THE NATIONAL PRISON PROJECT JOURNAL

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 8, NO. 4, OCTOBER 1993 • ISSN 0748-2655

Reform Advances in Tennessee After Decades of Brutality

BY GORDON BONNYMAN

Tennessee's prison conditions litigation, which ended in May after 18 years in the courts, was a success story.[1] As such it illustrates both the potential and the limitations of litigation as a catalyst for social reform. The lawsuit invoked transcendent constitutional principles, and pitted the coercive power of the courts against the institutional inertia of a sprawling prison system. And yet, as in any human drama, it was individuals, at least as much as legal principles and institutional relationships, that determined the final outcome.

Challenge to Reform

In 1975, when William Trigg and several fellow prisoners filed their handwritten complaint in a state court in Nashville, they confronted a prison system steeped in a century-old tradition of corruption and brutality.

Tennessee's prisons traced their roots to the infamous convict-leasing system that was instituted after former secessionists recaptured control of state government at the end of Reconstruction. Convicts, most of them black, and many guilty of nothing more than vagrancy, were held in state-run stockades and leased to mine operators under a tyranny of peonage as brutal as the former slavery it was intended to replace.

Convict leasing ended only after an armed insurrection by free, white miners whose own working conditions and pay scales were degraded by being forced to compete with convict labor. Miners burned the stockades and fought pitched battles with militia sent to the coal fields to reimpose the convict lease system.

Finally forced to abandon that system, the state constructed its first "modern" penitentiary in Nashville in 1898. The tradition of brutality persisted, however. The state continued to force prisoners to mine coal on state property adjacent to Brushy Mountain prison in the eastern part of the state. The mines, notorious for their harsh discipline and dangerous conditions, had closed only a few years before the filing of the *Trigg* case, when the coal reserves had

Delores Delvin, The Tennessean

Billy Sadler, the last prisoner to leave the Tennessee State Penitentiary, was escorted out with Gov. Ned McWherter on June 26, 1992. Sadler was transferred to the Riverbend Maximum Security Institution.

INSIDE . . .

finally played out.

In the west Tennessee bottomlands along the Mississippi, black prisoners chopped cotton under the shotguns of mounted guards and were crowded together in stifling, violence-ridden dormitories by night.

The strap was an everyday facet of prison life. The records of African-American prisoners were still marked with a large capital "B" and work assignments were made by race. Medical treatment was provided by unlicensed, untrained prisoner "medics." Each prison was a little fiefdom where convict kingpins and "good old boy" wardens collaborated to maintain order through what the courts would come to describe as a "reign of terror" based on violence and intimidation.

Confrontation in the Courts, Chaos in the Prisons

Early in 1976, the National Prison Project of the ACLU and several local legal services offices in Tennessee entered the case as counsel for the prisoners who had filed suit *pro se* several months before. The attorneys stuck with the plaintiffs' original choice of state court forum: the case was assigned to a respected trial judge, new justices on the Tennessee Supreme Court were expected to provide a progressive majority, and Tennessee's state constitution contained a Reconstruction-era provision guaranteeing "safe and comfortable prisons and the humane treatment of prisoners."

Five years of costly, often bitter, and ultimately inconclusive litigation ensued in the state court system. In 1978, following a month-long trial, Chancellor Ben H. Cantrell, the trial judge, issued a meticulous and compelling opinion declaring the entire state prison system to be in violation of both the federal and state Constitutions. The ruling was among the most sweeping institutional reform decisions ever entered, and was particularly courageous since Chancellor Cantrell was a Republican appointee facing a contested reelection in a heavily Democratic district.

Relief was stayed pending an appellate ruling that never came. The sudden death of a key Justice changed the orientation of the state's high court, and in 1981, that court voted to "abstain" from ruling on the merits.

In 1980, the federal District Court for the Middle District of Tennessee had accurately read the handwriting on the wall and concluded that it could no longer defer to the state courts to address the constitutional complaints which it regularly received from prisoners. The District Court appointed the same counsel who had been litigating *Trigg* for five years, as well as the state's largest commercial law firm, to represent Scotty Grubbs and several other prisoners who had filed *pro se* complaints concerning conditions in the Tennessee prison system.

After the State Supreme Court consigned the *Trigg* case to judicial limbo, the federal court certified Scotty Grubbs' suit as a class action that subsumed the same parties and the same issues involved in *Trigg*. In short, the same case continued in a new forum and under a new name.

Following retrial, District Judge L. Clure Morton again ruled the Tennessee prison system unconstitutional. His 1982 ruling used Chancellor Cantrell's detailed 1978 findings as a benchmark against which to measure the system's continuing deficiencies and the failure of state officials to address them. Patrick D. McManus, former Kansas Commissioner of Corrections, was appointed Special Master to supervise implementation of a remedy.

That remedy proved elusive. Throughout the first decade of litigation, conditions actually deteriorated under the pressure of increasing overcrowding. A massive construction program, combined with a temporary policy of early releases, briefly relieved those pressures in 1983. But the state neglected the prisons' many other deficiencies, and when overcrowding intensified in 1984 the system slid further into chaos. Three years after the federal court ruling, Tennessee's prisons had become the most violent in the nation, as measured by the rate of inmate homicides.

In 1985, riots broke out in prisons across the state. A prisoner was killed and the system sustained tens of millions of dollars in damage. In hearings before District Judge Thomas A. Higgins, who had been assigned the *Grubbs* case after Judge Morton took senior status, the state all but conceded that it had lost control of the prison system and was incapable of making any further assurances to the court regarding its ability to bring the system into compliance with the Constitution.

In what was then an unprecedented response, Judge Higgins enjoined further admissions into the entire prison system until state officials could ensure minimum standards of safety in the system's three regional reception centers.

The State's Commitment to Reform

Throughout the first decade of litigation, state politicians had continued their century-old tradition of "malign neglect" of the prison system. Their response to the courts was not so much defiant as indifferent. Elected officials ran on tough "law and order" campaign slogans, then enacted more stringent sentencing laws without providing for corresponding increases in prison budgets.

Always highly politicized, the Department of Correction continued to serve as a dumping ground for patronage appointments. Those administrators who were competent had neither the resources nor the managerial authority to properly run their institutions.

By late 1985, the prison crisis had finally become a political liability to then-Governor Lamar Alexander and state legislators. News media and the public increasingly blamed them rather than the courts for the violence and chaos in the prisons. It was evident that, seven years after the first judicial finding of unconstitutionality, political leaders of both parties had still not responded in good faith to the courts' repeated calls for reform.

Following the summer prison riots and Judge Higgins' order enjoining further admissions to the prison system, the state legislature met in late 1985 in a special session devoted exclusively to the corrections crisis. The session was attended by

THE NATIONAL PRISON PROJECT JOURNAL

Editor: Jan Elvin
Editorial Asst.: Jenni Gainsborough
Regular Contributors: John Boston, Russ Immarigeon
Alvin J. Bronstein, Executive Director
The National Prison Project of the American Civil Liberties Union Foundation
1875 Connecticut Ave., NW, #410
Washington, DC 20009
(202) 234-4830 FAX (202) 234-4890

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

The reprinting of *JOURNAL* material is encouraged with the stipulation that the National Prison Project *JOURNAL* be credited with the reprint, and that a copy of the reprint be sent to the editor.

The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

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

the predictable political grandstanding and irresponsibility and its outcome was often in doubt. But an angry public, the pressure of the injunction, and genuine statesmanship by key legislative leaders ultimately produced an historic commitment of state government to reform of its prison system.

The litigation not only goaded state officials to seek reform but provided them a blueprint for achieving it. During the year that preceded the 1985 riots and special legislative session, a team of nationally recognized experts had undertaken an intensive evaluation of the prison system. The state had acquiesced in the evaluation process rather than face heavy sanctions for its violation of earlier court orders. The result was an extensive report with comprehensive recommendations, ranging from prisoner classification to personnel management, that together would enable the Department of Correction to turn the system around.

Even before the formal release of their report, the outside evaluators and Special Master began to share their key findings and recommendations with important lawmakers. A relationship of mutual respect had developed between crucial state prison administrators and the outside evaluators. At a crucial juncture during the special legislative session, the evaluators appeared at a committee hearing to explain their findings and recommendations to the legislative leadership. The hearing turned into an extended tutorial which convinced lawmakers of the need for genuine reform, not just to mollify the courts, but because the public interest demanded it.

With relatively minor modifications, the governor and legislature embraced the reform plan developed by the court evaluators. In a number of important respects, the reforms went beyond constitutional minima adjudicated by the federal court.

For example, Judge Morton had ordered the single-celling of Tennessee State Prison, known as "The Walls," the infamous 19th-century institution constructed at the end of the convict-leasing era. The legislature, persuaded by the evaluators that the poorly-designed facility was not only dangerous but inefficient, voted to close it altogether. The court had been troubled by the system's treatment of mentally impaired prisoners, but had concluded that mental health services satisfied constitutional minima. The state, prompted in part by the evaluators' findings, decided to close its archaic mental health unit and build an entirely new system of prison mental health services.

Armed with a mandate for reform and the financial and political support needed to carry it out, state prison administrators energetically set about the implementation of the new remedial plan. After a century of brutality and a decade of stonewalling, reform proceeded at a breathtaking pace.

The strap was an everyday facet of prison life.

Improvements were evident within weeks of the close of the legislative session. Within two years, the evaluators themselves could hardly believe that it was the same system. Violence dropped off sharply. As morale improved, prisoner preoccupations and complaints moved away from issues of survival to focus on matters like family visitation and parole eligibility.

Throughout this transitional period, state officials looked to the evaluators as an important resource, and a collegial relationship developed between these outside experts and those able state administrators whose abilities were identified and brought to the fore to carry through the reforms.

A number of important reforms were contingent upon new construction or the design and acquisition of a new computer system, and so were not completed until 1992.

Despite occasional frictions, setbacks, or official second thoughts, the Tennessee prison system had, by 1992, been dramatically made over. The Department of Correction had internalized an ethos of professionalism. Prison managers and staff claimed the court-initiated reforms as their own, and fairly so since it was their hard work which had brought them to life. Despite some inevitable grandstanding and backsliding, the state's political leaders seemed to have learned the lessons of history and resolved not to force the court's hand again.

Post-Mortem

For all the gains won through the *Trigg/Grubbs* litigation, the suit could not address some of the most fundamental problems of Tennessee's criminal justice system. *Grubbs* prompted the creation of a Sentencing Commission which overhauled Tennessee's archaic penal code, but politicians flinched at squarely confronting the question of how to rationally spend scarce correctional dollars. Although court-induced budget pressures somewhat constrained the state's incarceration rate, Tennessee's rate, like America's, remains among the highest in the world.

The lawsuit indirectly helped force an improvement in conditions of confinement for pretrial detainees in local jails, but could not compel reform of a corrupt bail bond system. That system still causes the pretrial detention of hundreds whose only offense is their poverty.

And, on a broader level, the litigation prompted Tennessee, which has ranked 49th in *per capita* spending on education, to commit one-third of a billion dollars to its prison system, rather than to other educational or social services that address the underlying conditions which foster crime and violence.

Those shortcomings are inherent limitations of prison conditions litigation. In fact, the most important of Tennessee's prison reforms were ones which the lawsuits fostered, but could never have compelled.

Plaintiffs' counsel and the courts recognized that their principal challenge was to motivate the state itself to assume responsibility for prison conditions, and to embrace reform as state policy, not mere judicial mandate.

