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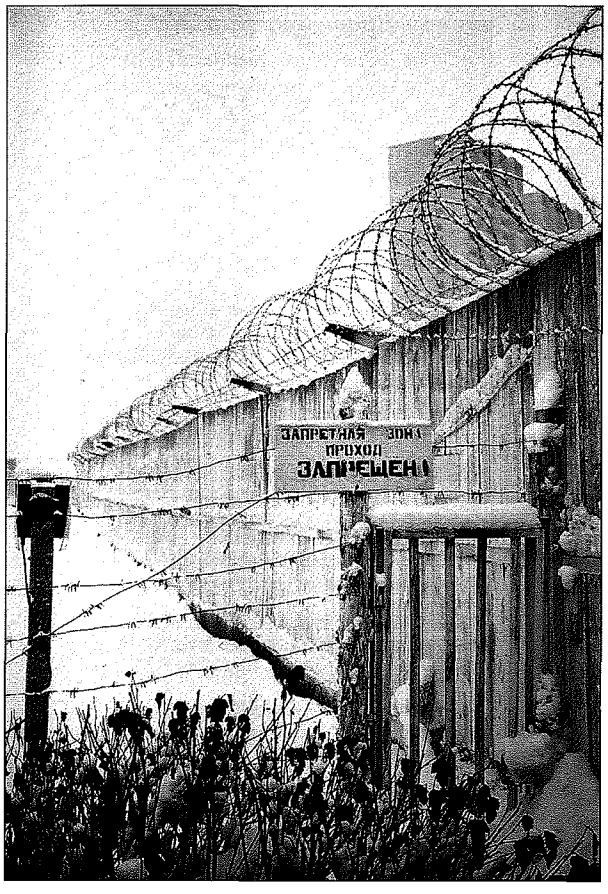
Moscow Prison Conference Breaks New Ground

BY JENNIFER MONAHAN

The International Conference on Prison Reform in Former Totalitarian Countries was held at a conference center about 30 miles outside of Moscow from November 14-19, 1992. Participants came from a number of former Soviet republics, from Russia to Kazakhstan. In addition, there were East Europeans from Croatia, Hungary and Poland, and West Europeans from France, Switzerland, Belgium, the Netherlands, Germany, Denmark, Sweden, Norway and the United Kingdom. A handful came from the United States. Alvin J. Bronstein, executive director of the National Prison Project, was one of the participants. He said, "In light of the economic chaos in the Russian confederation the impact of this conference on prison reform remains to be seen. However, the warmth and openness of the Easterners and the many friendships that developed will result in a continuing exchange." A followup conference has already been scheduled for May 1993, in Kazakhstan. (Also see sidebar, p. 20.)



Visitors were dismayed by conditions in the Russian prison beyond this gate. Their visit was part of the International Conference on Prison Reform in Former Totalitarian Countries.

"You are the bait," Alex Petrov told us as we came off the plane at Moscow. "By inviting foreigners to this conference, we enticed our own big names. With you here, our authorities couldn't refuse."

The strategy worked. The Russian human rights activists, coordinated by the Moscow Helsinki Group, had got together ministry officials and senior prison administrators from all over the former USSR. They had invited doctors and advocates with first-hand knowledge of prison conditions, and academics involved in legislative reform. Many of the organizers themselves knew the Gulag from the inside, having served sentences as political prisoners in the years before *perestroika*, and a number of their conference guests shared the same background. This was not a meeting where officialdom was going to get off lightly. Indeed, this was not a meeting that had ever happened before.

The foreign participation was the result of collaboration with Penal Reform International (PRI), a non-governmental organization based in London (U.K.) which has individual members in over 40 countries. Nearly 60 PRI members attended, mainly from West and East Europe, and the rest came from the U.S.

Without the foreign "bait" the organizers almost certainly would not have achieved their aim of assembling all the interested parties together. The very title of the conference, "Prison Reform in Former Totalitarian Countries," caused annoyance in the Ministry of the Interior. Not surprisingly, since many of the bureaucrats managing the criminal justice system today are those who did the same job under the old regime.

Given the mix of former dissidents on the one hand, and *apparatchiki* on the other, the tone was remarkably free of personal recrimination. There was no vindictiveness, no point-scoring. The whole four days saw an intensely serious debate which ran virtually non-stop and was still going full tilt at the press conference on the fifth day. It was essentially a Russian affair: the old-world courtesies of language (first name and patronymic as the term of address) contrasted oddly with the harsh testimony of

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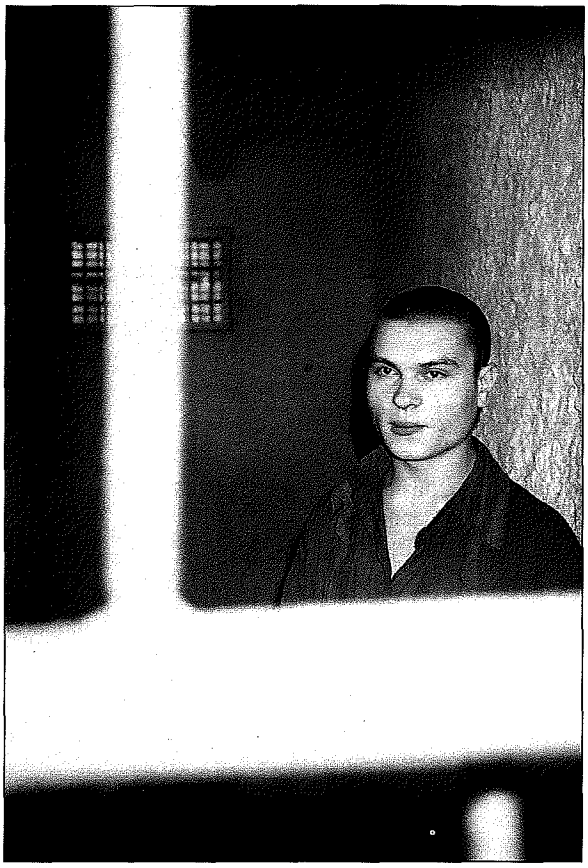

Photo courtesy of J. Monahan

This prisoner, shown in the segregation block of "Enterprise 136.2," a labor camp 70 km. north of Moscow, requested segregation after stealing food from other prisoners.

20th century experience. We, the outsiders, had come in on one chapter of a very long story.

Like everything in the former Soviet Union, the prison system exists now in a shifting no-man's land, between the old order and whatever new order may emerge. The cast of the conference rostrum was a living demonstration of recent shifts. Sergei Adamovich Kovalev, in the chair on the first morning, is chairman of the Human Rights Committee of the Russian Supreme Soviet and an influential voice in drafting legislation. Not so long ago he was in a labor camp serving a political sentence.

Reform Code

A reformed penitentiary code has been introduced—it scraped through Parliament on the third attempt last June. But given the lack of resources, asked the questioners on the floor, how would it be implemented? For instance, how would prisoners exercise the new right to make phone calls home, when the camps lack phones? Kovalev stressed that it is essential to get the principle established, "to get it on paper, as a right." He turned to two prison directors, also on the rostrum, and told them they must now "use the law we've given you, push for the money." What we are seeing are the mechanics of reform in action.

The new code outlaws the deprivation of food, clothing or bedding, or the cancellation of visits, as prison punishments; it guarantees freedom of conscience and religion; it permits prisoners to send complaints to organizations outside the prison administration; it increases allowances of visits and food parcels; it sets a minimum wage and grants convicts a week's leave off work.

But the code has not succeeded in abolishing compulsory labor, the bedrock of the system both under communism and before. The penal colonies therefore remain essentially a means of forced state production. Evidence presented at the conference shows that no one is spared. Women with small children, invalids, tuberculosis cases (11% of all prisoners), have to put in their hours.

The convict in Russia is well off compared with the prisoner awaiting trial. At the conference, former prisoners and independent witnesses described how the pretrial prisons, known as "investigation wards," are so overcrowded that cells designed for two hold up to seven. Prisoners have to take turns to lie down; lack of ventilation causes fainting. Sanitary arrangements are a row of stinking holes.

