrule the district judge and make it much easier for states to get out of consent decrees that they have freely negotiated, and in particular, consent decrees that involve restrictions on overcrowding. One of the things that we attempted to do in the newest rounds of negotiations in *Duran*, and Al Bronstein is primarily responsible for this, was to write provisions that would make the overcrowding limitations written in stone. For example, in the new *Duran* modified settlement agreement, the ban on double-celling is made enforceable in state court. This means that even if the Supreme Court, in *Rufo*, makes the consent decree non-enforceable in federal court, we'll still be able to enforce that ban on double-celling. We think we have developed a model to protect the provisions we previously negotiated. Whatever happens in *Rufo*, these provisions will still be enforceable.

NPPJ: If the Supreme Court does decide in favor of the defendants in *Rufo*, do you think states will be more reluctant to enter into that sort of settlement model?

Alexander: It's certainly going to make it harder for consent decrees to be negotiated because plaintiffs are going to be more reluctant to enter into consent decrees when they know that, as soon as the pressure's on, defendants are likely to be able to get out of them. Therefore,

there will be fewer consent decrees and more things will be litigated in federal court. That concern, however, isn't nearly as great as my concern about the fate of existing consent decrees. *Rufo* could cause severe disruption in the great majority of jurisdictions in which one or more prisons or the entire system is now under court order. What will happen to prison conditions when the great bulk of those orders may possibly be opened to major modifications? I hope that many of the states will realize that it's in their own interests to keep restrictions on their prison systems to avoid even worse problems.

NPPJ: The Standards Committee of the American Correctional Association just voted to allow double-celling and other forms of multiple-occupancy housing in medium security facilities.[6] How do you see that decision playing itself out?

Alexander: I find it really depressing that the ACA did that, and I think it undermines their credibility. The Supreme Court in *Rhodes v. Chapman*[7] had indicated that professional standards are different from constitutional standards in that professional standards were expected to be significantly higher than constitutional standards. What's happened with the ACA is that they've bent to political pressure and have decided that if constitutional standards are decreasing, then professional standards also have to decrease. The political backbone of corrections officials has weakened. Certainly nothing good will come of this. The standards will have very little credibility.

NPPJ: What do groups like ours do now that this decision has been made?

Alexander: We continue to work with progressive correctional officials to seek to overturn the changed standards because the changed standards are wrong. We have to work state by state to persuade people in each correctional system that they should not be misled by the new standards. Finally, in those systems in which overcrowding results in unconstitutional conditions, we're simply going to have to litigate. The standards weren't standards of constitutionality in any event, and their change doesn't make those conditions any more constitutional.

NPPJ: You and [NPP attorney] David Fathi have been investigating allegations of inadequate medical care at the Federal Bureau of Prison's medical facility in Springfield, Missouri. What have you found?

Alexander: We're very concerned about Springfield. There's a strong tradition, particularly among many federal judges, that the Bureau of Prisons is a progressive organization and not prone to the sorts of ills that are common to state systems. It has been, in many areas, a professional organization, but in part because of the tremendous impact of overcrowding in the system and, in part, because they have some long-standing problems, medical care is an area in which the Bureau does not appear to deserve its reputation. We were struck with the numerous problems we encountered when we investigated the Springfield facility, ranging from the use of mentally ill prisoners as nursing attendants for other prisoners, a use that's been routinely condemned by everybody that's looked at medical standards in prisons, to the lack of appropriate numbers of staff. Virtually none of the psychiatric positions were filled. There was no 24-hour physician coverage. It's dangerous to get sick at Springfield unless you do it between 9 a.m. and 5 p.m., Monday through Friday. Otherwise there's no on-site physician coverage. We observed an apparent lack of concern and lack of treatment by many members of the staff who were there. I was immediately concerned about an apparent lack of diagnosis and treatment for specific prisoners--medical problems that needed urgent treatment. On July 17 I testified before a subcommittee of Congress about the medical problems we found. I retain some hope that either through legislation or through discussions with the Bureau of Prisons we can make some progress, but the problems are very serious.

NPPJ: Back in the '70s when you started practicing prisoners' rights law, the entire field was a virtual frontier. What frontiers remain?