Success at meeting that challenge owed much to individual players and to the relationships that developed among them. Most important, of course, were the judicial personnel. The three trial judges shared uncommon courage, intelligence, wisdom and dedication to constitutional principles.

Throughout the difficult remedial phase in federal court, Judges Morton and Higgins demonstrated a keen sensitivity to the political nuances of the case, and of the interplay between the actions of the district court and the state political dynamics which would ultimately determine the fate of reforms. Without backing down or compromising constitutional principles, they applied the district court's coercive powers with such skill—finesse, even—that it was always evident to the public that it was the state's irresponsibility, not judicial activism, which was to blame for the court's intrusion.

Crucial to the judges' ability to do so were the diplomatic, political and technical skills of the Special Master, Patrick McManus. While the judges maintained an austere and intimidating aloofness, McManus was their amiable liaison with state officials. Mediating disputes, identifying and cultivating reformist elements in

state government, educating journalists and coordinating technical assistance, McManus fully merited Judge Higgins' praise as the "father" of a reformed Tennessee prison system.

The Special Master played "good cop" to the judges' "bad cop" role: state officials learned it was more productive to work with the Special Master to address the prisons' problems than to appeal his recommendations to the judges. As a result, the ten-year remedial process took remarkably little of the judges' time, given the breadth and complexity of the many issues addressed.

Also important were the personal qualities of the outside experts or "evaluators" who assisted in the formulation of the remedial plan and the monitoring of its implementation. As important as their technical expertise were their interpersonal skills which enabled them to establish a collaborative relationship with state prison managers.

Individuals also made a difference, for good or ill, on the state's side of the case. The cast of characters during nearly two decades of litigation included a rich mixture of heroes and heavies:

- Governor Ray Blanton, who was turned out of office early on charges of selling pardons and later sent to prison himself. He explained that he was just trying to respond to the lawsuit by reducing overcrowding.

- An out-of-state cropduster who assumed the identity of a physician acquaintance in order to obtain the prison system's post of Medical Director. When, after a two-year tenure (including attendance at the prison commissioner's successful hemorrhoidectomy), the imposter was found out and jailed, state officials explained that it never would have happened if the court had not ordered them to hire a medical director for the prison system.

- A string of corrupt, brutal, or merely incompetent wardens, managers and guards. The tradition they represented was personified by a former warden of Brushy Mountain Prison, who looked like he had been sent by Central Casting to play the role of the folksy but sinister good-old-boy Southern sheriff. He long presided over a violent and racially repressive regime, and his resignation marked the passing of the old order. A sick, fearful old man, he would finally be compelled by a federal jury to pay for having violated the civil rights of several of his former inmates.

Individual guards mitigated the system's brutality with acts of personal kindness.

- The eloquent, populist state legislator who was re-elected while serving time in federal prison on a tax conviction. At a dramatic moment during the 1985 crisis, a majority of state House members urged open defiance of the federal court and threatened to force adjournment of the Special Legislative Session. The lawmaker, who had been sentenced by the same federal court that his colleagues now proposed to defy, singlehandedly turned the tide with a passionate, eloquent extemporaneous speech. Invoking his own prison experience and appealing to the memory of Confederate forebears who had suffered in Yankee prisons, he persuaded his colleagues to respect the rule of law and commit themselves to prison reform. A man whose gifts were matched by self-destructive tendencies, he would later return to prison himself, following a federal probe of corruption in Tennessee state government.

- The sentencing commission, and especially its chair, one of Tennessee's first women judges. Vilified by police and prosecutors and abandoned by the politicians who appointed them, the Commission took on the thankless task of reforming a penal code riddled with inconsistent punishments and lengthy sentences which the overcrowded prison system could not accommodate.

- Steve Norris, a career state bureaucrat whose managerial ability, integrity and dedication to reform overcame his lack of prior corrections experience. Norris was appointed commissioner in 1985 and presided over the crucial first years of reform. He filled several key positions with outsiders and pruned some of the dead wood that had accumulated in the staff of the Department of Correction. But for the most part he turned the system around while relying on existing staff and middle management. He demonstrated that the Department's large ineffective bureaucracy contained a pool of talent which, with the right leadership and external support, could provide the human capital for reform.

- Statesmanlike defense counsel. Tennessee attorneys general are appointed by the state Supreme Court. Therefore the position is relatively nonpolitical, as compared with most other states in which the chief legal officer is appointed by the governor or is popularly elected. The attorneys general and their deputies, while vigorously defending the case, provided a counsel of moderation and responsibility within state government. They helped conceive of the creative use of outside experts to develop and monitor the remedial plan, and assumed personal responsibility for ensuring the state's fidelity to the terms of the negotiated settlement.

- Republican Governor Lamar Alexander. He exploited the prison system for political purposes during the first years of his administration. But he also talked legislators out of appealing the district court's ruling and, in 1985, won their support for policy changes that were essential to reform.

- Democratic Governor Ned Ray McWherter, Alexander's successor. McWherter chafed at the very idea of federal court constraints to his authority. But he made implementation of the remedial plan a priority of his administration and devoted great personal energy and attention to making it happen.

The ambiguity of individuals' roles and motives belied the stark categories created by the legal system. At crucial junctures, convicts displayed great physical and moral courage in speaking out against the system's violence and corruption, while law enforcement officials dissembled. Individual guards mitigated the system's brutality with acts of personal kindness. When deteriorating conditions and official irresponsibility spawned riots, prisoners intervened at the risk of their own lives to save hostage guards.

Nowhere were those human ambiguities more evident than at an oxymoronic "open house" held at the old Tennessee

State Prison in 1992, a few months after Governor McWherter personally escorted its last prisoner to a new institution. Thousands came to the event, wandering casually where beatings and rapes had once been commonplace. Curiosity-seekers were titillated by tours of the old death chamber and abandoned cellblocks. Children bantered and made believe. Plaintiffs' counsel had their picture taken with the Commissioner.

A more somber mood prevailed among The Walls' former employees and inmates and their family members. Like veterans from opposing armies, they talked quietly together, comparing memories and exorcising old, shared fears. It was the closest thing to a wake that the old Tennessee prison system ever received and better than it deserved.

The Department of Correction is now led by Christine Bradley, one of the nation's first women to hold such a position. For her and many of her staff reform represents a personal accomplishment to be preserved. Key state political leaders also are committed to the system's hard-won improvements. But institutional memories are short, and the fiscal and political pressures to backslide are enormous. As with all constitutional protections, the maintenance of constitutional conditions in Tennessee's prison system will always demand vigilance and advocacy. ■

Gordon Bonnyman is a senior attorney with Legal Services of Middle Tennessee and was a lead attorney in the Tennessee prison case from its inception in 1976.

EDITOR'S NOTE:

Gordon Bonnyman mentions a number of people who made a difference in the Tennessee prison saga. Missing from that list is Bonnyman himself who has been an important player in the case since its earliest stages. He was co-lead counsel with NPP lawyer Nan Aron at the state court trial in 1977 and has been lead counsel for the plaintiffs for the past 15 years. His tenacity, his wisdom, his legal skill (and his sense of humor) have all played a part in the successful conclusion to the Tennessee litigation.

[1] *Trigg v. Blanton*, No. A-6047 (Chancery Court for Davidson County, Tennessee, 1978) was not reported, but is discussed at some length in the later federal litigation. The federal case is reported as *Grubbs v. Bradley*, 552 F. Supp. 1052 (N.D. Tenn. 1982).

The district court entered several later orders of significance that were unreported, the most important of which was a 1985 ruling enjoining further admissions to the state prison system pending alleviation of overcrowding in the state reception centers. (That order, and the events surrounding its entry, were described in "Recent Federal Court Orders Spur Tennessee Toward Prison Reforms," *NPP JOURNAL*, No. 8, Summer 1986).

During the course of the *Grubbs* proceedings, other cases were consolidated with it. These included a successful challenge to racial discrimination in prisoner housing and job assignments (*Tuggle v. Pellegrin*, No. 3-83-1009, and *Groseclose* ex rel. *Harries v. Dutton*, No. 3-84-0579 (M.D. Tenn. 1985) vac. 788 F. 2d 356 (6th Cir. 1986)).

The Sixth Circuit consolidated several local jail overcrowding cases in which state prisoners were backed up in county facilities. These cases were assigned to the *Grubbs* court, so that the formulation and implementation of relief could be properly coordinated. *Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989), *Roberts v. Tennessee Dept. of Correction*, 887 F.2d 1281 (6th Cir. 1989).

The order which concluded the *Grubbs* litigation is reported at__F. Supp.__ (M.D. Tenn. 1993).

U.S. Fails to Conform to International Human Rights Tenets

BY MOHAMEDU F. JONES

The per capita incarceration rate of the United States is the highest in the world. Indeed, in 1990-1991 the United States imprisoned persons at a higher rate than South Africa or the former Soviet Union.[1] With over one million persons behind bars, it is not surprising that allegations of prisoners' human rights violations are pandemic.

The protection of convicted prisoners from torture or cruel, inhuman or degrading treatment or punishment under United States law derives from the Eighth Amendment's prohibition against "cruel and unusual" punishment.[2] Historically, the Supreme Court "tended to treat prison cases as raising relatively discrete issues under the Eighth Amendment, calling for standards relevant to specific issues...."[3] The Court's analyses in these cases were properly directed to whether the conditions under which a prisoner was held deprived him or her of the "minimal civilized measure of life's necessities,"[4] a standard which can be applied objectively.

In a series of cases beginning in 1976, the U.S. Supreme Court introduced a requirement that a prisoner must establish that prison officials acted with a culpable state of mind before a violation of the Eighth Amendment will be found. This legal standard is in direct conflict with various international documents to which the United States is subject.

Subjective Component

The Court opened the door of a subjective inquiry when it introduced its "deliberate indifference" principle in *Estelle v. Gamble*, a case involving an Eighth Amendment challenge to the denial of medical care.[5] Significantly, the Court did not define precisely what state of mind constitutes deliberate indifference.[6] Thereafter, in *Whitley v. Albers*, the Court moved the issue of prisoners' rights violations further into the uncharted realm of the psyche of prison officials by holding that, in use of force situations, the Eighth Amendment is violated only if prison officials use force "maliciously and sadistically for the very purpose of causing harm."[7]

In 1991, Justice Scalia in *Wilson v. Seiter* framed the issues before the Court as follows:

> *This presents the questions whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials and, if so, what state of mind is required.*[8]

Article 5...cannot be interpreted to require an inquiry into the state of mind of the official...

In so framing the question, the Court firmly entrenched a subjective component in a determination of whether the rights of a convicted person are violated by conditions of his or her confinement. The *Wilson* Court held that *all* Eighth Amendment challenges are subject to an objective and subjective requirement: violation of the Eighth Amendment (use of force or conditions of confinement) occurs when prison officials impose conditions or practices that are sufficiently

objectively bad, and do so with a sufficiently "wanton" state of mind.[9] Moreover, *Wilson* required the prisoner to prove both the objective and subjective elements of the violation.[10]

The next prisoners' human rights violation case to reach the Court was *Hudson v. McMillian*.[11] *Hudson* held that beating a prisoner in restraints, when no force was indicated, was a violation of the Eighth Amendment because it inflicted unnecessary pain.[12] In its most recent decision regarding the treatment a prisoner receives in prison and the conditions under which he or she is confined, *Helling v. McKinney*,[13] the Court reaffirmed its requirements of both objective and subjective analyses in such cases.