The notorious Kresty prison in St. Petersburg was cited. Built for 3,000 [ed. note: other reports cite 1,000], it houses 6-7,000. A mass hunger strike last May produced no effect, except to have the activists outside who publicized it threatened by the "special services" (KGB). An approach was made to the United Nations, who asked for more detailed information, which cannot be obtained because no one can get in.

Perhaps the most horrific account came from an advocate who described the plight of juveniles. Marina Natanovna Rodman said that when she visited youngsters being held in the investigation wards, she found them hungry, sick and terrorized. Under the current law, she said, a lawyer could visit a detainee after 24 hours. But the first day and night were used to extract confessions, and teenagers often complained that they had been beaten. When the trial finally took place, the lawyer was not informed. Complaints were now possible under the law, but she knew of only two successful outcomes when a detainee had been released.

Prison Visits

Visits to prisons by members of the conference confirmed these accounts. Members of the party that went to one of Moscow's two large remand prisons were amazed that they had been allowed to see such appalling conditions.

The party I joined went to a labor camp near Moscow for first-time convicts. Physical conditions were spartan, and dysentery hit the camp last summer. But the diet was no less varied than in current life outside. The colonel in charge (a *perestroika* appointment) allowed us unrestricted access to all parts of the camp, including the segregation block, where Russian speakers were allowed to talk to prisoners. Another party visited a prison for women, and had great problems even being allowed through the gates. A lot depends on whomever is in charge on the spot, now that central power has less grip.

(con't. on page 20)

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

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"Infamous Punishment": The Psychological Consequences of Isolation

The NPP JOURNAL continues its in-depth coverage of supermaximum security prisons. In the Fall 1992 issue, we ran an overview article, "The Marionization of American Prisons," and a piece on Barlinnie, the Scottish equivalent of our supermax. It operates in a very different manner from its U.S. counterparts with very different results. A third article on California's Pelican Bay State Prison, the most restrictive prison in the country, focused on its severe and restrictive confinement. In the following article, University of California psychologist Craig Haney examines the psychological effects of confinement in prisons like Pelican Bay.
—J.E.

BY CRAIG HANEY

Since the discovery of the asylum, prisons have been used to isolate inmates from the outside world, and often from each other. As most students of the American penitentiary know, the first real prisons in the United States were characterized by the regimen of extreme isolation that they imposed upon their prisoners. Although both the Auburn and Pennsylvania models (which varied only in the degree of isolation they imposed) eventually were abandoned, in part because of their harmful effects upon prisoners,[1] most prison systems have retained and employed—however sparingly—some form of punitive solitary confinement. Yet, because of the technological spin that they put on institutional design and procedure, the new super-maximum security prisons are unique in the modern history of American corrections. These prisons represent the application of sophisticated, modern technology dedicated entirely to the task of social control, and they isolate, regulate, and surveil more effectively than anything that has preceded them.

The Pelican Bay SHU

The Security Housing Unit at California's Pelican Bay State Prison is the prototype for this marriage of technology and total control.[2] The design of the Security Housing Unit—where well over a thousand prisoners are confined for periods of six months to several years—is starkly austere. Indeed, Pelican Bay's low, windowless, slate-gray exterior gives no hint to outsiders that this is a place where human beings live. But the barrenness of the prison's interior is what is most startling. On each visit to this prison I have been struck by the harsh, visual sameness and monotony of the physical design and the layout of these units. Architects and corrections officials have created living environments that are devoid of social stimulation. The atmosphere is antiseptic and sterile; you search in vain for humanizing touches or physical traces that human activity takes place here. The "pods" where prisoners live are virtually identical; there is little inside to mark location or give prisoners a sense of place.

Prisoners who are housed inside these units are completely isolated from the natural environment and from most of the natural rhythms of life. SHU prisoners, whose housing units have no windows, get only a glimpse of natural light. One prisoner captured the feeling created here when he told me, "When I first got here I felt like I was underground." Prisoners at Pelican Bay are not even permitted to see grass, trees or shrubbery. Indeed, little or none exists within the perimeters of the prison grounds, which are covered instead by gray gravel stones. This is no small accomplishment since the prison sits adjacent to the Redwood National Forest and the surrounding landscape is lush enough to support some of the oldest living things on earth. Yet here is where the California Department of Corrections has chosen to create the most lifeless environment in its—or any—correctional system.

When prisoners do get out of their cells for "yard," they are released into a barren concrete encasement that contains no exercise equipment, not even a ball. They cannot see any of the surrounding landscape because of the solid concrete walls that extend up some 20 feet around them.

Bare concrete walls form an exercise "yard" at Pelican Bay where prisoners engage in solitary recreation. An opaque roof covers half the yard; the wire screen which covers the other half provides prisoners with their only view of open sky.

Overhead, an opaque roof covers half the yard; the other half, although covered with a wire screen, provides prisoners with their only view of the open sky. When outside conditions are not intolerably inclement (the weather at Pelican Bay often brings harsh cold and driving rain), prisoners may exercise in this concrete cage for approximately an hour-and-a-half a day. Their movements are monitored by video camera, watched by control officers on overhead television screens. In the control booth, the televised images of several inmates, each in separate exercise cages, show them walking around and around the perimeter of their concrete yards, like laboratory animals engaged in mindless and repetitive activity.

Prisoners in these units endure an unprecedented degree of involuntary,

enforced idleness. Put simply: prisoners here have virtually nothing to *do*. Although prisoners who can afford them are permitted to have radios and small, regulation-size televisions in their cells, there is no *activity* in which they may engage. Except for the limited exercise I have described and showers (three times a week), there are no prison routines that regularly take them out of their cells. All prisoners are "cell fed"—twice a day meals are placed on tray slots in the cell doors to be eaten by the prisoners inside. (Indeed, on my first tour of the institution one guard told me that this was the only flaw in the design of the prison—that they had not figured out a way to feed the prisoners "automatically," thus eliminating the need for any contact with them.) Prisoners are not permitted to do work of any kind, and they have no opportunities for educational or vocational training. They are never permitted out on their tiers unless they are moving to and from showers or yard, or being escorted—in chains and accompanied by two baton-wielding correctional officers per inmate—to the law library or infirmary outside the unit. Thus, with minor and insignificant exceptions, a prisoner's entire life is lived within the parameters of his 80 square-foot cell, a space that is typically shared with another prisoner whose life is similarly circumscribed.

All movement within these units is tightly regulated and controlled, and takes place under constant surveillance. Prisoners are permitted to initiate little or no meaningful behavior of their own. When they go to shower or "yard," they do so at prescribed times and in a prescribed manner and the procedure is elaborate. Guards must first unlock the padlocks on the steel doors to their cells. Once the guards have left the tier (they are never permitted on the tier when an unchained prisoner is out of his cell), the control officer opens the cell door by remote control. The prisoner must appear naked at the front of the control booth and submit to a routinized visual strip search before going to yard and, afterwards, before returning to his cell. Some prisoners are embarrassed by this public display of nudity (which takes place not only in front of control officers and other prisoners, but whomever else happens to be in the open area around the outside of the control booth.) As might be expected, many inmates forego the privilege of taking "yard" because of the humiliating procedures to which they must submit and the draconian conditions under which they are required to exercise. Whenever prisoners are in the presence of another human being (except for those who have cellmates), they are placed in chains, at both their waist and ankles. Indeed, they are chained even *before* they are permitted to exit their cells. There are also special holding cages in which prisoners are often left when they are being moved from one place to another. Prisoners are kept chained even during their classification hearings. I witnessed one prisoner, who was apparently new to the process, stumble as he attempted to sit down at the start of his hearing. Because he was chained with his hands behind his back, the correctional counselor had to instruct him to "sit on the chair like it was a horse"—unstable, with the back of the chair flush against his chest.

"When I first got here, I felt like I was underground."

The cells themselves are designed so that a perforated metal screen, instead of a door, covers the entrance to the cells. This permits open, around-the-clock surveillance whenever guards enter the tiers. In addition, television cameras have been placed at strategic locations inside the cellblocks and elsewhere within the prison.

Because the individual "pods" are small (four cells on each of two floors), both visual and auditory surveillance are facilitated. Speakers and microphones have been placed in each cell to permit contact with control booth officers. Many prisoners believe that the microphones are used to monitor their conversations. There is little or no personal privacy that prisoners may maintain in these units.