Alexander: We're desperately trying to hold on to what's left of decent constitutional law. I see us as under attack all the way across the face of the law. If there are areas of expansion, they are in areas such as statutory rights. We've got to explore federal statutory rights such as Section 504, the Rehabilitation Act that prohibits discrimination against persons who have a handicap. We have to exploit federal statutory rights in a much more systematic way than we've done in the past. In those states with decent state court systems, we have to go into state court. One of the things that sustains me is the idea that there are cycles in legal theories, and that the Willie Horton era in American politics and the Justice Scalia, Chief Justice Rehnquist era in constitutional law will not last forever. At some point, just as Judge Frank Johnson in Alabama developed the area of prison law, there will be a new chance to come up with a humane framework for law in the area of corrections. My hope is that when that day comes about, it won't be limited to looking at conditions of confinement litigation in isolation. Conditions of

FOR THE RECORD

■ The National Center for Institutions and Alternatives has published *Trading Textbooks for Prison Cells*, a 21-page report by William J. Chambliss, an NCIA Augustus Scholar. Chambliss examines the shift in government spending from schools and textbooks to police and prison cells, noting that "for the first time in American history cities are spending more on law enforcement than on education." The report includes charts, diagrams and detailed data which illustrate how law enforcement budgets have grown while programs which ultimately help to reduce crime, such as education and social programs, have suffered budget cutbacks. *Trading Textbooks* offers a clear picture of a troubling trend. Available free from the National Center on Institutions and Alternatives, 635 Slaters Lane, Suite G-100, Alexandria, VA 22314, (703) 684-0373.

■ "Burden of Justice," a new 28-minute video on sentencing alternatives, is now available from The Sentencing Project. The video takes an in-depth look at how Alabama is responding to prison overcrowding. It highlights judges, corrections officials, and others who are seeking to develop innovative alternatives, and focuses on two sentencing programs which provide judges with sentencing options. The video is narrated by Hal Holbrook and was produced by Emmy Award-winning Ellis Productions. It is available for long-term loan for $10 plus a $15 deposit. Contact the Sentencing Project, 918 F St. N.W., Suite 501, Washington, D.C. 20004, (202) 628-0871.

confinement law has only limited impact on corrections systems because we've never had a developed body of law that looked at the whole range of criminal justice policy. We can't really solve the problems of prisons out of the context of the whole criminal justice system.

NPPJ: When you go home to Iowa, and people ask, "Why in the world do you do work for prisoners?," how do you respond?

Alexander: The answer I use is that over 90% of the people who are now in prison will eventually be back on the streets. Whether or not the experiences people have in prison lead them to be productive members of society or to be more inclined to break the law is significantly affected by what happens to them in prison. In particular, the two factors that are most strongly correlated with whether or not prisoners avoid returning to prison are the maintenance of family ties and the development of vocational skills. For that reason, everybody ought to be concerned about what happens to people in prison, out of self-interest.

NPPJ: What keeps you going practicing this kind of law?

Alexander: There are several levels of answers to that question. I really like the people in the office. I find doing prison law intellectually exciting. I've had wonderful opportunities here. I've worked on numerous Supreme Court briefs and worked with other lawyers who are just extraordinarily good at trying to preserve the rights of prisoners. Whenever I actually go to prisons such as Springfield or the New Orleans jail and I talk with individual prisoners, I realize how terrible their lives are for reasons that could be corrected, I know why I'm doing this. In a country that has this enormous wealth, it's just unconscionable that we allow people in our system to be denied the basic necessities of life.

NPPJ: What glimmers of hope do you see?