International Law

The subjective component required in conditions cases under United States domestic law is incompatible with international standards.[14] The Universal Declaration of Human Rights (hereafter "Universal Declaration") at Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[15] Prisoners are required to be treated with a level of respect that maintains the inherent dignity and value they possess as human beings.[16] Article 5 does not distinguish between "inhuman and degrading treatment or punishment" arising from conditions of confinement and such treatment or punishment arising from other circumstances.

Article 5 imposes a purely objective standard. It cannot be interpreted to require an inquiry into the state of mind of the official subjecting the prisoner to inhuman or degrading treatment or conditions. It is plain: no one shall be subjected to "inhuman or degrading treatment or punishment": when a person is so subjected, their human rights are violated. In effect, the subjective inquiry places convicted United States' prisoners outside the orbit of the protection of international human rights standards as established in the Universal Declaration.

The International Covenant on Civil and Political Rights (hereafter "the Covenant") is in accord with and expands the rights established by the Universal Declaration. Article 7 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[17] In its General Comments on Article 7, the United Nations Human Rights Committee (hereafter the "Human Rights Committee") stated that the objective of Article 7 "is to protect both the dignity and the physical and mental integrity of the individual."[18] Article 7 imposes an affirmative duty on each State party to afford protection against the acts prohibited under it, "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[19]

The fundamental human right standard set out in Article 7 is incompatible with any requirement of examination of the state of mind of the public official inflicting the proscribed treatment or punishment. The Human Rights Committee has interpreted Article 7 to allow no limitation: "no justification or extenuating circumstance may be invoked to excuse a violation of Article 7 for any reasons...."[20] This strongly supports the proposition that, under international law, the existence of inhuman treatment or punishment resulting from conditions may not properly turn on the culpability of a public official. By including a subjective component, United States domestic law provides for "justification or extenuating circumstances." This is patently inconsistent with prevailing international standards established in Article 7 of the Covenant.

If prison conditions objectively amount to cruel, inhuman or degrading treatment or punishment, the presence or absence of mental culpability is irrelevant. The bad conditions alone should be sufficient to constitute the prohibited treatment or punishment.[21] The violation of the human rights of the prisoners under international standards occurs because of the conditions, not necessarily because prison officials intended to inflict the consequences resulting from the conditions. No circumstance whatsoever, including a lack of mental culpability on the part of the perpetrator, is allowed to serve as a justification for such treatment or punishment.

In its General Comments, the Human Rights Committee has stated that a person violates Article 7 whether he or she "encouraged, ordered, tolerated or perpetrated" the prohibited acts.[22] This clause, and particularly the use of the word "tolerated," would indicate that the absence or presence of a bad state of mind is not relevant, and certainly could not exonerate a prison official nor justify the prohibited conditions.[23] The Committee has specifically stated that persons who violate Article 7 *must* be held responsible.[24]

Similarly, Article 10 of the Covenant states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This Article imposes a positive obligation "toward persons who are particularly vulnerable because of their status as persons deprived of liberty," and complements Article 7 of the Covenant.[25] Additionally, Article 10 prohibits convicted prisoners from being "subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons."[26]

Where it is objectively demonstrated that a prisoner's treatment or punishment is inconsistent with Article 10, the human rights of the prisoner are violated. The state of mind of the official whose conduct, actions or inactions leads to treatment and conditions that disregard the intrinsic quality of a prisoner as a human being is of no consequence under the Covenant.

The Human Rights Committee has commented that treating prisoners with humanity and respect for their human dignity "is a fundamental and universally applicable rule," and that the rule applies regardless of the material resources available.[27] If the availability of material resources is of no consequence, a reasonable implication is that the state of mind of prison officials who fail to apply the minimal standards, even because of lack of funds, would not be relevant in determining the existence of human rights violations. Where the "universally applicable rule" has been violated, the human rights of the prisoners have been violated. This would be true regardless of the state of mind of prison officials.

Article 16 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[28] is also in accord with the proposition that the violation of a prisoner's human rights does not turn on a culpable state of mind. Article 16 places a positive burden on each State party to "undertake to prevent in any territory under its jurisdictions... acts of cruel, inhuman or degrading treatment or punishment...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[29] As is the case with the other articles discussed above, Article 16 establishes an objective standard: the acts prohibited by the article constitute human rights violations regardless of the state of mind of the official. Indeed, mere "acquiescence"[30] is sufficient to establish wrongdoing, lending further support to the position that the requirement of proof of subjective intent in cases involving violations of prisoners' human rights is inconsistent with international standards.

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THE NATIONAL PRISON PROJECT JOURNAL

Case Law Report

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 8, NO. 4, OCTOBER 1993 • ISSN 0748-2655

BY JOHN BOSTON

Cruel and Unusual Punishment

Prisoners won a victory, or at least avoided defeat, in the Supreme Court in *Helling v. McKinney*, 113 S.Ct. 2475 (1993). The immediate issue was exposure to environmental, or "second-hand," tobacco smoke. However, the case presented a much larger issue of Eighth Amendment interpretation, and the Court addressed it directly.

The plaintiff in *Helling*, a Nevada state prisoner, alleged that he was double-celled with a five-pack-a-day smoker and that this involuntary exposure to tobacco smoke constituted cruel and unusual punishment. The Ninth Circuit affirmed a directed verdict against him with respect to his immediate symptoms, but held that he had stated a valid Eighth Amendment claim with respect to the risk of harm to his future health. It also stated that his damage claims were barred by qualified immunity, leaving only the injunctive claim in the case.

This decision was vacated and remanded by the Supreme Court for reconsideration in light of *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), which requires proof of a "subjective element" of deliberate indifference in all Eighth Amendment cases. On remand, the Ninth Circuit adhered to its previous decision, stating that *Wilson* did no more than establish an additional element that the plaintiff would have to prove. The Supreme Court granted *certiorari* to review this second appellate decision.

In the Supreme Court, prison officials advanced a position that, if accepted, would have drastically limited Eighth Amendment scrutiny of prison conditions. They argued that the Amendment protects only against present harms and not potential or future harms. One federal appeals court had already adopted this position in another prison smoking case. See *Clemmons v. Bohannon*, 956 F.2d 1525 (10th Cir. 1992) (*en banc*).

The Supreme Court categorically rejected this radical attack on Eighth Amendment jurisprudence, stating:

> *We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year...*
>
> *That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." ... It would be odd to deny an injunction to inmates who had plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. ... We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.*

113 S.Ct. at 2480-81 (citation omitted). The Court cited exposure to communicable disease, unsafe drinking water, exposed wiring, deficient firefighting measures, and the risk of assault as the kinds of dangers that have been addressed in prison litigation but that the defendants' position, if adopted, would exclude from Eighth Amendment scrutiny.

The standard for determining whether such risks actually violate the Eighth Amendment remains nebulous. The Court adopted the Ninth Circuit's formulation that the plaintiff was entitled to try to prove "that his future health is unreasonably endangered." However, it added that "he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight." 113 S.Ct. 2481 (emphasis supplied). It is difficult to understand how contemporary standards of decency could not be violated by acts that "unreasonably endanger" prisoners' health. Analytically, too, it is unclear whether the Supreme Court is suggesting that unreasonable risks in general may be constitutionally permissible, or that different kinds of unreasonable risks may yield different results. The Court added on this point that the trial court must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."

This elaboration adds verbiage but does not help answer the question whether it is the real quantum of risk or some social perception of a particular kind of risk that will determine the outcome. Thus, while *Helling* has ruled out the defendants' proposed evisceration of Eighth Amendment inquiry, it has provided little certainty or definition to the protections of the Cruel and Unusual Punishments Clause.

It seems unlikely that this issue will be resolved in McKinney's case. The Court noted that he has been transferred to another prison where he is not subject to the challenged conditions, and that a new smoking policy in the Nevada prisons may minimize his future risk and therefore his entitlement to an injunction. It added that the defendants' deliberate indifference must be assessed in light of their "current attitudes and conduct," an assessment that would be strongly affected by the promulgation of the new smoking policy, which appears designed to accommodate the needs of non-smokers to some degree, although it does not guarantee them a smoke-free environment. Interestingly, the Court did not suggest that the case might be moot, even though this is the usual disposition of injunctive cases brought by individual prisoners who are then transferred. See, e.g., *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991).

The other question that *Helling* leaves conspicuously open is the future of the deliberate indifference requirement. *Wilson v. Seiter*, which imposed the requirement, was decided by a 5-4 majority, with the Court's opinion authored by Justice Scalia and the concurring opinion—which rejected the deliberate indifference requirement—by Justice White. In *Helling*, Justice White wrote the majority opinion. However, there is no hint of any effort at spin control in the dicta about deliberate indifference. More importantly, Justice White is now off the Court. Justice Scalia, on the other hand, was in dissent in *Helling*, joining Justice Thomas's opinion. Justice Thomas argued in *Helling*, as he did in *Hudson v. McMillian*, 112 S.Ct. 995, 1010 (1992), that there are "substantial doubts" whether prison conditions are within the scope of the Cruel and Unusual Punishments Clause at all, and stated that he "might vote to overrule *Estelle [v. Gamble]*" if the issue were squarely presented. These views are completely out of the mainstream—the *Helling* majority notes that it was undisputed that prison conditions are subject to Eighth Amendment scrutiny, 113 S.Ct. at 2480—and it is improbable that any other Justice now on the Court, or likely to be appointed during this Presidency, will embrace them.

These points are important because the meaning and scope of the deliberate indifference rule are far from settled, and it is a near-certainty that the Supreme Court will be required to revisit the subject in the next few years. In view of the thin margin of decision in *Wilson*, the changes in the Court's membership, and the fact that two Justices may have removed themselves from the debate entirely depending on the way future questions are framed, the prospects for future development of Eighth Amendment jurisprudence are unpredictable.

Some of the open questions about deliberate indifference were aired in *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993). In that case, inmates at Glades Correctional Institution in Florida alleged and proved an appalling pattern of sexual assault and official inaction. The district court awarded damages to eight of ten named plaintiffs against the prison's former superintendent and entered an injunction against the present superintendent benefiting the class of present and former inmates at the prison.

On appeal, the Eleventh Circuit held:

> *To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs so that knowledge can be inferred. ... Because the Eighth Amendment requires a subjective standard, to demonstrate an official's deliberate indifference, a plaintiff must prove that the official possessed knowledge both of the infirm condition and of the means to cure that condition, "so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." ... Thus, if an official attempts to remedy a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative.*

995 F.2d at 1535-36 (citations and footnotes omitted).

...the prospects for future development of Eight Amendment jurisprudence are unpredictable.

The application of this standard had substantial practical effect on the plaintiffs' claims. The district court had held generally that the plaintiffs could prevail based on evidence that the former superintendent knew or should have known of the danger to the plaintiffs during the "relevant time period." On remand, the appeals court instructed, it must consider for each assault what the superintendent actually knew at the time of that assault, including his knowledge of alternative measures.

In adopting this "subjective" standard (also described as a criminal law standard) based on what prison officials actually knew, rather than what they should have known, the Eleventh Circuit has aligned itself with the First and Seventh Circuits on a disputed point that the Supreme Court will eventually have to resolve. See *McGill v. Duckworth*, 944 F.2d 344, 348-49 (7th Cir. 1991), cert. denied, 112 S.Ct. 1265 (1992); *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991). Contra, *Young v. Quinlan*, 960 F.2d 351, 360-61 (3rd Cir. 1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (*en banc*), cert. denied, 112 S.Ct. 972 (1992); *Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990).