Psychological Consequences

The overall level of longterm social deprivation within these units is nearly total and, in many ways, represents the destructive essence of this kind of confinement. Men in these units are deprived of human contact, touch and affection for years on end. They are denied the opportunity for contact visits of any kind; even attorneys and experts must interview them in visiting cells that prohibit contact. They cannot embrace or shake hands, even with visitors who have traveled long distances to see them. Many of these prisoners have not had visits from the outside world in years. They are not permitted to make phone calls except for emergencies or other extraordinary circumstances. As one prisoner told me: "Family and friends, after the years, they just start dropping off. Plus, the mail here is real irregular. We can't even take pictures of ourselves" to send to loved ones.[3] Their isolation from the social world, a world to which most of them will return, could hardly be more complete.

The operational procedures employed within the units themselves insure that even interactions with correctional staff occur infrequently and on highly distorted, unnatural terms. The institutional routines are structured so that prisoners are within close proximity of staff only when they are being fed, visually searched through the window of the control booth before going to "yard," being placed in chains and escorted elsewhere within the institution. There is always a physical barrier or mechanical restraint between them and other human beings.

The only exceptions occur for prisoners who are double-celled. Yet double-celling under these conditions hardly constitutes normal social contact. In fact, it is difficult to conceptualize a more strained and perverse form of intense and intrusive social interaction. For many prisoners, this kind of forced, invasive contact becomes a source of conflict and pain. They are thrust into intimate, constant co-living with another person—typically a total stranger—whose entire existence is similarly and unavoidably co-mingled with their own. Such pressurized contact can become the occasion for explosive violence. It also fails to provide any semblance of social "reality testing" that is intrinsic to human social existence.[4]

The psychological significance of this level of longterm social deprivation cannot be overstated. The destructive consequences can only be understood in terms of the profound importance of social contact and social context in providing an interpretive framework for all human experience, no matter how personal and seemingly private. Human identity formation occurs by virtue of social contact with others. As one SHU prisoner explained: "I liked to be around people. I'm happy and I enjoy people. They take that away from you [here]. It's like we're dead. As the Catholics say, in purgatory. They've taken away everything that might give a little purpose to your life." Moreover, when our reality is not grounded in social context, the internal stimuli and beliefs that we generate are impossible to test against the reactions of others. For this reason, the first step in any program of extreme social influence—ranging from police interrogation to indoctrination and "brainwashing"—is to isolate the intended targets from others, and to create a context in which social reality testing is controlled by

those who would shape their thoughts, beliefs, emotions, and behavior. Most people are so disoriented by the loss of social context that they become highly malleable, unnaturally sensitive, and vulnerable to the influence of those who control the environment around them. Indeed, this may be its very purpose. As one SHU prisoner told me: "You're going to be what the place wants you to be or you're going to be nothing."

Longterm confinement under these conditions has several predictable psychological consequences. Although not everyone will manifest negative psychological effects to the same degree, and it is difficult to specify the point in time at which the destructive consequences will manifest themselves, few escape unscathed. The norms of prison life require prisoners to struggle to conceal weakness, to minimize admissions of psychic damage or pain. It is part of a prisoner ethic in which preserving dignity and autonomy, and minimizing vulnerability, is highly valued. Thus, the early stages of these destructive processes are often effectively concealed. They will not be apparent to untrained or casual observers, nor will they be revealed to persons whom the prisoners do not trust. But over time, the more damaging parts of adaptation to this kind of environment begin to emerge and become more obvious.[5]

The first adaptation derives from the totality of control that is created inside a place like Pelican Bay. Incarceration itself makes prisoners dependent to some degree upon institutional routines to guide and organize their behavior. However, the totality of control imposed in a place like Pelican Bay is extreme enough to produce a qualitatively different adaptation. Eventually, many prisoners become entirely dependent upon the structure and routines of the institution for the control of their behavior. There are two related components to this adaptation. Some prisoners become dependent upon the institution to *limit* their behavior. That is, because their behavior is so carefully and completely circumscribed during their confinement in lockup, they begin to lose the ability to set limits for themselves. Some report becoming uncomfortable with even small amounts of freedom because they have lost the sense of how to behave without the constantly enforced restrictions, tight external structure, and totality of behavioral restraints.

Other prisoners suffer an opposite but related reaction, caused by the same set of circumstances. These prisoners lose the ability to *initiate* behavior of any kind—to organize their own lives around activity and purpose—because they have been stripped of any opportunity to do so for such prolonged periods of time. Apathy and lethargy set in. They report being tired all the time, despite the fact that they have been allowed to do nothing. They find it difficult to focus their attention, their minds wander, they cannot concentrate or organize thoughts or actions in a coherent way. In extreme cases, a sense of profound despair and hopelessness is created.

The experience of total social isolation can lead, paradoxically, to social withdrawal. That is, some prisoners in isolation draw further into themselves as a way of adjusting to the deprivation of meaningful social contact imposed upon them. They become uncomfortable in the course of the little social contact they are permitted. They take steps to avoid even that—by refusing to go to "yard," refraining from conversation with staff, discouraging any visits from family members or friends, and ceasing correspondence with the outside world. They move from being starved for social contact to being frightened by it. Of course, as they become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and disoriented in their presence.

The absence of social contact and social context creates an air of unreality to one's existence in these units. Some prisoners act out as a way of getting a reaction from their environment, proving to themselves that they still exist, that they are still alive and capable of eliciting a human response—however hostile—from other human beings. This is the context in which seemingly irrational refusals of prisoners to "cuff up" take place—which occur in the Pelican Bay SHU with some regularity, in spite of the knowledge that such refusals invariably result in brutal "cell extractions" in which they are physically subdued, struck with a large shield and special cell extraction baton, and likely to be shot with a taser gun or wooden or rubber bullets before being placed in leg irons and handcuffs.[6]

In some cases, another pattern emerges. The line between their own thought processes and the bizarre reality around them becomes increasingly tenuous. Social contact grounds and anchors us; when it is gone, there is nothing to take its place. Moreover, for some, the environment around them is so painful and so painfully impossible to make sense of, that they create their own reality, one seemingly "crazy" but easier for them to tolerate and make sense of. Thus, they live in world of fantasy instead of the world of control, surveillance, and inhumanity that has been imposed upon them by the explicit and conscious policies of the correctional authorities.

For others, the deprivations, the restrictions, and the totality of control fills them with intolerable levels of frustration. Combined with the complete absence of activity or meaningful outlets through which they can vent this frustration, it can lead to outright anger and then to rage. This rage is a reaction against, not a justification for, their oppressive confinement. Such anger cannot be abated by intensifying the very deprivations that have produced it. They will fight against the system that they perceive only as having surrounded and oppressed them. Some will lash out violently against the people whom they hold responsible for the frustration and deprivation that fills their lives. Ultimately, the outward expression of this violent frustration is marked by its irrationality, primarily because of the way in which it leads prisoners into courses of action that further insure their continued mistreatment. But the levels of deprivation are so profound, and the resulting frustration so immediate and overwhelming, that for some this lesson is unlikely ever to be learned. The pattern can only be broken through drastic changes in the nature of the environment, changes that produce more habitable and less painful conditions of confinement.

SHU prisoners. . . get only a glimpse of natural light.

The magnitude and extremity of oppressive control that exists in these units helps to explain another feature of confinement in the Pelican Bay SHU that, in my experience, is unique in modern American corrections. Prisoners there have repeatedly voiced fears of physical mistreatment and brutality on a widespread and frequent basis. They speak of physical intimidation and the fear of violence at the hands of correctional officers. These concerns extend beyond the physical intimidation that is structured into the design of the units themselves—the totality of restraint, the presence of guards who are all clad in heavy flak jackets inside the units, the use of chains to move prisoners out of their cells, and the constant presence of control officers armed with assault rifles slung across their chests as they monitor prisoners within their housing units. Beyond this,

prisoners speak of the frequency of "cell extractions" which they describe in frightening terms. Most have witnessed extractions in which groups of correctional officers (the previously described "cell extraction team") have entered prisoners' cells, fired wooden or rubber bullets and electrical tasers at prisoners, forcibly chained and removed them from their cells, sometimes for the slightest provocation (such as the failure to return food trays on command). And many note that this mistreatment may be precipitated by prisoners whose obvious psychiatric problems preclude them from conforming to SHU rules or responding to commands issued by correctional officers.[7] One prisoner reported being constantly frightened that guards were going to hurt him. The day I interviewed him, he told me that he had been sure the correctional staff was "going to come get him." He stuck his toothbrush in the door of his cell so they couldn't come inside. He vowed "to hang myself or stop eating [and] starve to death" in order to get out of the SHU.

