

High Court Hands Down Prisoners' Rights Victory in Beating Case

BY ALVIN J. BRONSTEIN

The Supreme Court of the United States recently reaffirmed basic American principles of human decency by ruling that the malicious beating of a prisoner by prison guards violated the Eighth Amendment to the Constitution which prohibits cruel and unusual punishment. In a 7-2 decision on February 25, 1992, the court reversed a lower court of appeals decision and

held that the rights of Keith Hudson, a prisoner at the Louisiana State Penitentiary (Angola), had been violated by two correctional sergeants and a lieutenant.

The ruling in *Hudson v. McMillian*, a case argued by lawyers from the National Prison Project, is an important development in Eighth Amendment law and the first clear-cut prisoners' rights victory in the Supreme Court in some time. In addition, the decision gives an early indication of the extremely

conservative views of Justice Clarence Thomas on the role of the federal courts. In a dissenting opinion, joined only by Justice Antonin Scalia, Justice Thomas argued that the Eighth Amendment was being extended "beyond all reasonable limits" and complained bitterly about what he characterized as "the pervasive view that the federal Constitution must address all ills in our society." In essence, Justice Thomas argued for a return to the 19th century "hands off doctrine" under which prisoners were regarded as "having no more rights than slaves."¹

The case originated at Angola in 1983. The prisoner, Keith Hudson, was housed in Camp J, a maximum security unit notorious for problems of prisoner abuse by staff. He had an exchange of words with an officer in the middle of the night. He was then issued two disciplinary reports and told he was going to solitary confinement. Two officers, Marvin Woods and Jack McMillian, then put him in leg irons, waist chains and handcuffs and led him out of his cell. They took him around a corner, out of sight of other prisoners, and while Sgt. Woods held



AND YOU THOUGHT RODNEY KING HAD PROBLEMS....

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INSIDE . . .

New Orleans Parish Prison Back in Court	4
Case Law Report	6
Russ Immarigeon Reviews Jerome Miller's New Book	16

him from behind, Sgt. McMillian repeatedly punched him in the face. Woods also kicked him. Woods and McMillian are both over six feet tall and each weighs more than 200 pounds, while Hudson is slightly built. A supervisor, Lt. Arthur Mezo stood by, watched the beating and said, "Don't be having too much fun, boys."

Hudson suffered bruises and swelling of his face, mouth and lip. The blows also loosened his teeth and cracked his partial dental plate.

Without a lawyer, Hudson brought a suit for damages against the three officers under the federal civil rights act, 42 U.S.C. §1983, and conducted the trial himself in federal district court in Louisiana. He testified, called witnesses, and cross-examined the defense witnesses. The district court found that the officers had violated his Eighth Amendment right to be free from cruel and unusual punishment and awarded him \$800 in damages. The prison officials appealed and the federal court of appeals agreed that the officers' conduct was clearly excessive and occasioned unnecessary and wanton infliction of pain. However, they reversed the trial court because they concluded that Hudson did not sustain "significant injury."²

Under the reasoning of the court of appeals, and the argument of the state of Louisiana, there must be serious, measurable and lasting physical injuries to constitute a violation of the Constitution. The infliction of pain and suffering and, by implication, torture that left no marks, were not enough.

Still proceeding without a lawyer, Hudson drafted and filed a petition in the Supreme Court, asking the Court to review the court of appeals decision. The Court directed prison officials to file a response and, on April 15, 1991, the Supreme Court granted *certiorari* to determine whether the "significant injury" requirement applied by the court of appeals accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted. Two weeks later, the Court appointed this author to serve as counsel for Hudson in the Supreme Court.

Amici

NPP staff were able to interest an important group of organizations in filing *amicus* briefs supporting the prisoner's claim. After a series of

meetings with Department of Justice officials, the Solicitor General of the United States, joined by the Assistant Attorneys General in charge of the Criminal and Civil Rights Divisions, filed a brief on behalf of the United States which argued for a reversal of the court of appeals decision. They

"Don't be having too much fun, boys," said Lt. Mezo.

pointed out that the court of appeals' standard might interfere with their authority to criminally prosecute prison guards for this kind of conduct. They also stated that the "United States has a general interest in ensuring that the law regarding violent conduct by law enforcement officials adequately protects the rights of citizens..."

Americans for Effective Law Enforcement filed a brief in support of the prisoner's position. They argued that the court of appeals decision, if affirmed, would encourage unprofessional conduct on the part of police and correctional officers. The conduct of the officers in this case was in violation of the use of force standards of the American Correctional Association. Two regional organizations, Prisoners' Legal Services of New York and D.C. Prisoners' Legal Services Project, filed briefs arguing for reversal of the court of appeals' "significant injury" standard. Both briefs provided specific details of cases in their jurisdictions in which prisoners were brutally abused and beaten by prison officers but suffered only minor physical injuries.

Finally, Human Rights Watch, the respected international organization, submitted a brief which discussed the application of various international human rights treaties and standards. They informed the court, for example, that the treatment of Hudson by the correctional officers was a violation of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.³

Only one *amicus* brief was filed in support of the position of the officers. The States of Texas, Hawaii, Nevada, Wyoming and Florida made the usual litany of "states' rights" arguments. Mischaracterizing the facts and ignoring precedent and the fundamen-

tal role of the federal court in preserving the constitutional rights of individuals, the five states argued that they could themselves adequately protect the rights of prisoners.

The Court's holding

Speaking for a majority of the Court, Justice Sandra Day O'Connor said:

[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is...whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how

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

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diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.

The dissenting opinion by Justice Thomas suggests that the Eighth Amendment should apply only to measure whether a judge's sentence is unduly severe. This sort of argument is a favorite of conservatives, contending that the Constitution is not a living document, and that it means no more than it meant when the Bill of Rights was enacted two centuries ago. That argument in this case is historically inaccurate. The Eighth Amendment language barring cruel and unusual punishment comes directly from the English Declaration of Rights, and it is clear that the central meaning of that clause was to bar punishment unauthorized by law, a category that surely includes this beating of a prisoner.

More important, given that history does not compel a more limited reading of the Eighth Amendment, the real issue is how to interpret the Constitution today. Is

the unauthorized and malicious beating of a prisoner "cruel and unusual"? It is certainly cruel, and we have a right to demand that it be unusual. If one believes that the central purpose of the Bill of Rights is to prevent the abuse of our people through the misuse of governmental authority, the Constitu-

[Hudson] testified, called witnesses, and cross-examined the defense witnesses.

tion must protect us all, even those individuals some consider undeserving. It is the Bill of Rights, after all, that ultimately protects each of us from the government. How can we protest torture and other human rights abuses abroad, yet argue that the Constitution does not protect our own citizens?

The majority decision sends a clear and important message to prison officials. It tells them that they can be held liable for money damages if they abuse their power by using unnecessary force and

administer beatings to prisoners. The wanton brutalization of prisoners by guards will not be tolerated by the courts.

It took courage for Keith Hudson to seek a remedy in the courts. In 1987, the National Prison Project published a special issue of the *JOURNAL*¹ in celebration of the 15th anniversary of the Project's founding. At that time I wrote that lawsuits would not have been possible without the prisoners who had been willing to step out into the light of public exposure in order to improve the lives of their fellow prisoners. I named about 40 men and women whom we wished to recognize for the courage that those actions took. I add Keith Hudson's name to that list. ■

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¹*Ruffin v. Commonwealth*, 62 VA. 790, 796 (1871).

²*McMillian v. Hudson*, 929 F.2d 1014 (5th Cir. 1990).

³The United States signed the Convention in 1988 and it was ratified by the Senate in October 1990.

⁴No. 13, Fall, 1987.

Attorney General Barr Holds "Corrections Summit" to Promote Imprisonment

"The choice is clear," said Attorney General of the United States William P. Barr last January. "More prison space or more crime."

In his speech in January to the California District Attorneys' Association, Barr made some calculations and came to the surprising conclusion that, with the federal government's help, states can allow their prisons to become as overcrowded as the federal system (165% over design capacity) without violating the Constitution.

To promote this theory, he held a "corrections summit" conference in Washington, D.C. on April 26-28, and invited state and local corrections officials. The purpose of the meeting was clear: how to help states find ways to pack more offenders into jails and prisons.

After National Prison Project staffers were told by Depart-

ment of Justice officials that we would not be allowed to attend the summit, we decided to help sponsor an "alternative press conference," to be held on the site of the summit. The purpose of our press briefing was to challenge Barr's basic premise that more incarceration equals less crime, his failure to see the health and safety consequences of overcrowded facilities for both staff and prisoners, and finally, to challenge his failure to recognize racial and class disparities in sentencing practices.

The "alternative press conference" was sponsored jointly by the National Black Police Association, the National Prison Project, the National Conference of Black Lawyers, the Sentencing Project, the Southern Center for Human Rights, the Florida Justice Institute, and the National Center on Institutions and Alternatives. Representatives from several of those

groups spoke, as well as two corrections commissioners: Chase Riveland of Washington State and Robert Watson of Delaware. Corrections director Orville Pung of Minnesota had also been scheduled to speak but was unable to. Just before the press conference New York State Legislator Dan Feldman approached and asked if he could also speak in support of our message.

The press conference was well attended by summit conference attendees, several of whom expressed their frustration over the lack of debate and open discussion at the summit.

The lack of debate did not come as a surprise to *NPP JOURNAL* editor Jan Elvin, who had been told by DOJ public affairs spokesperson Paul McNulty that "the corrections summit is not a debate. It is not a conference on 'whether.' It is: 'how to.'"

We need national and local leaders to speak out against this self-destructive course of action. At our press conference, we saw and heard from some corrections officials who obviously did not agree with Attorney General Barr. How many more do not agree? ■

Reactivated New Orleans Jail Case Uncovers Same Old Problems, Divisions

BY MARK J. LOPEZ

The Orleans Parish Prison (OPP) was built in 1929 and designed to house 400 to 450 inmates. By 1969 the population had approximately doubled; this was the catalyst for a successful lawsuit challenging the overcrowded and deplorable conditions as violative of the Eighth Amendment. (*Hamilton v. Schiro*, 338 F.Supp. 1016 (E.D.La. 1970)). Today OPP refers to a sprawling complex of buildings and make-shift housing areas—including “tent city” and several converted warehouses—where between 4,500 and 5,000 prisoners are confined under dangerously crowded conditions. The gains achieved by the original lawsuit have been completely offset by the unprecedented expansion that occurred in later years. In 1989, new counsel for plaintiffs reactivated the case, and, despite a string of partial victories, it remains to be seen whether the new litigation will result in any meaningful changes in the way business is done at the prison.