The former superintendent's primary defense on appeal was that he had done what he could to improve safety at the prison, but was unable to go further because of the budgetary constraints under which he worked. The court of appeals was not convinced. Although it accepted the premise that officials may not be held liable for matters outside their control, it held that the plaintiffs had presented sufficient evidence that the superintendent had the "capacity, within budgetary constraints, to improve prison safety" and that he "could have, but did not, take steps to minimize" safety problems at the prison. These included inadequate training, an inadequately supervised and deployed staff, obstructions to surveillance, the lack of a standard procedure for investigating rape allegation, the lack of inmate movement controls, and the failure to transfer known assailants to other facilities. Id. at 1537-38. The plaintiffs' evidence also supported their assertion that such action on the superintendent's part would have ameliorated the "infirm conditions," meeting their burden of proof under the causation requirement of 42 U.S.C. § 1983.

The court's focus was very different in its discussion of the injunctive claims. The new superintendent's first argument, that changed conditions obviated the need for injunctive relief, received short shrift; the court held that he had failed to "ensure that GCI's past wrongs would not be repeated." 995 F.2d at 1542. Equally briefly, but more substantially, the court rejected the argument that the new superintendent, whom the district court had labelled "a dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution," should not be the subject of injunctive relief. "In essence, he asserts that the court should have focused on his deliberate indifference, instead of the institution's historical indifference." However, the court cited the Supreme Court's observation, made in the Eleventh Amendment context, that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent" and are "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citations omitted); accord, *Hutto v. Finney*, 437 U.S. 678, 699 (1978) (plaintiffs' "injunctive suit against prison officials was, for all practical purposes, brought against the State.") Therefore, *LaMarca* held, the substitution of a new named defendant does not bar injunctive relief. 995 F.2d at 1542.

This laconic passage seems to be the first explicit acknowledgement in a reported decision of the distinction that the courts must make in order meaningfully to preserve injunctive jurisprudence in prison cases and in other cases in which the deliberate indifference standard is applied. If deliberate

indifference were construed solely as a state of mind of discrete individuals, many objectively intolerable conditions would be placed beyond the scope of the Eighth Amendment. As Justice White pointed out, concurring in the result in *Wilson v. Seiter:*

> *Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.*

Seiter, 111 S.Ct. at 2330.

LaMarca, with its reference to "the institution's historical deliberate indifference" (emphasis supplied), suggests that in injunctive cases, the deliberate indifference inquiry focuses on the collective performance of state officials rather than the consciousness of any individual defendant or group of defendants. This approach is consistent with prior law that defined deliberate indifference as including "'systematic or gross deficiencies in staffing, facilities, equipment or procedures.'" *French v. Owens*, 777 F.2d 1250, 1254 (7th Cir. 1985), cert. denied, 479 U.S. 817 (1986), quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). And if official capacity means a suit against "the entity of which an officer is an agent," that collective assessment extends, in Justice White's words, to "officials inside and outside a prison"—including the members of the state or municipal legislature.

This approach disposes of the "cost defense" issue that has troubled prison litigators since *Wilson v. Seiter*, which raised it but did not resolve it. There is no question that there is a cost defense in personal capacity damage cases, to the extent that particular officials work under budget constraints that limit their freedom of action. However, if injunctive cases are deemed to be against the governmental unit as such, including their budgetary decision-makers, there is no place for the defendants to hide once the plaintiffs have shown the existence of objectively cruel conditions.

A different problem of application of the deliberate indifference standard is presented by *LeMaire v. Maass*, 1993 WL 304627 (9th Cir., July 21, 1993). That case was filed by an inmate in the Disciplinary Segregation Unit of the Oregon State Prison challenging various conditions and practices in that unit; the parties stipulated that the district court's injunction would apply to all persons similarly situated, and therefore no class was certified. The district court had found several of the unit's practices unconstitutional and enjoined them. *LeMaire v. Maass*, 745 F.Supp. 623 (D.Ore. 1990). The appeals court vacated the injunction and remanded, reversing parts of the district court's decision outright and severely limiting others.

Space precludes discussion of the details of *LeMaire*'s holdings as to segregation practices. However, the *LeMaire* panel's theoretical starting point was that prison policies intended to maintain discipline are not governed by *Wilson v. Seiter*'s deliberate indifference standard; rather, they violate the Eighth Amendment only if they are imposed "maliciously or sadistically." This is the standard that the Supreme Court has applied to uses of force by staff. *Hudson v. McMillian*, 112 S.Ct. 995 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986).

The Supreme Court has not explicitly resolved this point, and its language can be selectively quoted to support either position. In *Whitley*, the Court held that the "malicious or sadistic" standard should be applied to uses of force to control a prison disturbance. It cited in support both "the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates" and the inappropriateness of "critiqu[ing] in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S. at 320. Both factors were also cited in *Hudson*, which extended the malicious and sadistic requirement to all use of force cases.

What is unusual about *LeMaire* is that its holding squarely contradicts a very recent *en banc* decision of the Ninth Circuit; in fact, it reflects a continuation of the dispute in that case. Judge Trott, the author of the *LeMaire* opinion, also wrote the initial panel opinion in *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992), declining to apply the deliberate indifference standard to a prison search practice. 953 F.2d at 1144 n. 3. On rehearing, the *en banc* court explicitly rejected that conclusion, holding that the necessity to make decisions "in haste, under pressure" is the factor that invokes the malicious and sadistic standard. *Jordan v. Gardner*, 986 F.2d 1521, 1529 (9th Cir. 1993) (*en banc*); accord, *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C.Cir. 1987); *Fisher v. Koehler*, 692 F.Supp. 1519, 1562 n. 56 (S.D.N.Y. 1988), aff'd, 902 F.2d 2 (2nd Cir. 1990). Judge Trott dissented vehemently from the *en banc* decision in *Jordan*, and the same polemical tone permeates his majority opinion in *LeMaire*.

It remains to be seen whether Judge Trott's *LeMaire* opinion turns out to be anything more than an incident in the turbulent internal politics of the Ninth Circuit. The plaintiff has sought rehearing *en banc*, and the dissenting judge—a member of the *Jordan* majority—has filed an amended opinion suggesting that the case is moot. (Before the decision, the court had been notified that the plaintiff had been transferred to another state. As noted earlier, such transfers generally result in a finding of mootness. In addition, the prison superintendent had represented that it was "at best uncertain" that the plaintiff would be returned either to Oregon or to disciplinary segregation, and that in any case both the physical facilities and the means of controlling disruptive inmates had changed since the district court decision.)

Whatever the ultimate result, *LeMaire* graphically demonstrates the latitude for disagreement over the application of the deliberate indifference standard, and the likelihood that the Supreme Court will be asked to revisit the meaning of the Cruel and Unusual Punishments Clause for prison conditions sooner rather than later.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Procedural Due Process—Property Confiscation and Destruction of Legal Materials

Zilich v. Lucht, 981 F.2d 694 (3rd Cir. 1992). At 695: "'[m]any courts have found a cause of action for violation of the right of access stated where it was alleged that prison officials confiscated and/or destroyed legal materials.' *Simmons v. Dickhaut*, 804 F.2d 182 (1st Cir. 1986)." [String cite omitted]. The availability of a post-deprivation remedy is irrelevant. The rule of *Parratt v. Taylor* does not apply to court access claims.

False Imprisonment Qualified Immunity

Slone v. Herman, 983 F.2d 107 (8th Cir. 1993). The sentencing judge gave the plaintiff three years in prison and a month later resentenced him to probation. Prison officials told the court that they had decided not to release the plaintiff because they did not believe its action was consistent with Missouri statutes. The court reiterated its direction and the defendants pursued a writ of prohibition and other remedies. The plaintiff was not released until eight months later.

At 109: The defendants have the burden of pleading and proving qualified immunity. They are not entitled to qualified immunity on this record. The question is not whether Missouri sentencing law is clear but whether the plaintiff had a clearly established right to be released from prison once the order became final and nonappealable. At 110:

> *We conclude that when Judge Ely's order suspending Slone's sentence became final and nonappealable, the state lost its lawful authority to hold Slone. Therefore, any continued detention unlawfully deprived Slone of his liberty, and a person's liberty is protected from unlawful state deprivation by the due process clause of the Fourteenth Amendment. . . . Moreover, contrary to defendants' misplaced assertions, Slone's liberty interest was clearly established because it was based on a final and nonappealable court order. Whether or not defendants agreed with the order or thought that it was lawful does not diminish Slone's liberty interest or make his liberty interest less clear.*

Use of Force
Personal Involvement and Supervisory Liability
Negligence, Deliberate Indifference and Intent

Buckner v. Hollins, 983 F.2d 119 (8th Cir. 1993). The plaintiff alleged that he was beaten in the state prison reception center by one officer after a second officer admitted the first officer to his holding cell. The second officer allegedly witnessed but did not intervene in the beating.

The officer's duty to intervene was governed by the deliberate indifference standard, which "has been the test applied in numerous cases in which a prisoner claims injury (or aggravation of injury) due to a prison official's failure to act." The allegation that the defendant failed to intervene while the plaintiff was being beaten, "particularly when [he] was naked, hand-cuffed, and defenseless," presents a jury question as to deliberate indifference.

The defendant was not entitled to qualified immunity. Prison officials' "duty to restore control in a tumultuous situation," their liability for deliberate indifference to prisoners' serious illness or injury, and their liability for "failure to protect a prisoner from foreseeable attack or otherwise to guarantee his or her safety" were sufficiently "fact-specific" to defeat the immunity claim.

***Pro Se* Litigation**
Appointment of Counsel

Kilgo v. Ricks, 983 F.2d 189 (11th Cir. 1993). The district court should reconsider the plaintiff's request for counsel. Civil litigants, including those raising civil rights claims, "have no absolute constitutional right to counsel....The key is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court." (193) Though this plaintiff's factual and legal claims were straightforward, other factors limited his ability to present his claims—"most daunting,...the district court's insistence that Kilgo prepare a lengthy pre-trial order and comply with instructions which assume familiarity with litigation procedures." (193) At 194:

> *Unless the court is willing to guide* pro se *litigants through the obstacle course it has set up, or to allow them to skip some of the less substantive obstacles, it should not erect unnecessary procedural barriers which many* pro se *litigants will have great difficulty surmounting without the assistance of counsel.*

Searches—Person—Prisoners
Privacy

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993). At 1030: "We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" (1030, citation omitted) The *Turner* standard applies to such claims. Defendants are entitled to qualified immunity since the right has not previously been recognized in this circuit.

Medical Care

Watson v. Caton, 984 F.2d 537 (1st Cir. 1991). An allegation that a prison nurse refused to treat the plaintiff for a serious injury on the ground that the state was not responsible for injuries incurred before the plaintiff entered prison was not frivolous under the deliberate indifference standard.

Use of Force—Restraints
Trial

Lemons v. Skidmore, 985 F.2d 354 (7th Cir. 1993). The plaintiff brought suit for use of force. His attorney asked that he not appear in handcuffs and leg irons before the jury. The magistrate judge said that since he was in Department of Correction custody, they set the rules. The jury found for the defendants. At 356:

> *The magistrate judge abused his discretion by relying on the self-serving opinion of fellow penal officers of the defendants and not holding a hearing to determine what, if any, restraints were necessary, taking no steps to minimize the prejudice to Mr. Lemons in having him appear to be a violent and dangerous person who required leg irons and handcuff restraints, and in failing to give a curative instruction or take any other ameliorative steps.*

The court does not decide any constitutional question but uses its supervisory authority over federal court proceedings. However, it relies on the constitutional right to a fair trial in a civil case and on the "extreme need" standard in federal criminal trials to conclude that the judge must hold a hearing at which "the state may try to prove that restraints are necessary"; the need is to be determined based on the prisoner's "history of violence in the face of maximum security precautions." (356) Even if restraints are necessary, they must be the minimum necessary, a curative instruction should be given, and the appearance of restraints should be minimized.

