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ABA Report Urges Reform in Sentencing, Corrections

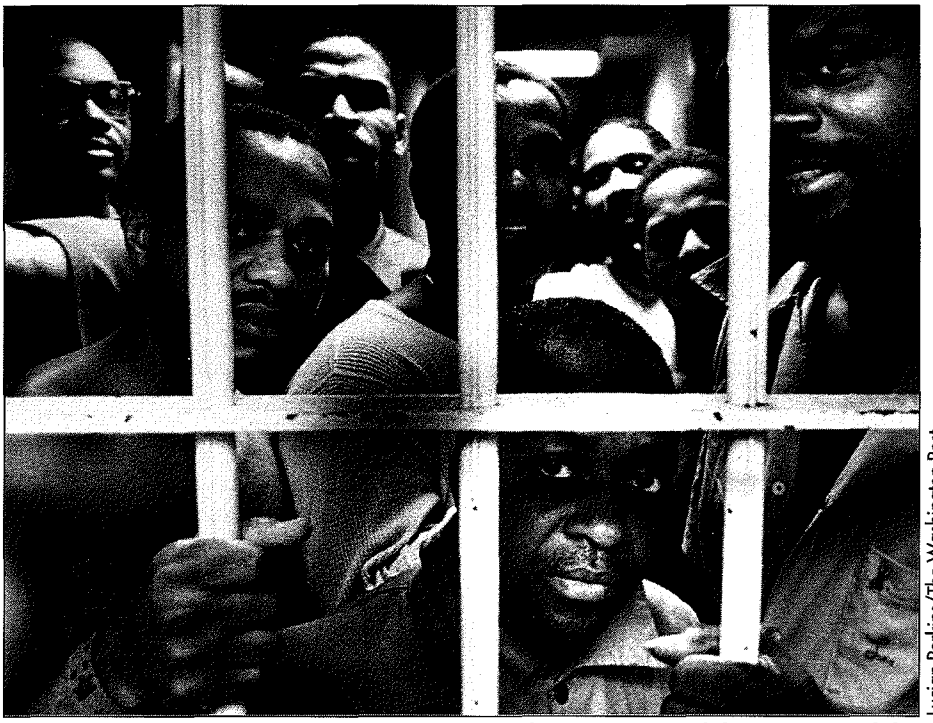
BY BETSY BERNAT

On the eve of the April 1992 "Corrections Summit" sponsored by Attorney General William Barr, the American Bar Association (ABA) released a new report, *The Use of Incarceration in the United States: A Look at the Present and the Future* by Professor Lynn S. Branham. Unfortunately, the report was nearly lost in the glare of the Summit's political motivations and arrived too late to challenge the Bush Administration's claim that we must choose between "more prison space or more crime." Rather than spend tax dollars on an expensive conference with questionable results, Summit organizers would have done well to simply send participants a copy of this comprehensive and valuable report.

The ABA report is written with members of state and local bars in mind, and urges them to assume responsibility for pushing sentencing and correctional reform. However, it offers important food for thought for anyone with a role in corrections, be they lawyers, corrections officials, community groups, legislators, judges or otherwise.

The report is divided into three sections. The first one provides a clear and detailed picture of incarceration today. Recommendations for reform follow in section two. The report concludes by advising state and local bars to work for reform with suggestions on how they might do so effectively. An Appendix includes the full text of the ABA's Model Community Corrections Act which was approved by the ABA's House of Delegates in February 1992.

One characteristic which sets this report apart is its sense of balance and the lack of a hidden agenda. Professor Branham has clearly heard, and more importantly, listened to arguments and complaints from corrections administrators, judges, lawyers and others. In this report, she puts all the facts about incarceration on the table, gives them a good hard look, and asks, "How can we do this better?"



Lucian Perkins/The Washington Post

Racial disparities raise questions "which go to the very heart of the integrity of the criminal justice system," says the ABA report.

The Current Picture

In the first section, "Where We Are Today," Branham lays the groundwork for the report's recommendations. She discusses the number of people incarcerated in U.S. prisons and jails; their age, race, ethnicity and type of offense; how long their sentences are; and whether they previously have been convicted of a crime.

Branham takes the reader beyond these statistics to show how they translate into a typical prisoner's life behind bars. She acknowledges the difficulty in describing a representative picture given all the variables involved.

INSIDE . . .

Crowded Prison Systems Cannot Care for Mentally Ill 15

Case Law Report 6

Prison Siting on Ohio Farmland Draws Local Fire 3

Chances are good, though, that the facility is overcrowded, the prisoner is idle much of the time, has little or no privacy, and must find some way to protect himself against physical attacks. This section would be further enhanced by a similar discussion of what life is like for a typical correctional officer in an overcrowded and understaffed facility.

Branham offers five key reasons why, based on her research, more people are incarcerated today.[1] The crime rate is not the culprit. According to the National Crime Survey, the level of crime was 14.5% lower in 1990 than in 1980 and was fairly stable in the years in between; yet, in the same ten years, the prison population grew by 133.8%.

The population increase can be better explained by the following: 1) a higher percentage of people are being sentenced to prison for crimes that, at one time, either would not have been prosecuted or would have resulted in a non-incarcerative sentence; 2) longer sentences are being imposed for some crimes (though Branham points out that sentence lengths are due for some up-to-date analysis); 3) more restrictive parole and release policies ; 4) increased probation and parole revocations (i.e., in 1978, 8% of prison admissions in California were parole violators; in 1988, 45%); and 5) demographic factors. From 1974 to 1986, the national population experienced a double-digit increase in the number of people in their 20s (the prison-prone years).

The costs and benefits of all this incarceration, under Branham's scrutiny, yield some surprises. For instance, in 1991, the average cost to incarcerate a prisoner for one year was reported as $17,545.55. However, the report notes, this figure omits costs such as pensions for correctional officers and contract mental health care. Weighing all factors, the annual expense reaches $30,000 per inmate.

What does this mean for state budgets and for taxpayers? In Delaware, it takes all of the state income tax paid by 18 residents to keep just one state prisoner incarcerated for a year. In California in 1990, when the state's prison population experienced the sharpest increase in the country, the legislature cut the education budget by $2 billion to pay for more prisoners.

With so many people incarcerated, is the country safer? The answer is no, and Branham cites supporting crime statistics and several reports on recidivism and criminal incapacitation as proof.

Twelve Recommendations

Having given us the bad news, Branham follows with some good news in the form of 12 recommendations which "hold the promise of making our criminal-punishment system more effectual." Branham rescues the recommendations from becoming mere rhetoric by substantiating them with detailed work plans and reports.

In Delaware, it takes all of the state income tax paid by 18 residents to keep just one state prisoner incarcerated for a year.

The recommendations—abbreviated here—suggest that states and localities:

1. Adopt a comprehensive community corrections act, to include a broad range of sanctions for non-violent offenders to be used not only at sentencing but also when sanctioning parole and probation violators. The ABA's Model Adult Community Corrections Act, attached to the report as an Appendix, provides a detailed plan for developing and implementing such a program.
2. Adopt sentencing guidelines which include a range of community-based sanctions.
3. Draft sentencing guidelines to ensure that prison space is generally reserved for violent offenders.
4. Expand the use of means-based fines. Fines are widely used with much success in other countries.
5. Allow for a graduated response, within a sentencing system, to a violation of a community-based sanction or parole. Prison need not be the automatic response. Sanction options, which become more severe depending on the level of offense, include restricted mobility in the community, increased supervision, special conditions, and financial penalties.
6. Repeal mandatory minimum sentences. Branham notes, "These statutes are the product of what has practically become a shoving match between politicians to demonstrate who is the toughest on crime."
7. Prepare correctional impact statements before enacting legislation which would raise the number of people under correctional supervision. These statements should forecast the legislation's effect in terms of prison space, staff, programs and costs.
8. Require sentencing guidelines commissions to draft and adjust sentencing guidelines which are commensurate with the capacity of the jurisdiction's correctional system.
9. Provide a range of programs—educational, vocational, mental-health, substance abuse treatment, counseling, and others—in order to reduce recidivism. These programs should be fully funded and of high quality.

Branham understands that many Americans object to the idea of providing job training to prisoners when their own access to these programs is limited. She offers a convincing "pay now or pay later" argument in which

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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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she notes that if we don't pay for these programs while the prisoner is incarcerated, chances are that we'll be paying for his incarceration all over again later on.

10. Inmates who are not going to school full-time should work while incarcerated.
11. Develop release programs to help ensure a prisoner's successful return to life on the "outside."
12. Earmark at least 3-5% of a corrections budget for research to study the system's effectiveness and cost-efficiency. Branham also emphasizes the need for more research into racial and ethnic disparity in the criminal justice system. Evident disparities raise "questions...which go to the very heart of the integrity of the criminal justice system."

The Role of State and Local Bars

The ABA report concludes by urging members of state and local bars to shoulder their share of responsibility toward implementing correctional reform. They can do so by establishing corrections and sentencing committees; working with ABA committees and other organizations; offering to educate judges, defense attorneys and prosecutors on community-based sanctions; educating the public about corrections and sentencing issues; and, finally, monitoring corrections legislation and operations.

Branham follows with...12 recommendations for "making our criminal-punishment system more effectual."

More Valuable Information

Thirteen pages of excellent references follow the body of the report. Branham concludes the ABA report by urging an overhaul of sentencing and corrections systems. Such an overhaul, she notes, must stress "accountability: ...accountability of offenders to their victims and society and accountability of government officials...to the public."

Finally, she says, "Reform only occurs through hard work and over time. And now is the time for the hard work of reforming the nation's sentencing and corrections systems to begin." ■

The Use of Incarceration in the United States: A Look at the Present and the Future, by Professor Lynn S. Branham, is available from ABA Order Fulfillment, 750 North Lake Shore Drive, Chicago, IL 60611, 312/988-5555 for $8.75 prepaid ($7.00 for ABA Criminal Justice Section members), checks payable to American Bar Association. Please request Order #5090051.

Betsy Bernat is editorial assistant of the NPP JOURNAL.

[1] This section opens with a useful explanation of why there is so much variation between the crime rates reported by the National Crime Survey and the Uniform Crime Report.

Citizens Protest Taking of Farmland for Federal Prison Site

BY JAN ELVIN

"A 900-acre tract near Elkton [Ohio] has been chosen as the site for a 2,750-bed federal prison to be built here, bringing with it between 650 and 850 jobs that pay an average of $26,000 a year."

On January 9, 1992, landowners and farmers in Columbiana County, Ohio awoke to this news on the front page of the local *Morning Journal*. The newspaper article further stated that, since the Bureau of Prisons requires that the property for the prison be donated, the county would offer property owners fair market value for their land. Should landowners refuse the offer, the county could still confiscate the land through the right of eminent domain. This will happen, say the landowners, over their dead bodies.

The proposed federal prison has created a controversy and pitted Columbiana Countians against each other. Since January, county and state officials have come under heavy fire from landowners as it has become evident that many of the officials knew of the plans to build before the announcement was made public. Affected landowners were kept completely in the dark.

In fact, opponents of the prison accuse officials of secretly courting the Federal Bureau of Prisons (BOP) to secure the property as the site of the prison, then deliberately waiting to announce the choice publicly until the deed was as good as done.