Background and Procedural History¹

In October of 1969 prison inmates filed a class action lawsuit in an effort to improve conditions in the Orleans Parish Prison. *Hamilton v. Schiro*, was filed in the United States District Court for the Eastern District of Louisiana. Trial on the merits of the lawsuit was held in April 1970, pursuant to the plaintiffs' motion for preliminary and permanent injunctions. In June 1970, United States District Judge Herbert W. Christenberry recognized the validity of the inmate claims when he found that “the conditions of...confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution...” *Hamilton v. Schiro*, 338 F.Supp. 1016, 1019

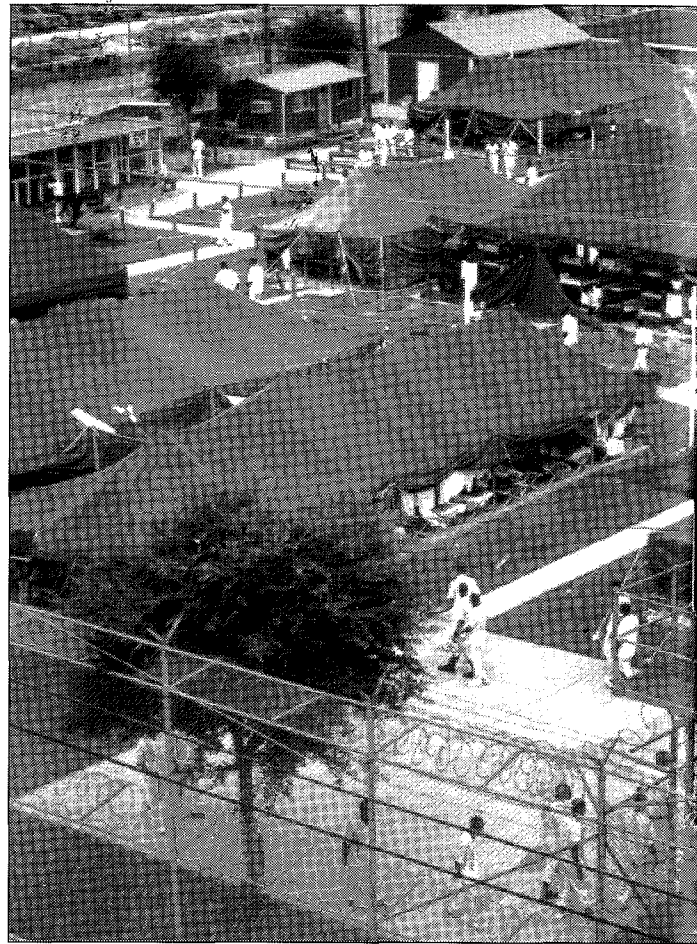
(E.D.La.1970). He ordered the mayor and city council to correct the unconstitutional conditions without delay.

The litigation related principally to the physical plant and prison personnel. Physical deterioration, severe overcrowding in the jail, and lack of qualified, trained supervisory personnel were identified as the key causes of the problems. The prison, built and designed in 1929 to hold between 400 and 450 inmates, contained an average daily population estimated at the time of the trial to be between 800 and 900 inmates. Conditions were abominable. Plumbing was badly corroded and unsanitary. Living areas were dark and dingy. Mattresses, although filthy, were rarely cleaned. Overcrowding meant many inmates sleeping on mattresses on cell floors and in corridors. Cells were often damp and inmates were subjected to extremes of seasonal temperatures. Rodents, roaches, and other vermin infested the prison. Facilities for bathing were inadequate. Prisoners were allowed outdoors to exercise only once every 20 or 30 days. Conditions violated state and local fire and health codes, posing a serious danger to the health and safety of inmates and staff.

Overcrowding, the lack of a classification system, inadequate supervision and easy inmate access to materials for fashioning weapons created a situation in which physical and sexual assaults were frequent and the threat of attack was constant. Medical care for inmates was inadequate and mental health care did not exist. (*Hamilton v. Schiro* at 1016-1018).

Although the court ordered the defendants to correct the unconstitutional conditions that it found, it did not provide a detailed remedial plan. Instead, the court ordered the defendant mayor and city council to file a progress report within 30 days. The city filed a progress report, describing its compliance efforts and a strategy for funding construction of a new prison. Lawyers for the prisoners disputed the allegations in the report and filed a response claiming that conditions in the prison

remained essentially the same as they had been when the court order was filed. After almost a year of inaction by the court, the plaintiffs filed three motions, beginning in late 1971, which documented their dissatisfaction with compliance progress.



Large army tents house over 300 municipal detainees in the “tent city” section of the New Orleans Parish Prison.

The first motion claimed that the defendants had failed to make a reasonable effort to correct the conditions in the prison, had failed to meet promises contained in progress reports, and that the conditions had worsened since the litigation began. The second motion alleged that conditions in the prison had deteriorated to the point that it was uninhabitable and that the original 1970 order was inadequate. That motion requested a hearing to consider alternatives, including permanently closing the jail. The third motion requested appointment of a special master with expertise in prison reform and rehabilitation to provide a comprehensive plan for relief from emergency conditions existing at the OPP.

The court acted only on the motion to appoint a special master. Among other

responsibilities, the court required the special master to "...devise and submit to...[the]...court a detailed workable plan for the correction of the conditions found by him to exist at Orleans Parish Prison." (Order, October 14, 1971).

The special master filed three separate

(*Hamilton v. Landrieu, supra*, at 550). Failure to implement the order frustrated all serious attempts to improve conditions at the prison. This was particularly true regarding the need for an independent department of detention and corrections.

The division of authority and responsibility for the prison was and continues to be the largest single factor in perpetuating the unconstitutional conditions in the prison. A corrections expert, who studied the prison at the request of the special master, filed a report analyzing the local governmental structure and its effect upon the prison conditions. The report, referred to hereafter as the "Mattick Report," found:

...[T]he basic problem of Orleans Parish Prison is one of politics and money; the fragmentation of power over the prison and the division of control between the Criminal Sheriff and the City of New Orleans...The Criminal Sheriff is elected by the Parish and has administrative control of the prison; he operates it with his employees...The municipal administration is elected by the City of New Orleans and has effective financial control of the prison; they supply the money...The result: the Criminal Sheriff blames the City for not giving him enough money to operate and maintain a decent prison; the City refuses to invest public funds in a prison administered so poorly by the Criminal Sheriff; and both are right...The inmates and the employees of the prison suffer the direct effects of this political infighting over money and control; and the entire jurisdiction and electorate suffers the indirect effects of a malfunctioning, maladjusting and maladministered penal facility. (Mattick Report, pp. 4-5)²

reports within the following year, the last of which was adopted by the court as its final remedial decree. (*Hamilton v. Landrieu*, 351 F.Supp. 549 (E.D.La. 1972)). The court's remedial order covered all phases of prison operations including medical services, limitations on inmate population size, security, inmate discipline, recreation, administrative and personnel matters, admission and orientation procedures, rehabilitation systems, and environmental health conditions. In addition, the court called for two extraordinary measures that went to the very core of maintaining and managing the Orleans Parish Prison.

The first extraordinary measure called for the creation of a city department of detention and corrections. The second called for the closure of the main prison for all purposes except as an admittance and orientation unit by March 1, 1975.

Consistent with the findings of the Mattick Report, the special master

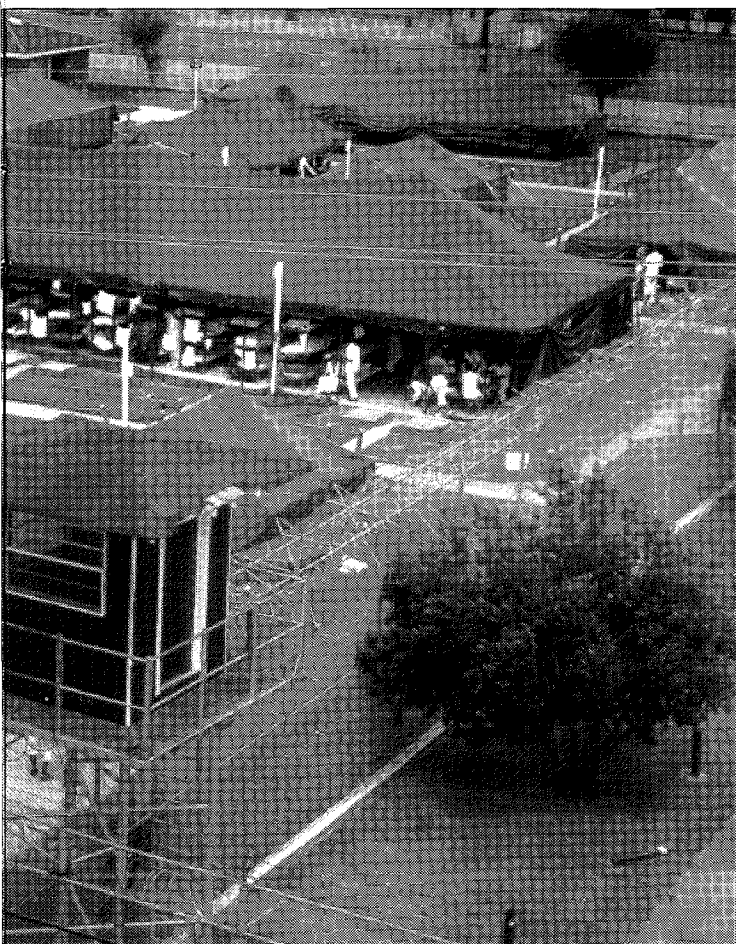
recommended creation of a separate department of detention and correction within the city government. (Report of Special Master, 7/26/72). Today, the mayor and sheriff are still waging a war of words over who is responsible for the sordid conditions at the prison. The State of Louisiana has joined in the finger pointing by virtue of the over 2,000 convicted "state-ready" prisoners who remain confined at OPP rather than being transferred to the state prison system.

Following the entry of the final decree, formal litigation related principally to monitoring and enforcing compliance. The court assigned the special master additional duties as a compliance monitor, responsible for reporting the defendants' progress in implementing the ordered relief. Pursuant to his additional duties, the master filed a number of compliance reports, the last of which was in 1980. The reports tracked the sheriff's progress or lack of progress in implementing the requirements of the decree. The most significant gains were made in the areas of medical care and prison security. While progress was made in other areas, such as physical plant renovations and opportunities for recreation and rehabilitation, the prison's failure to meet the court-imposed population limitations made compliance impossible. Indeed, by 1976, the focus of the entire litigation shifted to population control. For reasons that are not clear from the record, the special master filed his final report in 1980.

The plaintiffs' efforts to monitor and enforce compliance with the final decree continued through a series of largely unsuccessful motions for contempt or supplemental relief between 1974 and 1982. Despite the noncompliance, the court never held the defendants in contempt. But it did reduce or provide alternative housing for the rising population by ordering the City to make more buildings available to the sheriff and by ordering the transfer of "state-ready" prisoners.

At the close of 1976, the growing backlog of state-ready prisoners at OPP forced the court to order state officials to accept convicted state prisoners. (Order, 10/8/76). Since most state prisons were under court-imposed population limits themselves (most notably Louisiana State Penitentiary at Angola),³ this created tension between the United States District Court in

(cont'd on page 14)



Ted Jackson, The Times-Picayune

BY JOHN BOSTON

Highlights of Most Important Cases

USE OF FORCE

Prisoner advocates breathed a sigh of relief at the Supreme Court's use of force decision, *Hudson v. McMillian*, 60 U.S. Law Week 4151 (Feb. 25, 1992). The Court rejected the argument that misuse of force only violates the Eighth Amendment if prison staff inflict "significant injury" on the prisoner. Justice O'Connor declared for the majority, "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." Only if injuries are "*de minimis*" will they escape Eighth Amendment scrutiny.

Hudson is an unusual decision for the present Supreme Court, not only because the prisoner won, but also because its central holding represents an uncharacteristically bold and unqualified statement of principle for this Court. But it should not be forgotten that the virtues of *Hudson* are only relative virtues—i.e., relative to the diminished expectations of prisoner advocates and civil libertarians regarding the Supreme Court. *Hudson's* holding concerning injury merely ratifies the *status quo* in most of the lower federal courts, and the Court begins its analysis by cursorily resolving against prisoners another central question concerning the Eighth Amendment use of force standard.