I believe that the existence of such brutality can be attributed in part to the psychology of oppression that has been created in and around this prison. Correctional staff, themselves isolated from more diverse and conflicting points of view that they might encounter in more urban or cosmopolitan environments, have been encouraged to create their own unique worldview at Pelican Bay. Nothing counters the prefabricated ideology into which they step at Pelican Bay, a prison that was designated as a place for the "worst of the worst" even before the first prisoners ever arrived. They work daily in an environment whose very structure powerfully conveys the message that these prisoners are not human beings. There is no reciprocity to their perverse and limited interactions with prisoners—who are always in cages or chains, seen through screens or windows or television cameras or protective helmets—and who are given no opportunities to act like human beings. Pelican Bay has become a massive self-fulfilling prophecy. Violence is one mechanism with which to accommodate to the fear inevitably generated on both sides of the bars.

Psychiatric Disorders

The psychological consequences of living in these units for long periods of time are predictably destructive, and the potential for these psychic stressors to precipitate various forms of psychopathology is clear-cut. When prisoners who are deprived of meaningful social contact begin to shun all forms of interaction, withdraw more deeply into themselves and cease initiating social interaction, they are in pain and require psychiatric attention. They get little or none.[8] Prisoners who have become uncomfortable in the presence of others will be unable to adjust to housing in a mainline prison population, not to mention free society. They are also at risk of developing disabling, clinical psychiatric symptoms. Thus, numerous studies have underscored the role of social isolation as a correlate of mental illness. Similarly, when prisoners become profoundly lethargic in the face of their monotonous, empty existence, the potential exists for this lethargy to shade into despondency and, finally, to clinical depression. For others who feel the frustration of the totality of control more acutely, their frustration may become increasingly difficult to control and manage. Longterm problems of impulse control may develop that are psychiatric in nature.

This kind of environment is capable of creating clinical syndromes in even healthy personalities, and can be psychologically destructive for anyone who enters and endures it for significant periods of time. However, prisoners who enter these places with *pre-existing* psychiatric disorders suffer more acutely. The psychic pain and vulnerability that they bring into the lockup unit may grow and fester if unattended to. In the absence of psychiatric help, there is nothing to keep many of these prisoners from entering the abyss of psychosis.

Indeed, in the course of my interviews at Pelican Bay, numerous prisoners spoke to me about their inability to handle the stress of SHU confinement. Some who entered the unit with pre-existing problems could perceive that they had gotten worse. Others had decompensated so badly that they had no memory of ever having functioned well, or had little awareness that their present level of functioning was tenuous, fragile, and psychotic. More than a few expressed concerns about what they would do when released—either from the SHU into mainline housing, or directly into free society (as a number are). One prisoner who was housed in the unit that is reserved for those who are maintained on psychotropic medication told me that he was sure that the guards in this unit were putting poison in his food. He was concerned because when released (this year), he told me "I know I won't be able to work or be normal."

Many SHU prisoners also reported being suicidal or self-mutilating. A number of them showed me scars on their arms and necks where they had attempted to cut themselves. One prisoner told me matter-of-factly, "I've been slicing on my arms for years, sometimes four times a day, just to see the blood flow." One suicidal prisoner who is also deaf reported being cell extracted because he was unable to hear the correctional officers call count (or "show skin"—a procedure used so that staff knows a prisoner is in his cell). He now sleeps on the floor of his cell "so that the officers can see my skin." Another prisoner, who has reported hearing voices in the past and seeing "little furry things," has slashed his wrists on more than one occasion. Instead of being transferred to a facility where he could receive mental health treatment—since obviously none is available at Pelican Bay—he has been moved back and forth between the VCU and SHU units. While in the VCU, he saw a demon who knew his name and frequently spoke to him. As I interviewed him, he told me that the voices were cursing at him for talking to me. In the course of our discussion, he was clearly distracted by these voices and, periodically, he laughed inappropriately. One psychotic SHU prisoner announced to me at the start of our interview that he was a "super power man" who could not only fly, but see through steel and hear things that were being said about him from great distances. He had lived in a board-and-care home and been maintained on Thorazine before his incarceration. Although he had attempted suicide three times while at Pelican Bay, he was confident that when he was placed back in the mainline he would not have to attempt to kill himself again—because he thought he could convince his cellmate to do it for him. Another flagrantly psychotic SHU prisoner talked about a miniature implant that the Department of Corrections had placed inside his head, connected to their "main computer," which they were using to control him electronically, by programming him to say and do things that would continually get him into trouble. When I asked him whether or not he had seen any of the mental health staff, he became agitated and earnestly explained to me that his problem was medical—the computer implant inserted into his brain—not psychiatric. He offered to show me the paperwork from a lawsuit he had filed protesting this unauthorized medical procedure.

When prison systems become seriously overcrowded—as California's is (operating now at more than 180% of capacity)—psychiatric resources become increasingly scarce and disturbed prisoners are handled poorly, if at all. Often, behavior that is caused primarily by psychiatric disfunction results in placement in punitive solitary

confinement, where little or no psychiatric precautions are taken to protect or treat them. They are transferred from one such punitive isolation unit to another, in what has been derisively labeled "bus therapy."[9] In fact, I have come to the conclusion that the Pelican Bay SHU has become a kind of "dumping ground" of last resort for many psychiatrically disturbed prisoners who were inappropriately housed and poorly treated—because of their psychiatric disorders—in other SHU units. Because such prisoners were unable to manage their disorders in these other units—in the face of psychologically destructive conditions of confinement and in the absence of appropriate treatment—their continued rules violations, which in many cases were the direct product of their psychiatric disorders, have resulted in their transfer to Pelican Bay. Thus, their placement in the Pelican Bay SHU is all the more inappropriate because of the process by which they got there. Their inability to adjust to the harsh conditions that prevailed at these other units should disqualify them for placement in this most harsh and destructive environment, yet, the opposite appears to be the case.

Conclusions

Although I have seen conditions elsewhere that approximate those at the Pelican Bay SHU, and have testified about their harmful psychological effects, I have never seen longterm social deprivation so totally and completely enforced. Neither have I seen prisoner movements so completely regimented and controlled. Never have I seen the technology of social control used to this degree to deprive captive human beings of the opportunity to initiate meaningful activity, nor have I seen such an array of deliberate practices designed for the sole purpose of preventing prisoners from engaging in any semblance of normal social intercourse. The technological structure of this environment adds to its impersonality and anonymity. Prisoners interact with their captors over microphones, in chains or through thick windows, peering into the shields that hide the faces of cell extraction teams as they move in coordinated violence. It is axiomatic among those who study human behavior that social connectedness and social support are the prerequisites to longterm social adjustment. Yet, persons who have been wrenched from a human community of any kind risk profound and chronic alienation and asociality.

A century and a half ago, social commentators like Dickens and de Tocqueville marveled at the willingness of American society to incarcerate its least favored citizens in "despotic" places of solitary confinement.[10] De Tocqueville understood that complete isolation from others "produces a deeper effect on the soul of the convict," an effect that he worried might prove disabling when the convict was released into free society. Although he admired the power that American penitentiaries wielded over prisoners, he did not have the tools to measure their longterm effects nor the benefit of more than a hundred years of experience and humane intelligence that has led us away from these destructive interventions. Ignoring all of this, places like Pelican Bay appear to have brought us full circle. And then some. ■

"I'm happy and I enjoy people. They take that away from you [here]. It's like we're dead."

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[1] In words it appears to have long since forgotten, the United States Supreme Court, more than a century ago, characterized solitary confinement as an 'infamous punishment' and provided this explanation for its abandonment: '[E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service'... [I]t is within the memory of many persons interested in prison discipline that some 30 or 40 years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.' *In re Medley*, 134 U.S. 160, 168 (1890).