The error was not harmless; it "goes to the central issue in the case" because it suggested that the plaintiff was dangerous and violent so that whatever the guards did was necessary.

Searches—Person—Prisoners
Negligence, Deliberate Indifference and Intent

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (*en banc*). Clothed pat frisk searches of female inmates by male guards violated the Eighth Amendment. The court does not resolve the case based on the Fourth Amendment because prisoners' privacy rights are extremely limited and because the gravamen of these plaintiffs' complaint is that the searches inflict great pain and suffering. The district court found that there was a high probability of "great harm, including severe psychological injury and emotional pain and suffering," to some plaintiffs, based in part on their histories of verbal, physical and sexual abuse by men, and supported by the testimony of ten expert witnesses including prison staff members. The district court's finding was not clearly erroneous. At 1526: "We are satisfied that the constitutional standard for a finding of 'pain' has been met in this case."

The searches are not justified. The injunctions have been in effect for three years without any claim by the defendants that security has been compromised; security has admittedly been maintained by the establishment of random and routine searches by female guards. The defendants conceded that not a single bid had been refused, promotion

denied, nor guard replaced as a result of the ban. The district court's conclusion that the searches inflicted pain without penological justification (i.e., were "unnecessary") was therefore consistent with the evidence (1527).

The policy was adopted with deliberate indifference. The Superintendent testified that the policy was not required for security purposes and was adopted without a great deal of knowledge about its impact on the inmates, yet before it was implemented he was urged by members of his own staff to abandon it. The policy remained in place despite the severe reaction suffered by one of the first prisoners subjected to it, and the defendants persisted in trying to get it reinstated despite all the evidence in the trial record about its consequences. At 1529: "The wish to avoid a lawsuit from an employees' union, however, does not provide a justification for inflicting pain of a constitutional magnitude upon inmates...."

The Superintendent "urges, in effect, that it is proper to inflict serious psychological pain on the inmates because otherwise it may be necessary to interrupt the lunch periods of female guards...." (1530)

Use of Force
Qualified Immunity
Res Judicata and Collateral Estoppel

Kane v. Hargis, 987 F.2d 1005 (4th Cir. 1993). It would have been "apparent" that a 200-pound police officer repeatedly smashing the face of a 100-pound woman into the pavement while arresting her violated the Fourth Amendment, and the officer accordingly was not entitled to qualified immunity.

The fact that a state court found the plaintiff guilty of attempting to impede an officer did not estop her from alleging misuse of force because under Virginia law, a judgment of conviction or acquittal in a criminal proceeding does not establish in a subsequent civil proceeding the truth of the facts on which it was based (1008).

Remedial Principles
Modification of Judgments

Johnson v. Robinson, 987 F.2d 1043 (4th Cir. 1993). A 1987 post-judgement stipulation provided that prison officials would perform a number of actions, mostly related to environmental health. A subsequent contempt motion resulted in the defendants' providing a timetable of projected dates for completing some eighty-three specific repairs. It was submitted to the court as part of monthly status reports but was never presented as a formal settlement agreement or proposed consent decree. On plaintiffs' motion, the court converted the schedule to an order. At 1046:

> *...Even given their distinctive character as agreements backed by the authority of the court, consent decrees are to be interpreted as contracts .... The binding force of a consent decree comes from the agreement of the parties...A federal district court may not use the power of enforcing consent decrees to enlarge or diminish the duties on which the parties have agreed and which the court has approved...*

Although a district court "may, of course, modify a consent decree to impose new duties upon a party" (1050), the basic modification procedures were not pursued here. At 1050:

> *...To modify a consent decree to impose new obligations, a district court must at a minimum (1) provide specific notice that it is contemplating the imposition of obligations in addition to those contained in the decree; (2) allow the parties an opportunity to present relevant evidence on the need for the additional obligations and the proper character of those obligations; and (3) issue specific findings that support a determination that modification is warranted.*

***Pro Se* Litigation**

Faile v. Upjohn Co., 988 F.2d 985 (9th Cir. 1993). The rule of *Houston v. Lack*, that prisoners' *pro se* papers are deemed filed when they are turned over to prison authorities for mailing, is applied to the service of discovery responses. At 988: "[W]e see no reason to treat other civil 'filing' deadlines differently than the deadline for filing a civil appeal." *Id.*: "Similarly, as regards application of the *Houston* rule, there is no meaningful distinction between 'service' deadlines and those for 'filing'".

DISTRICT COURTS

Exhaustion of Remedies
Medical Care

Thomas v. James, 809 F.Supp. 448 (W.D.La. 1993). The plaintiff's medical care claim need not be presented to a medical review panel as required by state law for malpractice cases because the plaintiff alleges that the defendants were "callous, deliberate and intentional" in their failure to provide medical treatment, and malpractice is defined as an unintentional tort.

Federal Officials and Prisons
Pre-Trial Detainees
Physical Conditions
Qualified Immunity
Hygiene

Young v. Keohane, 809 F.Supp. 1185 (M.D.Pa. 1992). At 1193: "What is 'clearly established' law for qualified immunity purposes, however, commands only some, 'not precise factual correspondence between relevant precedents and the conduct at issue.' . . . Accordingly, the defendants are charged with the responsibility of 'consider[ing] the legal implications of their actions,' . . . and 'relat[ing] established law to analogous factual settings.'" [Citations omitted]

The defendants were not entitled to qualified immunity. The court finds "objectively unreasonable in light of both existing precedent and plain common sense" confinement in a "fishtank," a converted gymnasium, with eleven other inmates with no wash basin, toilet, tables or chairs, television or drinking fountain, where the prisoners slept on folding cots and were forced to lie on them at times to avoid the water that seeped in from the adjacent shower area. "Particularly distressing is Young's unrefuted allegations that limited access to an outside toilet regularly required detainees to urinate in cups inside the fishtank." (1195) The plaintiff was confined under these conditions for almost six months, "a duration that strongly contributes to the unreasonable nature of the defendants' conduct." The conditions (imposed on all pre-trial detainees at Lewisburg) were far more restrictive than those of the maximum security convict population. At 1194: "The practice of housing detainees in conditions more severe than convicted inmates has been considered unconstitutional in the Third Circuit for quite some time."

Attorneys' Fees
Damages—Assault and Injury
Pendent and Supplemental Jurisdiction

Velazquez Hernandez v. Morales, 810 F.Supp. 25 (D.P.R. 1992). A jury awarded $500,000 to the estate of a prisoner beaten to death by prison guards and $500,000 to his mother on her supplemental tort claim.

The dismissal of one of several defendants does not necessarily indicate that a plaintiff has not succeeded on all claims, since a claim may still survive as to other defendants.

Medical Care—Standards of Liability—Deliberate Indifference

Rosen v. Chang, 811 F.Supp. 754 (D.R.I. 1993). The plaintiff's decedent allegedly died of untreated appendicitis. The allegation that a prison doctor acted with deliberate indifference is sufficient to state a constitutional

claim. At 760:

Grossly incompetent and recklessly inadequate examination by a licensed physician is a deliberately indifferent examination. This is ineluctably so when the manifested symptoms scream of a diagnosis that virtually lies within the knowledge of a lay person.

• • •

Courts are reluctant to raise a misdiagnosis to the level of a constitutional [761] violation, but will do so when the failings in the process or outcome of such a misdiagnosis are particularly glaring. This is not a case where the evidence demonstrates a carefully thought-out medical decision.

Eye Care
Confiscation and Destruction of Legal Materials
Hygiene

Williams v. ICC Committee, 812 F.Supp. 1029 (N.D. Cal. 1992). The plaintiff's allegation that he was deprived of his eyeglasses although he is legally blind states a claim for deliberate indifference to medical needs.

The allegation that the plaintiff was deprived of his legal materials and was therefore unable to amend his complaint in another action states a court access claim.

At 1032: "This court considers the deliberate denial of toilet paper and soap for any extended period to be more significant than a de minimus [sic] intrusion and certainly to constitute a denial of the 'minimal civilized measure of life's necessities.'"

Correspondence—Legal and Official Access to Courts—Punishment and Retaliation

Hindliter v. Hungerford, 814 F.Supp. 66 (D.Kan. 1993). At 68: "While the inadvertent, negligent opening of legal mail does not violate the Constitution, the courts have not hesitated to find a violation where the mail has been read or where a policy of opening mail outside inmates' presence has been shown." (Citations omitted.) The plaintiff's allegation that prison officials transferred him in retaliation for his legal communication, based on information that they could only have obtained from his legal mail, raised a triable issue of fact barring summary judgment as to his claim of mail opening and also supported a claim of an unconstitutional retaliatory transfer (68).

Pleading—Discovery

Cecere v. County of Westchester, 814 F.Supp. 378 (S.D.N.Y. 1993). The plaintiff alleged that he had been attacked by other inmates as a result of overcrowding and inadequate protection.

At 380:

The complaint in this case contains only conclusary allegations concerning inadequate safety precautions. But detailed information on that subject is not readily available to the plaintiff and hence otherwise insufficient allegations may suffice in the first instance. If a party submits all of the information available to that party without discovery, and it supports an inference that a legal standard has been violated, it may be necessary to authorize at least limited discovery to develop whether or not dismissal of the complaint at that stage would constitute a miscarriage of justice.

The court denies the defendants' motion to dismiss, but "grant[s] them permission to make a motion for summary judgment after responding to all reasonable requests for documents" about the incident, the injuries, and safeguards against such incidents, and directs the defendants to provide plaintiffs' counsel with any such documents.

Suicide Prevention

Hare v. City of Corinth, Miss., 814 F.Supp. 1212 (N.D.Miss. 1993) The defendants are not entitled to summary judgment on qualified immunity in a jail suicide case in which "a chemically dependent, youthful, first-time offender, undergoing withdrawal and depression, and who had made a threat of suicide and exhibited unstable behavior in the hours preceding her death, was placed alone in a cell that allowed no full time observation" and in which there had been another suicide three and a half months earlier (1322).

Contradictory evidence as to the municipal response or lack of it to the previous suicide and the adequacy of defendants' training presented a jury issue as to municipal liability.

NON-PRISON CASES

Judicial Disengagement
Consent Decrees

**Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632 (2d Cir. 1992). At 639:

The district court correctly denied the State's motion to add a sunset clause to the Settlement Order. Although we agree that a consent decree is not "intended to operate in perpetuity," Board of Educ. of Okla. City v. Dowell..., *we believe that the State's motion is premature. The cases cited by the State in support of its position involve motions to dissolve injunctions or consent decrees rather than motions to add a sunset clause to provide for dissolving a consent decree sometime in the future....*

• • •

.... When the State concludes that the specific wrong that the Settlement Order was drafted to cure no longer exists, it should move to dissolve the Settlement Order. Until that time, the inclusion of a sunset clause in the Settlement Order would be based on speculation as to when the Settlement Order no longer would be necessary.

The settlement in this case involved the method of calculating prescription drug prices to be paid to pharmacists as health care providers for Medicaid reimbursement.