The Injury Question in the Lower Courts

Hudson's holding that the injury inflicted is "one factor" in determining whether force was used unconstitutionally adopts the settled approach of most lower courts. As one appeals court put it, "the extent of injury is but one of the factors to be considered. Even if the injuries suffered were not permanent or severe, a plaintiff may still recover if 'the force used was

unreasonable and excessive.'" *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (citation omitted) (jury question was presented where inmate was allegedly knocked unconscious and sustained cuts, swelling, dizziness and blurred vision); accord, *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991) (minor injuries are actionable when force is completely unjustified); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (completely unjustified spraying with a fire hose was actionable even though injuries were minor); see also *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988) (rejecting "severe injury" requirement under the Eighth Amendment). A number of courts have found constitutional claims or violations in the absence of any injury at all, usually in cases involving credible threats with a deadly weapon or other elements of psychological torture. See, e.g., *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment; damages awarded); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (death threat made at gunpoint by a prison guard was "a wanton act of cruelty which ... was brutal despite the fact that it resulted in no measurable physical injury"; Due Process Clause cited); *Oses v. Fair*, 739 F.Supp. 707, 709 (D.Mass. 1990) (Eighth Amendment was violated when an officer struck inmate with a gun, stuck gun barrel into his mouth, and made him kiss the officer's wife's shoes); *Parker v. Asher*, 701 F.Supp. 192, 194-95 (D.Nev. 1988) (threatening a prisoner with a taser gun solely to inflict fear stated an Eighth Amendment claim); *Douglas v. Marino*, 684 F.Supp. 395, 398 (D.N.J. 1988) (similar to *Parrish*). As one court sardonically observed, "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999'—may cause agony as they occur yet leave no enduring injury." *Williams v. Boles*, 841 F.2d at 183. *Hudson* should be viewed as ratifying this body of lower court law rather than breaking new ground.

The "Malicious and Sadistic" Standard

Hudson's other significant holding was its extension of a "subjective component" of malicious and sadistic intent to all Eighth Amendment use of force cases. This standard was first asserted in the context of a damage claim arising from prison officials' actions during a riot. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

This holding resolves against prisoners a question that had divided the lower federal courts several ways. Some courts had applied *Whitley* to all prison use of force cases. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (*en banc*), *cert. denied*, 111 S.Ct. 1018 (1991); *Haynes v. Marshall*, 887 F.2d 700, 703 (6th Cir. 1989); *Brown v. Smith*, 813 F.2d 1187, 1188 (11th Cir.), *rehearing denied*, 818 F.2d 871 (11th Cir. 1987). Others had limited it to cases involving the actual existence of a substantial "prison disturbance" at the time force was used. *Al-Jundi v. Mancusi*, 926 F.2d 235, 240 (2d Cir.) ("The latitude accorded prison officials in deciding when and how to use force to retake a prison from rioting inmates has no application to the summary infliction of brutal punishment once the riot is quelled"), *cert. denied*, 112 S.Ct. 182 (1991); *Unwin v. Campbell*, 863 F.2d 124, 130 (1st Cir. 1988). Others had defined "prison disturbance" broadly to include almost any defiance of authority, but had still insisted that there be some actual security threat at the time force was used. *Compare Stenzel v. Ellis*, 916 F.2d 423, 427 (8th Cir. 1990) (refusal to "show skin" while sleeping and to uncover a surveillance camera constituted a disturbance invoking *Whitley*); *Couans v. Wyrick*, 862 F.2d 697, 699 (8th Cir. 1988) (inmate's refusal to close the food slot in his cell door was a disturbance) *with Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989) (malice need not be shown in case involving retaliatory beatings after a disturbance had been suppressed), *cert. denied*, 110 S.Ct. 542 (1990); *Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987) (malice need not be alleged if there was no security need for force).

The *Hudson* Court's application of the *Whitley* malice standard to all force cases

represents a serious lapse of logic. The Court stated:

Many of the concerns underlying our holding in Whitley arise whenever guards use force to keep order.

Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively.... In recognition of these similarities, we hold that whenever prison officials stand accused of using excessive force, the core judicial inquiry is...whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

60 U.S. Law Week at 4153 (emphasis supplied).

The lapse, of course, is the fact that in some force cases, there is *no* need to maintain or restore discipline and *no* other penological interest to be weighed. *Hudson* itself is such a case. Mr. Hudson, after an argument with an officer, was handcuffed and shackled and taken to the "lockdown" area; on the way, officers beat him while he was still restrained. The trial court found "no need to use any force at all." Plainly, the officers were not "us[ing] force to keep order"; the shackled and unresisting prisoner presented no risk to prison order. On these facts, there was no need to balance the risk of injury against any penological interest, and the extension of *Whitley v. Albers*' reasoning to this case makes little sense, however it might be justified in a different case. The need to give prison officials wide latitude in security-related decisions simply has no logical bearing on cases like *Hudson* that involve completely gratuitous beatings.

The Court's glossing over of this essential point is particularly surprising because it was done by Justice O'Connor, who also authored the *Whitley* majority opinion, and who has previously insisted on a fact-specific approach to the application of the *Whitley* standard. In *Stubbs v. Dudley*, 849 F.2d 82, 86 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989), damages were awarded to a prisoner who was assaulted by an angry mob of other inmates after prison officials closed a door in his face rather than let him into an administrative office where he might have been safe. The jury was instructed on the "deliberate indifference" standard generally used in inmate assault cases. Justice O'Connor, dissenting from the denial of *certiorari*, argued that the

Whitley malice standard should have been applied because the record revealed competing security considerations underlying the defendants' actions, even though the case was not about use of force. In view of Justice O'Connor's close attention to the facts of *Stubbs, Hudson's* broad sweep of *all* use of force cases—including those involving gratuitous abuse—seems anomalous at best.

MODIFICATION OF JUDGMENTS/ CONSENT JUDGMENTS

The Supreme Court gave cause for another sigh of relief, relatively speaking, in *Rufo v. Inmates of the Suffolk County Jail*, 60 U.S. Law Week 4100 (January 15, 1992). In *Rufo*, the Court addressed the legal standard governing modification of injunctive decrees in "institutional reform litigation," and left things pretty much as they were.

Rufo involved one of the longest-running jail conditions cases, filed in 1971, decided on the merits in 1973 and nominally settled as to remedy in 1979 and again in 1985. The question before the Court was whether the federal district court had applied the proper standard in denying prison officials' request to modify the 1985 consent decree to permit double celling in a jail designed for single occupancy. The district court had held that jail officials must show a "grievous wrong evoked by new and unforeseen conditions" in order to justify modification, citing *United States v. Swift & Co.*, 286 U.S. 106 (1932).

The Supreme Court held that the *Swift* "grievous wrong" standard is simply inapplicable to institutional reform litigation. "The experience of the district and circuit courts in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation." 60 U.S. Law Week at 4103. Therefore, the Court held, "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances." *Id.* at 4107.

The Court's decision is consistent with those of the majority of federal appeals courts; the "grievous loss" standard had largely been abandoned in federal court institutional reform litigation. *Rufo's* major significance is its conclusive rejection of the view advanced by jail officials, that the district court must in effect redetermine the underlying constitutional questions whenever it is presented with a motion to modify. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to the negotiation of settlements in institutional

reform litigation." Whether modification is sought based on changed facts or changed law, "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." The Court reaffirmed that parties may settle a case not only for "more than the Constitution itself requires...but also [for] more than what a court would have ordered absent the settlement." Even if modification is warranted, "the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances."⁴ The rules are the same whether the judgment is arrived at by consent or after litigation. *Rufo* reaffirmed that consent judgments, while "in some respects contractual in nature," are also "subject to the rules generally applicable to other judgments and decrees."

Rufo's significance was enhanced by its timing. Only two days before the decision was issued, Attorney General William Barr, addressing the California District Attorneys' Association, denounced consent decrees that "were negotiated at a time when some lower courts thought the Eighth Amendment required more ambitious improvements by the states," and announced a Department of Justice policy of considering support for modification of prison consent decrees "to the extent necessary to remove restraints on the state not required by the Constitution." But *Rufo's* holdings that "a clarification in the law [does not] automatically open[] the door for relitigation of the merits of every affected consent decree" and that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor" seem squarely to reject the Attorney General's view of these issues.

The Court offered further guidance in the application of the flexible modification standard.

With respect to changes in facts, it rejected the view urged by the plaintiffs that only "unforeseen and unforeseeable" changes can justify modification. However, "events that were actually anticipated" at the time of the decree should ordinarily not support modification. The Court distinguished between consent decree terms "that arguably relate[] to the vindication of a constitutional right" and those amounting to "extraneous details...unrelated to remedying the underlying constitutional violation"; modification of the latter kind of term requires only a "reasonable basis." The moving party bears the burden of showing that modification is justified, and no deference is owed to local government administrators in making that determination. However, if modification is warranted, the court should "give significant weight" to the views of local government

officials. The court should also consider the public interest, including the financial constraints of government and the undesirability of releasing potentially violent prisoners.

Litigating under *Rufo*

The *Rufo* decision makes clearer what most institutional litigators have already begun to realize: the outcome of a motion to modify may have more to do with what happens during the formulation and entry of the judgment than with the modification proceedings themselves. Whether a changed circumstance was foreseen, whether a decree provision "relates to the vindication of a constitutional right" or is an "extraneous detail," and whether the parties proceeded on a "misunderstanding of the governing law" are all questions that refer back to the parties' intentions and state of knowledge when the decree was agreed to.

Plaintiffs' counsel should therefore proceed with the dangers of modification in mind and make the record necessary to defend future motions to modify. This should be done both with consent decrees and with injunctions entered after trial and decision.

Ideally, a consent judgment should itself address some of these issues, stating the relationship of the remedial provisions to claimed constitutional violations insofar as practicable, and identifying those compliance problems that are foreseeable. For example, some consent judgments specifically identify population increases as foreseen contingencies that do not justify modification; others address the possibility that affected populations will be transferred to different or newly constructed facilities.

In most cases it will be difficult to negotiate, or even draft, a judgment that adequately addresses all these issues, so counsel will need another forum in which to do so.

Most institutional reform cases are class actions. An appropriate forum for making a record sufficient to oppose modification is created by Rule 23(e), Fed.R.Civ.P., which provides that class actions "shall not be dismissed or compromised without the approval of the court." The Rule is silent concerning the requirements for such approval, but case law indicates that the district court must determine whether the proposed settlement is "fair, adequate, and reasonable" to class members, and the trend appears to be towards more formal proceedings and more thorough explorations of those questions. See, e.g., *Harris v. Pemsley*, 654 F.Supp. 1042, 1049-52 (E.D.Pa.), *aff'd on other grounds*, 820 F.2d 592 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987); see also *Harris v. Reeves*, 761 F.Supp. 382, 394 (E.D.Pa. 1991), *aff'd on*

other grounds, 946 F.2d 214 (3d Cir. 1991).