Residents opposed to the building of the prison also claim that *Morning Journal* readers are not getting objective reporting, and that the newspaper's reports are intended to sway the citizenry in favor of the prison. The paper's publisher, John Burgess, has been a strong and public supporter of the prison. Indeed, a review of the paper's headlines suggests a bias in favor of the building of the prison:

"County's economy will get big boost;"

"County effort [to bring prison] draws praise from governor;"

"Prison will mean 1,000 jobs for county;"

"Opposition could spell prison loss, officials say;"

"Council celebrates progressive start" (refers to "its first accomplishment—luring a federal prison to a site outside of Elkton").

Landowners would undoubtedly write the headlines differently, if they could. They are fighting hard to keep their land, and they vow that the federal government will never take it from them. They have formed a grassroots organization called Columbiana Countians Against the Prison (CCAP), and are, according to their literature, "united in our love and care and protection of the land that feeds our entire nation."

CCAP members claim that the BOP refuses to give straight answers to their many questions; that the information they do get changes almost weekly, and that the resulting confusion only adds to

(cont'd on page 4)

Photo courtesy of Columbiana Countians Against the Prison

Farmers in Columbiana County plowed this message into their land for the benefit of government photographers taking pictures for an environmental impact statement.

their feelings of frustration and helplessness. The Bureau's estimate of the number of affected property owners has gone from the originally stated 12, to 58 only two months later. The number of prisoners they claim will be held there has also varied, from the original 2,750 to the latest count of 4,800.

Loss of Family Farmland

"We're nothing to you guys," Lori Garn angrily told county commissioners at one January meeting. Garn's family owns 82 acres on Scroggs Road, which runs through the property.

"There's a lot of me in that ground up there," said Richard Scroggs, who lives in the family home that was built in 1832 on the road named after his ancestors.

Morris Boles, 62, lives near the cemetery on Church Hill Road where his parents and grandparents, who had also farmed the land, are buried. "I remodeled the house several years ago and got it all lined up for my retirement," says Boles of his 72-acre farm. "This was where I figured I would spend the rest of my life. Now, I don't know."

"It's one thing," wrote Shirley Mondak in the local paper, "to lose a place because you've fallen behind in taxes, but these families have hung on and kept their farms and properties despite some very staggering odds. They've done it the American way—earning the land and working the land, maintaining its use and its beauty."

> *"There's a lot of me in that ground up there."*
> *—Richard Scroggs, landowner.*

There are two historical homes located on the site and over 600 acres of tillable, fertile farmland.

Bureau officials have apparently rejected a nearby site which is reclaimed mining land because of the distance from sewage hookups and water resources.

Jobs

State and county officials are looking forward to an economic boom brought about by the building of the prison. According to county commissioner Don Lowe, other areas where federal prisons have been built, such as Lewisburg, Pennsylvania, have boomed economically.

Another commissioner said, "This is one of the greatest shots in the arm we've had in a long time. This might be a better benefit than Lordstown (GM plant) because this is recession-proof."

County commissioner John Wargo states, "I think financially the impact will be profound." Federal officials have told Wargo that two new "outside" jobs are usually generated for every prison job.

Columbiana Countians Against the Prison (CCAP)

Every Monday night CCAP holds strategy meetings at the County Career Center, drawing 100-150 locals who are upset about the prison. An attorney who specializes in farmers' rights has been hired by CCAP. The group has also

The Vindicator/William D. Lewis

Lori Garn, who owns 82 acres in the vicinity of the planned prison, speaks out at a local meeting.

formed eight committees, begun a petition drive by citizens and businesses, started a public information campaign, mounted store displays, and initiated a speakers' bureau. A research committee was formed to ensure the accuracy of information being disseminated. One member said, "We used to have lives here. Now all we do is work on this."

The Bureau of Prison's View

"We are sensitive to their concerns," said Debra Hood, site selection and environmental review specialist for the BOP, "but the Bureau has a mission. With the overcrowded conditions in the federal prisons, we have to look at expansion."*

When asked why the Bureau picked the Elkton site in Columbiana County for the new prison, Hood told the *NPP JOURNAL* that county and state officials, as well as a congressional delegation, had solicited the Bureau for this site. In addition, she said that BOP projections show that "the largest number of federal offenders will come from their region."

She said that the level of resistance to the prison that they have encountered to date in Columbiana County is not unusual. "It's the 'Not in My Back Yard' syndrome," said Hood. "To us, opposition is opposition. The final decision on where to locate the prison rests with [Bureau of Prisons] Director Quinlan."

To raise money for their cause, they have organized pig raffles and held rummage sales and bake sales.

Environmental Concerns

The fact that the land belongs to them is not the only reason CCAPers are opposed to the prison site, however. CCAP also has questions about the impact of a 4,800-bed prison on the water supply, sewage and utility availability, fire protection (the area is served by one small volunteer fire department), and deep mines. An environmental impact statement done by the government should be available for public review by the late fall.

Growing Anger from Local Residents

At more than one meeting, furious crowds of 250-300 homeowners, all who live either on the site or its perimeter, have gathered to voice opposition to the prison.

"So we're screwed," yelled one man.

"Dictators," shouted another over and over.

In addition to petition drives, confrontational meetings, strategy sessions with attorneys, and sophisticated public education campaigns, CCAP members have also relied on traditional organizing methods with an Ohio flair to them. To raise money for their cause they have organized pig raffles and held rummage sales and bake sales.

(cont'd on page 14)

THE NATIONAL PRISON PROJECT JOURNAL

Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

Exhaustion of Remedies/Federal Officials and Prisons/Access to Courts

Prisoners' remarkable winning (or at least non-losing) streak in the 1991-92 Supreme Court term continued in *McCarthy v. Madigan*, 112 S.Ct. 1081 (1992).

In previous decisions this term, the Supreme Court refused significantly to worsen the law governing use of force (*Hudson v. McMillian*) or the modification of injunctive judgments governing jail conditions (*Rufo v. Inmates of the Suffolk County Jail*). In *McCarthy*, the Court held unanimously (with Chief Justice Rehnquist and Justices Scalia and Thomas concurring in the result) that federal prisoners seeking only damages in a "*Bivens* action" need not exhaust their administrative remedies in the Bureau of Prisons, which do not provide for damages, before resorting to federal court. (Constitutional damage suits against federal officials are commonly called "*Bivens* actions" after the Supreme Court case that allowed them despite the absence of an authorizing statute similar to 42 U.S.C. §1983. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 [1971].)

It has long been established that state prisoners proceeding under §1983 need not exhaust administrative remedies, except in a limited category of cases governed by the Civil Rights of Institutionalized Persons Act. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982). Federal prisoners, however, have consistently been subject to an administrative exhaustion requirement, at least in cases where the relief the prisoner sought could be obtained through the administrative process. *See Lyons v. U.S. Marshals*, 840 F.2d 202, 204 (3d Cir. 1989); *Payne v. Day*, 440 F.Supp. 785, 787-88 (W.D.Okla. 1977) and cases cited.

The rule the Court overturned in *McCarthy* went one step further and required prisoners to exhaust administrative remedies even if those procedures could not provide the money damages the prisoner sought. This rule has its origins in *Brice v. Day*, 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980), and was justified by the supposed necessity preliminarily to develop the facts so the court could determine whether permitting a "*Bivens* action" was appropriate. The *Brice* court also stressed the need to reinforce the authority of prison officials and their chain of command.

Brice was decided before *Carlson v. Green*, 446 U.S. 14 (1980), in which the Supreme Court first upheld the availability of a *Bivens* action to a prisoner claiming an Eighth Amendment violation, and tacitly affirmed that *Bivens* is presumptively applicable to all constitutional claims. Before *Carlson*, some lower courts had proceeded gingerly in extending the *Bivens* doctrine beyond the Fourth Amendment police misconduct context of *Bivens* itself. Neverthless, even at the time, the *Brice* holding seemed to some more like an exercise in docket-clearing than a reasoned adjudication, and it was not widely followed.

Justice Blackmun's opinion in *McCarthy* canvasses the law of administrative exhaustion at some length, but its analysis is ultimately simple. "Where Congress specifically mandates, exhaustion is required.... But where Congress has not clearly required exhaustion, sound judicial discretion governs." 112 S.Ct. at 1086. This judicial discretion requires consideration of the courts' "'virtually unflagging obligation' to exercise the jurisdiction given them" by Congress, 112 S.Ct. at 1087 (citation omitted), and balancing of "the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id.*

Applying these principles, the Court found that Congress had not specifically mandated exhaustion. The Court refused to find an exhaustion requirement in the general delegation of authority to the Attorney General to administer the federal prison system. Nor was it convinced by prison officials' rather perverse argument that the Civil Rights of Institutionalized Persons Act, which applies only to state prisoners, somehow supports an exhaustion requirement for federal prisoners as well.

Balancing the interests at stake, the Court held that the prisoner's interest in avoiding the exhaustion requirement is great. The risk of forfeiting a claim by missing one of a succession of rapid filing deadlines, combined with the unavailability of damages in the administrative scheme, creates a situation in which the prisoner seeking only damages "has everything to lose and nothing to gain" from an administrative exhaustion requirement. 112 S.Ct. at 1090. Nor does the Bureau of Prisons have weighty interests in favor of administrative exhaustion, other than its generalized interest in "encouraging internal resolution of grievances and in preventing the undermining of its authority by unncessary resort by prisoners to the federal courts." 112 S.Ct. at 1092. The subject matter of the suit—failure to provide medical care—has little bearing on the Bureau's ability to control and manage the prisons, and the Bureau "does not bring to bear any special expertise" on the issues presented in the case.

The *McCarthy* holding is limited to those cases in which the plaintiff seeks damages and nothing else; the plaintiff conceded that the analysis would be different if his complaint sought an injunction, and the lower federal courts agree that exhaustion is required in such cases. *Terrell v. Brewer*, 935 F.2d 1015, 1019 (9th Cir. 1991) and cases cited.

McCarthy's implications go beyond its narrow holding.

First, *McCarthy* should have a significant impact on the application of the Civil Rights of Institutionalized Persons Act ("CRIPA") to the claims of state prisoners. At least one lower court has held that CRIPA requires prisoners seeking damages to exhaust grievance procedures that do not provide for damages. *Martin v. Catalanotto*, 895 F.2d 1040, 1042 (5th Cir. 1990). Justice

Blackmun in *McCarthy* observed that CRIPA requires exhaustion only of "effective administrative remedies" and makes clear his view (supported by earlier observations by the Department of Justice) that an administrative remedy must provide damages to be deemed "effective" relative to a damage lawsuit. 112 S.Ct. at 1089 and n. 4. Since this discussion is integral to the Court's dismissal of CRIPA as supporting a federal prisoner exhaustion requirement, it cannot be dismissed as dictum, and appears clearly to overrule *Martin v. Catalanotto*.

Second, the Court's opinion gives no credence to the growing hostility to prisoner claims as a class, readily apparent in the lower courts after eleven years of purposefully conservative judicial appointments. *See, e.g., Long v. Collins*, 917 F.2d 3, 4 (5th Cir. 1990) (referring to "current misallocation of social resources toward excessive prisoner litigation"); *Martin v. Catalanotto*, 895 F.2d at 1040 (complaining about "inund[ation]" with prisoner claims); *Scher v. Purkett*, 758 F.Supp. 1316, 1317 (E.D.Mo. 1991) (denouncing "inmate knavery" and "malcontent inmates" complaining about "petty deprivations"). But the Court in *McCarthy* treats the technical exhaustion question in a technical manner without reference to any perceived problem presented by prisoner claims as a class. (Indeed, so does Chief Justice Rehnquist's opinion concurring in the result.)