FEDERAL RULES DECISIONS

In Forma Pauperis

Coleman v. St. Vincent de Paul Society, 144 F.R.D. 92 (E.D.Wis. 1992). The IFP statute does not authorize the waiver of witness fees for trial subpoenas; however, it does authorize the government's advancing these fees to the witness, but only "after a preliminary and complete showing of the materiality and necessity of each witness." (96) The court authorizes the subpoenaing of seven of the plaintiff's 13 proposed witnesses.

Ayres v. Eggers, 145 F.R.D. 99 (D.Neb. 1992). A prisoner proceeding IFP with appointed counsel is permitted to continue his IFP status after receiving a $30,000 settlement for a vehicular accident. The plaintiff argued that he had child support obligations and future medical expenses that the prison would not pay. At 101: "It is not the object of the court to require a litigant to spend his last dollar in supporting litigation in order to qualify for *in forma pauperis* status." At the end of the case, if the plaintiff loses and has not used his money for medical and child support purposes, he will be directed to pay his attorneys a partial fee. The plaintiff is required to document spending from the settlement and restrict it to the stated purposes.

Intervention—Class Actions—Certification of Classes
Disabled
Personal Involvement and Supervisory Liability

Clarkson v. Coughlin, 145 F.R.D. 339 (S.D.N.Y. 1993). Additional plaintiffs are permitted to intervene in a case pled as a

statewide class action on behalf of hearing-impaired inmates. The motion is timely because the litigation is in the early stages, and the intervenors have potential claims with questions of law or fact in common with the present plaintiffs. The court includes plaintiffs from the Sensorially Disabled Unit (SDU), even though SDU conditions are not at issue, because of the defendants' power to move inmates in and out of the SDU.

The court certifies sub-classes of present and future male and female deaf and hearing-impaired prisoners who are "discriminated against, solely on the basis of their disability, in receiving the rights and privileges accorded to all other inmates." (347) The female subclass meets the numerosity requirement, even though only seven members have been identified, since the problems faced by these prisoners are "systemic," the population is "inherently 'fluid,'" and the defendants admit considerable difficulty identifying and tracking these individuals. The male class of at least 49 inmates meets the numerosity requirement despite the defendants' attempt to discredit the accuracy of their own records.

The plaintiffs are permitted to amend the complaint to assert a claim under the Americans with Disabilities Act.

Contempt
Crowding

Stone v. City and County of San Francisco, 145 F.R.D. 553 (N.D.Cal. 1993).

Coercive contempt fines did not accrue while a contempt order was stayed pending appeal even though the order was affirmed. This holding does not rob the underlying injunction of all effect pending appeal because in this kind of case the court does not lose jurisdiction entirely over enforcement of the judgment.

As of this January 1993 opinion, fines for violation of a crowding order had accrued since the September 1992 affirmance of the contempt order. ■

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

"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 are continuing an "advice" column, a sort of "Dear Abby" for prisoners on legal questions. This issue's "Dear Abby" is Anne Marie Jackson.

Dear Prison Project:

I have just received a motion for summary judgment from the opposing party in my civil lawsuit. What is a motion for summary judgment, and what can I do?

Confused by the motion

Dear Confused:

In the federal system, motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. The moving party files a motion for summary judgment when they believe two conditions are present: 1) that there is no genuine issue or dispute regarding the material or important facts of the case, and 2) when the law is applied to these facts, they are clearly entitled to a judgment in their favor.

There are three possible responses to a motion for summary judgment: 1) admit that the facts submitted by the moving party are accurate and complete, but cross-move for summary judgment explaining why you are entitled to a judgment in your favor when the law is applied to the facts presented by the moving party's motion; 2) dispute the facts presented by the moving party's motion; or 3) request that the motion be stayed (postponed) or denied until discovery has taken place so that additional facts may be gathered.

According to Rule 56(e) of the Federal Rules of Civil Procedure, if you dispute the facts presented by the moving party you *must* set forth, in a sworn statement (a notarized affidavit or a declaration under penalty of perjury), specific facts showing that there is a genuine issue or important fact that is in dispute. This means that you must relate what important facts the moving party left out or what facts the moving party stated that you disagree with. Additionally, you must explain how you know this information, and if there are any documents which support your allegations you must attach these documents to your statement.

Rule 56(e) of the Federal Rules of Civil Procedure further states that "[t]he court may allow affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further interrogatories." You cannot solely rely on the allegations set forth in your original complaint.

If you have not had an opportunity to complete discovery or if the moving party has not yet complied with your discovery requests, you should request that the court deny or stay the motion for summary judgment until you have had an opportunity to obtain the necessary information to support your case through the discovery process. As the court in *Castlow v. United States*, 552 F.2d 560, 564 (3rd Cir. 1977) stated, "where the facts are in the possession of the moving party, a continuance of a motion for summary judgment should be granted as a matter of course."

Summary judgment can be requested and granted for some or all of the issues in a case. Additionally, if more than one issue is involved in the motion for summary judgment, you may choose individual strategies for each individual issue presented; you do not have to adopt one strategy for all of the issues.

Virginia Prisoners Take Steps to Shun Violence

BY ESTHER AND FRANKLIN SCHMIDT

On January 9, 1993, inmates, prison staff and peace activists took part in an unusual graduation ceremony at the Augusta Correctional Center, a Virginia state prison. The event was held in a large, yellow, cinderblock room at the maximum security facility near Staunton, Virginia. Nine inmates received certificates of completion of a course called Alternatives to Violence.

The program was the brainchild of inmates Joe Giarratano and Kelly Stepp, with journalist and Washington Post columnist Colman McCarthy providing the syllabus. It is the first time a program of this nature has been offered in a Virginia prison.

The 10-week course had students reading essays from the works of peace activists such as Ghandi, Leo Tolstoy, Dorothy Day and Martin Luther King Jr. They then wrote weekly essays on how these writings affected their lives.

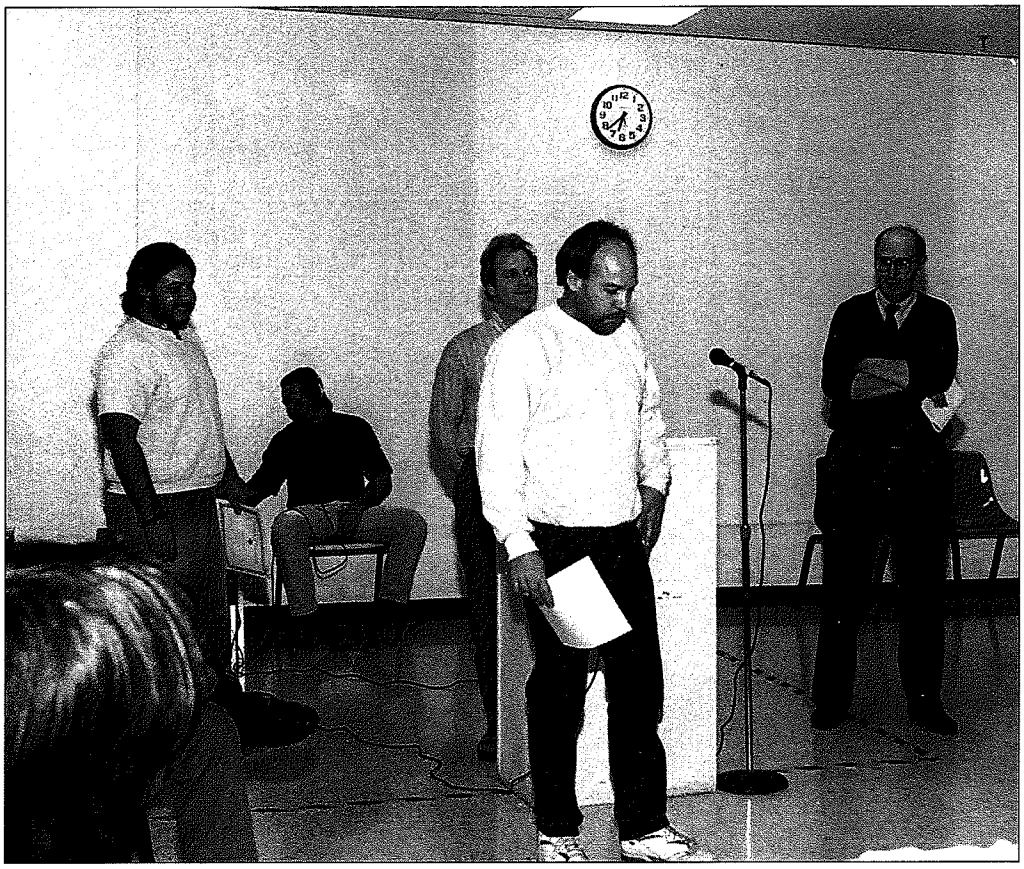
At graduation, inmates in denim and a handful of guests sat in plastic chairs listening intently as McCarthy told them, "It takes courage to reject the norms of violence ... we are a violent society. When the country goes to war and uses bombers, its OK—it's patriotic—but when poor people commit violent acts, they go to prison."

He explained that his course teaches conflict resolution without violence, and that conflicts result from a lack of awareness, not good versus evil.

During the ceremony, Assistant Warden F. Stuart Taylor recalled when Giarratano and Stepp first approached him with the idea. He "felt in [his] gut that this was the right thing" to support. Taylor added he had real pride in the outcome of the course and remarked that before his Department of Corrections career he had been a marriage counselor and had marched with Martin Luther King Jr. A course in nonviolent conflict resolution, he said, might even be appropriate for correctional officers and staff.

Assistant Warden Taylor, along with Marie Millard, operations officer at Augusta, and prison chaplin Jim Roepke, sponsored the program.

Like other large maximum security prisons, Augusta is plagued with overcrowding, too few jobs for inmates, and racism. According to the participants, the course begins to address the problems caused by these issues.



A participant in the Alternatives to Violence course receives his certificate of completion watched by Joe Giarratano (far left) and Colman McCarthy (right).

James Ray Todd, one of the graduates, said, "I didn't believe in peace, it was an alien concept to me. [This course] changed my way of thinking."

Another prisoner stated, "I've been a violent person all of my life. In recent weeks some incidents arose in which I probably would have become violent, but the things I've learned through this course made me talk back instead of throw a punch."

Giarratano and Stepp had difficulty convincing some of the men to take part. Graduate Daniel O'Biren joked, "They promised me parole and pizza if I would get involved. I didn't get either, but I got a lot out of the program."

Colman McCarthy remarked that it is difficult to be an advocate of peace, especially in a prison setting. He plans to use this experience as a model for future courses in other Virginia prisons. He has already offered the program as a correspondence course taken by more than 100 inmates in prisons throughout the nation.

McCarthy heads the Center for Peace in Washington, D.C., and teaches similar courses at a local D.C. high school and the University of Maryland. This fall he will teach the course at the Georgetown University Law Center.

The success of the course depended upon the cooperation of a number of people and institutions that frequently find themselves on opposing sides: the prison administration, chaplaincy staff, inmates and peace activists.

Only two years ago Joe Giarratano was under sentence of death. While on Virginia's death row, he filed and won many suits against the Department of Corrections that resulted in changes in

conditions on death row. He also filed a case on behalf of a fellow death row inmate in which he contended that indigent and handicapped death row inmates should be entitled to free attorneys. The U.S. Supreme Court heard the case on an appeal filed by the Commonwealth of Virginia.

Giarratano's own case became public when doubts about his guilt caused a grass roots campaign to save him from the electric chair. More than 18 newspapers throughout Virginia demanded a new trial for him.