The Rule 23(e) proceeding and the "fair, adequate and reasonable" inquiry neatly fit the need of plaintiffs' counsel to create a sort of "legislative history" of the consent judgment to inform future modification proceedings. The word "inform" is used advisedly, since such proceedings will often take place before a different judge from the one who approved the settlement and may be conducted by different counsel on both sides as well. Plaintiffs' counsel should present the court with an explanation of the judgment's terms, in writing or orally on the record, combining argument and evidence as required to make the point. An affidavit or declaration by counsel, supported by excerpts of depositions, documents obtained during discovery, and an expert's report, prepared either for trial or specifically in support of the consent judgment, is probably the most appropriate vehicle. A rationale should be presented for each provision of the consent judgment, explaining its relationship to the protection of constitutional rights. In particular, provisions that might seem "extraneous detail" to someone with less familiarity with the institution and its problems than plaintiffs' counsel should be explained. Counsel should also state their understanding of the relevant law, but do so in the most general terms with which they are comfortable, to avoid future claims that the parties proceeded under a "misunderstanding" of the applicable law or that subsequent decisions represent more than a "clarification" of that law. Counsel should also "foresee" everything they can, discussing the possibility of population increases and disavowing any reliance on the defendants' Pollyannish predictions, and identifying the possibility or likelihood of cost overruns, construction delays, and the other predictable disasters that prison officials like to pretend that they never thought about. One would think that such a pose by defendants would seem untenable on a subsequent motion to modify if there is a contemporaneous document in the case file predicting the kind of scenario from which the defendants seek relief.

The same principle applies to cases that are tried on the merits, though the existence of a trial record makes the job easier. In some cases, the court's findings of fact and conclusions of law may be sufficient support for an adequate remedy. But that is rarely true in cases involving technical issues or large institutions. For example, most institutional litigators understand that reforming a medical care system generally requires some form of quality assurance or other self-auditing procedure. Similarly, the control of misuse of force or the maintenance

of sanitary conditions may require changes in staffing patterns, administrative reporting requirements, or other devices that may seem unnecessarily intrusive if unexplained.

Some courts may require an evidentiary hearing on remedy, resulting in the creation of the necessary remedial record. Even if a hearing is not required, plaintiffs' counsel should consider asking for one if the evidence to support plaintiffs' remedial proposals is not already in the trial record. (In some cases this purpose may be accomplished by submitting additional documentation or affidavits.) If the trial record is sufficient, counsel should marshal it appropriately to support the remedial terms sought. A handy device for this purpose is the annotated proposed order, in which every remedial paragraph is followed by an explanation of its necessity, supported by citations to relevant parts of the record.

All this makes for more work for the plaintiffs' attorney, especially in cases that are settled. In reality, though, the work will probably have to be done sometime, and it's easier to do it when the case is fresh than to engage in reconstruction years later.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Damages—Conditions of Confinement/Ventilation and Heating/Qualified Immunity

Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991). The heat failed for four days in subzero weather and the plaintiffs, segregation prisoners without any extra clothing, were not given additional clothing or blankets. A jury awarded each plaintiff \$3,000 in compensatory damages and \$2,000 in punitive damages against the warden and assistant warden.

The right to "adequate heat and shelter" was clearly established by 1982. The court rejects the view that there was no clear right to adequate heat and shelter during these abnormal conditions. At 1059: "Contrary to defendants' assertion, constitutional rights don't come and go with the weather."

Defendants acted with deliberate indifference "if they possessed actual knowledge of impending harm, easily preventable, so that a conscious, culpable refusal to prevent the harm could be inferred from their failure to prevent it." The jury could have found that the failure to provide any protection from the cold constituted deliberate indifference.

Medical Care/Denial of Ordered Care

Johnson v. Lockhart, 941 F.2d 705 (8th Cir. 1991). A prison doctor recommended surgery for the plaintiff's hernia within days; it took ten months. Such delays were commonplace. This request was not considered for three months, and the Elective Surgery Review Committee downgraded the priority of the surgery for no apparent reason.

At 707: "Abdication of policy-making and oversight responsibilities can reach the level of deliberate indifference and result in the unnecessary and wanton infliction of pain to prisoners when tacit authorization of subordinates' misconduct causes constitutional injury."

AIDS/Financial Resources/Mental Health Care/Handicapped/Law Libraries and Law Books

Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991). HIV positive prisoners must be provided with "minimally adequate medical care." (1504) At 1505:

In institutional level challenges to prison health care such as this one, systemic deficiencies can provide the basis for a finding of deliberate indifference.... Deliberate indifference to inmates' health needs may be shown, for example, by proving that there are "such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care."...Moreover, although incidents of malpractice standing alone will not support a claim of eighth amendment violation, "[a] series of incidents closely related in time may disclose a pattern of conduct amounting to deliberate indifference."... "Repeated examples of delayed or denied medical care may indicate a deliberate indifference by prison authorities to the suffering that results."...[Citations omitted]

The plaintiffs' evidence in this case shows at most "isolated incidences [sic] of medical malpractice." The staffing is adequate and while the lack of knowledge of some primary care physicians is "disturbing," deliberate indifference is not shown.

In dictum (1509), the court *rejects] any suggestion...that a state's comparative wealth might affect an HIV-infected prisoner's right to constitutionally adequate medical care. We do not agree that "financial considerations must be considered in determining the reasonableness" of inmates' medical care to the extent that such a rationale could ever be used by so-called "poor states" to deny a prisoner the minimally adequate*

care to which he or she is entitled.

The mental health care offered to HIV-positive inmates was constitutionally adequate even though at least one prison "is not ideally staffed and the quality of its mental health care perhaps is substandard." (1510) The court suggests that the plaintiffs' claims regarding deficiencies in education and counseling—i.e., help in "cop[ing]" psychologically with the various aspects of a dread physical illness, while therapeutic, may be a more expansive view of mental health care than that contemplated by the eighth amendment." (1511)

Prison inmates retain some degree of constitutional protection of privacy. The court "believe[s] and assume[s] *arguendo* that seropositive prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses to other inmates, as well as to their families and other outside visitors to the facilities in question." (1513) However, segregation of HIV-positive inmates, which results in disclosure of their status, is upheld under the *Turner* standard.

The Rehabilitation Act applies to prisoners. Seropositive prisoners are handicapped within the meaning of the Act. The district court's generalized conclusion that such prisoners were not "otherwise qualified" for the programs from which they were excluded, based on the danger that infection would be transmitted, is insufficiently supported, because each program must be analyzed separately. The court "do[es] not believe...that the prison's choice of blanket segregation should alone insulate the DOC from its affirmative obligation under the Act to pursue and implement such alternative, reasonable accommodations as are possible for HIV-positive prisoners with respect to various programs and activities that are available to the prison populations at large." (1527)

The district court's conclusions regarding the inadequacy of seropositive prisoners to the law library are inconsistent with its denial of relief; the claim is therefore remanded.

Protection from Inmate Assault

Hendricks v. Coughlin, 942 F.2d 109 (2d Cir. 1991). The plaintiff implicated another prisoner in a crime and was threatened. He complained and prison officials decided he should be transferred, but the transfer application was rejected by the Central Office. Another inmate then threw hot water at him and burned him. His claim against prison officials was properly submitted to the jury.

Inmate assault cases are governed by the deliberate indifference standard, not the *Whitley* malice standard, because there are generally no competing penological interests.

"In fact, taking measures to ensure inmates' safety aids in the maintenance of order in prison." (113) Jury instructions that failed to state that a finding of liability could be based on a finding of reckless disregard for the plaintiff's rights were inadequate.

Municipalities/Use of Force

Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991). Evidence of numerous prior incidents of excessive police force, a low percentage of excessive force complaints sustained through internal investigations, and policies of destroying investigative reports after six months and not photographing dog bites were sufficient to withstand a motion for summary judgment as to municipal liability. At 269:

...[I]f [appellant] can prove the numerous instances of excessive force she alleges, in conjunction with circumstantial evidence of a "circle the tents" approach to police brutality complaints, we think a fair-minded jury could find that the county has a custom or practice of letting incidents of excessive force go unpunished.

Protection from Inmate Assault

Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991) (*en banc*). The 18-year-old slightly built plaintiff was placed in a "young and tender" unit on admission to jail. A week later he was transferred to general population and double celled with an "aggressive homosexual" who had been transferred out of homosexual housing because of his sexually aggressive behavior. The plaintiff was repeatedly raped. His girlfriend's mother called the jail and told personnel he had been threatened; she was told that the jail did not operate a "baby-sitting service." The plaintiff was called down and interviewed within view of his assailant and other inmates and denied having any problems. A panel of the Ninth Circuit affirmed a directed verdict for jail officials, which the *en banc* court here reverses.

The deliberate indifference standard applies to inmate assault cases whether the plaintiff is a detainee or a convict. Conduct that is "so wanton or reckless with respect to the 'unjustified infliction of harm as is tantamount to a knowing willingness that it occur'" (1443, *citing Whitley*) is actionable because it is equivalent to a deliberate choice. "[I]f...officials know or should know of the particular vulnerability, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." (1443, citation omitted.) The jail's policy or custom of placing "aggressive homosexuals" in general population and the county's policy of overcrowding the jail so that other inmates were double celled with

aggressive homosexuals, as opposed to segregating these prisoners, supported a *Monell* claim.

The Sheriff could be held liable, even though there was no evidence that he knew of the specific threat to the plaintiff, based on evidence that he "knew or reasonably should have known of the overcrowding at a facility under his administration and that he acquiesced in a deficient policy that was a moving force behind Redman's rape and that repudiated Redman's constitutional right to personal security," (1447) and that he personally approved the jail's classification policies.

Searches—Living Quarters/Qualified Immunity/Cruel and Unusual Punishment—Proof of Harm

Scher v. Engelke, 943 F.2d 921 (8th Cir. 1991). The plaintiff reported a guard's misconduct and the guard eventually resigned. Afterward, the plaintiff's cell was searched repeatedly by the defendant (ten times in 19 days) and was left in disarray three times. A jury awarded \$1000 in punitive damages and no compensatory damages; the court *sua sponte* awarded \$1.00 in nominal damages.

The district court correctly denied JNOV, since the evidence supported a finding of Eighth Amendment violation. *Hudson v. Palmer*, while finding no Fourth Amendment rights with respect to cell searches, acknowledged that the Eighth Amendment prohibits "calculated harassment unrelated to prison needs." To my knowledge, this is the first reported case ruling in a prisoner's favor on an Eighth Amendment cell search claim.

At 924: "[T]he scope of eighth amendment protection is broader than the mere infliction of physical pain..., and evidence of fear, mental anguish, and misery inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher's cell, could suffice as the requisite injury for an eighth amendment claim."

The defendant is not entitled to qualified immunity despite the lack of a case in point. At 925: "The law making retaliation for the exercise of a constitutional right actionable under §1983 has been established for some time and an objectively reasonable official could not fail to know of it."

Pro Se Litigation/Hygiene

Carver v. Bunch, 946 F.2d 451 (6th Cir. 1991). An allegation of a two-week denial of personal hygiene items stated an Eighth Amendment claim if the defendants denied the plaintiff "basic elements of hygiene" through deliberate indifference and not inadvertence or good faith error.

The plaintiff's complaint should not have been dismissed for failure to comply with a

local rule requiring litigants to file memoranda of law in connection with all motions. That interpretation of the local rule would exceed the court's authority under Rule 41(b), Fed.R.Civ.P., which deals with failure to prosecute. Since the plaintiff generally tried to comply with the rules, he did not really fail to prosecute the case.