More pointedly, the *McCarthy* Court reaffirmed the view it stated in 1980 in *Carlson v. Green* that the *Bivens* remedy should be no less available to prisoners than to other litigants:

> ...[*R*]*espondents appear to confuse the presence of* special *factors with* any *factors counseling hesitation [in allowing a* Bivens *suit]. In Carlson, the Court held that "special factors" do not free prison officials from* Bivens *liability, because prison officials do not enjoy an independent status in our constitutional scheme nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a* Bivens *claim.*

112 S.Ct. at 1090 (citation omitted) (emphasis in original).

Finally, a throwaway line in the *McCarthy* opinion may ultimately influence the development of the law of prisoners' access to courts. In describing the danger of procedural forfeiture of claims posed by the Bureau of Prisons' administrative remedy scheme, the Court noted:

> *The "first" of "the principles that necessarily frame our analysis of prisoners' constitutional claims" is that "federal courts must take cognizance of the valid constitutional claims of prison inmates."* Turner v. Safley,.... *Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining "most fundamental political right, because preservative of all rights."* Yick Wo v. Hopkins,....

112 S.Ct. at 1091.

The important question that may be affected by this observation is the relationship between the "reasonable relationship" standard, articulated in recent Supreme Court decisions involving prisoners' First Amendment and substantive due process claims, and the requirement of *Bounds v. Smith*, 430 U.S. 817, 822 (1977), that prisoners' means of access to courts must be "adequate, effective, and meaningful." The Court held in *Turner v. Safley*, and has reiterated forcefully, that the reasonable relationship standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). Under the *Turner* standard, the plaintiff must "point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests...." 482 U.S. at 91; *see Jordon v. Gardner*, 953 F.2d 1137, 1141 (9th Cir. 1992) (plaintiff must suggest "costless alternative"), rehearing granted. F.2d, 1992 WL 155760 (9th Cir., July 7, 1992); *Blankenship v. Gunter*, 898 F.2d 625, 628 (8th Cir. 1990) (alternatives requiring "little or no effort" required). But anyone familiar with prison operations knows that accommodating the right of court access is one of the most expensive services that prisoners receive, because of the inordinate costs of purchasing and maintaining law libraries or providing trained legal assistance and the administrative difficulties of making either alternative meaningfully available to all prisoners (including segregated populations) who require them. If the *Turner* standard were applied literally to court access claims, and *Bounds* deemed limited by it, prison officials might well be permitted severely to curtail their law library or legal assistance programs.

To date, courts have not taken that approach. Indeed, at least two courts have explicitly rejected the application of *Turner* to court access claims, albeit for different reasons.

In *Griffin v. Coughlin*, 743 F.Supp. 1006, 1022 n. 15 (S.D.N.Y. 1990), the court held that the *Turner* factors are appropriately applied only to those rights "for which the original interpretation arose outside a prison setting," unlike court access, a right that is chiefly an artifact of the restrictions imposed by incarceration. The problem with this argument is that there are plenty of court access cases that arise outside prison. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 851 (5th Cir. 1991); *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422, 1427-28 (8th Cir. 1986); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260-61 (8th Cir. 1984). The historical accident that prisoners' court access cases may have been decided earlier than those of non-prisoners hardly seems a convincing basis for distinguishing the right to court access from other rights in which the time sequence was different. Moreover, the premise that the "original interpretation" of the right of court access arose in prison cases is itself questionable. Some courts have traced the right (if not the precise phrase "access to courts") as far back as 1907. *See Ryland v. Shapiro*, 708 F.2d 967, 971 (8th Cir. 1983), *citing Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).

In *Abdul-Akbar v. Watson*, 775 F.Supp. 735, 748 (D.Del. 1991), the court held that *Turner* does not apply because the right of court access places affirmative obligations on prison officials, and the *Turner* standard applies only to restrictions on rights. This distinction, too, is problematical. In the regimented setting of prison life, the exercise of most rights—including correspondence, marriage, and religious observance, to which the Supreme Court has already applied the *Turner* standard—places affirmative obligations on prison officials, e.g., to hire clergy and provide for delivery of mail.

McCarthy v. Madigan provides support at least in dictum for a third approach: that the fundamental role of court access in preserving all rights makes it qualitatively different from other rights and justifies excepting it from the "one size fits all" approach of *Turner* and *Washington v. Harper*. This approach has the virtue of concreteness and practicality and does not rely on distinctions that may not survive close analysis.

In Forma Pauperis

Prisoners' Supreme Court string ran out in *Denton v. Hernandez*, 112 S.Ct. 1728 (1992), in which the Court tried and seemingly failed to give content to its prior holding that "claims describing fantastic or delusional scenarios" are sufficiently

"baseless" to be considered frivolous, and therefore ineligible for *in forma pauperis* status, under 28 U.S.C. §1915(d). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

Mr. Hernandez had filed several civil rights suits alleging that he had been drugged and raped 28 times by both inmates and staff members in various California prisons. He did not claim to remember any of these incidents, but inferred most of them from the presence of needle marks on his body and fecal and semen stains on his clothes. However, three of the incidents were supported by affidavits from other prisoners who stated that they witnessed the plaintiff being sexually assaulted by other prisoners.

The district court dismissed the plaintiff's claims as frivolous on the ground that, considered together, his allegations were "wholly fanciful." A divided panel of the Ninth Circuit reversed, with one judge holding that a claim may not be dismissed as frivolous on factual grounds unless the factual allegations are in conflict with facts that are subject to judicial notice. 861 F.2d at 1426. One judge concurred in the result on procedural grounds, and the other panel member (a Third Circuit judge sitting by designation) dissented, emphasizing that the plaintiff had been transferred from prison to a mental hospital for psychiatric treatment and arguing that the purpose of prisoner civil rights actions "should not be prostituted by the hallucinations of a troubled man."

The Supreme Court granted *certiorari* and vacated the judgment in light of *Neitzke v. Williams*, 490 U.S. 319 (1989). On remand the appellate judges adhered to their views, with one modification: the author of the majority opinion stated the general standard for dismissal as "delusional" or "hallucinatory" is whether the complaint "rests upon facts which the court knows could not have occurred." Contradiction of judicially noticeable facts is "one useful standard" in determining whether allegations are "fanciful." 929 F.2d at 1376. The Supreme Court again granted *certiorari* "to consider when an *in forma pauperis* claim may be dismissed as factually frivolous under §1915(d)." 112 S.Ct. at 1732.

The Supreme Court vacated and remanded, rejecting the appeals court's reasoning and stating that "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." 112 S.Ct. at 1733. However, the Court provided little guidance to the lower courts in determining whether allegations are "irrational," "incredible," "fanciful," "delusional" or "hallucinatory." It stated that "the district courts, who are 'all too familiar' with factually frivolous claims,...are in the best position to determine which cases fall into this category." *Id.* at 1734. Accordingly, it held that the appeals court had erred by reviewing the district court's finding of frivolousness *de novo*, and should instead have reviewed the case only for an abuse of discretion. The case was remanded for "proceedings consistent with this opinion." It may still be open to the appeals court to find that the district court did abuse its discretion.

Thus, after two Ninth Circuit opinions and two trips to the Supreme Court, there is still no resolution of whether this case, filed in 1984, will be permitted to proceed *in forma pauperis*. Nor has the Supreme Court provided any meaningful guidance to the lower courts in making the initial decision of factual frivolousness.

The difficulty of this question in some cases cannot be overstated, since the reality of American prison life approaches the "fantastic" or "delusional" more often than anyone wishes to acknowledge. *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (awarding damages against officer who verbally taunted paraplegic prisoner, waved a knife in his face, and extorted food from him); *Oses v. Fair*, 739 F.Supp. 707, 709 (D.Mass. 1990) (awarding damages to a prisoner against an officer who struck him with a gun, stuck the gun barrel into his mouth, and made him kiss the officer's wife's shoes).

The practical effect of the decision may be to insulate from review unjustified dismissals of possibly meritorious prisoner complaints. The federal appeals courts regularly reverse lower court decisions holding prisoner claims (usually *pro se* complaints) frivolous even though they clearly state well-recognized constitutional claims. *See, e.g., LaFevers v. Saffle*, 936 F.2d 1117, 1119-20 (10th Cir. 1991) (denial of religious diet); *In re Cook*, 928 F.2d 262 (8th Cir. 1991) (denial of medical care); *Frazier v. DuBois*, 922 F.2d 560, 561-62 (10th Cir. 1990) (transfer in retaliation for constitutionally protected activities); *Abdul-Akbar v. Watson*, 901 F.2d 329, 334 (3d Cir. 1990 (denial of access to courts); *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir. 1990) (denial of medical care); *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990 (knowing failure to protect from other inmates). It appears in many such cases that the district court simply paid too little attention to the actual allegations of the prisoner's complaint, did not seriously consider their legal viability, or made credibility judgments that are not appropriate at that stage of the proceeding. *See Brownlee v. Conine*, 975 F.2d 353, 355 (7th Cir. 1992) (Posner, J.) ("Most prisoner civil rights cases are frivolous, but district judges, busy as they are, must not assume that all are and dismiss them by note. They may not throw out the haystack, needle and all.")

The Supreme Court's endorsement of a less exacting standard of appellate review will most probably lead to more affirmances of such dismissals, resulting both in injustice to the affected individuals and to a further deterioration of quality control in the face of a significant pattern of perfunctory lower court adjudication.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Telephones/Assistance of Counsel/Medical Care

Tucker v. Randall, 948 F.2d 388 (7th Cir. 1991). At 390-91:

> *Denying a pre-trial detainee access to a telephone for four days would violate the Constitution in certain circumstances. The Sixth Amendment right to counsel would be implicated if plaintiff was not allowed to talk to his lawyer for the entire four-day period.... In addition, unreasonable restrictions on prisoner's [sic] telephone access may also violate the First and Fourteenth Amendments.*

Deliberate nontreatment of broken ribs and hand for nine months presents a clear Eighth Amendment violation. The plaintiff is unable to investigate personally because he is in a different facility from the one in which the claim arose. The case will involve conflicting medical evidence. For these reasons, counsel should be appointed on remand.

Searches—Person—Visitors and Staff

Cochrane v. Quattrochi, 949 F.2d 11 (1st Cir. 1991). Strip searches of visitors must be justified by "some as-yet undefined 'level of *individualized* suspicion.'" (Citation omitted.) The plaintiff was subjected to a strip search when visiting her father, allegedly because a confidential informant had indicated that she had smuggled in drugs. The plaintiff's father had previously accused the defendant of providing him with

drugs and the defendant had allegedly responded, "I'm going to get you for that."

A directed verdict for the defendant after the plaintiff's case was improper. A reasonable jury could have found that the strip search was conducted in retaliation for the plaintiff's father's allegations, and therefore without individualized suspicion, based on the plaintiff's testimony plus the defendant's testimony that he could not remember the name of the informant until the morning of the trial, and the fact that he vouched for the informant's credibility only in general terms.

Procedural Due Process—Property

Freeman v. Dept. of Corrections, 949 F.2d 360 (10th Cir. 1991). The plaintiff alleged that prison officials confiscated his stereo and refused to return it, his administrative grievances were unsuccessful, and the small claims court never responded to his suit despite repeated inquiries. Subsequently, prison officials induced him to drop his suit by promising to give him his stereo back, but did not do so.