In February, 1991, two days before the execution, and in the face of national attention, Governor Wilder commuted Giarratano's death sentence, stating that he was not sure of Giarratano's guilt. However, Wilder left it to Attorney General Mary Sue Terry to grant the prisoner another day in court. She has refused to do so.

"...things I've learned in this course made me talk back instead of throw a punch."

Today, Joe Giarratano's lawyers continue to investigate the circumstances of the crime that sent him to prison in 1979. Kelly Stepp, who coordinated the course with Giarratano, has just had his parole denied for the seventh time after serving 13 years for burglary. He still has hopes of returning to his family after his next parole hearing.

Following the ceremony, the graduating prisoners and their guests went to the chow hall, where McCarthy and Russ Ford, director of chaplains, addressed almost 100 inmates about the program. Marie Deans, director of the Virginia Coalition of Jails and Prisons, and coordinator of Murder Victims' Families for Reconciliation, spoke, praising the program. Rev. Jim Reopke, prison chaplain and co-sponsor of the program, said that since the initial course had been completed, he expects upwards of 50 requests from other inmates to take the next course.

Giarratano, who has been in prison since 1979 and will not be eligible for parole until 2004, was delighted with the graduation and said, "Nothing in prison—or the world—will change overnight, but we've made a good beginning." ■

Esther and Franklin Schmidt are freelance writers and photographers who have been following Joe Giarratano's case since 1987.

To the Editor:

The *JOURNAL* article on *How Not to Implement a Medical Parole Law* (Vol.8, No. 3, July 1993) was poorly researched and leads the reader to the wrong conclusion. This is a disservice to all of us who advocate for more dignified and humane treatment of inmates.

The problem with the compassionate release program in New York is the law itself. The law requires that, before the Board of Parole can consider a case, there must be such significant physical incapacity that the prisoner poses no danger to society. The opportunity for compassionate release is severely restricted by the narrow definition of such capacity in law. It has the ridiculous provision requiring a physician to determine the inmate's potential danger to society. This is inappropriate and outside our professional experience.

The clinical course of AIDS is not so immediately predictable that the legal requirements of the current medical parole law can be easily met, while still accomplishing its mission. The number of AIDS deaths in New York prisons will only be reduced significantly by other means, such as sentencing reform, change in the demographics of HIV infection, or a dramatic change in the compassionate release law.

The record of the New York State Department of Correctional Services on humane treatment of inmates with HIV infection is in the public domain. It speaks for itself. Check it out through our publications, policies and procedures. Look for key words like autonomy, privacy, voluntary testing on demand, education, family reunion, pre-symptomatic treatment, mainstreaming, training, compassionate release and access to clinical trials. For at least four years, the HIV programs in the New York State Department of Correctional Services have been on the forefront of modern medical care.

Look further at who lobbied hard for the current medical parole law in New York, and who began to lobby for relaxation of the rigorous standards imposed by that law, before it was even passed. The law that passed was a political compromise, but it was also a big step forward. Even with its limited scope, fifteen inmates have already been released on medical parole, and many more will be able to gain from the existing law.

Robert B. Greifinger, M.D.
Deputy Commissioner/
Chief Medical Officer
State of New York
Department of Correctional Services

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The NPP JOURNAL stands by the article by Jackie Walker in the last issue. A large part of Ms. Walker's job, as coordinator of our AIDS Project, is to be a vigorous advocate for prisoners with AIDS. This usually means pushing the establishment harder than it is comfortable being pushed. We appreciate that Dr. Greifinger has a difficult and challenging job, but members of the correctional establishment ***should*** *come under scrutiny by prisoner rights advocates, especially when it concerns prisoners with AIDS, whose lives are at stake.*

HUMAN RIGHTS • *con't from pg. 6*

Conclusion

The so-called subjective element of judicial inquiries into conditions under which prisoners are held places the United States in a state of nonconformity with international standards relating to prisoners' human rights.[31] The state-of-mind test adopted by the United Sates Supreme Court affords a lesser level of human rights protection to prisoners in this country than that proclaimed at the international level. This is a consequence of a judicial philosophy that attempts to limit the protections afforded prisoners regarding their treatment or punishment and conditions of confinement. Measured by international law, the United States is "deliberately indifferent" to the violations of the human rights of its prisoners. ■

Mohamedu Jones is a staff attorney at the NPP.

EDITOR'S NOTE:

It must be remembered, however, that our Supreme Court has been hostile to the idea of following international law. Justice Scalia, writing for the Court, rejected evidence that every other Western democracy prohibited the imposition of the death penalty on juveniles:

"We emphasize that it is *American* conceptions of decency that are dispositive... While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well... they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."

Stanford v. Kentucky, 109 S.Ct. 2969, 2975 n.1. (1989)

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[1]"U.S. Now Leads World in Rate of Incarceration," *NPP JOURNAL*, Vol. 6, No. 1, Winter 1991. The United States imprisoned black men at a higher rate than even apartheid South Africa.

[2]*Helling v. McKinney*, No. 91-1958, (Opinion of White, J.), slip op. at 9 (Supreme Court, 1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."); *Hudson v. McMillian*, 112 S.Ct. 95 (1992); *Wilson v. Seiter*, 111 S.Ct. 2321 (1991); *Graham v. Connor*, 108 S.Ct. 1865 (1989); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Trop v. Dulles*, 356 U.S. 86 (1958).

[3]"Prisoners' Rights," ACLU National Prison Project, presented American Civil Liberties Union's Biennial Conference in Atlanta, Georgia, (June 16-10, 1993) (pp.10-12).

[4]*Rhodes v. Chapman*, 452 U.S. 337 (1981).

[5]429 U.S. 97 (1976).

[6]*See* n.3, *supra*, at 10-16.

[7]475 U.S. 312, 320-321 (1986).

[8]*Wilson v. Seiter*, 111 S.Ct. 2321, 2322 (1991).

[9]*See* n.3, *supra*, at 10-12.

[10]*Wilson* "clearly and substantially narrowed the reach of the Eighth Amendment," and cynically departs from long standing federal practice without sufficient explanation. "First, the opinion refuses to distinguish between damages and injunctive actions. If conditions are bad enough to result in a deprivation of a basic necessity of life, why should a federal court's ability to issue an injunction turn on proof of a culpable state of mind on the part of one or more defendants? What about bad conditions produced by the combined actions [or inactions] of a number of officials and the legislature, ignoring a deteriorating prison over time?" *See* n.3, *supra*, at 10-17.

[11]112 S.Ct. 995 (1992).

[12]*Hudson* extended *Whitley* standards to all Eighth Amendment excessive use-of-force claims.

[13]*Helling v. McKinney*, No. 91-1958 (Opinion of White, J.), slip op. at 9 (Supreme Court, 1993). Significantly, the Court decided that *Estelle*'s deliberate indifference standard applied to this case. Justice Scalia, who delivered the *Wilson* opinion, along with Justice Thomas, dissented. They were also the dissenting Justices in *Hudson*.

[14]The United States has declared that the international documents discussed here are not self-executing. This means that they do not create privately enforceable rights, and therefore, legal claims cannot be based directly on them without further implementing legislation. International human rights and domestic civil rights and civil liberties organizations have lobbied for the enactment of implementing legislation covering the International Covenant on Civil and Political Rights, and to bring the United States into full compliance with other international standards. The International Human Rights Conformity Act, which would allow legal claims based upon the International Covenant on Civil and Political Rights, is currently making its way through the congressional process.

[15]Article 5, Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948. The Universal Declaration of Human Rights is not a treaty or agreement, and thus did not require the "advice and consent" of the Senate nor ratification by the United States. The United States is bound by the Universal Declaration as a member of the United Nations.

[16]"Basic Principles for the Treatment of Prisoners," adopted and proclaimed by General Assembly resolutions 45/111 of 14 December 1990. *See also*, the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment," adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 1. The fifth principle of the Basic Principles provides: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Social and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

[17]Article 7, International Covenant on Civil and Political Rights. The Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. The United States ratified the Covenant in June 1992. This ratification was conditioned by the attachment of reservations, declarations and understandings that limit its domestic effect to the existing requirements of United States law. Obviously, this includes such limitations as the subjective inquiry in conditions cases.

[18]International Human Rights Instruments, HRI/Gen/1, 4 September 1992, General Comment 20 (Article 7) (Forty-fourth session, 1992), no. 1.

[19]*Id.*, no. 2.

[20]*Id.*, no. 3. This is the case even in a public emergency.

[21]Under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the term "cruel, inhuman or degrading treatment or punishment" is to be interpreted to the maximum possible extent, to govern physical and mental abuses. See note to Principle 6.

[22]*See* n. 17, *supra*, no. 13.

[23]Webster's New World Dictionary, 3rd College Edition (1988), defines "tolerate" as "to not interfere with; permit."

[24]See n. 21, *supra*.

[25]*See* n. 17, *supra*, General Comment 21, (Article 10) (Forty-fourth session, 1992), no. 3.

[26]*Id.* General Comment 21, no. 3 further provides: "Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to restrictions that are unavoidable in a closed environment."

[27]See n. 17, *supra*, General Comment 21, no. 4.

[28]Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. The United States signed the convention in 1988, and the Senate gave its advice and consent in 1990 with reservations, declarations and understanding. Ratification, i.e., deposit of the treaty with the United Nations, is pending.

[29]Article 16 extends specific obligations regarding "torture" in Articles 10, 11, 12 and 13, to cover cruel, inhuman or degrading treatment or punishment: (1) education and information regarding the prohibition against cruel, inhuman or degrading treatment or punishment in training of law enforcement involved in the custody or treatment of persons subjected to imprisonment (Article 10); (2) Review of rules, instructions, methods, and practices and arrangements for the custody and treatment of persons subject to imprisonment with a view to prevent cruel, inhuman or degrading treatment or punishment (Article 11); (3) prompt and impartial investigation and examination of reasonable allegations of cruel, inhuman or degrading treatment or punishment (Articles 12 and 13).

[30]Webster's New World Dictionary, 3rd College Edition (1988) defines "acquiescence" as "to agree or consent quietly without protest...."

[31]Several international human rights organizations point out that United States domestic law deviates from international law in several important, substantive areas: the execution of juvenile offenders and pregnant women; standards of cruel, inhuman or degrading treatment or punishment; retroactive imposition of lighter criminal penalties; compensation for unlawful arrests and convictions resulting from the miscarriage of justice; successive prosecution by federal and state authorities; and the segregation of juvenile from adult offenders and of the convicted from the accused.

For the Record

■ The Eastern State Penitentiary Task Force has produced a 1994 calendar, *Eastern State Penitentiary: Beyond the Walls* with current photographs, historic images, and important dates in the history of the Penitentiary. Eastern State is a Philadelphia and National Historic Landmark and it is thought to be eligible as a World Heritage Site. Its seminal role in the history of crime and punishment is undisputed. Some 300 prisons worldwide were based on the radial design of Eastern State; many employed the Pennsylvania System of separate confinement at hard labor which was embodied in Eastern State. The Task Force has been working with the City of Philadelphia to increase public access to the site and to promote an honest discussion about penal theory as it developed since the Penitentiary opened in 1829. Copies of the calendar are available at $12.95 each from 250 S. 16th Street, Philadelphia, PA 19102, (215) 546-0531.