Correspondence—Non-Legal/Qualified Immunity

Griffin v. Lombardi, 946 F.2d 604 (8th Cir. 1991). Prison officials refused to deliver to the plaintiff his original diploma and grade transcript from a correspondence paralegal course. They argued that their rule was rationally related to preventing forgery of documents, but the plaintiff submitted evidence that many other inmates had been permitted to receive their original diplomas and transcripts. This evidence raised a genuine issue of fact as to whether the officials could have reasonably believed that they were not violating the plaintiff's rights under the *Turner* standard, and defendants were not entitled to summary judgment based on qualified immunity.

Suicide Prevention/Municipalities/Negligence, Deliberate Indifference and Intent/Financial Resources/Damages/Pendent Claims; State Law in Federal Courts/State Law Immunities/Training

Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991). The decedent was arrested for public intoxication, was placed in a cell alone and with only intermittent surveillance, and hanged himself with his trousers.

The jury found the city to have had a policy of deliberate indifference but the defendant officer merely to have been negligent. The verdicts are upheld. The liability of line staff need not be established to support municipal liability. However, the plaintiff must have adduced "scienter-type evidence" as to some identifiable person determined by the district court to have final policy-making authority. At 1063: "[A]bsent the conscious decision or deliberate indifference of some natural person, a municipality, as an abstract entity, cannot be deemed to have engaged in a constitutional violation by virtue of a policy, a custom, or a failure to train."

In assessing the degree of risk with which municipal policymakers are confronted, it is a mistake to emphasize the probability of harm to an *individual* detainee. The small number of suicides relative to the entire jail population is not determinative. The question is whether "the City showed deliberate indifference toward the *class* of intoxicated and potentially suicidal pretrial detainees..."

(1070) Thus, the fact that the same small number of detainees had been committing suicide for several years supported the *plaintiffs'* case. The fact that the City had considered additional suicide measures used in other cities but had not implemented them also supported the plaintiffs' case, especially since some of these measures were relatively inexpensive, and the City presented no actual evidence of how expensive the others would be.

The record supported the view that the City's deliberate indifference caused the decedent's suicide, since he was left alone in a cell block with no audio-visual monitoring.

At 1071, n. 28: The fact that the City took some measures against suicide does not negate a deliberate indifference claim. "...[I]n some cases deliberate indifference may indeed coexist with deliberate, but insufficient, caution." For example, policymakers may take steps that they later find to be insufficient, and then do nothing about it.

DISTRICT COURTS

Medical Records/Federal Prisons and Officials

Benavides v. Bureau of Prisons, 771 F.Supp. 426 (D.D.C. 1991). Federal regulations implementing the Privacy Act that permitted the Bureau of Prisons to release prisoners' medical records only to physicians and not to the prisoner are inconsistent with the Privacy Act, which is intended to protect individuals from invasions of privacy by others.

Visiting—Conjugal Visits

Cromwell v. Coughlin, 773 F.Supp. 606 (S.D.N.Y. 1991). The state prisons' Family Reunion Program regulations do not create a liberty interest; it does not deny due process to establish the program at some prisons and not others. But the failure to provide the program at Sing Sing may violate the plaintiff's "fundamental right to marital privacy." Defendants asserted only that "current program priorities and fiscal considerations continue to militate against the establishment of a Family Reunion Program at Sing Sing." Without more, the court cannot determine whether the absence of the program meets the *Turner* reasonable relationship standard. It notes that the plaintiff has alleged that a Quaker organization is prepared to donate the necessary facilities.

Law Libraries and Law Books

Gluth v. Kangas, 773 F.Supp. 1309 (D.Ariz. 1988). Defendants' changes in law library policy did not moot the plaintiff's injunctive claims in view of the allegations of continuing constitutional violations.

Inmates denied physical access to the law library are entitled to the assistance of "persons *trained in the law*" (citing *Bounds*, emphasis added by court), and the plaintiff is entitled to summary judgment based on evidence that inmate legal assistants receive no training.

Defendants' paper policy provided adequate law library access, but undisputed evidence showed that the defendants have "a history of arbitrarily denying prisoners library access." Summary judgment is granted to the plaintiff. At 1311: "In light of this history, the vagueness of the Defendants' new policy fails to provide detailed guidelines to thwart arbitrariness and insure that inmates will enjoy adequate law library access."

Plaintiff is granted summary judgment as to defendants' indigency policy, which "forces inmates to choose between purchasing essential hygienic supplies and essential legal supplies. This 'choice' is unacceptable." (1312) The supplies mentioned by the court include stamps and paper.

AIDS/Handicapped/Attorney Consultation

Casey v. Lewis, 773 F.Supp. 1365 (D.Ariz. 1991). At 1367: "A prisoner's right to access to the courts encompasses a right to contact attorney visits." Under the *Turner* standard, plaintiffs were entitled to summary judgment on the denial of contact counsel visits in high-security units, since the defendants came forward with no evidence of escapes, assaults, etc., during the period when such visits were permitted. The court rejects the cost defense.

The exclusion of HIV positive prisoners from food service jobs violates §504 of the Rehabilitation Act. The rational relationship test is not applicable, since the statute "flatly prohibits" discrimination against the handicapped. The "unfounded fears and mythologies" of other prisoners do not justify such discrimination. Each HIV positive individual must be assessed individually as "otherwise qualified" or not. The court also notes that the defendants' affidavits "appear to be based on speculation, conclusory statements, and allegations not based on personal knowledge." (1372) It cites as an example the claim, "It is well known that one of the major causes of riots at correctional institutions...is inmate dissatisfaction with food services."

Communication with Media

Kimberlin v. Quinlan, 774 F.Supp. 1 (D.D.C. 1991). The plaintiff told the press that he had sold drugs to Dan Quayle and had another press interview scheduled; the director of the Bureau of Prisons cancelled the interview and had him put in administrative detention. Two days later, he was again placed in

detention before a scheduled phone call to the press. Plaintiff brought *Bivens* claims against the defendant federal officials. The district court rejected the government's motion to dismiss.

At 3: "It was clearly established in November 1988 that, absent special circumstances, federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." Supreme Court decisions upholding restrictions on prisoners' First Amendment rights have stressed the restrictions' content-neutrality. At 4 n. 6: "An inmate also has a well-established right to be free from retaliation based on the content of his previous interviews with the press." Whether a prisoner had a constitutional right to visits or phone calls to the press is not the issue even for qualified immunity purposes.

Classification—Race/Personal Involvement and Supervisory Liability

Santiago v. Miles, 774 F.Supp. 775 (W.D.N.Y. 1991). At 777:

I find that plaintiffs have proven the existence of a pattern of racism at the Elmira Correctional Facility. This racism goes beyond verbal taunts and racial slurs uttered by guards to minority inmates. The racism affects job placement, housing assignments and discipline at Elmira to a degree that is unacceptable under the principles of equality that form the basis of our government.

The plaintiffs' unrefuted statistical evidence alone established a *prima facie* case of intentional discrimination. The court is unimpressed by the defendants' failure to submit an explanation of the racial disparities in addition to their criticisms of the plaintiffs' evidence. The statistical analysis is buttressed by testimony about (800)

scores of incidents from which a clear pattern of racial animus emerges. The evidence is overwhelming that an entrenched attitude of discrimination and racism exists at Elmira. This historical background evidence of animus strongly supports the inference that housing and programming disparities resulted from intentional discrimination.

Contempt

Morales Feliciano v. Hernandez Colon, 775 F.Supp. 487 (D.P.R. 1991). The court directs that the \$68 million in fines for overcrowding that have accumulated under its prior contempt orders be transferred to the United States Treasury at a rate of \$1 million a week.

At 489: "Despite the continuing horrors within the walls of the institutions, defendants produce more excuses than results... This pattern of broken promises and abandoned plans must be stopped, and the business of making lasting changes in the administration of this system must be started."

Access to Courts/Legal Assistance Programs

Abdul-Akbar v. Watson, 775 F.Supp. 735 (D.Del. 1991). Prisoners in a "Maximum Security Unit" were not permitted physical access to the main law library. They were permitted access to a satellite library, a paging system for the provision of photocopies, and varying degrees of legal assistance by paralegals and an attorney. The satellite library was in an area that flooded every time inmates' sinks or toilets overflowed (in fact, there were high-water marks painted on the walls).

If prison officials choose to satisfy their *Bounds* obligations with a law library, "inmates must be afforded a reasonable amount of time to use the library." (748) If they provide an alternative to direct law library access, the alternative "must be of at least equal caliber;...even for inmates in segregated security areas." (748) Restrictions on direct access must be justified by "specific security considerations that the access limitations address," and not by "automatic and conclusory assertions of discipline and security in the support of restrictive policies." Paging systems are probably not constitutionally adequate by themselves. A system intended to provide assistance from persons trained in the law, rather than law libraries, must provide access as good as that provided by a law library. An untrained staff is not enough. If prison authorities rely *exclusively* on attorney assistance, lawyers must be available "for all relevant legal proceedings." Prisoners need not prove injury in court access cases implicating the "core *Bounds* issue" of adequate access to a law library or persons trained in the law.

The satellite library is not adequate because it lacks sufficient materials. At one point it had only "a 1974 set of the Delaware Code Annotated, several volumes each of the Atlantic 2d Reporter and the Atlantic Digest, and treatises on torts and criminal law." (749) Later, it had more state reporters but they were two years behind. The only federal materials were several volumes of the U.S.C.A. and a 1969 habeas corpus treatise. Access to federal law is necessary for habeas petitions and civil rights cases.

The paging system is inadequate because it only provides for five photocopied cases a week and digests are not available. At

751: "[I]mplementing an exact-cite paging system without providing inmates sufficient resources from which to locate citations does little to assist them with their research." The fact that a lot of copies were made does not show the system is adequate. The five-case limit is not justified by the fact that there is only one copying machine; "it may be necessary to purchase one or more additional photocopiers." (752)

The system of trained legal assistance is also inadequate. The prison has a staff attorney, but he has not assisted any inmate, and the inmate paralegals do not offer advice or even perform legal research under his supervision.

FEDERAL RULES

Discovery

Fagan v. District of Columbia, 136 F.R.D. 5 (D.D.C. 1991). At 7:

Defendants also claim that these interrogatories are unduly burdensome because they require endless culling of files to tabulate the information. The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden.... It is reasonable to expect defendants to have the information plaintiffs seek and for the information to be accessible in defendants' files. Plaintiffs should not suffer if the information is not easily accessible because defendants have an inefficient filing system....

Sanctions/Monitoring and Reporting

Lelsz v. Kavanagh, 137 F.R.D. 646 (N.D.Tex. 1991). In a case involving institutions for the mentally retarded, the court directs the removal of an Assistant Attorney General from the case based on her obstructionist conduct, particularly with regard to the activities of a court-appointed "Expert Consultant." ■

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NPP Goes Beyond Litigation in Pennsylvania

BY ADJOA A. AIYETORO

Power concedes nothing without a demand; it never has and it never will.

—Frederick Douglass

Since the early 1980s, prisoner rights advocates have seen hard-won rights of prisoners eroded by the Supreme Court. We have fought an uphill battle to avoid the total destruction of those rights.

At a meeting held at the National Prison Project office in Washington in late 1989, we put words to our long-held thoughts: we must go beyond litigation to community activism in order to change criminal justice policies.

At that meeting Scott Burris and Stefan Presser of the American Civil Liberties Union of Pennsylvania came to the offices of the NPP to sit around the table and discuss our helping with a statewide class action lawsuit challenging the constitutionality of Pennsylvania's prisons. The meeting was held on the heels of the Camp Hill prison disturbance which focused public attention on the brutality of prison conditions in Pennsylvania.