The plaintiff's due process claim should not have been dismissed as frivolous. He set forth "specific facts suggesting that the state post-deprivation remedies were effectively denied to him." (362) The existence of a statutory remedy may create a presumption of adequate due process, but it is not conclusive.

Personal Property/Religion/ Appointment of Counsel/Equal Protection/Procedural Due Process

Abdullah v. Gunter, 949 F.2d 1032 (8th Cir. 1991). The plaintiff tried to donate $2 to a mosque in Lincoln, Nebraska, and prison officials forbade the donation pursuant to policy.

The district court should have appointed counsel. Once the court determines that a claim is neither frivolous nor malicious, the court must determine the plaintiff's need for counsel and the benefit to plaintiff and the court from the assistance of counsel. This inquiry is governed by "the factual complexity of the case, the ability of the indigent to investigate the facts, the existence of conflicting testimony, the ability of the indigent to present his claim and the complexity of the legal issues." (1035, citation omitted.) The plaintiff had the burden of showing that the policy was not reasonably related to legitimate penological interests. Since there were genuine issues of material fact as to some of the *Turner* factors, the case was both legally and factually complex. The plaintiff lacked sufficient resources to investigate the relevant facts, e.g., "the extent to which the prison policy actually controlled the flow of inmate funds and illegal activities, the impact of permitting Zakah on the prison system, and the existence or absence of ready alternatives to the regulation." (1036) The fact that the case was to be tried to a jury also supported the appointment of counsel.

Use of Force/Discovery/ Appointment of Counsel

Murphy v. Kellar, 950 F.2d 290 (5th Cir. 1992). The plaintiff alleged that as a result of his filing of grievances he was beaten and otherwise abused. The district court dismissed because he could not sufficiently identify the defendants. However, he provided some identifying information and explained that he could not do better because they were not wearing their name tags and because he was punished for his efforts to identify them more fully. The district court is directed to allow him to conduct discovery, e.g., of duty rosters and personnel records.

The district court is also directed to *consider* appointing counsel based on the fact that "Murphy is a prisoner and those he is trying to identify are prison officials" and "competent discovery would allow the court to efficiently and conclusively determine whether Murphy is able to adequately identify his alleged attackers...."

Medical Care/Damages/Jury Instructions and Special Verdicts

Warren v. Fanning, 950 F.2d 1370 (8th Cir. 1991). The plaintiff complained for a year about a foot problem before the prison's contract physician sent him to a specialist, who rendered a different diagnosis and provided different treatment. The contract physician's trial testimony "reveals an attitude towards Warren's medical needs that reasonably could be viewed as indifferent, if not contemptuous." (1373) A jury verdict finding an Eighth Amendment violation is therefore upheld.

Ex Post Facto Laws/Good Time

Arnold v. Cody, 951 F.2d 280 (10th Cir. 1991). The plaintiff was provided with "emergency time credits" under the Oklahoma Prison Overcrowding Emergency Powers Act in effect at the time of his offense. He was then deprived of them by subsequent statutory amendment which denied those credits to persons who have been denied parole. These emergency credits would be applied only in the event of a future overcrowding emergency.

The statutory amendment constituted an *ex post facto* law as applied to the plaintiff and he was entitled to have his emergency credits calculated as of the time of the offense.

Pre-Trial Detainees/Protection from Inmate Assault/Discovery

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992). The district court should not have granted summary judgment without first ruling on the plaintiff's motion to compel discovery, e.g., the production of the jail's classification procedures and history of violent incidents in the jail.

Law Libraries and Law Books

Gluth v. Kangas, 951 F.2d 1504 (9th Cir. 1991). Since the defendants submitted no evidence of the actual operation of their policy, and the plaintiffs submitted unrebutted evidence of unconstitutional conditions, summary judgment was properly denied to the defendants and granted to the plaintiffs.

Inmates denied physical access to the law library are entitled to help from trained legal assistants (n. 1). Defendants' failure to establish any qualifications or provide any training for legal assistants entitled the plaintiffs to summary judgment. An injunction requiring training of inmate paralegals was not an abuse of discretion.

Undisputed evidence of arbitrary denials of, and restrictions on, law library access entitled the plaintiffs to summary judgment. At 1508: "It is the state's burden to provide meaningful access and to demonstrate that its chosen method is adequate."

A policy that "forces inmates to choose between purchasing hygienic supplies and essential legal supplies, is 'unacceptable.'" (1508) Under the policy, inmates were entitled to indigent status if they had less than $12 in their accounts and their income for the previous 30 days had not exceeded $12. It cost at least $46 to purchase necessary personal items and legal supplies and inmates had to purchase hygiene items in order to avoid punishment.

The district court did not abuse its discretion in ordering an indigency threshold of $46 and a minimum amount of supplies for indigents. At 1510:

> *While the Constitution does not require any particular number of pens or sheets of paper, it does require some.... The district court acted within its discretion when it concluded that numerical minimums are the best way to ensure that indigent inmates get the required pens and paper.*

Since the "core *Bounds* requirements" are not involved in the indigency policy claim, the plaintiffs were required to prove actual injury. At n. 2: This requirement was met by their uncontroverted allegation that

"[n]on-indigent inmates without funds have cases that go unfiled or have been dismissed due to the high cost of postage, legal copies, and legal supplies."

Procedural Due Process—Visiting/Crowding

Patchette v. Nix, 952 F.2d 158 (8th Cir. 1991). Regulations providing for specific visiting hours, combined with other regulations providing that visiting procedures may be temporarily modified or suspended under certain specified circumstances ("riot, disturbance, fire, labor dispute, space restriction, natural disaster, or other extreme emergency"), created a liberty interest protected by due process.

The court does not say what process was required in this case. Ordinarily, due process requires procedures of some sort, but the main concern of this opinion is whether the substantive standards in the regulation were followed.

Religion—Practices

McKinney v. Maynard, 952 F.2d 350 (10th Cir. 1991). The Native American plaintiff alleged that he was denied his medicine bag, required to cut his hair, denied an exemption from the grooming code, and denied the right to build a sweat lodge. His claim should not have been dismissed as frivolous, since prisoners were permitted to possess artifacts of other religions, and since the plaintiff alleged he was denied all means of religious expression.

Crowding/Summary Judgment

Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991). The plaintiff's verified complaint, which described allegedly unconstitutional prison conditions, was based on personal knowledge, and set forth specific admissible facts, should have been considered in response to defendants' summary judgment motion.

At 824-25:

> *It is clear that double or triple celling of inmates is not* per se *unconstitutional... But, overcrowding accompanied by unsanitary and dangerous conditions can constitute an Eighth Amendment violation, provided an identifiable human need is being deprived.*

Allegations of crowding combined with unsanitary conditions, insufficient showers, flooding with sewage from leaking toilets, deprivation of blankets and coats, and infestation of insects and vermin raised a genuine factual issue under the Eighth Amendment.

The plaintiff's failure to allege harm resulting from the crowded and unsanitary conditions did not require dismissal of his complaint. At 825: "It seems apparent that psychological harm could be inferred,..., as could an increased likelihood of illness and violence."

Evidence that prison officials had been placed on notice of unlawful conditions supported a finding of deliberate indifference. At 826: "...[O]nce prison officials become aware of a problem with prison conditions, they cannot simply ignore the problem, but should take corrective action when warranted." The evidence consisted of published reports concerning prison conditions, grievances that the plaintiff and other prisoners had allegedly filed, and inspection reports.

Pre-Trial Detainees/Medical Care—Standards of Liability—Serious Medical Needs

Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991). The district court properly instructed the jury that a serious medical need is "one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." (351)

Procedural Due Process—Administrative Segregation

Layton v. Beyer, 953 F.2d 839 (3d Cir. 1992). New Jersey regulations create a liberty interest in staying out of the "Management Control Unit" (administrative segregation). At 847: "...the inmate has a reasonable expectation that if he never poses a threat to others, to property, or to the operation of a facility, he will remain free of the restrictive confinement of M.C.U. and Prehearing M.C.U." The court views *Kentucky Dept. of Corrections v. Thompson* as holding that regulations must eliminate any discretion to apply criteria other than the regulations' substantive predicates. It rejects the view that under *Thompson*, "the official action must be mandated *whenever* the relevant substantive criteria have been met" (848) (emphasis in original). This interpretation reconciles *Thompson* and *Hewitt v. Helms*.

Use of Force/Training

Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992). Evidence that officers admitted they were frequently called on to deal with mentally and emotionally disturbed and disabled persons, but that they could not remember their training on that subject, combined with expert testimony as to the adequacy of their training, raised a factual issue precluding summary judgment concerning the adequacy of the municipality's training.

Recreation and Exercise/Qualified Immunity

Mitchell v. Rice, 954 F.2d 187 (4th Cir. 1992). The plaintiff, who had an extensive and continuing record of assaultive behavior and had already been placed in "maximum custody assigned to intensive management," was subjected to 32 months of arm and leg restraints whenever he left his cell, and was denied any out-of-cell recreation or exercise for 18 of them.

The defendants were not entitled to qualified immunity on this record. It was established that though denial of out-of-cell exercise is not *per se* cruel and unusual, "generally a prisoner should be permitted some regular out-of-cell exercise." (191, footnote omitted.) At 192: "It seems proper to require a...showing of infeasibility of alternatives, excepting financial justifications, before granting qualified immunity." The plaintiff's unmanageable, violent nature may present sufficiently exceptional circumstances to justify the deprivation. At 193: "A detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise would need to precede a grant of qualified immunity in a case such as this."

Municipalities/False Imprisonment/Procedural Due Process

Oviatt by and through Waugh v. Pearce, 954 F.2d 1470 (9th Cir. 1992). The schizophrenic plaintiff waited four months for arraignment because of a court clerk's error. A jury awarded him $65,000 on his constitutional and tort claims.

Freedom from unjustified incarceration is a constitutionally based liberty interest. In addition, liberty interests were created by state statutes requiring release after 60 days if no trial has been held and requiring arraignment within 36 hours absent good cause. Under *Mathews v. Eldridge*, the sheriff's failure to provide an internal procedure for keeping track of whether inmates had been arraigned or otherwise appeared in court was unconstitutional.

DISTRICT COURTS

Women/Equal Protection

McCoy v. Nevada Dept. of Prisons, 776 F.Supp. 521 (D.Nev. 1991). Prison gender discrimination cases are governed by the "heightened standard" that permits discrimination only if it serves important governmental objectives and is substantially

related to achieving them. Female prisoners must be treated "in parity" with male prisoners (523). The *Turner* reasonable relationship test does not apply (n. 2).

Evidence that male inmates had access to a wider variety of educational and vocational training programs, better recreation programs and more facilities per capita, more privileges in connection with visiting, more lock-out time, unmonitored telephones, better visiting conditions, more ice machines, better law libraries, better commissary services, better building maintenance and more clothing, barred summary judgment for the defendants. Summary judgment is granted as to various other claims as to which the plaintiffs submitted no evidence of disparate treatment.

AIDS/State Law in Federal Courts/ Privacy/Deference

Nolley v. County of Erie, 776 F.Supp. 715 (W.D.N.Y. 1991). Jail officials placed a red sticker on the jail medical and transportation record of the HIV-positive plaintiff, placed her in a unit for the mentally disturbed and suicidal, and barred her from the law library and religious services.