[2] Its predecessor, the federal prison at Marion, Illinois, is now more than 25 years old and a technological generation behind Pelican Bay. Although many of the same oppressive conditions and restrictive procedures are approximated at Marion, these comments are focused on Pelican Bay, where my observations and interviews are more recent and where conditions are more severe and extreme. In addition to some of the descriptive comments that follow, conditions at the Pelican Bay SHU have been described in Elvin, J. "Isolation, Excessive Force Under Attack at California's Supermax," *NPP JOURNAL*, Vol. 7, No. 4, (1992), and White, L. "Inside the Alcatraz of the '90s," *California Lawyer* 42-48 (1992). The unique nature of this environment has also generated some media attention. E.g., Hentoff, N., "Buried Alive in American Prisons," *The Washington Post*, January 9, 1993; Mintz, H., "Is Pelican Bay Too Tough?" 182 *The Recorder*, p.1, September 19, 1991; Roemer, J. "High-Tech Deprivation," *San Jose Mercury News*, June 7, 1992; Ross, J. "High-tech dungeon," *The Bay Guardian* 15-17, (1992). The creation of such a unit in California is particularly unfortunate in light of fully 20 years of federal litigation over conditions of confinement in the "lockup" units in four of the state's maximum security prisons (Deuel Vocational Institution, Folsom, San Quentin, and Soledad). E.g., *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976). In a lengthy evidentiary hearing conducted before Judge Stanley Weigel, the state's attorneys and corrections officials were present during expert testimony from numerous witnesses concerning the harmful effects of the punitive solitary confinement they were imposing upon prisoners in these units. Except for some disagreement offered up by Department of Corrections employees, this testimony went unanswered and unrebutted. *Toussaint v. Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983), *aff'd in part Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984). Only a few years after this hearing, and while a federal monitor was still in place to oversee the conditions in these other units, the Department of Corrections began construction of Pelican Bay. In apparent deliberate indifference to this extensive record, and seemingly without seeking any outside opinions on the psychological consequences of housing prisoners in a unit like the one they intended to create or engaging in public debate over the wisdom of such a project, they proceeded to commit over $200 million in state funds to construct a prison whose conditions were in many ways worse than those at the other prisons, whose harmful effect had been litigated over the preceding decade.

[3] Most corrections experts understand the significance of maintaining social connectedness and social ties for longterm adjustment, in and out of prison. See, e.g., Schafer, N. "Prison Visiting: Is It Time to Review the Rules?" *Federal Probation* 25-30 (1989). This simple lesson has been completely ignored at Pelican Bay.

[4] Indeed, in my opinion, double-celling in Security Housing Units like those at Pelican Bay constitutes a clear form of overcrowding. As such, it can be expected to produce its own, independently harmful effects, as the literature on the negative consequences of overcrowding attests.

[5] Although not extensive, the literature on the negative psychological effects of solitary confinement and related situations is useful in interpreting contemporary observations and interview data from prisoners placed in punitive isolation like Pelican Bay. See, e.g., Heron, W. "The Pathology of Boredom," *Scientific American*, 196 (1957); Burney, C. "*Solitary Confinement*," London: Macmillan (1961); Cormier, B., & Williams, P. "Excessive

(con't. on page 21)

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BY JOHN BOSTON

Highlights of Most Important Cases

The due process theory of "liberty interests" created by statute or regulation has by now surpassed Eleventh Amendment interpretation as the most obscure legal doctrine commonly encountered by prison litigators. Several recent cases illustrate the clear contradictions emerging from the murk in the interpretation of the liberty interests doctrine—contradictions that find their source in the decisions of the United States Supreme Court.

The origins of the problem are easy to state. Once upon a time, due process law looked simple. A "grievous loss" could only be imposed in a manner consistent with "fundamental fairness." *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). However, the civil rights revolution of the late 1960s and early 1970s resulted in a huge increase in citizens' challenges to government action. Not surprisingly, these demands from below prompted a search for limits among society's power-holders, including the courts. Insofar as the challenges took the form of litigation alleging the denial of due process, the judicial search for limits focused on the language of the Due Process Clause, which applies only to deprivations of "life, liberty, or property." The definition of these terms has preoccupied the courts for two decades.

The first big step in the domestication of due process involved property. A university professor argued that his job constituted property and that his discharge without procedural protections deprived him of that property without due process. The Supreme Court rejected his claim, stating:

> *To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.*

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). This formulation relied heavily on the Court's earlier decision in *Goldberg v. Kelly*, 397 U.S. 254, 262 and n.8 (1970), that welfare benefits were protected by due process because they were "a matter of statutory entitlement" for persons eligible to receive them, and therefore amounted to property.

Two years later the Court was presented with the question whether prisoners are entitled to due process in disciplinary proceedings involving the deprivation of statutory good time. It held:

> *...[T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances....*
>
> *This analysis as to liberty parallels the accepted due process analysis as to property....*

Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

For prisoners, this focus on state-created rights very quickly became a near-exclusive focus. In *Meachum v. Fano*, 427 U.S. 215 (1976), the Court refused to apply due process protections to transfers between prisons of different security levels. In doing so it broadly rejected the notion of degrees of protected liberty within the context of penal confinement, holding that a criminal conviction "sufficiently extinguishe[s] the [prisoner's] liberty interest to empower the State to confine him in *any* of its prisons" and to subject the prisoner to any treatment that is "within the normal limits or range of custody which the conviction has authorized the State to impose." 427 U.S. at 224-25 (emphasis in original).

In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court held that placement in administrative segregation, like transfer, implicates no liberty interest of prisoners unless such an interest is created by statute or regulation. It also articulated a method for determining whether statutes and regulations have created a liberty interest: "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." 459 U.S. at 472. "Substantive predicates" are standards or conditions that are used by officials in making decisions. Language is "mandatory" if it links a particular outcome or decision with a substantive predicate in a way that limits the discretion of the decision-maker.

In *Hewitt*, the "substantive predicates" consisted of regulatory provisions authorizing administrative segregation only to serve "the need for control" or in case of "the threat of a serious disturbance." The regulations provided that segregation "may" be imposed under those circumstances, a phrase the Court reasonably interpreted as meaning that segregation "*will not* occur absent [the] substantive predicates...." 459 U.S. at 471-72 and n.6 (emphasis supplied). Citing this requirement as well as certain procedural requirements of the regulations, the Court stated that Pennsylvania had "used language of an unmistakably mandatory character." *Id.*

So far, clear enough, whatever one may think of this abstract and mechanical gloss on a "broad and majestic" word like "liberty." *Board of Regents v. Roth*, 408 U.S. at 571. The fog rolled in several years later with *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), which presented the question whether state prison visiting regulations created a liberty interest in avoiding the suspension of visits. The Court held that they did not. Although the regulations contained substantive predicates stating the circumstances that justify excluding visitors, the Court found that they lacked the necessary mandatory language. The regulations "stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met....Visitors *may* be exclud-

ed if they fall within one of the described categories, ...but they need not be. Nor need visitors fall within one of the described categories in order to be excluded." 490 U.S. at 464 (emphasis in original).

On its face, *Thompson* appears irreconcilable with *Hewitt v. Helms*, in which the relevant regulation provided that inmates "may" be placed in administrative segregation if officials found that one of the required substantive predicates was present, and *Vitek v. Jones*, 445 U.S. 480, 483 n.1 (1980), which found a liberty interest in a statute providing that a prisoner "may" be transferred to a mental hospital if certain medical findings have been made. Justice Marshall, dissenting in *Thompson*, squarely stated, "If the use of the word 'may' could not defeat a liberty interest in *Hewitt* or *Vitek*, I fail to see how it could do so here." 490 U.S. at 475.

The restrictions in *Hewitt* and *Vitek* can be described as "one-way" limits on discretion, since they forbid the liberty deprivation if the substantive predicates are absent, but do not require it if they are present. By contrast, *Thompson*'s "need not" language suggests on its face that a "two-way" limit on discretion is required to create a liberty interest. That is, either the presence or the absence of the substantive predicates must dictate the action taken by the official.

This reading of *Thompson* amounts to a significant narrowing of the due process rights both of prisoners and of nonprisoners who rely on statutes or regulations for their claim of a liberty interest. Under this view, statutes or regulations not only must limit officials' discretion; they must eliminate it entirely.