We shared with Stefan and Scott our desire to combine litigation with community activism wherever possible. They told us about several groups in

Pennsylvania who were doing some community education and legislative lobbying, including CURE, the Pennsylvania Prison Society, and the Pennsylvania Institutional Law Project. We decided to become involved in the case and to join the litigation component with community education and mobilization.

We invited the community groups to a first meeting in April 1990. Representatives from the ACLU, CURE, Pennsylvania Prison Society, Pennsylvania Coalition to Abolish the Death Penalty and the Pennsylvania Institutional Law Project talked about the need for a coalition to advocate for necessary changes in criminal justice policies that were resulting in overcrowded prisons and wasted lives. We discussed the importance of involving people of color—the most affected by inhumane criminal justice policies—religious groups, and other organizations known for their interest in social justice. We developed goals including public education and support for alternatives to imprisonment. We named ourselves the "Coalition for Fair and Effective Criminal Justice."

The Coalition has grown over the last year and a half and now represents the Lewisburg Prison Project, International Coalition of Jewish Prisoners, National

Conference of Black Lawyers, American Friends Service Committee, Western Pennsylvania Coalition Against the Death Penalty, Pennsylvania Defenders Association, the NAACP, Community Assistance for Prisoners, Offender Aid and Restoration (OAR), Pennsylvania Council of Churches, the Latino community, ex-prisoners, and family members of prisoners.

The Community Speaks

When I got off the elevator on the fifth floor at 924 Cherry Street in Philadelphia for a meeting on November 1, 1990, running late, I stopped dead in my tracks: the conference room was bulging with people. I could hardly get in. People, lined up against the walls, spoke passionately about the need for change. Wives and loved ones of prisoners spoke of their frustration at going to the prison only to learn of a new visitation policy that would mean they had to return home without a visit. They talked about the waiting lists for educational and vocational programs that meant that their loved ones would have less chance for employment upon release and, in addition, more difficulty obtaining parole. They told about the "life without parole" sentence that relegated their loved ones to higher-security prisons which were less accessible and less programmatically challenging. These facilities often denied them participation in certain programs, although their in-prison record indicated they were good candidates. Any time it wished, the (Pennsylvania) Department of Corrections could transfer a loved one



Sheila Harrington

The meeting brought all the different groups together.

to another state, far from home. Many were too poor to financially assist or even to regularly visit their loved ones. The discussion of poverty was interwoven in, and was often underlying, other discussions.

At the meeting I was, in many ways, a participant-observer as well as a group leader. I had felt the struggle of working to change the system. Family members wanted solutions to the very personal problems they faced in confronting the prison system on a daily basis. I realized that for many of us "organizational" people the concern was at least one step removed from the personal: we had seen the problems of prisons as more global and systemic than personal. All of us, during the course of our work, had been touched by some human experience—the fine artist who may never see the city streets except from the window of a cell; the 18-year-old victim of abuse and an inhumane foster care system who was now facing 25 years in prison; or, the community activist who stopped to help a victim of police violence and now was on death row. The impact the criminal justice system's prison bureaucracy had on the lives of its most immediate victims gave us reason to pause and reconsider our strategies.

We realized we could not build a movement to make fundamental changes in criminal justice policy without addressing the more immediate needs of the prisoners and their families and friends. Although the litigation, if successful, would remedy problems of access to health care, sanitation, some programming and other "in prison" issues, it could not meet other concerns of the prisoners and families, much less change

the shortsighted and cruel policies of the "lock 'em up and throw away the key" mentality.

Over the next months we deliberated and, through the continued involvement of ex-prisoners and prisoners' families, developed a strategy for change through legislation coordinated with the need to focus on prison administrative decisions.

Susan Beard, a CURE member and wife of a life-sentenced prisoner, developed a visitation survey. She and other family members had experienced the arbitrary differences in visitation policy among Pennsylvania prisons. Often, she or another family member would travel to a facility only to be told they could not visit, bringing disappointment as well as wasting time and money. We wanted to compile data on the visitation problems and present some recommendations to the Pennsylvania Department of Corrections. We also wanted prisoners and their families to know they were included in the coalition.

The Coalition for Fair and Effective Criminal Justice, although technically created in the spring and summer of 1990, was not really born until after November 1990, when we combined our community education and legislative lobbying efforts with the realities faced daily by prisoners and their families. We developed the survey and talked about visitation. At the same time we discussed strategies for increasing the availability and use of alternatives to incarceration. We debated the need for earned time legislation while discussing how to increase volunteerism and programs within the prisons. Our second major forum, held in September 1991, symbolized our growth as a coalition.

At that meeting we again combined a discussion of in-prison programming with the need for community and legislative action. We spoke about the role of religious groups both within the prison and in the community to advocate for humane criminal justice policies; the role of families and their concerns; and the need for creative legislative strategies. Our keynote speaker, state representative David Richardson, brought the issues together:

We need changes in the country. We need to develop proactive legislation, to develop a grassroots lobby. There have been some victories over the years, but we need one now.

The conference brought together a lot of what I call "just plain folks." Community people wanted to know more about what could be done. Some said they knew the current policies wasted tax dollars, encouraged prison crowding, and failed to really protect the community. They wanted to hear about another way. They didn't buy the idea that the ACLU, NCBL, Pennsylvania Prison Society and other groups were soft on crime. Some of these people are working with the Coalition as we continue to discuss and activate strategies to end prison crowding and start salvaging the lives of those—largely poor and people of color—who end up receiving the harsh punishment of incarceration.

Our meetings and public education have resulted in small victories. Legislation was passed allowing prison visits for Pennsylvania Prison Society volunteers and legislators in December 1990. In December 1991, both houses of the legislature passed a bill exempting the mentally retarded and persons 18 or under at the time of the crime from the death penalty. Also in December 1991, public hearings were held on lifers' parole eligibility in two state prisons.

We have a lot more work to do in Pennsylvania to turn things around. There is no full-time staff to coordinate our work; community education and legislative lobbying take time and energy. We now have a coalition, however, that represents not only traditional prisoner rights advocates, but also newly formed organizations of ex-prisoners, families of prisoners, and "just plain folk." ■

Adjoa A. Aiyetoro is associate director for administration and a senior staff attorney with the National Prison Project.

(cont'd from page 5)

Baton Rouge, which was handling the Angola litigation, and the District Court in New Orleans. This conflict lasted for four years and was finally resolved by the Fifth Circuit Court of Appeals in 1981. (*Hamilton v. Morial*, 644 F.2d 351 (5th Cir. 1981)). The court of appeals decided that all future questions of inmate population were to be assigned to Judge Frank J. Polozola of the Middle District of Louisiana. Those parts of the 1972 original *Hamilton* order not dealing with population limits remained intact.

To this day, Judge Polozola sets population levels at all of Louisiana's prisons and jails. Under this current mechanism, OPP accepts and holds convicted state prisoners until they are transferred according to the weekly quota allowed the sheriff. The length of post-conviction confinement at OPP ranges from two to five years, although it is not unusual for sentenced prisoners to remain even longer.

Litigation after the decision transferring jurisdiction of the population issue to Judge Polozola was limited to resolving the dispute between the defendants over responsibility for medical care at the prison. The local state hospital refused to accept prisoners without payment. The City and sheriff refused to pay, arguing that the State had an obligation to provide medical care to the destitute. In general they do have some obligation, a legacy of Huey Long, but the State argued that its duty did not extend to prisoners. In 1982, plaintiffs' counsel sought to force the state hospital to accept prisoners.

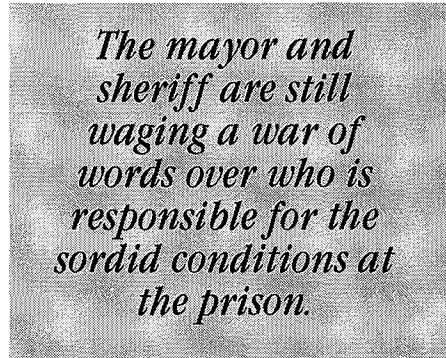
After 1982, there is no indication in the record that plaintiffs were represented by counsel.⁴ Eventually, defendants reached agreement among themselves, the terms of which were renegotiated annually through 1985—not without motions and cross-motions for contempt. This was the only activity reported on the case during the period. It was not until 1988 that plaintiffs indicated renewed interest in the case.

The Current Litigation

There are 4,500-5,000 prisoners confined at various OPP facilities. The great majority are confined in four buildings: the Old Parish Prison, the House of Detention, the Community [Corrections] Center and the

Templeman facility. Additionally, large army tents house between 300 and 400 municipal detainees, and a number of warehouse-type facilities have been constructed or renovated to accommodate several hundred other low-risk detainees, including some 200 juveniles. Even with this capacity, most municipal detainees (and some minor felons) are released or not admitted because of the crowding.⁵

The crowding at OPP is almost without parallel in any big city jail in the United States. While most jails and many prisons struggle under the strain of double-bunking, triple-bunking and quadruple-bunking is used throughout most of the OPP. One routinely sees prisoners sleeping on the floor waiting



*The mayor and
sheriff are still
waging a war of
words over who is
responsible for the
sordid conditions at
the prison.*

for a bunk to open. To compound matters, the prison operates on a virtual lock-down status with only periodic opportunities for recreation or out-of-cell activities. The list of deplorable conditions that resulted from the crowding generally track the findings made by Judge Christenberry 20 years ago. By the time plaintiffs' counsel reappeared in the case, the accumulated problems of the OPP appeared both enormous and intractable.

In 1988, the National Prison Project was approached by local attorneys and the local American Civil Liberties Union affiliate for assistance in challenging the conditions at OPP. Shortly after the National Prison Project filed an appearance on behalf of plaintiffs in 1989, the plaintiffs' lawyers recognized that the need for immediate relief was most acute in the prison's medical department.⁶ Fragmented, grossly underfunded and understaffed, the medical department failed to meet the needs of OPP prisoners, resulting in unnecessary suffering and loss of life. At this juncture, the court separated the claims into phases and ordered that activities

in the case be directed toward an expeditious resolution of Phase I, the medical claim. Unfortunately, this did not happen.

Throughout 1989 the plaintiffs and the sheriff waged a pitched battle over access to the prison and the information in the sheriff's possession. At every turn, we met with intense opposition. By the end of the year, because of defendants' tactics, we knew little more about the workings at OPP than when the year started. Most of the information we obtained was provided by a handful of prisoners or gleaned by plaintiffs' consultant, Dr. Robert Cohen (former director of the Health Care Services at Rikers Island, New York), during his restricted on-site visits. We were largely unsuccessful in prying from the sheriff the other discovery necessary to proceed to trial.

For example, our interrogatories and document requests were largely ignored. Similarly, after intensely opposing our request for an on-site visit by Dr. Cohen, so many restrictions were placed on his eventual visit that he left without resolving most of his questions. Frustrated by the lack of progress, Dr. Cohen resigned as plaintiffs' expert. In contrast, if the sheriff had allowed Dr. Cohen the access later granted Dr. Steven Safyer, plaintiffs' new expert and current director of Health Care Services at Rikers Island, New York, a whole year of litigation and expense could have been avoided.

By the close of the year we had serious questions about our ability to develop and present a successful case. Although we knew that serious problems existed in the prison, the sheriff had successfully kept us at bay. Clearly, a new strategy was required and, beginning in 1990, we took a new tack by circumventing the sheriff's refusal to cooperate in discovery.