■ Prisoners wondering how to deal with either the threat of sexual assault or its traumatic consequences can now get practical information from audiotapes made by ex-prisoners specifically for males confined in jails and prisons. The Prisoner Rape Education Project consists of a 27-minute audiotape (*An Ounce of Prevention*) emphasizing sexual assault avoidance tactics, intended for use in prisoner orientation programs; a 90-minute audio tape for prisoners (*Becoming a Survivor*) emphasizing survival issues for victims of sexual assault in confinement; and a 46-page manual for staff. The tapes are available in both English and Spanish. The materials can be purchased as a set for $20, plus $5 shipping, from The Safer Society Press, P.O. Box 340, Brandon, VT 05733, (802)247-3132. If you are a prisoner who has already been victimized by sexual assault, you can obtain a free copy of Tape II: *Becoming a Survivor* by mailing a request to Stop Prisoner Rape, c/o ABC No Rio, 156 Rivington Street, New York, NY 10002. The Safer Society Press, a national sexual abuse prevention project of the New York State Council of Churches, is publishing the materials under a grant from the Aaron Diamond Foundation. The tapes were written by Stephen Donaldson of Stop Prisoner Rape.

Funding For People, Not Prisons

BY JENNI GAINSBOROUGH

At a press conference on September 9, the National Council on Crime and Delinquency (NCCD) launched a ten-year plan entitled *Reducing Crime in America: A Pragmatic Approach*. This blueprint for change calls for a fundamental shift from "failed and redundant" policies in corrections and enforcement toward proven prevention programs. As Dr. Barry Krisberg, NCCD President, says in his introduction to the report, "The crime policy debate in America has been dominated by simplistic and naive proposals to 'get tough' and 'send messages to lawbreakers'. All levels of government have invested massively in construction and operation of new prisons and jails, yet there is scant evidence that the huge increase in incarceration has stemmed the tide of criminal violence and drug trafficking." By contrast, the NCCD blueprint outlines a comprehensive, two-tiered effort: immediate reforms of both criminal justice and drug policies, and long-term reforms targeting health care, economic opportunities, communities, families and youths at risk.

The immediate reforms arise from the premise that the criminal justice system can have only a marginal impact on crime rates, and that current criminal justice practices from arrest through sentencing (especially those involving drug crimes) discriminate against minorities, exacerbate the crime problem, and damage race relations. The U.S. spends a world-record $80 billion each year to operate its criminal justice system. The NCCD's proposals target the $25 billion budget of corrections and enforcement to shift funds from ineffective programs to those tackling the underlying causes of crime. All public spending for corrections operations should be frozen at current levels. No crime or sentencing legislation should be implemented without a complete fiscal impact statement on the likely effects of proposed legislation on prisons, jails, probation, parole, and public safety. Mandatory prison sentences and life sentences without the possibility of parole should be abolished. The availability of earned good-time credits for inmates who participate in meaningful work, education, and other self-improvement programs should be expanded for the purposes of reducing current prison and jail sentences. Prison sentences should be principally reserved for violent criminals, repeat criminals whose new crimes involve a substantial threat to public safety, and those whose crimes involve substantial violations of the public trust. The use of intermediate sanctions or alternatives to incarceration should be expanded.

Moneys saved by these measures could be spent instead on family planning, prenatal care, child health services, drug treatment programs, education and job creation—measures that will have a long-term impact on the quality of life for the disadvantaged who are predominantly both the perpetrators and the victims of crime.

Attorney General Janet Reno and Drug Policy Director Lee Brown joined senators and representatives for a special symposium held on the evening of the report's release. Those of us working for a more enlightened and rational approach to criminal justice can only hope that they paid as much attention to the NCCD as they do to the tough-on-crime demagogues and profiteers of the multi-billion-dollar corrections industry.

As this provocative report argues so persuasively, "Radical and enduring social problems demand radical initiatives, that in the words of Thomas Jefferson, require a social revolution."

To obtain the report, contact the National Council on Crime and Delinquency, 685 Market Street, Suite 620, San Francisco, CA 94105, (415) 896-5109. ■

Jenni Gainsborough is editorial assistant of the NPP Journal.

BY JACKIE WALKER

AIDS Education Empowers Women

In most correctional systems AIDS education for women prisoners, as for their male counterparts, is limited to a pamphlet or video. Fortunately women's and AIDS service organizations have managed to provide programs to educate and empower women.

Arkansas—The Women's Project
The Women's Project started providing AIDS education to women prisoners at the Women's Unit in Pine Bluff as an outgrowth of discussions with battered women in prison and work with prostitutes on the outside. Peer educators are trained in AIDS education and certified as pre/post-HIV-test counselors. Kerry Lobel, organizer with the Women's Project, says the program's main goal is to train women prisoners to become a resource for each other and their community. Peer educators provide AIDS presentations for over 300 women each year and also do individual counseling. The Women's Project also publishes *HIV, AIDS And Reproductive Health: A Peer Trainer's Guide.*

Lobel, describing the Project's impact, says "We've seen an overall change in the tone of the prisoners. When we first started there were a lot of misconceptions and fear. Today we find less fear and more support for women with HIV/AIDS." Two peer educators trained by the Project have also become employed by AIDS service organizations since their release.

Delaware—Delaware Gay and Lesbian Health Advocates
The Delaware Council On Crime and Justice and Delaware Gay and Lesbian Health Advocates started training peer educators at the Delaware Women's Correctional Institution in 1989. Suzanne Triano, HIV/AIDS Outreach Worker with Delaware Lesbian and Gay Advocates, was trained by the Council and while in prison authored the booklet *Before ... I was scared.* Peer educators are paid to conduct a weekly one hour talk about HIV/AIDS. Triano feels peer educators are impacted on several levels. "I see a lot of changes in self-esteem because women are giving something back to others. I also see women becoming more responsible and engaging in less risky behavior."


Terri Suomi

Peer educator Suzanne Triano, HIV/AIDS Outreach Worker with Delaware Gay and Lesbian Health Advocates

District of Columbia—Whitman Walker Clinic
Whitman-Walker started providing AIDS education at the District of Columbia Jail after being contacted by two prisoners in 1990. Beverly Flemming, Outreach Coordinator for the SHOW Project, provides AIDS education to women twice a week. Flemming tries to make her educational sessions into a two month course: women who attend regularly receive a certificate. In addition to AIDS education, Flemming also has support group meetings on Sundays for women with HIV/AIDS. Flemming gives the following advice to educators, "Go in and share your own sexual experiences to strike up a rapport, and have respect for the women. Remember these are human beings who have made mistakes and we've all done that. As women, we're more alike than different."

Massachusetts—Social Justice for Women
The Women and AIDS Project at Social Justice For Women began in 1988 and currently provides HIV/AIDS education and services to MCI-Framingham and two county correctional facilities. The program includes four levels of HIV/AIDS education from the mandatory one-hour orientation for incoming women to a peer education program. Caroline Stevenson, Program Director, reflects on the benefits of the peer education program: "Becoming a peer educator gives women a way to respond to the AIDS crisis. Peer Educators also get a real sense of purpose from their work. They're taking constructive action in their lives to help others, something many have never done before."

Besides education, the Project coordinates a continuum of care for women with HIV/AIDS after their release. Case managers provide services that include teaching women how to monitor their health, explaining drug therapies, developing an aftercare service plan and accompanying women to appointments. Although the need for outside HIV/AIDS educators continues, Stevenson also urges groups to focus more attention on drug treatment programs for newly-released women.

New Mexico—Project Alerta
Project Alerta began training peer educators at the Bernalillo County Detention Center in 1992. Sidney Buffington, Health Educator with the Albuquerque Family Health Center, designed the curriculum based on Paulo Friedes' theories that all education is political. Ten women are selected for the six-week program, according to length of stay, ethnicity and subcultures to ensure diversity. After completing a two-day training women choose an area of work and later design a class project. Women are paid $5 a hour, which is kept in a fund until they are released or transferred.

In her AIDS education programs Buffington feels, "The biggest challenge is to shut up and listen for awhile. Let the women set the tone and pace, because they'll challenge themselves much more than you will." ■

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, AIDS, family support, and ex-offender aid. 10th Edition, published January 1993. Paperback, $30 prepaid from NPP.

_____ **The National Prison Project Status Report** lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1993. $5 prepaid from NPP.

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_____ **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.

_____ **TB: The Facts for Inmates and Officers** answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free. Bulk orders: 100 copies/$25. 500 copies/$100. 1,000 copies/$150 prepaid.

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_____ **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.

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The National Prison Project
1875 Connecticut Ave., NW #410
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THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project's litigation program since June 15, 1993. Further details of any of the listed cases may be obtained by writing the Project.

Helling v. McKinney—The National Prison Project appeared as *amicus curiae* in the Supreme Court of the United States in this case which involves the issue of whether the Constitution is violated when a prisoner is exposed to levels of environmental tobacco smoke (ETS) that pose a serious risk to his or her health. On June 18, in a 7-2 decision with implications for other environmental health concerns, the Supreme Court found that prisoners need not prove a present health problem for potential health risks to be actionable under the Eighth Amendment. It is sufficient to show that the risk of harm from exposure to ETS is "unreasonably high" and that such exposure is a risk which today's society will not tolerate.

Austin v. Lehman—This state-wide prison conditions case involving 13 facilities in Pennsylvania was filed jointly with the ACLU of Pennsylvania and other local counsel in 1990. The case challenges overcrowding, problems with medical care and other conditions. During the past quarter, the great bulk of the discovery has been completed. The final pretrial order is to be submitted on October 22, 1993 and the case will be placed on the trial list for November 25, 1993.

Hamilton v. Morial challenges conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans. The National Commission on Correctional Health Care is auditing the medical program and an excellent comprehensive mental health program has been developed. A tentative agreement has been reached with the Sheriff on the conditions phase. The agreement provides for the closing of Tent City, a new Central Lock-Up, a new kitchen, and various other physical plant and fire safety improvements.

Spear v. Waihee—On July 15 an agreement was reached in the Hawaii prison conditions case. The new agreement will replace the existing 1985 consent decree governing conditions at the Oahu Community Correctional Center and the Women's Community Correctional Center. It is designed to accomplish three main goals: it replaces old language and procedures that are no longer relevant because of changed conditions; it simplifies the process by which court supervision takes place and provides an express mechanism for determining when such monitoring is no longer necessary; and it provides for permanent population caps at the facilities which will be enforced by the state courts, rather than the federal courts as is now the case. The population controls include prohibitions against housing prisoners in areas not designed for housing, prohibit housing more than two prisoners in a cell, place conditions on double-celling, and impose space requirements for new construction. The process for ending the court supervision has three phases: first, the expert monitors will oversee compliance and report to the court on their findings until they determine there has been substantial compliance with the terms of the agreement; second, the Department of Public Safety will report to the court on its compliance efforts; finally, once the court finds continued substantial compliance in all areas, the decree will be vacated except for population controls which will remain permanently in effect.

U.S. v. Michigan/Knop v. Johnson—This is a state-wide Michigan prison conditions case. In *U.S. v. Michigan*, in a change of position, the Department of Justice will oppose the defendants' appeal from the court's order refusing to dismiss most of the case. The court granted a motion to compel inspection by the Department of Justice, and it appears that the Department will now attempt to enforce the consent decree. In *Knop,* on June 30, defendants filed their legal access plan. Plaintiffs filed their opposition on July 30, and a hearing is scheduled for September 1993.

National Prison Project
American Civil Liberties Union Foundation
1875 Connecticut Ave., NW, #410
Washington, D.C. 20009
(202) 234-4830

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