This is exactly the position taken by some courts. In *Russ v. Young*, 895 F.2d 1149, 1153 (7th Cir. 1990), the court held that regulations providing that a prisoner "may" be placed in "temporary lockup" only if one of five specified conditions is found to exist did not create a liberty interest, despite the close similarity of the regulations to those in *Hewitt*. Similarly, in *Burgin v. Nix*, 899 F.2d 733, 734-35 (8th Cir. 1990) (*per curiam*), a regulation provided that "incorrigible" inmates could be served sacked meals "in some cases" with the warden's approval. The definition of "incorrigible" is rather explicit, and the plain import of the regulation is that sacked meals will not be served to inmates who do not fit the definition. Again, despite the parallel to *Hewitt*, the regulation was held not to create a liberty interest.

Other courts have rejected this view and reaffirmed that a one-way limit on discretion can create a liberty interest. In *Smith v. Shettle*, 946 F.2d 1250 (7th Cir. 1991), an administrative segregation case, Judge Posner referred to *Thompson*'s discussion of mandatory language as "dicta," and dismissed the conclusion of *Russ v. Young* as a "suggestion" that "a statute which permits but does not require administrative segregation or some other deprivation" fails to create a liberty interest. Judge Posner declared:

> *It...makes no difference...that the statute does not* require *but only permits segregation—most statutes leave discretion to the persons charged with their enforcement rather than commanding them to enforce the statute to the hilt—this is the famous "prosecutorial discretion...."*

946 F.2d at 1253 (emphasis in original).

Judge Posner's view was echoed in *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1005 and 113 S.Ct. 1027 (1993). There, the court addressed a prison procedure called "Feces Watch" (no doubt a prized assignment among correctional staff), and found a liberty interest in regulations authorizing it only upon a determination that there is reasonable suspicion that the prisoner is secreting contraband. The court stated:

> *The defendants mistakenly focus upon the question whether the superintendent has discretion not to place a prisoner on dry cell watch even though he may have reasonable suspicion that the prisoner has secreted contraband. The relevant question is whether the superintendent has discretion to* fail *to follow dry cell watch procedures once he determines to place a prisoner on a watch.*

960 F.2d at 1429 (emphasis in original). Although *Kentucky Dept. of Corrections v. Thompson* was cited in the opinion, the court did not directly address the view that *Thompson* requires a two-way limit on discretion in order for a liberty interest to be recognized.

The most explicit review of the tension between *Thompson* and *Hewitt v. Helms* appears in *Layton v. Brewer*, 953 F.2d 839 (3rd Cir. 1992), which finds a liberty interest in regulations governing placement in the Management Control Units of the New Jersey prison system. As in *Mendoza*, the defendants argued that under *Thompson*, the existence of discretion not to impose a liberty deprivation if the substantive predicates are found precludes a finding of a liberty interest.

The *Layton* court, unlike *Mendoza* or *Smith v. Shettle*, addressed the *Thompson* language directly. As noted above, *Thompson* states that the regulations:

> *stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met.... Visitors* may *be excluded if they fall within one of the described categories,...but they need not be. Nor need visitors fall within one of the described categories in order to be excluded.*

490 U.S. at 464 (emphasis in original).

It is the second of these sentences—the one containing the "need not" language—that supports the defendants' argument that the existence of any discretion defeats a liberty interest. However, *Layton* focuses instead on the third sentence, and it states that the key to the *Thompson* holding is that the Kentucky regulations permitted exclusion of visitors based on the listed reasons "'but not limited to' them." 953 F.2d 848. That is, if a statute or regulation lists substantive predicates, but does not make them the exclusive basis for the liberty deprivation at issue, it does not limit officials' discretion sufficiently to create a liberty interest. *Accord*, *Kellas v. Lane*, 923 F.2d 492, 495 and n.2 (7th Cir. 1990) (criteria that "among other factors, may" justify segregation did not create a liberty interest).

Having declared this issue of exclusivity to be the focus of the *Thompson* holding, the *Layton* court turned to the issue of one-way versus two-way limits on discretion. It stated, "Some language in *Thompson* can arguably be read to suggest that to create a liberty interest the statute must not only provide for substantive predicates which must be met in order for the deprivation to occur, but that once they are met, the outcome must then be mandated so as to eliminate *all* official discretion." 953 F.2d at 848-49. However, it asserted that *Thompson*'s requirement that the statute or regulation must "mandat[e] the outcome to be reached" if the substantive predicates exist means only "that the statutes must force the decision-maker to use the listed criteria as the only reasons for depriving the prisoner of the liberty interest in question." 953 F.2d at 849.

This interpretation robs *Thompson*'s "need not" language of any significance, ordinarily an unsatisfactory result. But the court points out that *Thompson* contains other language supporting the *Hewitt* approach of "determining whether an inmate *may* [not 'must'] be deprived of the particular interest in question." *Layton*, 953 F.2d at 849 n.15, *citing Thompson*, 490 U.S. at 464 n.4. Moreover, any other interpretation requires an even more unsatisfactory result: the conclusion that *Thompson* silently overruled *Hewitt v. Helms* and *Vitek v. Jones* while citing both with apparent approval.

This clear conflict among circuits in the interpretation of an important Supreme Court decision must ultimately be resolved by the Supreme Court itself. However, no resolution is in sight; the Court denied certiorari in *Mendoza v. Blodgett*.

There is an even more fundamental contradiction in the liberty interest doctrine.

The statutes and regulations discussed up to this point have been those that limit official discretion in a contingent fashion—"if X..., then Y," as one court put it. *Smith v. Shettle*, 946 F.2d at 1253. If a liberty interest is found to exist, the task of due process analysis is to determine what measures are necessary to ensure a fair and reliable decision as to the existence of "X." However, in many statutes and regulations, official discretion is limited in absolute, rather than contingent, language. In *Shettle*'s terms, such regulations require "Y, period." In *Hewitt*'s language, they have "mandatory language" but no "substantive predicates."

For example, in *Domegan v. Fair*, 859 F.2d 1059 (1st Cir. 1988), state regulations provided that segregated inmates "shall" be provided with regular meals, electricity, and water. No exceptions were allowed. The court held that the regulation created a liberty interest in avoiding having one's electricity or water turned off and in receiving the same meals as other prisoners. There is now a small family of cases finding liberty interests in such noncontingent statutes and regulations. *See, e.g., Jackson v. Cain*, 864 F.2d 1235, 1250-51 (5th Cir. 1989) (limit on punitive segregation time); *Williams v. Lane*, 851 F.2d 867, 880-81 (7th Cir. 1988) (regulations providing for equal housing and program opportunities for protective custody inmates), *cert. denied*, 488 U.S. 1047 (1989); *Madden v. Kemna*, 739 F.Supp. 1358, 1363 (W.D.Mo. 1990) (regulation requiring "substantial equality" of privileges for protective custody inmates); *Nicoletti v. Brown*, 740 F.Supp. 1268, 1284-85 (N.D.Ohio 1987) (statutory standards for institutions for the developmentally disabled); and *Morgan v. District of Columbia*, 647 F.Supp. 694, 697 (D.D.C. 1986) (limit on segregation time).

The results of these cases are absolutely consistent with the founding axiom of the liberty interest doctrine: that limits on official discretion give rise to a "legitimate claim of entitlement" of the kind "upon which people rely in their daily lives," *Board of Regents v. Roth*, 408 U.S. at 561—a concept conceived in property but quickly extended to liberty. *Wolff v. McDonnell*, 418 U.S. at 557. The solidest of all limits on discretion is the one that removes discretion entirely by forbidding officials to deprive an individual of an interest under any circumstances.