Plaintiffs sought to learn from the State and the parish coroner how many prisoners died in recent years or were admitted to Charity Hospital (CHNO) in critical or serious condition. To do this, we reviewed coroner autopsy reports, CHNO death logs, and emergency room logs for a five-year period. This massive effort produced the names of 50 deceased OPP prisoners, as well as names of hundreds of prisoners requiring emergency room treatment. The records thus acquired showed a shocking pattern of serious failure to provide medical care. When the defendants were confronted with this

evidence, the case took a decisive turn in our favor. Shortly thereafter the parties entered into a joint discovery order that put liability aside and focused on developing a remedy.

To the sheriff's credit, this mechanism worked very well. In several short months, Dr. Charles Mary, the sheriff's expert, and Dr. Safyer completed their evaluation, and jointly developed a comprehensive medical program for the prison. The remaining question was the funding for the program. The sheriff maintained that the responsibility rested with the City and State defendants, in proportion to the number of prisoners each had at the prison. The City and State (particularly the State) contested that position, arguing that the established *per diem* paid to the sheriff satisfied any duty they had. Additionally, the State and City defendants both disputed whether a constitutional violation existed at the prison and attempted to prove otherwise.

The impasse lasted nearly six months and all parties expended large amounts of time and money preparing for trial. Until the eve of trial, the defendants contested liability and fought over who should bear the cost of providing medical services. In the final analysis, the dispute over the constitutional question ultimately became secondary. The real dispute centered on funding, and that issue, not whether the medical care violated the Constitution, stalled settlement until after trial had begun. Anyone familiar with the conclusions reached in the Mattick Report could not help feeling a sense of *deja vu*.

One day into trial, the defendants surrendered and the parties signed a comprehensive agreement establishing a system of medical care at the prison, to be funded by two million dollars in annual aid from the State and City and to be headed by a full-time medical director. The agreement governs every aspect of medical services at the prison and provides for a level of staffing and care that is consistent with correctional health standards for big-city jails. Moreover, the agreement provides that the judgment shall remain in effect until the prison receives accreditation from the National Commission on Correctional Health Care. To ensure its implementation, the decree establishes a self-reporting mechanism and provides for a court-appointed monitor.

After two years, in late November

1990, Phase I finally came to a close. However, there is serious concern over whether the sheriff will be able to implement the decree. Early indications from the court-appointed monitor are that many of the changes appear to be cosmetic and that the Order is not being taken seriously. One year after the decree was negotiated, a full-time medical director was only finally hired; still, there has been no action on a number of significant decree provisions. Post-judgment enforcement proceedings are inevitable.

Phase II deals with mental health services. After discovery was conducted in the spring of 1991, the parties entered into a stipulation in which the defendants acknowledged the gravity

*One routinely sees
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a bunk to open.*

of the situation and essentially confessed liability. Discovery revealed that mental health services are grossly inadequate to serve the population. Over 250 seriously ill inmates are under the care of a single psychiatrist who uses psychotropic medications as a control agent, without monitoring. The majority of mentally ill patients under his care are confined in large eight- to ten-man cells under a virtual lockdown. No mental health services are available to the general population, and there are no adequate intake screening mechanisms in place to identify those in need of mental health care.

Perhaps most egregious of all, many people adjudicated incompetent to stand trial or not guilty by reason of insanity are confined in the prison for months and years awaiting transfer to a state hospital. After much dickering, the defendants contracted with the National Commission on Correctional Health Care to assess and develop a mental health care system at the prison. The target date for submission of a plan to the court was the close of 1991, although as of this writing a plan has yet to be submitted. In April 1992, the court appointed an expert to develop a plan. The Louisiana Department of Health and Hospitals also agreed to remove from the OPP those persons legally committed to state hospitals.

Phase III of the case involves general conditions of confinement. Discovery has been occurring for several months and will close on June 1, 1992. Trial will occur shortly thereafter. At a minimum, plaintiffs will seek to close tent city, to eliminate triple and quadruple-bunking, to remove juvenile prisoner from adult facilities, and to otherwise improve desolatory living conditions.

The course of *Hamilton* shows that conditions at OPP improved in some respects in the years immediately following the 1972 decision. However, the defendants never completely complied with many of the critical standards set forth in that decision, including establishing a city department of correction, eliminating the overcrowding at OPP, and closing the Old Parish Prison. The success of the current litigation will depend on the persistence of plaintiffs' counsel, the attention of the court, and the lawful behavior of the defendants. ■

Mark J. Lopez is an attorney with the National Prison Project.

¹ The principal source for the background section is from an American Bar Association case study of the *Hamilton* case. See *After Decision: Implementation of Judicial Decrees in Correctional Centers: A Case Study of Hamilton v. Schiro*, Spiller, D., October 1976.

² Hans Mattick, Co-Director of the Center for Studies Criminal Justice at the University of Chicago Law School. A copy of this report is appended to the final report of the Special Master (7/26/72), and is on file with the court.

³ See *Williams v. Edwards*, 644 F.2d 351 (5th Cir. 1981).

⁴ The absence of plaintiffs' counsel may explain in part why there was no significant litigation over rapidly deteriorating conditions at the prison after 1982. The other significant factor was the transfer of jurisdiction of the population issue to Judge Polozola. No doubt this delivered a message to all involved that the problem could not be resolved within the *Hamilton* litigation.

⁵ Approximately 10,000 to 12,000 detainees are released each year. At the same time, the Sheriff rents hundreds of beds to the Federal government at a daily charge significantly higher than he receives from the City and State.

⁶ After conducting a pre-filing investigation, the National Prison Project and local counsel filed suit against Sheriff Foti and the City of New Orleans (*Estavez v. Foti*, No. 88-01162 "K"(5)). Subsequently, *Estavez* was consolidated with the old *Hamilton* case, which had been inactive for years, and the litigation proceeded under the latter caption. Even in this posture, however, the case proceeded as a new action, and not one seeking post-judgment relief. One important consequence of the consolidation was that the State of Louisiana was joined as a defendant in the suit. Nearly 2000 of the over 4500 prisoners are "state-ready" prisoners, that is, convicted prisoners awaiting transfer to a state facility. Judge Mitchell has assigned the day-to-day supervision of this case to Magistrate Alma Chasez.

Book Review

BY RUSS IMMARIGEON

Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools, by Jerome Miller (Ohio University Press, 1991, \$35.00)



Courtesy of National Center on Institutions and Alternatives

Jerome Miller, author of *Last One Over the Wall*, is now executive director of the National Center on Institutions and Alternatives.

“Reform is always more a matter of will than of legislation, and most youth and adult corrections agencies have the capacity to reform themselves within existing legislation and budgets. They seldom use the means at hand and, as the least accountable of state bureaucracies, they maintain an entirely reactive stance, waiting for mandates which seem never to arrive.”

—Jerome Miller

In 1969, Jerome G. Miller, an academic social worker from Ohio State University who had practiced his profession largely while in the U.S. Air Force, moved to Boston to become commissioner of the Massachusetts Department of Youth Services. Miller was hired to implement new juvenile justice reforms spearheaded by the Massachusetts Committee on Children and Youth, an influential group of citizen activists. Before he left the state four years later, Miller had gained national prominence, and an official censure from the National Conference of Superintendents of Training Schools

and Reformatories, for closing down the Commonwealth's juvenile training schools and reducing the number of “youngsters” housed in secure custody.

Last One Over the Wall is the former commissioner's account of those years. Miller, who would later work in Illinois and Pennsylvania before creating the National Center on Institutions and Alternatives (NCIA) in the early 1980s, went to Massachusetts with little experience as an administrator, only a few ideas about how kids in trouble with the law should be treated, and a penchant for getting to know firsthand the children who would be under his agency's care. All of these would eventually get him into trouble, but by the time he left Massachusetts he had established the primacy of community care over institutional confinement for juvenile offenders.

The closing of reform schools in Massachusetts remains an event of major importance in the history of juvenile corrections.¹ Other factors helped establish an environment in which it could have happened, but it would not have happened without Miller.

Miller's memoir, however, is more than an account of what happened in one state during one period of time; it is more than war stories from the trenches. Indeed, what Miller gives us in this didactic volume is a challenge suitable for developing helpful adult, as well as juvenile, offender programs and policies.

Miller makes it quite clear that impulse had much to do with what happened in Massachusetts. A chance meeting with a child held in solitary confinement at the Shirley Industrial School for Boys, for instance, was critical in moving him to end this barbaric practice. But other plans were made less extemporaneously. The Harvard Center for Criminal Justice, for example, was hired from the outset, prior to the decision to shut down the juvenile corrections facilities, to document and evaluate the Massachusetts reforms. The Harvard research would prove useful, not only in validating the reforms, but in providing further directions for them.

The deinstitutionalization of juveniles in Massachusetts emerged slowly. One of Miller's first moves after becoming commissioner was simply to visit the facilities for which he was responsible. What were these places like? He was horrified by what he saw

(“all the accoutrements and routines of rabble management which occasionally produce the personal violence that revalidates the system”).

When he went officially to the institutions, administrators would give their dog and pony show. But where were the kids? Miller had to ask for them. On occasion, he would purposely wander into unvisited buildings on his way off facility grounds. This is where he found kids in solitary confinement. Or he would conduct unannounced visits. One such visit, which he made with Jessie Sargent (the wife of Governor Frank Sargent) was particularly helpful in maintaining the Governor's support for Miller's actions.

These visits gradually helped Miller envision what it was he wanted the Commonwealth's juvenile justice system to do, or not do. He gave orders to halt degrading and harsh disciplinary measures, such as cleaning the floor with toothbrushes, or the use of solitary confinement. Even the more humane agency workers felt that isolation was necessary to maintain discipline, but Miller boldly abolished the practice. Instead, he encouraged kids to call him at his office about what was happening at institutions with such venerable names as the Judge Connelly Reception and Diagnostic Center in Roslindale, the Girls' Industrial School at Lancaster, John Augustus Hall, and the Lyman School for Boys, the first reform school in the country.

Miller's strategy toward deinstitutionalization relied on the use of what we now commonly call alternative sentencing plans. In this book, Miller does not discuss the design and use of Client Specific Planning, but he describes what are undoubtedly the roots of this vehicle for sentencing reform. In Massachusetts, he ordered psychologists to work around the clock to interview kids at “Rozzie,” a decrepit maximum-security prison for hard-core young offenders, and quickly design community placements for them. Years later, in Pennsylvania, he used a similar strategy to remove young kids from the Camp Hill juvenile prison. These were one-on-one exercises that were as effective as they were efficient.

Miller found that psychologists, social workers, and other criminal justice practitioners were more likely to recommend community placements if they knew of the availability of

suitable program options. Given the hollow choice of prison or probation, these professionals, not unlike judges at sentencing hearings, tended to incarcerate. Given real choices, however, they were secure in making other decisions.

But the most important part of Miller's reforms was that he gradually removed financial support for the institutions that had harmed kids for so many years. To do so, he had to fight the state legislature, juvenile court judges, employee unions, his own staff, the people who hired him, and even some of the incarcerated kids themselves.

All were fixed on institutions. But Miller clear-headedly understood that the availability of institutional beds gave the juvenile justice system sanction to use them. Also, he knew that "deep-end delinquents provide the rationale for a massive national system of locking up juveniles." It was for hard-core kids that Miller first found community placements.