There is a private cause of action under state statutes protecting the confidentiality of HIV-related information. The red sticker policy violated the statute and the regulations promulgated under it.

The constitutional right to privacy "includes protection against unwarranted disclosure of one's medical records or condition." (729) Prisoner privacy claims are governed by the *Turner* reasonable relationship standard. The red sticker policy is not reasonably related to protecting staff from infection because it is underinclusive, i.e., there are clearly inmates who are infected but not known to be infected. There is a readily available (and superior) alternative—using universal precautions. Since universal precautions had later been instituted, there would be minimal impact on staff and others.

The plaintiff's segregation violated the state statute. It also was unreasonable under *Turner* because it was so "remotely connected" to legitimate goals. It is a prisoner's behavior, not the mere fact of HIV infection, that makes transmission likely. In addition, the segregation was contrary to the jail's own policy, rendering it an "exaggerated response." (736)

The plaintiff's segregation denied due process. It is more analogous to placement in a mental hospital than to security-related segregation because it involved a stigma similar to mental hospital confinement. The deranged behavior of the other inmates rendered confinement with them "qualitatively different from the punishment normally suffered by a person convicted of a crime." (738) In addition, the plaintiff's confinement was indefinite and not subject to periodic review. Jail regulations providing for mandatory review "to determine whether the reasons for initial placement in the unit still exist" and stating that housing decisions will not be made solely on the basis of HIV status created a liberty interest in staying in general population.

The plaintiff's exclusion from the law library, denial of face-to-face access to inmate law clerks, and relegation to a copying system that required her to identify specific materials for copying denied access to courts. At 741: "By now choosing to alter these practices, defendants have essentially admitted that the prior practice was misguided." The practice also was unreasonable under the *Turner* test.

The plaintiff's exclusion from religious services violated the First Amendment.

Use of Force/Administrative Segregation—High Security

Friends v. Moore, 776 F.Supp. 1382 (E.D.Mo. 1991). The plaintiff suffered a bloody nose as a result of being subdued in his cell by a "movement team" because he would not give up his clothing to be put in a strip cell. The use of force did not violate the Eighth Amendment.

The plaintiff was also stripped and left naked and wet in an outdoor recreation area for less than two hours. The Eighth Amendment was not violated because the defendants did not intend to punish but only to restore order and to clean up the plaintiff's cell, which he had flooded. There was no evidence that he was cold or in discomfort (even though a video-tape showed him pacing "like a caged lion").

This opinion is notable for its depiction of mutually abusive behavior by staff and inmates in a high-security unit. It also notes that an officer was assigned to examine the plaintiff's feces for a missing handcuff key. It is also another case in which the video camera somehow malfunctioned at the point when the incident started.

Medical Care/Injunctive Relief

McCargo v. Vaughn, 778 F.Supp. 1341 (E.D.Pa. 1991). The court had previously issued a preliminary injunction requiring prison officials to establish a system for diabetic inmates to receive special diets and to assure them access to insulin. It then ordered that the injunction be made permanent, and the defendants moved to alter or amend on the ground that it provided relief to persons who were nonparties.

An injunction can benefit persons who are nonparties to the litigation even if no class has been certified. At 1342: "Where as here an injunction is warranted by a finding of defendants' outrageous unlawful practices, the injunction is not prohibited merely because it confers benefits upon individuals who were not named plaintiffs or members of a formally certified class."

Protection from Inmate Assault

Smith v. Artison, 779 F.Supp. 113 (E.D.Wis. 1991). An allegation that the plaintiff warned the sheriff about threats of assault he had received from other inmates, the sheriff disregarded the warnings, and the plaintiff was subsequently assaulted was not frivolous under the deliberate indifference standard.

Procedural Due Process—Visiting/Qualified Immunity

Van Poyck v. Dugger, 779 F.Supp. 571 (M.D.Fla. 1991). Prison officials denied visiting rights to the fiancee of the plaintiff, a death row inmate, because she had worked for six months as a nurse in a jail and her knowledge of jail operations allegedly made her a security risk. The plaintiff alleged that he was being retaliated against because he had murdered a correctional officer and because of his legal activities.

There is no absolute right to visit, and the denial of access to a particular visitor is not protected by the due process clause unless state law creates a liberty interest. Florida visiting regulations create such an interest. They provide substantive predicates (an exhaustive list of reasons permitting denial of visits from particular persons) and mandatory language ("shall" all over the place).

The defendants are not entitled to qualified immunity because it is clearly established that it is unlawful to deny an inmate visiting privileges without legitimate penological objectives.

Accidents/Negligence, Deliberate Indifference and Intent

Choate v. Lockhart, 779 F.Supp. 987 (E.D.Ark. 1991). The defendant prison officials "demonstrated reckless disregard for plaintiff's safety when he was directed to perform work on a 45 degree angle plywood roof, without toe boards or scaffoldings installed, when plaintiff, among other things possessed a recognizable infirm right leg." (988) The defendants included the director of the Arkansas Department of Correction, for whose personal use a garage was being constructed. Inmates had complained about the working conditions and had been told to "shut up and go back to work."

Protection from Inmate Assault/ Color of Law

Payne v. Monroe County, 779 F.Supp. 1330 (S.D.Fla. 1991). The county government could not be held liable for an inmate assault because there was no evidence that it knew or should have known that the assailant would attack the plaintiff. The court ignores the plaintiff's allegation that crowding created an unreasonable risk of assault, focusing instead on the risk to him from the particular assailant.

The Wackenhut Corporation acted under color of state law since it "was authorized to exercise supervision and control over the functions of the Monroe County Jail." (1335) The claim against it is dismissed because of the lack of allegations of deliberate indifference.

Law Libraries and Law Books/ Pre-Trial Detainees

Kaiser v. County of Sacramento, 780 F.Supp. 1309 (E.D.Cal. 1991). The county policy with respect to pre-trial detainees representing themselves was to provide a "pro per" information package, copies of the appropriate statutory sections, information packets pertaining to various motions, habeas corpus, §1983 actions and other matters, plus a cell delivery system for law books permitting generalized requests for books in a certain area (with a one-day turnaround for persons defending themselves), and Shepardizing. The plaintiffs submitted evidence that the system "work[s] more poorly in practice" than in theory, but the court finds that it satisfies their Sixth Amendment rights for purposes of the application for a preliminary injunction. Further evidence of the system's failure might justify a permanent injunction.

For convicted inmates, to whom *Bounds* clearly applies, a paging system by itself is clearly unconstitutional. While paging plus legal assistance may satisfy *Bounds*, the defendants' "assistance"—obtaining general references, narrowing the scope of legal inquiries, and providing compiled packages of forms and legal materials—may not meet the standard. The court denies broad preliminary relief because the plaintiffs have not shown the extent of the harm to the plaintiff class and have not proposed a remedy with practical specifics. However, it orders the posting of a complete list of available legal reference materials.

Pro Se Litigation

Patrick v. Staples, 780 F.Supp. 1528 (N.D.Ind. 1991). At 1532:

> *As this massive Report and Recommendation clearly indicate, the disposition and management of* pro se *prisoner litigation is just plain hard, time-consuming work. The sooner that those who record time consumption probabilities to such cases learn that lesson the better all of us in the federal trial judiciary will be.*

Intentional refusal to let the plaintiff see a doctor when he was obviously sick stated an Eighth Amendment claim.

Allegations that the plaintiff was not permitted to obtain his medication on one day stated an Eighth Amendment claim; if the defendant "deliberately interfered with his medically prescribed treatment for the purpose of causing him unnecessary pain, she could be subject to liability even though he suffered no apparent injury."

Allegations that the plaintiff was assigned to a job or denied medical care because of his race stated an equal protection claim. Other such allegations, unsupported by any specific factual allegation demonstrating racial animus, did not state an equal protection claim. (1548)

AIDS/Privacy

Lipinski v. Skinner, 781 F.Supp. 131 (N.D.N.Y. 1991). The plaintiff was arrested, tested for HIV infection without his consent, and jailed; his positive test results were disclosed by the doctor to the State Police, who had asked for the test, and by them to jail authorities. The information then showed up in the local newspaper, allegedly because jail staff disclosed it.

The newspaper's editorial writer was not entitled under the First Amendment to "absolute immunity" from discovery. The newspaper's journalists, but not its editors, were entitled to "qualified immunity." Discovery from the editors must be limited so as to minimize its impact on the journalists.

Medical Care—Standards of Liability—Deliberate Indifference

Diaz v. Broglin, 781 F.Supp. 566 (N.D.Ind. 1991). At 574: "Although negligence alone, or simple medical malpractice, is insufficient to state a claim for relief,...courts have begun to recognize that repeated, long-term negligent treatment of a prisoner's medical condition, rather than intentional actions, may amount to deliberate indifference...." The plaintiff's medical care claims are rejected for lack of factual substantiation.

Mental Health Care—Psychotropic Drugs

Breads v. Moehrle, 781 F.Supp. 953 (W.D.N.Y. 1991). The court briefly recounts the history of defendants' failure to respond to a *pro se* case.

Defendants were not entitled to summary judgment on plaintiff's allegations that he was subjected to involuntary psychotropic medication while in jail. An affidavit alleging that the plaintiff was a "disciplinary nightmare" and that the drugs were administered by a "qualified medical aide following the orders of the facility's psychiatrist" was insufficient. *Washington v. Harper* requires that the prisoner have "a serious mental illness" and be "dangerous to himself or others," and that the treatment be "in the inmate's medical interest." (957) It also provides for procedural requirements, which are not addressed at all on this record.

Good Time/Habeas Corpus

Doughty v. U.S. Board of Parole, 782 F.Supp. 653 (D.D.C. 1992). The District of Columbia Good Time Credits Act has been amended to award credits to D.C. offenders housed in federal prisons outside the District.

The plaintiff would not be required to exhaust his administrative remedies with respect to deprivation of good time, since the defendants had declared unequivocally in open court that they would not give him any good time back.

The plaintiff's claim concerning good time should have been brought as a *habeas corpus* petition in the district where he was held and not as a suit for declaratory and injunctive relief. *Preiser* is cited by analogy. The court rejects the "creative" argument that as a D.C offender the plaintiff is in the custody of the Attorney General no matter where he is incarcerated.

Procedural Due Process—Disciplinary Proceedings/Summary Judgment

Russell v. Coughlin, 782 F.Supp. 876 (S.D.N.Y. 1991). Incarcerated *pro se* litigants are entitled to notice of the consequences of failure to respond to a summary judgment motion. If they get it and still don't respond, the moving party is not automatically entitled to summary judgment; the court must determine whether the facts set forth in the moving party's statement of undisputed facts warrant summary judgment.

A prison official could not be held liable for an unlawful disciplinary proceeding based on having appointed the hearing officers, absent any evidence that he was involved in or aware of their wrongful conduct or knew that one of them had prior involvement with the case.

The hearing officer could not be held liable for declining to call witnesses when he claimed, without dispute, that the prisoner admitted that they would be unnecessary.

The hearing officer was not entitled to

summary judgment on his failure to assess independently the credibility of confidential informants. He was not entitled to qualified immunity either.

AIDS/Medical Care—Standards of Liability—Deliberate Indifference

Myers v. Maryland Div. of Correction, 782 F.Supp. 1095 (D.Md. 1992). The court notes that it appointed counsel both for *pro se* inmates seeking the segregation of HIV-positive inmates and for HIV-positive inmates who intervened as defendants.