Alexander: One way of looking at it is that the trends we have now cannot continue because, if they continue, by the year 2050, half the population will be in prison and the other half will be guarding them. Therefore, by definition, things have to get better. We just have to stick it out. Second, I've got two wonderful daughters, and I expect them to be fighting for justice in the 21st century. ■

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[1] 111 S. Ct. 2321 (1991). See also, in this issue, "Proving Deliberate Indifference in the Wake of *Wilson v. Seiter*," p. 3.
[2] *Brown v. Murray*, C.N. 81-0853-R (E.D. Va.).
[3] *Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984), *rev'd. in part*, 830 F.2d 912 (8th Cir. 1987) (en banc).
[4] 687 F.Supp. 839 (D.N.M. 1988); 885 F.2d 1485 and 885 F.2d 1492 (10th Cir. 1989). For more information, see "New Mexico Seeks to Elude Obligations of Consent Decree," by Mark Lopez, *NPP JOURNAL*, No. 16, Summer 1988.
[5] Nos. 90-954, 90-1004; 915 F.2d 1557 (1st Cir. 1990) (unpublished opinion). For more information, see "Modification of Consent Decrees Goes to High Court," by David Fathi, *NPP JOURNAL*, Vol. 6, No. 3, Summer 1991.
[6] For background, see "ASCA Proposes Watering Down of Single-Celling Standards," by William C. Harrell, *NPP JOURNAL*, Vol. 6, No. 3, Summer 1991.
[7] 101 S.Ct. 2391 (1981).

Betsy Bernat is the editorial assistant of the NPP JOURNAL.

Attica Anniversary

September 9, 1991 marked the 20th anniversary of the Attica rebellion when prisoners seized control of Attica Correctional Facility in upstate New York and demanded reforms. The disastrous end to that uprising came on September 13 when the National Guard, state police and corrections officers stormed the facility, and, in a 15-minute flood of gunfire, killed 43 prisoners and hostages, wounding 80 others.

The roots of the National Prison Project are closely woven with those events. When the world glimpsed firsthand the atrocities of prison, a movement for reform rose from the cries of outrage.

Now, 20 years later, reforms gained are quietly being squeezed out by the demands of overcrowding and a public infuriated by crime and spurred on by the careless, inflammatory crime-speak of politicians--a public which cannot understand why it should care about prisoners.

Still, for many, the voices of Attica echo on. We remember Attica here.

[Attica] brought home to the American public, at least for a while, as nothing else had, the horror of prison life and the desperation of the prisoners. For a while we thought that that dreadful tragedy...might do some real good. We were wrong.

—Herman Schwartz, Professor of Law, American University College of Law.

The horror of the re-taking was compounded by the brutality of the aftermath. By the hundreds, prisoners were stripped naked and made to crawl through a field of mud and broken glass, and then forced to run through a gauntlet of corrections officers as they were beaten viciously and showered with the most vile of racial epithets...

It is only at our great peril that we allow ourselves to forget what Attica means.

— Haywood Burns, Dean, CUNY Law School at Queens, was the coordinator of the Attica Brothers Defense Committee.

AP/Wide World Photos

Authorities stormed and recaptured Attica on September 13, 1971. Here, inmates herded into A Yard lie on the ground as they are stripped and searched.

BY JUDY GREENSPAN

Women Develop Effective AIDS Education Programs

Since the publication of the report by the National Commission on AIDS in March 1991, interest in and support for peer AIDS education programs in prisons and jails has increased dramatically. Corrections administrators and prisoners alike are recognizing that *prisoners* can best communicate and educate other prisoners about AIDS, substance abuse and other problems people face behind the walls. Some of the most effective education programs have been developed in women's prisons.

Peer Programs in Women's Prisons

■ ACE (AIDS Counseling and Education) at the women's prison at Bedford Hills in New York State, is the best-known peer education and counseling project. This summer, the women of ACE organized their first annual AIDS conference, "Sisters Helping Sisters; Experiences of Solidarity in Prison." Over 100 AIDS educators and outside friends of the ACE program attended a day of workshops, panel discussions and performances about AIDS education.

■ In the summer of 1990, I visited an HIV/AIDS education program for women at Rikers Island, part of the New York City jail system, started by the Center for Community Action to Prevent AIDS at Hunter College. This program, built on the "empowerment model," promotes discussion of pregnancy, birth control, prenatal care, sexually transmitted diseases and AIDS.

■ In 1988, Social Justice for Women initiated the Women and AIDS Project at the women's prison in Framingham, Massachusetts. This program provides education, counseling and workshops for all interested women. As the NPP AIDS Information Coordinator, I had the opportunity to visit with and meet some of the women involved in the Project. Many of the women prisoners are playing an informal but leading role in educational sessions. The project holds bi-annual "AIDS Speak-Outs" for prisoners and staff.