The importance of administrative leadership should not be taken lightly, particularly when administrators have

authority over agency operations. Miller's actions were the key factor in the Massachusetts experiment.

But other factors were also important. Miller doesn't lay them out in orderly fashion, but then again he doesn't spend much time heralding his own contributions, either. Among these factors were existing reform legislation, a generally unprofessional youth services bureau, and an environment for change beyond legislation that included support from citizen groups (e.g., a local chapter of the League of Women Voters), the media (particularly *The Boston Globe*), certain key legislators, and the Governor.

Lastly, the juveniles themselves, and the people who ran a variety of nonprofit agencies, frequently on shoestring budgets and salaries, were instrumental in bringing in results for these reforms. In 1989, a National Council on Crime and Delinquency study reaffirmed earlier Harvard findings that Miller's juvenile reforms resulted in significantly reduced rates of recidivism. In short, kids treated with decency and given hope are more likely to set themselves straight than

kids battered and bullied by indifferent or punitive handlers. ■

Russ Immarigeon, a freelance writer living in Hillsdale, New York, is a regular contributor to the NPP JOURNAL.

¹ Miller argues that liberal helping professionals can be as resistant to change as law-and-order conservatives. The American Correctional Association (ACA) recently released a video cassette entitled "Juvenile Justice in the United States: A Video History," which purports to cover the history of juvenile corrections. One doubts that Miller would be surprised to learn that the video mentions the Lyman's School's opening in 1847 but fails to mention the school's closing, or the person who closed it. Indeed, the failure to even mention the Massachusetts reforms (in a "public education" presentation designed to show "the progress America has made in its treatment of juveniles") vividly confirms his contention that "the hardware and shackles crowd," as he refers to the ACA, are still oriented towards confinement and control rather than community-based services and care.

For the Record

The National Center for Correctional Health Care Studies announces its Second Annual Forum, "Quality Improvement and Ethics: Who is the Customer?" to be held July 24-25, 1992 at the Inn on the Park, Madison, Wisconsin. Scheduled speakers include B.J. Anno, Dr. Armond Start, Dr. Ronald Shansky, Norman Faust and other experts in the field of correctional health care. The registration fee is \$135 before June 26 and \$150 after June 26; make check payable to the University of Wisconsin-Madison and send to the National Center for Correctional Healthcare Studies, 777 South Mills Street, Madison, WI 53715. For more information, contact Lydia Reitman, 608/265-2339.

Drug violations accounted for about one-half of the 1983-1989 increase in female jail inmates, according to a recent Bureau of Justice Statistics report.

"In 1983 one in eight women were in jail for drug-related crimes, but by 1989 one in three female jail inmates were there for a drug offense," noted Bureau director Steven D. Dillingham.

Almost 40% of the women said they had committed their offense while under the influence of drugs.

Copies of the report, "Women in Jail 1989," may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, MD. 20850, telephone 1-800-732-3277.

At hearings held last February, United States senators questioned the effectiveness of the "War on drugs." Questioning revealed bipartisan criticism of the administration's \$12.7 billion 1992 drug control efforts for overemphasizing law enforcement to the detriment of treatment and prevention programs.

Statistics indicate that drug use is on the rise and drug-related crime continues.

"This is not the picture of a nation winning the drug war," said Senator Joseph R. Biden Jr. (D-DE), judiciary chairman. "Indeed, it is not even the picture of a nation waging a good fight." *NCJA Justice Bulletin*, Feb. 1992, Vol. 12, No. 2. ■

Corrections

The following corrections should be made to "The Status Report: the Courts and the Prisons," published in our Winter 1992 issue.

In Florida, the appeals decision in *Costello v. Wainwright*, cited at 525 F.2d 1239, was issued in 1976, not 1977.

In Indiana, *Hendrix v. Faulkner* should be cited as 525 F.Supp. 435 (N.D. Ind. 1981) (not as the Western District of Indiana).

In Kentucky, the appeals decision in *Canterino v. Wilson* should be cited as 869 F.2d 948 (6th Cir. 1989).

In Ohio, the remedial orders in the case, *Taylor v. Perini*, were vacated in 1991 following a report and recommendation of the special master.

BY JACKIE WALKER

Dynamic N.Y. Alliance Convenes on Behalf of Inmates with AIDS

In her final "AIDS Update," former NPP AIDS coordinator Judy Greenspan reflected on the small but growing network of advocates for prisoners with HIV/AIDS. The Alliance for Inmates With AIDS is an example of that developing network. With almost 20 participating organizations in the New York City area, the Alliance runs the gamut from the hard-core activism of ACT UP/NY's Prison Issues Committee to the many substance abuse treatment programs provided by The Osborne Association. On March 6 the Alliance held a day-long forum on prisoners with HIV/AIDS.

The forum opened with the voices of people with AIDS (PWAs) relating their experiences with the corrections system: voices like that of Vilma Santiago, of the Latino Commission on AIDS, who has two sons in prison. Vilma described the journeys to visit her sons as particularly devastating to her body and complicated by the humiliation guards put family members through.

Although Gil Serrano, a member of the Latino Commission on AIDS and author of an HIV/AIDS education booklet called "Inmate to Inmate," recently marked his first year out of prison, he continues to feel as though he were in prison because he knows that his brothers in prison are still dying. Serrano urged that as taxpayers, "we need to develop a sense of outrage...it's incredible what the Department of Corrections can do and get away with." Katrina Haslip, a cofounder of ACE (AIDS Counseling and Education) and Education Outreach worker with the Upper Manhattan Task Force On AIDS stressed the special problems women with HIV/AIDS encounter in the prison system. In the area of medical care she advocated having an infectious disease doctor and gynecologist experienced with HIV at each facility. Haslip also described how women are being paroled and becoming homeless because they have no support systems. She ended her comments urging us to keep the pressure on the departments of

corrections to implement these programs.

The second half of the morning was a speak-out for participants designed to identify problems and successes in their experience with HIV/AIDS in the criminal justice system. Some were success stories like that of Mike Aboussleman, a corrections officer at the Arthur Kill Correctional Facility, who turned his concern with HIV/AIDS education into forming the Committee On Prevention and Education For AIDS (COPE). COPE provides a wide range of services for prisoners from one-on-one counseling to pre-release referrals and legal information. But more often there were stories of struggle like that of Yolanda Rosado, the community liaison counselor for ACE at the Bedford Hills Correctional Facility, who focused on the stories of two women with AIDS who died shortly after parole because of the lack of support services, and her own battles to get corrections officials to provide adequate pre-release services.

Haydee Zambrana of Mujeres Latinas En Accion told of plans for a national march on Washington, D.C. in May, focusing on the impact of HIV/AIDS in the Latino community.

In the afternoon session a series of five workshops brought many of the concerns raised during the speak-out into strategy sessions. Workshop topics ranged from strategies for keeping support groups operating to the impact of disclosing HIV status to the parole board and ways to advocate for prisoners who want HIV testing. Each workshop brought a number of observations and recommendations back to the general body. One workshop found peer educators more effective in providing HIV/AIDS education, but in need of support from HIV/AIDS social service organizations on the outside. In another workshop participants argued that the empowerment model used in the general population must be modified in prison settings. Still another session

advanced improving medical care through legal referrals. There was general agreement on using St. Clare's hospital as one possible model for providing medical care to prisoners with HIV/AIDS. Most workshops also reached consensus that women face a range of problems including the CDC definition of AIDS (which does not include opportunistic infections specific to women), and the location of pre-release support services.

As the forum ended, participants were quick to acknowledge how the day's events would affect their own work. Anthony Karagu, HIV/AIDS service coordinator for The Osborne Association, felt the forum was important in a number of respects. "First, to bring everyone together under one roof to map out strategies was helpful. I also felt it was quite representative with the input of PWAs. And finally, the forum's breakdown into workshops to share strategies and network was helpful for me." Nancy Mahon, director of the AIDS Prison Project for the Correctional Association of New York, described the forum as a "definite success in terms of people getting together for the first time. The evaluation forms have raved about the importance of being with people who care about and work in the same areas of interest. We also developed a better sense of what policy issues to work on and which geographical areas are needy, like upstate New York."

The forum has already produced results. A directory of organizations serving prisoners with HIV/AIDS in New York state is in the last stages of production. Recently, Steve Machon of ACT UP/NY received a call from an HIV/AIDS service organization that had been contacted by a relative of a prisoner who was having difficulty with the HIV testing process. Within a short period of time, Machon was able to put him in touch with five different contacts in his area. And Dr. Robert Greifinger, chief medical director for the New York State Department of Corrections, who had declined a meeting with Alliance members last year, has now agreed to meet with members this month. Another forum is planned for midsummer. This time participants will include parole, corrections and probation officers. ■

Jackie Walker is the Project's new AIDS information coordinator.

Publications



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

The Prisoners Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, 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 cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1992. \$5 prepaid from NPP.

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

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

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; \$5 for prisoners. ACLU Dept. L, P.O. Box 794, Medford, NY

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

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The following are major developments in the Prison Project's litigation program since January 16, 1992. Further details of any of the listed cases may be obtained by writing the Project.

Bartkus v. Manson, a comprehensive challenge to conditions of confinement at Connecticut's maximum security prison, was originally filed by the Connecticut Civil Liberties Union in 1980 and later handled by New Haven Legal Services. In January 1992, the Prison Project was asked to join as co-counsel. Trial, which was never held because of earlier failed settlement efforts, has now been scheduled for September 1992.

Bates v. Lynn challenges inadequate legal access for inmates sentenced to Louisiana's death row and we obtained a favorable settlement last year. On March 10, a federal magistrate awarded plaintiffs' counsel their requested attorneys' fees and expenses including Washington, D.C. rates for NPP lawyers. The magistrate also applied a 15% multiplier to the

fee award, citing the risk involved in filing such a case, and the special expertise required to handle this particularly complicated litigation.

Denton v. Hernandez concerns the standard for refusing to allow a *pro se* indigent prisoner to file a complaint in federal court. On January 13, the Prison Project filed an *amicus* brief in the Supreme Court of the United States on behalf of a California state prisoner. The prisoner had filed a series of complaints in the trial court including repeated implausible allegations of rape. Because the rape allegations were without merit, the trial court dismissed all of the prisoner's complaints as frivolous, despite the possible merit of individual complaints. The Ninth Circuit reversed the decision, and the state of California sought and was granted *certiorari*. The Supreme Court heard oral argument on February 20.

Dickerson v. Castle challenges conditions and overcrowding in Delaware's adult prisons. Due to renewed overcrowding, plaintiffs filed a new motion on January 29 seeking to find state officials in contempt of the consent decree. The court held a status

conference on March 23 to establish procedures for hearing the contempt motion.

Hudson v. McMillian—On February 25, 1992, the Supreme Court of the United States ruled in a 7-2 decision that the malicious beating of Louisiana prisoner Keith Hudson by prison guards violated the Eighth Amendment to the Constitution. The Court reversed a Fifth Circuit decision which required a showing of significant injury in order to prove an Eighth Amendment claim. (See p. 1 for more details.)

Nolasco v. Romer challenges overcrowding and conditions in three Colorado facilities not covered by court orders in an older case, *Ramos v. Lamm*. In February, parties submitted a settlement agreement which covers all Colorado facilities and requires renovations, improved fire safety measures, expanded medical and mental health services, and the development of a comprehensive sex offender treatment program. The settlement also provides for the eventual release of the state's prisons from court oversight.

National Prison Project

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