The plaintiffs' claims have largely been resolved by operational changes by the defendants, who now provide (1096):

> *(1) extensive education for inmates on AIDS-related issues, (2) HIV testing for all incoming inmates who request such testing, (3) testing for all inmates in the standing population who request to be tested if a physician has made a clinical judgment that testing is appropriate and (4) involuntary testing for inmates who have been found guilty of the violation of an institutional regulation which causes potential exposure to the HIV virus.*

The parties agreed that the plaintiffs must show a "pervasive risk of harm" as well as deliberate indifference to that risk. The "pervasive risk" was demonstrated "in the view of any fair-minded person" by defendants' experts' concession that 60 to 70 inmates annually contract HIV and that an uninfected inmate has a 1 in 200 chance of contracting HIV during each year of his prison stay. However, plaintiffs failed to present evidence of deliberate indifference, since defendants' policies "fall well within the norm" of other state prison systems and "conform to applicable community standards outside of the prison context" and are based on the opinions of experts. The defendants' reasoned choice between the two alternatives of mandatory testing and separation versus voluntary testing and education must be given deference. ■

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Publications worth noting:

■ *Odyssey* is a quarterly magazine edited by Luke Janusz, a former Massachusetts state prisoner. According to Janus, the magazine is published as a way of "establishing a dialogue between prisoners and members of the community."

"In the absence of political representation and access to the media," says Janusz, "prisoners must seek new ways to reopen a meaningful dialogue."

A recent issue featured articles on cross-gender supervision, First Amendment rights for prisoners, the Salem witch trials, and an interview with attorney Max Stern who argued on behalf of inmates in *Rufo v. Inmates of Suffolk County Jail* in the Supreme Court. The magazine also included a number of essays, legal articles, political commentary, state legislative news, book reviews, and fiction and poetry by prisoners. The impressive roster of contributing writers included prisoners, an attorney, a staff writer for the *Boston Globe*, and a sheriff.

Odyssey is produced through the cooperative efforts of attorneys, journalists, prisoners' rights groups and others, but, according to Janusz, "the magazine belongs to prisoners." *Odyssey* is available for $16/year prepaid; $5 per single copy, from Box 14, Dedham, MA 02026.

■ *Prison Legal News* is a monthly newsletter published by Washington State prisoners Ed Mead and Paul Wright. *PLN* covers recent court decisions affecting prisoners' rights, prison news from around the world, and articles and analysis of prison issues from a progressive perspective. According to Wright, *PLN*'s goal is to "extend democracy to all" by helping prisoners help themselves through the legal system and by encouraging prisoners and their families to seek change in the prison system. For subscription details and/or a free sample copy, write *PLN*, P.O. Box 1684, Lake Worth, FL 33460.

"Dear Prison Project..."

The National Prison Project receives over 500 letters each week from prisoners. Many of those letters include legal questions which, unfortunately, we have neither the time nor the staff to answer individually. In order to give prisoners some of the information requested, we have decided to write an "advice" column, a sort of "Dear Abby" for prisoners on legal questions. In each issue of the NPP JOURNAL, *a different member of the legal staff will develop a composite question, drawing on the mail we receive (but not using a specific letter), and then will provide the answer to the question. This issue's "Dear Abby" is NPP law fellow Mohamedu Jones.*

Dear Prison Project:

I am incarcerated in a state prison that is real overcrowded. We are double and triple-celled. I believe that this is a violation of the Eighth Amendment to the Constitution, but a fellow inmate says that being double and triple-celled is not unconstitutional. Who is right?

Jam Packed Inmate

Dear Jam Packed:

Your friend is correct that double or even triple-celling is not *per se* unconstitutional. Two things must exist to establish that overcrowding or other prison conditions are unconstitutional: 1) there must be a serious deprivation of a basic human need as a result of the conditions and, 2) prison officials must be deliberately indifferent to these conditions. This means that the overcrowding must be accompanied by other factors such as unsanitary and dangerous conditions leading to the deprivation of identifiable human needs. Examples are those instances where the conditions result in the lack of medical care, dangers from fire, the spread of disease, or cause psychological harm and increased likelihood of illness and violence. Additionally, prison officials have to be aware of the conditions and fail to take reasonable corrective action. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392 (1981); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1977); *Tillery v. Owens*, 907 F.2d. 418 (3rd.Cir. 1990); *Palmigiano v. Garrahy*, 639 F.Supp.244 (D.R.I. 1986); *Hoptowit v. Ray*, 682 F.2d. 1237,1239 (9th Cir.1982).

(cont'd from page 5)

Just to make sure federal officials got the message, farmers plowed the words "NO PRISON" 150 feet high into the land for the benefit of government photographers who flew over to take photos for the environmental impact statement.

A Different Definition of "Progress"

Progress, of course, means different things to different people. Homeowners opposed to the prison say that to define progress as "development" is to define it too narrowly. To them, it may mean the destruction of their way of life. One local resident, Don Harrold, wrote, "Isn't that the way it's always been here? Sell off the land for strip mines, dumps, anything to make money. Promise jobs. Get rich.

"Progress," he went on, "must now mean taking care of the land, not exploiting it. Progress must mean support for farms and small businesses....If you are aware of the value of what you have here, you must be aware that you have to fight to keep it." ■

**The Bureau plans to open 47 new prisons and expand 16 existing ones between 1992 and 1995. BOP projects that its inmate population will swell from about 60,000 in 1991 to over 98,000 by 1995. From GAO Reports, May 1992.*

Jan Elvin is the editor of the NPP JOURNAL.

For the Record

■ Health care in the nation's prisons is in critical condition, according to a group of medical organizations in the July 1, 1992 issue of *Annals of Internal Medicine*. The situation is a "public health problem," according to the American College of Physicians (ACP), the American Correctional Health Services Association (ACHSA), and the National Commission on Correctional Health Care (NCCHC) in their article, "The Crisis in Correctional Health Care: The Impact of the National Drug Control Strategy on Correctional Health Services." The U.S. inmate population has doubled in the last decade, the report says, overcrowding correctional facilities and overwhelming the correctional health care system.

Most inmates are substance abusers who are more susceptible to communicable diseases such as AIDS, hepatitis and tuberculosis. Nearly 10 million inmates, possibly carrying infectious diseases, are released back into the community each year.

The groups assert that people in prisons and jails must receive health care that meets the currently accepted standard of care in the community and adequate resources must be dedicated to providing that care. No less can be tolerated—ethically or legally.

They make specific recommendations to improve the system:

- Evaluate the effectiveness of the National Drug Control Strategy and consider one that puts less emphasis on incarceration and more on prevention.
- Increase funding to provide comprehensive services to treat substance abuse and intravenous-drug-related illness. Correct deficiencies in meeting the health needs of female inmates and mentally ill inmates.
- Recognize correctional health care as an integral part of the public health sector.
- Implement and maintain standards of health care delivery in all correctional facilities.
- Change the current correctional health system from reactive "sick call" to one of proactive screening, early disease detection and treatment, and health promotion and disease prevention.

Unless substantial changes are made in correctional health care, the groups warn, the magnitude of health problems threatens to overwhelm the substantial gains made in correctional health care over the past two decades.

"Those of us who work in correctional health are proud of the recent gains that we have made in service to our patients, but we fear that all may be lost as our resources do not keep pace with the burgeoning population," says Kim Marie Thorburn, M.D., president of ACHSA.

"Providing quality health care in our nation's jails, prisons, and juvenile detention facilities contributes to the health of our communities," says Robert Burmeister, Ph.D., president of NCCHC. "For this reason, all of us must work to assist correctional institutions in meeting nationally recognized standards of care for the delivery of health care services."

For a free single copy of the paper, contact Linda J. White, American College of Physicians, at 215/351-2840.

■ The importance of improving prison health care was also the subject of testimony presented by Carl C. Bell, M.D., chairman of the National Commission on Correctional Health Care, before a subcommittee of the U.S. House Appropriations Committee on April 28. Bell testified that "the federal government must act to improve health care provided to the incarcerated in order to protect the health of the nation's communities."

"Over one million Americans are incarcerated in the jails and prisons in America and 10 times that number will pass through correctional institutions in a year's time," said Bell. He cited statistics indicating that those behind bars suffer from a number of maladies—mental illness, substance abuse, tuberculosis and others—at a rate higher than that reported for the general population. "The opportunity exists to address their problems while they're incarcerated and return them, in a healthier state," he testified, "back to their community where they can hopefully live productive and healthy lives."

Bell urged the federal government to require the following: that all federal correctional facilities meet minimal standards for health care; that Congress consider continuing Medicaid and Medicare benefit eligibility for prisoners; that Congress create incentives for health professionals to enter the field of correctional health care, e.g., through student loans and federal aid; and that Congress do whatever possible to more closely integrate correctional health care programs with public and mental health programs in the community. Bell also commended a recent initiative by Congressman Louis Stokes (D., Ohio) to study violence in the community as a public health problem and find ways to effectively intervene.

For a complete copy of Dr. Bell's testimony by mail or by fax, contact Jamie Budd, National Commission on Correctional Health Care, 2105 N. Southport, Chicago, IL 60614, 312/528-0818.

Crowded Prisons and Jails Unable to Meet Needs of Mentally Ill

BY MARK LOPEZ AND CATHERINE CHENEY

The few community resources designed to ease the integration of the mentally ill into society are not meeting their needs. People with mental illnesses are often unable to conform their behavior to community standards, and frequently run into trouble when they are forced to live without treatment or support. Life on the streets for the mentally ill, harsh in and of itself, often leads to something even worse: jail or prison, where they are denied treatment and subjected to victimization.

The institutional problems presented by the influx of mentally ill inmates into jails and prisons have arisen chiefly because these facilities were not designed to provide mental health care. They are not equipped with the backup resources necessary to provide humane and therapeutic living conditions. Psychotic prisoners frequently suffer in prison because they do not understand their surroundings, and receive little or no medical or mental health treatment.

Prisons officials, despite their failure to design workable mental health policies and programs, are constitutionally obligated to provide necessary care to these inmates. In 1976, the Supreme Court held in *Estelle v. Gamble* that "elementary principles establish the government's obligation to provide medical care for those whom it is punishing with incarceration."[1] The Court found that "deliberate indifference to serious medical needs of prisoners"[2] violates the constitutional right of prisoners to be free from cruel and unusual punishment under the Eighth Amendment. *Estelle* referred to medical care for physical illness, but lower courts quickly extended the principle to "psychiatric care for serious mental or emotional illness."[3] To show a violation of the *Estelle* standard, prisoners must prove deliberate indifference to serious medical needs by showing "a pattern of...medical inadequacy that is so far reaching and consistent as to persuade [the court] that the mental health care efforts...reflect a systemic failure."[4]

It is often difficult to demonstrate that institutions have fallen below this standard. The Supreme Court has unilaterally limited its own control over the level of care provided to inmates by showing deference to state prison policies. Lower courts tend to be more willing to intercede on behalf of prisoners. Essentially, when prison administrators claim that their actions are based on a concern for security issues, the Supreme Court has maintained a hands-off posture. Virtually any action taken by a prison official, however, can be linked to some type of security interest.