■ The Delaware Council on Crime and Justice, which runs peer education programs in the men's prisons, has recently initiated a similar program for women prisoners in that state. The Council trained several women prisoners as peer educators. These women are now conducting weekly and monthly AIDS education sessions at the Women's Correctional Institution. One woman has written a comic-style coloring book about AIDS that will soon be distributed throughout the prison.

■ Over the past year, two programs have been started by prisoners at two federal women's prisons. The "AIDS Education and Information Group" has already completed a 12-week session at the Shawnee Unit of the Federal Correctional Institution in Marianna, Florida. Designed by the women prisoners themselves, the educational sessions focus on such topics as "HIV transmission," "Myths and Fears about AIDS," and "Living with AIDS." The AIDS education course started up again in September.

■ Another highly successful peer education project is underway at the Federal Correctional Institution at Pleasanton, California. The project, which began as a small study group on AIDS and health, has been given the green light to provide education sessions in the women's housing units. The Pleasanton AIDS Counseling and Education (PLACE) project has designed an effective poster for their AIDS education efforts.

Videos, educational materials and assistance provided by the National Prison Project, Women in the Director's Chair in Chicago, and local AIDS service organizations and activists have helped make these two peer education projects a reality.

Materials Available

Outside organizations and innovative AIDS educators have produced curricula and training manuals that can provide invaluable assistance to both prisoner peer educators and community-based organizations beginning projects in local jails and prisons.

■ *"Girls Night Out" A Safer Sex Workshop for Women*, produced by the Chicago Women's AIDS Project, is an excellent manual for educators in women's prisons. While developed for small group discussions in women's homes and on the street, the workshops can very easily be adapted for sessions behind the walls. The curriculum includes "safe sex" quizzes, helpful handouts, a risk assessment summary and creative role-plays. This manual is available by writing to the Chicago Women's AIDS Project, 5249 N. Kenmore, Chicago, Illinois 60640.

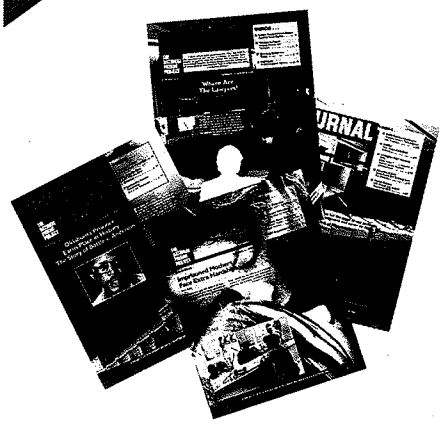
■ *The Empowerment Program—A Curriculum for Health Education Groups for Women At Rikers Island* was prepared by Beth E. Richie of the Hunter College Center for Community Action to Prevent AIDS. The goal of the program is to empower women prisoners to "play a more active role in reducing their risk of HIV infection." The sessions revolve around the many issues that incarcerated women face—sexuality, relationships, drug use and economic situation. This curriculum with hand-outs is available from the Center for Community Action to Prevent AIDS, Hunter College, 425 E. 25th Street, New York, NY 10010.

■ *AIDS, Substance Abuse and Health, Volumes I and II* is a comprehensive training manual and curriculum "to train peer educators within the prison community." Written and compiled by Sara Dubik-Unruh, an outside AIDS educator with the participation of students at Billerica House of Corrections in Massachusetts, this manual is very thorough in its approach to AIDS education workshops. Dubik-Unruh provides comprehensive lesson plans with handouts and even clocks the time it should take to present each subject. Her "Suggestions for Working in Correctional Facilities" is must reading for outside community-based organizations going into prisons and jails for the first time. Some of the prisoner educators have prepared a course curriculum, translated into Spanish, which has been incorporated into the manual. This two-volume AIDS educational tool is available to outside educators and community organizations for $20. It is free to prisoner peer educators. Write to Sara Dubik-Unruh, Lowell House, 555 Merrimack Street, Lowell, MA 01852. ■

Judy Greenspan is the AIDS information coordinator for the NPP.

THE NATIONAL PRISON PROJECT

Publications



____ **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, AIDS, family support, and ex-offender aid. 9th Edition, published September 1990. Paperback, $30 prepaid from NPP.