At least one court has vigorously rejected the approach of *Domegan* and similar cases. In *Meis v. Gunter*, 906 F.2d 364 (8th Cir. 1990), the plaintiff argued that a statute providing that prisoners shall be informed of prison rules and policies created a liberty interest in being provided on request with those rules and policies. The court responded:

> *...[T]his is not the kind of state statute that would create a liberty interest as that term has come to be used in Fourteenth Amendment jurisprudence. The terms liberty interest and property interest are used in the context of procedural-due process-claims....The statute quoted above certainly uses mandatory language, but it does not create a certain right or entitlement subject to specified factual findings....Instead, the state statute required unconditionally that information with respect to the programs in question be given to all committed persons....*
>
> *This is the language of substance, not procedure, and the concepts of liberty and property interests are, as we have noted, useful solely in the context of procedural due process....[To hold otherwise] would be holding, in effect, every state statute which imposes a mandatory duty, or creates a legal right, is constitutional in nature, and the violation of every such statute would be a violation of the Due Process Clause of the Fourteenth Amendment. This is emphatically not the law....*

906 F.2d at 348.

Meis's claim that the concepts of liberty and property interest are "useful solely in the context of procedural due process" trivializes the labor the Supreme Court has put into developing them. They clearly are not flags of analytical convenience to be raised and lowered at will. Rather, they reflect a systematic effort to define the central terms in the Due Process Clause. Liberty and property do not change their natures depending on whether the plaintiff is asserting a procedural or a substantive claim, *DeTomaso v. McGinnis*, 970 F.2d 211, 213-14 (7th Cir. 1992); *Nicoletti v. Brown*, 740 F.Supp. at 1284-86, and their basic definitions cannot be invoked for one purpose and then abandoned when they lead to unsettling conclusions.

Yet *Meis* correctly recognizes the pitfalls of acknowledging noncontingent liberty interests. If there is no contingency, there is nothing to have a hearing about, and the usual inquiry as to the "process due" is irrelevant. What, then, does due process require? The only logical answer is that it requires compliance with the statute or regulation.

This result, as *Meis* recognizes, amounts to saying that violations of state law are *ipso facto* violations of the federal Constitution and that due process categorically requires official agencies to follow their own regulations. *See Nicoletti v. Brown*, 740 F.Supp. at 1286-87 (official's failure to perform a mandatory, nondiscretionary duty is arbitrary and denies substantive due process). Both propositions fly in the face of two decades of effort by the Supreme Court to restrict the scope of constitutionally protected interests and to distinguish sharply between the interests protected by the federal Constitution and by state law. *See, e.g., United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (restricting due process claims based on agency departures from regulations); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (cautioning that the Constitution must not become a "font of tort law"). But they are difficult to refute without also repudiating or ignoring the most basic foundation of the liberty interest doctrine.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Access to Courts/Juveniles

John L. v. Adams, 969 F.2d 228 (6th Cir. 1992). The right of access to courts has its sources in the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the First Amendment right to petition for a redress of grievances (231-32). The right extends to incarcerated juveniles. Despite the different treatment of adults and juveniles in the criminal justice system, "the stigma of being found to have violated the law and the resulting incarceration are the key similarities between juveniles and adults that make it logical for juveniles to be entitled to the right of access to courts." (233)

The court "read[s] *Bounds* as extending the right of access only to civil rights actions that are related to prisoners' incarceration" (234), and defendants may limit their reimbursement of contract attorneys accordingly. Nor must the state affirmatively assist prisoners with claims concerning state law education and treatment issues. With respect to state law civil actions, defendants need not provide "affirmative assistance" but need only refrain from imposing barriers or impediments to court access (235-37).

Protection from Inmate Assault

Swofford v. Mandrell, 969 F.2d 547 (7th Cir. 1992). The plaintiff was arrested for aggravated sexual assault and placed in a jail holding cell with other inmates, who beat him, urinated on him, and sodomized him with a broom handle. No one responded to his screams for help for eight hours.

At 549:

The due process clause protects pretrial detainees from deliberate exposure to violence and from the failure to protect when prison officials learn of a strong likelihood that a prisoner will be assaulted....Our recent decisions have held that a due process violation requires "deliberate indifference" to or "reckless disregard" of the detainee's right to be protected from harm....A detainee must show that the state actor knew of the risk or "that the risk of violence was so substantial or pervasive that the defendants' knowledge could be inferred." [Citations omitted]

The plaintiff's allegations state a claim. At 549:

... The facts themselves—including the failure to inspect the cell for over eight hours despite Swofford's screams, the accessibility of a makeshift weapon in the cell and the placement of Swofford into a crowded and dangerous population, given the charge against him—are indeed quite shocking, and could give rise to an inference of knowledge on the part of the defendant.

Assuming it was necessary to plead the defendant's state of mind, the allegation that the sheriff "had to know" of the danger was sufficient. Violations of state jail standards and internal and state tool control regulations, though they may not have denied due process themselves, support a conclusion of recklessness or deliberate indifference.

The fact that the plaintiff had not previously reported being attacked or threatened did not defeat the claim. At 551: "... [W]hen prison officials themselves actively and knowingly (or recklessly) place a detainee in a particular situation that is dangerous, then such a report becomes superfluous."

Procedural Due Process—Disciplinary Proceedings, Administrative Segregation

Brown-El v. Delo, 969 F.2d 644 (8th Cir. 1992). The plaintiff was convicted of several minor disciplinary violations; two months later, after no further misconduct, he was placed in administrative segregation based only on the disciplinary violations. This sequence of events supported an inference that he was segregated improperly for punitive reasons without a *Wolff* hearing.

Appointment of Counsel

Rayes v. Johnson, 969 F.2d 700 (8th Cir. 1992). The plaintiff's court-appointed attorney withdrew with permission; the court gave the plaintiff 60 days to retain a lawyer, which he was unable to do; the district court refused his two requests for substitute counsel. This refusal was an abuse of discretion. The plaintiff, as an "adjustment center" inmate, lacked ready access to a law library, did not understand his rights to obtain records and to seek discovery; he was unable to articulate his claims against all defendants; the case turned on conflicting testimony. The plaintiff had also attempted unsuccessfully to retain an attorney.

Procedural Due Process—Disciplinary Proceedings Qualified Immunity

Zavaro v. Coughlin, 970 F.2d 1148 (2nd Cir. 1992). The plaintiff was convicted of participating in a violent disturbance based on reports that "every inmate in the messhall" participated and on confidential information that was not corroborated in any fashion. The district court granted summary judgment for the plaintiff against the hearing officer based on the lack of any reliable evidence to support the conviction.

The statements that "every inmate" in a group of 100 participated, coming from officers who were being assaulted at the time, are so "blatantly implausible" that they do not constitute "some evidence" of a particular inmate's guilt.

Federal Officials and Prisons/Searches—Person—Arrestees/Qualified Immunity

Act Up! Portland v. Bagley, 971 F.2d 298 (9th Cir. 1992). The plaintiffs were arrested at a demonstration and strip searched by U.S. Marshals. The district court denied the defendants' motion for summary judgment based on qualified immunity.

The district court correctly understood that it was clearly established that reasonable suspicion of contraband is required in order to justify strip searching arrestees accused of minor offenses, and that strip searches must be conducted in a reasonable manner that respects arrestees' privacy interests. However, the district court should also have determined whether a reasonable officer could have believed his conduct was proper under this established law. Previous cases holding that this question is for the jury were overruled by the Supreme Court in *Hunter v. Bryant*.

Suicide Prevention/Personal Involvement and Supervisory Liability

Gordon v. Kidd, 971 F.2d 1087 (4th Cir. 1992). The decedent was arrested, drunk, after threatening to kill himself and then threatening police officers. He had a history of alcohol abuse, mental illness, and depression. He hanged himself in jail that night.

It is clearly established that the deliberate indifference standard applies to jail suicide cases; that under the standard officials are not liable unless they had prior knowledge of the prisoner's suicidal tendencies; and that there is no duty to screen detainees for suicidal tendencies without such knowledge.

An officer who was told of the suicide risk but failed to make a note of it, call the jail nurse to screen the decedent, or tell anyone else about the risk, could be found deliberately indifferent. The officer was not entitled to qualified immunity since the law was clearly established and there were no extraordinary circumstances justifying a belief that his conduct was legal.

Grievances and Complaints about Prison

Wolfel v. Morris, 972 F.2d 712 (8th Cir. 1992). The plaintiffs were disciplined for circulating a petition under a rule prohibiting group organizing activities without prior approval by prison authorities.

The group organizing rule was vague as applied to the plaintiffs, since prisoners had previously been allowed to circulate petitions. Although the degree of specificity required in prison regulations is less than that required in other contexts, these plaintiffs did not have fair warning that their actions were prohibited.