A vivid example of the Court's deference to state officials is its 1990 decision in *Washington v. Harper*, 110 S.Ct. 1028 (1990). This case upheld a state's right to compel a mentally ill prisoner to take anti-psychotic medication "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[5] The conditions under which prisoners can be forced to ingest psychotropics are actually even broader than the language in *Washington v. Harper* suggests. The majority opinion also included in this subclass of prisoners those "who as a result of their illness, are gravely disabled,"[6] even if they were never adjudicated mentally ill or incompetent to make medical decisions. The regrettable result of this decision is that, rather than require officials to provide integrated treatment to mentally ill inmates, the Court has provided administrators with the opportunity to administer drugs as a means of behavior modification. While forced medication is not always a harmful or dangerous practice, it does open the door to the possibility of misdiagnosed or improperly administered medication being used to manage the mentally ill.

[The mentally ill] frequently run into trouble with the law when they are forced to live without treatment or support.

There is no quick fix for the problem of mental illness in prison. Offering medication without therapy or individualized treatment may stem the tide of immediate disruptive outbursts, but fails to address the long-term constitutional implications of housing inmates with mental illnesses in prisons that do not provide them with proper care.

Over the past several years, as prison conditions for mentally ill inmates have worsened, a body of case law has developed identifying the Eighth Amendment violations to which these inmates are subjected. Judges recognize the appalling and inhumane living conditions, but are sometimes hesitant to order the kinds of reforms necessary to alleviate the situation, or in the alternative, order that mentally ill inmates be cared for in separate facilities.

In *Langley v. Coughlin*, 715 F.Supp. 522, 546 (S.D.N.Y. 1989), the court poignantly described the failures in the mental health services provided to prisoners at a correctional facility in New York with a special unit for the mentally ill.

Among other things, the treatment unit was characterized by "dramatic outbursts of screaming, self-mutilation, attempted or staged suicides, throwing of feces and garbage, fires and other distressing behavior."[7] An injunction was issued designed to alleviate the harsh conditions.

Even worse conditions were found in Puerto Rico's prison system:

Psychotic mad men are kept for weeks and months, (some pre-trial detainees) caged like animals, without clothes, without medicines, forced to eat with their hands and in most cases without having been seen by a doctor....Suicides are alarmingly frequent, but not so staggering to the mind as the number of violent deaths that the court has reviewed. Raw sewage runs in dormitories and kitchens; toilets in all closed institutions do not work; prescriptions do not get filled; beds and mattresses are not provided, nor, for that matter, is soap, toothpaste, tooth brushes, or sufficient toilet paper. Food has to be destroyed everywhere because it has

been contaminated by rats or other vermin. Usually, people can not see a doctor unless the prison guards acquiesce....The only psychiatric screening that the overwhelming number of inmates receive is the subjective untrained evaluation of the prison guard. Overcrowding, the basic evil of each closed institution, is so intense that in some areas, such as the "Q" or quarantine section...where pre-trial detainees constitute the overwhelming majority, the inmate may have no more than fifteen (15) square feet of living space.[8]

Based on these facts, Judge Perez-Gimenez held that "solitary confinement of psychiatric patients without supervision, without treatment and without medication, is cruel and barbaric,"[9] and ordered that psychotics be removed from the prisons.

Despite the strong language in this opinion, change has been slow in coming. In 1986, the judge appointed two court monitors to work with state officials to remedy the noncompliance with his seven-year-old order. And in 1989 the First Circuit Court of Appeals affirmed contempt fines for noncompliance.[10] In that opinion and order, Judge Perez-Gimenez noted that "the record in these [prisoners' rights] cases establishes an appalling disregard by defendants not only of constitutional rights but of common decency in the incarceration of human beings...."[11] The court found that mentally ill prisoners were still being "abandoned for days and weeks"[12] in isolation cells. Among other remedies, the judge ordered defendants to remove the doors of the isolation cells, to provide prisoners daily access to medical staff, and to impose limits on the jail's population.[13]

Similar conditions were found at the State Correctional Institution in Pittsburgh, Pennsylvania, according to the district court opinion, affirmed by the Third Circuit, in *Tillery v. Owens*.[14] There, mentally ill prisoners were separated from the general population, housed in a unit described as "malodorous, filthy... and inadequately staffed."[15] An injunction was issued requiring the development of a comprehensive Mental Health Plan.

While state prisons across the country shamefully neglect the mentally ill, conditions in local jails are typically much worse. They have neither treatment programs in place nor the resources to develop them. At the same time, local jails have the greatest need for mental health services. Whether because of the shock of incarceration, or simply because of the number of persons arrested with long histories of mental illness, new arrestees are often very depressed or actively psychotic. In those jails where the mentally ill are not treated or closely monitored, they are susceptible to abuse by other inmates and acts of self-destruction. In one recent case, a man detained on a burglary charge hung himself with an ace bandage and a towel rack in an isolation cell where he had been held for a week. A few weeks before his death, he had tried to hang himself while in a "behavior modification module," but the psychiatrist who examined him after the incident labelled the attempt a "gesture."[16]

One reason for the high suicide rate is that mental illness often goes undetected in jails. A recent study of a random sample of 728 jail detainees who were given a diagnostic interview (designed by the National Institute of Mental Health) during intake and then followed up during their jail stay, found that of those who manifested severe mental illness, only one-third got treatment within one week of intake. Treatment was more likely to be given if the person had already received mental health treatment, if the person had schizophrenia rather then depression, and if the jail staff had documented the detainee's symptoms.[17] Many jail officials complain that wide-scale psychiatric testing is unreasonably costly and time consuming. However, alternatives to traditional psychological assessment techniques exist for use in jails with limited resources so that mentally ill detainees will be detected during intake procedures. For example, an instrument called a "Referral Decision Scale" (RDS) is designed to detect whether a person has a high enough probability of having a mental illness that referral for a diagnostic evaluation is appropriate. The RDS is short, reliable, and simple enough to be administered by trained correctional personnel.[18] Widespread use of such diagnostic tools could prevent the mentally ill from moving unnoticed and untreated through the jail system.

The cases and problems discussed here provide only glimpses of the suffering endured by the mentally ill while incarcerated. Although some reforms have been achieved through litigation, the real challenge in this area lies ahead. The goal of future litigation should be to encourage coordination with the mental health community to develop treatment programs for mentally ill inmates which will serve as more than drug-based behavior modification. Courts must send prison administrators a message that in order to provide minimally constitutional care they must create a safe and therapeutic environment.

When prison officials realize that the courts are serious about protecting the constitutional rights of these inmates, the sheer cost involved will send them with a message to lawmakers that the prison system is not equipped to care for the mentally ill. This may be the best way to encourage legislatures to devote the resources necessary to provide community-based therapy services intended to keep people with mental illnesses off the streets and, accordingly, out of prisons and jails. ■

Mark J. Lopez is an attorney with the National Prison Project. Catherine Cheney is a former NPP law clerk who is now a public defender in Seattle.

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[1] 429 U.S. 97 (1976).

[2] 429 U.S. at 104.

[3] *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3rd Cir. 1979).

[4] *Langley v. Coughlin*, 715 F.Supp. 522, 540-41 (S.D.N.Y. 1989).

[5] *Washington v. Harper*, 110 S.Ct. 1028, 1040 (1990).

[6] *Id.* at 1039.

[7] *Langley* at 540.

[8] *Feliciano v. Barcelo*, 497 F.Supp. 14, 18-19 (D.P.R. 1979).

[9] *Id.* at 35.

[10] *Morales-Feliciano v. Parole Bd. of Com. of P.R.*, 887 F.2d 1 (1st Cir. 1989).

[11] *Morales-Feliciano v. Hernandez Colon*, 697 F.Supp. 37, 39 (D.P.R. 1988).

[12] 697 F.Supp. at 43.

[13] *Id.* at 50-51.

[14] 719 F.Supp. 1256 (W.D.Pa. 1989), 907 F. 2d 418 (3rd Cir. 1990).

[15] *Id.* at 1303.

[16] *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1457 (9th Cir. 1988), *U.S. cert. denied* in 110 S.Ct. 1838.

[17] Teplin, "Detecting Disorder: The Treatment of Mental Illness Among Jail Detainees," 58 *Journal of Consulting and Clinical Psychology*, (1990) 2-233.

[18] Teplin and Schwartz, "Screening for Severe Mental Disorder in Jails: The Development of the Referral Decision Scale," 13 *Law and Human Behavior* 1 (1989).

Film Review: "Cancelled Lives"

BY JAN ELVIN

Cancelled Lives: Letters From the Inside is an educational film about life behind bars for television and for use in schools. It is based on personal letters written to family and friends by individuals serving time in prisons, jails, and youth facilities across the country. The letters reveal deep feelings; many, especially those written by young girls and boys, are painful and heartbreaking. The film was originally created to deter youngsters from crime, but the producers say that it has also been effective in sensitizing corrections officers, chaplains, and jail and prison volunteers to the emotions of the incarcerated.

In their letters, men, women, and teenagers describe their feelings upon entering such places as the Northern California Women's Facility, San Quentin, Soledad Training Facility, and Folsom Prison. The film shows actual footage of these institutions accompanied by music such as "There's No Way Out of Here," "I Fought the Law," and "Please, Mr. Jailer." The film concludes, ironically, with Rod Stewart's "Forever Young."

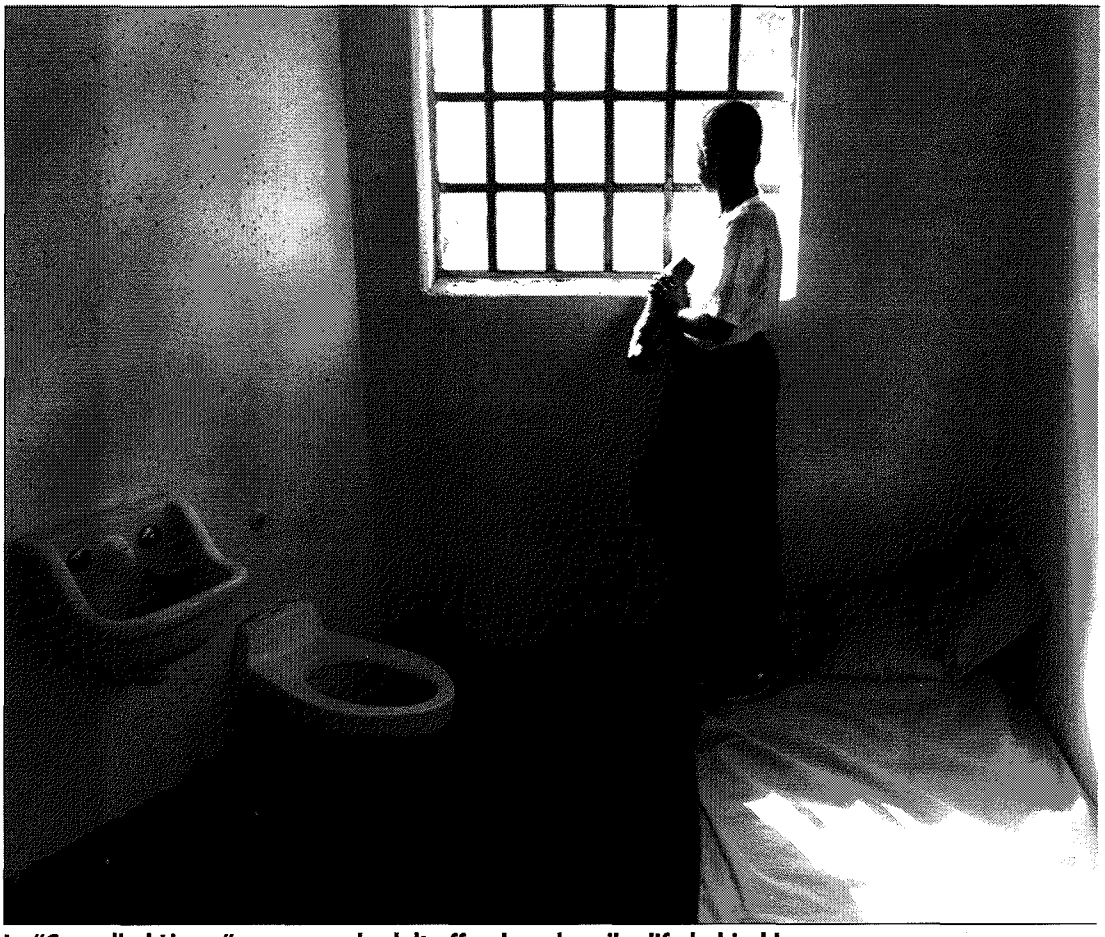
This film is no **Scared Straight**. There are no graphic horror stories or scenes of violence. The photography is vivid, but not shocking. What comes through the letters is a mixture of regret, fear, loneliness, despair, and most poignant of all, hope.