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

QTY. COST

____ **The National Prison Project Status Report** lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Periodically updated. $3 prepaid from NPP.

____ **Bibliography of Women in Prison Issues.** A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $5 prepaid from NPP.

____ **A Primer for Jail Litigators** is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations and correctional standards. 1st Edition, February 1984. 180 pages, paperback. (Note: This is not a "jailhouse lawyers" manual.) $15 prepaid from NPP.

QTY. COST

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

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

(order from ACLU)

ACLU Handbook, The Rights of Prisoners. Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. $7.95 (free to prisoners) from ACLU, 132 West 43rd St., New York, NY 10036.

QTY. COST

Fill out and send with check payable to:

The National Prison Project
1875 Connecticut Ave, NW, #410
Washington, D.C. 20009

Name _____

Address _____

City, State, Zip _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the Prison Project's litigation program since July 1, 1991. Further details of any of the listed cases may be obtained by writing the Project.

Casey v. Lewis, filed on behalf of all Arizona state prisoners, challenges legal access, health care and practices relating to assignment to segregation. On August 30, 1991, the district judge enjoined defendants from continuing a blanket policy of prohibiting contact visits between prisoners and their attorneys. Defendants must now submit written reasons for denial and establish procedures for the prisoner or attorney to challenge the denial. The court also ruled that prison officials may not deny food service jobs to HIV-infected prisoners who would otherwise qualify for these positions.

Duran v. King is a statewide New Mexico prison conditions case. After more than a year of intensive negotiations, the parties agreed in June to modify the 1980 consent decree. Because the state is near substantial compliance with the decree, it has been agreed that the decree will be vacated after a finding by the Special Master of substantial compliance and a period of further reporting. In exchange, the state has agreed to a permanent, non-modifiable set of population controls including a prohibition against double-celling. The new agreement was approved by the court on August 30, 1991.

Harris v. Thigpen challenges the AIDS testing and segregation policies of the Alabama Department of Corrections. On September 18, 1991, the Eleventh Circuit partly reversed a district court opinion which had rejected plaintiffs' claims and dismissed the case. The appeals court ruled that HIV-infected prisoners are considered handicapped under the federal Rehabilitation Act and therefore, under section 504 of the Act, cannot be excluded from programs and activities. The court also reversed and remanded the trial court's order dismissing plaintiffs' claims that they were denied access to the courts. The appeals court denied claims that medical care for HIV-infected prisoners was inadequate and that mandatory segregation violated their right to privacy.

Hudson v. McMillian--On April 29, 1991, the United States Supreme Court appointed the National Prison Project to serve as counsel in this brutality case filed *pro se* by Louisiana prisoner Keith Hudson. The Fifth Circuit rejected petitioner Hudson's claim because he did not suffer significant injury. Petitioners argue that an Eighth Amendment violation should not require a showing of significant injury. Parties filed briefs over the summer, and argument is scheduled for November 13, 1991. A number of important organizations and the Solicitor General of the United States have filed *amicus* briefs in support of the petitioner.

U.S. v. Michigan/Knop v. Johnson is a statewide Michigan prison conditions case. On July 2, the Sixth Circuit Court of Appeals issued an order limiting the Prison Project's involvement as *amicus* in *U.S. v. Michigan*. The court also upheld one of two findings of contempt against defendants and upheld the requirement that defendants implement a classification plan and prepare population projections, while it reversed various other relatively minor orders.

Wilson v. Seiter--In June 1991, the Supreme Court overturned a Sixth Circuit decision requiring that a prisoner show that officials acted with "persistent malicious cruelty" in order to prove that conditions of confinement violate the Eighth Amendment. Rather, prisoners need prove only that prison officials were "deliberately indifferent" in allowing unconstitutional conditions to exist. The Supreme Court remanded the case to the Sixth Circuit which in turn remanded to the district court. We filed our brief with the district court in September. See p. 3 for further details.

Witke v. Vernon challenges conditions and inequitable programming in the Idaho women's prison. In July, the court approved a settlement which places a cap on the prison population, expands medical staffing and services, and provides for safety-related renovations.

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