The letters are read on film by an array of Hollywood actors, including Kelly McGillis, Jimmy Smits, Peter Coyote, Mary Steenburgen, Alec Baldwin, Edward James Olmos, and Blair Underwood. A useful "Discussion Guide" accompanies the film, which offers pointers on how teachers should use the film in class. The guide suggests discussion points on drug addiction, the causes of criminal behavior, rules of conduct and ethics, and the role of television in glorifying violence.

The purpose of the film is "to eliminate the romanticized attitude toward crime and the harm it causes [the offenders'] families, [and] their victims." It does that well. It stresses, appropriately (especially for the younger audience), the role of individual choice in criminal behavior. However, the discussion guide would be improved by a recommendation that students look at the effects of racism and classism. Given the shocking fact that the United States has the highest incarceration rate in the world, and that African-American males are locked up at a rate almost five times that of Black males in South Africa, this is simply too important a point to overlook. Racism really is *the* issue for this country, and any discussion of criminal justice sanctions should include it—even focus on it—particularly in a teaching setting. The program is designed to get young people to look at their choices and grasp in a personal way what the consequences of those choices may be. But a deeper understanding of the issues of race and class would only enhance the discussion and benefit the students.

Cancelled Lives was produced in association with the "I Have a Dream" Foundation in Los Angeles. The foundation receives the profits from the film. "I Have a Dream" is a nationwide charitable organization which provides 10,000 inner city youths in 43 cities with educational, cultural and recreational activities, and a guaranteed scholarship for the college education of their choice upon graduation from high school.

It is available from Milestone Media, Inc., 3463 State Street, Suite 284, Santa Barbara, CA 93105. Fax 805/687-4961. It costs $133, which includes shipping. ■



Brett Hodges

In "Cancelled Lives," young and adult offenders describe life behind bars in their personal letters.

Jan Elvin is the editor of the NPP JOURNAL.

BY JACKIE WALKER

Families of Terminally Ill Wait, Hope for Medical Parole

Like most prisoners with AIDS, Alex Velazquez is serving the equivalent of a death sentence at Virginia's Powhatan Correctional Center. Although a rally of over 50 family members at the state Capitol influenced Governor Douglas Wilder to develop guidelines for releasing terminally ill prisoners, Mr. Velazquez's request for executive clemency was denied. With a T-cell count of zero and numerous opportunistic infections, he is considered a "public safety threat." Under Gov. Wilder's guidelines, Velazquez is ineligible for release because he may live longer than three months.

Lajuanda Saunders is serving another kind of sentence, one of waiting. Her husband, Walter Saunders Jr., a prisoner at Virginia's Greenville Correctional Center, was diagnosed with lymphoma cancer early this year. He has exhausted all types of chemotherapy and doctors have petitioned the parole board for early release. Mrs. Saunders echoes the feelings of most families when she says, "Right now I just wish he could come home to spend his last days with his family. My biggest fear is something happening to him and only receiving a phone call."

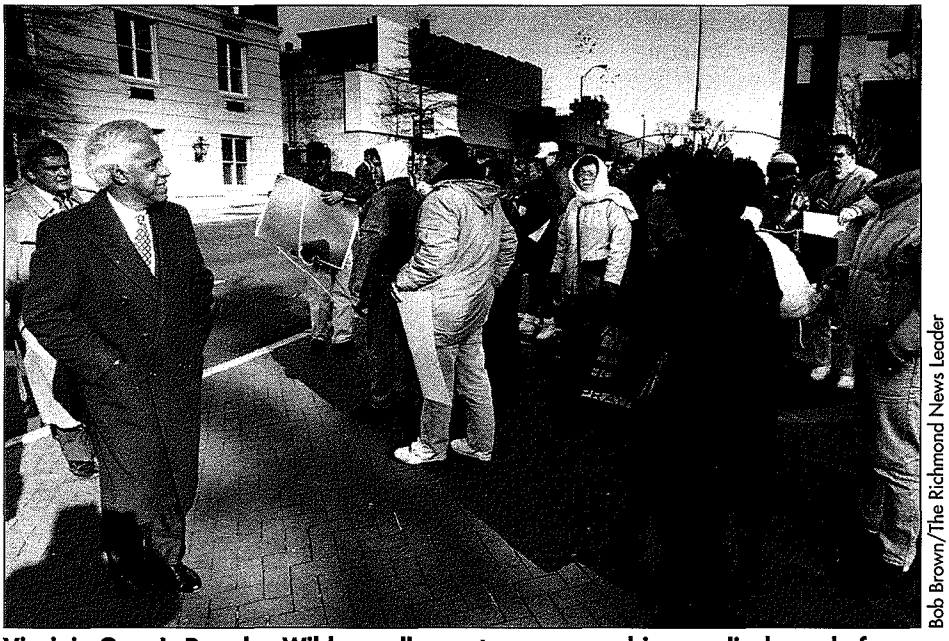
State corrections systems face a growing number of terminally ill prisoners like Alex and Walter. Like most terminally ill prisoners, both men are dependent on the whims of "tough-on-crime" governors to grant clemency. In three states—Michigan, Oregon and Missouri—the Parole Board can grant early release but, like clemency, the process is rarely used. Legislation providing medical parole has been passed in only five states (Missouri, Louisiana, Michigan, Oregon and New York). The latest bill passed in New York offers medical parole for terminally ill prisoners (except those convicted of murder, manslaughter 1 or any sex offense defined in Penal Law article 130) who present no physical danger to society. Parole is granted for four-month renewable periods, and can be revoked at any time if the parolee becomes a "threat to society."

New York has the largest number of prisoners with HIV/AIDS. As of January 1992, 8,000 of the 58,000 prisoners were HIV positive. Of that number 800 have AIDS.

Since the bill's passage in April, the Alliance for Inmates With AIDS has received over 100 requests for further information. Nancy Mahon, director of the AIDS In Prison Project of the Correctional Association of New York, sees the bill as a "great victory for the community. The real problem is how to get it to work." William Gibney of New York's Prisoner's Legal Services agrees: "We're pleased that it passed. We hope it serves as a model for other systems, who will be experiencing similar problems."

Yet, the bill leaves many questions unanswered. Among them are the doctor's liability in certifying that a prisoner is unable to commit a crime, the lack of clarification on the definition of "terminally ill," and the lack of timelines in the whole process. Both Mahon and Gibney see the bill as riddled with complications. According to Mahon, the Department of Correctional Services' (DOCS) inexperience in handling housing placement and the lack of additional support staff to handle these cases may point to disaster. What has happened with medical parole so far? Not very much. Gibney filed six cases immediately after the bill was passed. Fifty prisoners filed applications in the form of informal letters. Of those 50, none have been released; some of these prisoners have since died.

What can DOCS expect if they continue their footdragging? Gibney has already planned more meetings with administrators and legislators who supported the bill and has initiated litigation over the lack of implementation. In the meantime, prisoners with AIDS in New York face a slow bureaucratic death. ■



Bob Brown/The Richmond News Leader

Virginia Gov. L. Douglas Wilder walks past a group seeking medical parole for Alex Velazquez.

Support letters requesting clemency for Alex Velazquez and Walter Saunders Jr. can be mailed directly to The Hon. Douglas Wilder, State Capitol, Richmond, VA 23219.

Jackie Walker is the Project's AIDS information coordinator.

THE NATIONAL PRISON PROJECT

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 11763.

QTY. COST

Fill out and send with check payable to:

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

Name _____

Address _____

City, State, Zip _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the Prison Project's litigation program since April 1, 1992. Further details of any of the listed cases may be obtained by writing the Project.

Cody v. Hillard—This case challenges conditions at the South Dakota State Penitentiary. On May 29, 1992, the court held an evidentiary hearing on plaintiffs' motion for enforcement of the consent decree and further relief. Plaintiffs argued that the state had failed to correct environmental problems which were first discovered in 1990.

Denton v. Hernandez—The Prison Project participated as *amicus* in this Supreme Court case which concerns the standard for refusing to allow a *pro se* indigent prisoner to file a complaint in federal court. On May 4, 1992, the Supreme Court issued an opinion and remanded the case to the Ninth Circuit. The Court did not decide whether the plaintiff should have been denied leave to proceed *in forma pauperis* in this case, but it modified slightly the Ninth Circuit standard under which district courts determine to grant *in forma pauperis* status. It also modified the standard under which appellate courts review the denial of *in forma pauperis* status.

Hadix v. Johnson—The National Prison Project has filed an appearance in the mental health portion of this case which concerns conditions at the State Prison of Southern Michigan in Jackson. A long-standing consent decree comprehensively addresses conditions of confinement at the facility. Judge Feikens, who presides in *Hadix*, recently transferred the mental health issues to Judge Enslen, who presides over *U.S. v. Michigan*, because the mental health provisions in the *Hadix* consent decree correspond closely to those in the *U.S. v. Michigan* decree. (See *U.S. v. Michigan*, below.) Judge Enslen terminated a June 19 status conference when defendants announced that they were considering filing an appeal of the order to transfer the mental health issues.

John A. v. Castle challenges conditions in two Delaware juvenile facilities. The court has scheduled trial in this case for April 1993. Discovery is currently underway.

Inman v. Board of Supervisors—This case challenges overcrowding and conditions at the Northampton, Virginia County Jail. The jail has made considerable improvements as a result of the lawsuit, and on March 27 we filed a motion for voluntary dismissal of the case. On March 30, the county also filed a motion to dismiss. On June 15, the district court held a hearing on both motions; we are awaiting a decision.

U.S. v. Michigan/Knop v. Johnson—This is a statewide prison conditions case; the National Prison Project appears as *amicus* in *U.S. v. Michigan*. In April 1992 in *U.S. v. Michigan*, the Department of Justice filed a motion to vacate most of the consent decree and a stipulation attempting to withdraw their motion for contempt on mental health issues. This move followed the announcement by U.S. Attorney General Barr of a new policy of refusing to enforce prison consent decrees that go beyond constitutional requirements. The trial court deferred ruling on the motion to vacate. On June 19, 1992, the court held a hearing on pending mental health issues, including the stipulation to withdraw the contempt motion. We are awaiting a decision.

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