The district court's order expunging the disciplinary convictions is affirmed. However, defendants are entitled to qualified immunity from damages. They were relying on published and facially valid regulations, and the court cannot say that no reasonable official could have thought that the regulation was properly applied.

Use of Force/Evidentiary Questions

Robinson v. City of St. Charles, Mo., 972 F.2d 974 (8th Cir. 1992). Police officers' personnel files were not admissible in a use of force case to show that they acted maliciously and sadistically because the Fourth Amendment standard is one of objective reasonableness and their state of mind is not relevant.

Qualified Immunity

Rainey v. Conerley, 973 F.2d 321 (4th Cir. 1992). The defendant officer was not entitled to qualified immunity in a use of force case. Although the question is whether a reasonable officer could have believed his conduct was lawful based on his perception of the facts, this defendant's testimony was generally inconsistent with his argument as to what his perceptions were.

It was reversible error for the trial judge to refuse to ask members of the jury panel "whether they would tend to credit the testimony of a law enforcement official over that of a prisoner, simply because of their respective positions." (325)

Suicide Prevention/Municipalities

Rhyne v. Henderson County, 973 F.2d 386 (5th Cir. 1992). The mother of a detainee who committed suicide in jail had standing to recover for her own injuries arising from her son's wrongful death. State law providing for such claims is incorporated into §1983 by §1988. There is a conflict among circuits on this point.

At 391:

> *...Pre-trial detainees are entitled to a greater degree of medical care than convicted inmates. They must be provided with "reasonable medical care, unless the failure to supply it is reasonably related to a legitimate governmental objective." [Citation omitted]*

Heating and Ventilation

Gordon v. Faber, 973 F.2d 686 (8th Cir. 1992). Prisoners who were required to go outside into exercise pens during sub-freezing, windy weather, for periods of an hour to an hour and 45 minutes, while their living quarters were searched, and who were denied hats and gloves even though these were readily available, were found to have been subjected to "extreme" deprivations through deliberate indifference, thereby establishing both elements of their Eighth Amendment claim. These findings were not clearly erroneous.

Summary Judgment/Use of Force/Protection from Inmate Assault/Pro Se Litigation

Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992). The Tenth Circuit's procedure for determining whether *pro se* prisoners' complaints are frivolous, under which prison officials' report and investigation is treated as an affidavit, is not intended to resolve material factual issues; the report's findings are not to be accepted if the prisoner presents conflicting evidence. The same rules apply to a telephonic hearing. The court should not have dismissed the case based on a telephonic hearing without complying with the notice and response requirements of the summary judgment rule.

An allegation that jail officials put a gun to the plaintiff's head while he was on his way to his work release assignment, threatened to kill him, and returned him to the jail and forced him to entrap another member of the jail staff was not fantastic or delusional. The fact that the plaintiff may have engaged in other fantastic or delusional behavior during a telephonic conference (i.e., trying to communicate with a ghost) does not render his legal claim frivolous. The allegation that a defendant put a gun to his head and threatened to kill him stated an Eighth Amendment claim for excessive force; such conduct "is not *per se de minimis* and...the ensuing psychological injury may constitute pain under the Eighth Amendment excessive force standard." (1524)

Municipalities

Walker v. City of New York, 974 F.2d 295 (2nd Cir. 1992). At 297-98:

> *...[W]e discern three requirements that must be met before a municipality's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens. First, the plaintiff must show that a policymaker knows "to a moral certainty" that her employees will confront a given situation....*
>
> *Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation....*
>
> *Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights....*

Hazardous Substances and Conditions

Hunt v. Reynolds, 974 F.2d 734 (6th Cir. 1992). At 735:

> *The circuits are in accord that mere exposure to Environmental Tobacco Smoke ("ETS"), without more, does not constitute a deprivation of a prisoner's Eighth Amendment rights.... However, those circuits that have addressed the question have accepted the possibility that a prisoner may be able to show a medical need to be placed with a non-smoking cellmate that is sufficiently serious to implicate the Eighth Amendment.*

At 736: "Thus we will adhere to the position, adopted by every circuit to address the issue, that the Eighth Amendment's objective component is violated by forcing a prisoner with a serious medical need for a smoke-free environment to share his cell with an inmate who smokes." The district court should consider whether the plaintiffs in this case (one of whom has pulmonary disease, heart disease, and a peptic ulcer) have such needs.

Pro Se Litigation/Medical Care—Standards of Liability—Deliberate Indifference/Service of Process

McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1992). The plaintiff should have been allowed to amend a complaint that named one defendant only in the caption, since there were allegations of deliberate indifference by "the entire medical department" (which included this defendant) and specific allegations against the defendant were contained in the plaintiff's response to the summary judgment motion. *Pro se* complaints may not be dismissed for failure to state a claim without giving the plaintiff notice of the deficiencies and an opportunity to amend.

The district court should not have dismissed a claim against a defendant whose name was misspelled on the ground that "no such person exists." He clearly existed, an attorney appeared on his behalf, and a *pro se* prisoner's inability to spell his name correctly should not lead to dismissal. The plaintiff should have been provided an opportunity to remedy this defect in the complaint also.

The plaintiff showed "good cause" for failing to serve the misspelled defendant within 120 days. Simple negligence ordinarily is not an excuse, but a *pro se* litigant should be provided more latitude—"*especially* when that litigant is incarcerated" (1058, emphasis supplied). The court also notes that the plaintiff provided detailed instructions for service, that prison officials or the Marshals were at fault, and that the defendant was represented by counsel and suffered no prejudice.

At 1059-60:

> *A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain."....The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a "serious" need for medical treatment.*

A painful back condition treatable by surgery constituted a serious medical need.

At 1060: "A defendant must purposefully ignore or fail to respond to a prisoner's pain or possible medical need in order for deliberate indifference to be established." A claim of "mere delay of surgery" does not amount to deliberate indifference unless the denial was "harmful." However, "substantial" harm is not necessary.

Psychotropic Medications

Felce v. Fiedler, 974 F.2d 1484 (7th Cir. 1992). The plaintiff was paroled on the condition that he submit to monthly injections of Prolixin.

The plaintiff had a liberty interest based on the Constitution in avoiding the unwanted

administration of antipsychotic drugs. He also had a constitutionally based liberty interest in staying on parole and a state law based liberty interest in being released on parole. His liberty interest in avoiding unwanted medication is "essentially the same" as that enjoyed by prisoners.

After an extensive analysis under *Mathews v. Eldridge*, the court concludes that the Wisconsin procedure, which heavily emphasizes the judgment of the individual parole agent and does not "subject [the decision] to independent medical evaluation," does not meet due process requirements. The court remands for the entry of a suitable injunction.

Correspondence—Legal and Official

Reneer v. Sewell, 975 F.2d 258 (6th Cir. 1992). The plaintiff's allegation that items of his legal mail were read, rather than simply being inspected for contraband, in retaliation for his prior complaints against a prison staff member, made out a First Amendment claim. The court emphasizes the fact that such reading is prohibited by state regulation without explaining how that fact fits into the constitutional analysis. (The case can be read as suggesting that lower-level prison officials cannot rely on a supposed penological interest disclaimed by their superiors.)

Equal Protection

Albright v. Oliver, 975 F.2d 343 (7th Cir. 1992). Equal protection is violated only by discrimination based on membership in a class and not by random governmental incompetence.

Hazardous Conditions and Substances/Injunctive Relief

Burton v. Armontrout, 975 F.2d 543 (8th Cir. 1992). The plaintiffs alleged that they were involved in a large-scale cleanup of sewage and prison officials failed to warn them that the sewage was contaminated with the HIV virus and other infectious diseases. A jury found for the defendants.

The court properly granted an injunction requiring defendants to supply protective clothing and masks and to post warnings. Although equitable relief must be consistent with the jury findings, a general verdict of no damages did not preclude injunctive relief because it did not clearly establish the factual bases for denial of relief. The court was entitled to take additional evidence not heard by the jury concerning prison officials' continuing failure to remedy the problem in considering injunctive relief.

Religion—Practices—Diet/Deference

Bass v. Coughlin, 976 F.2d 99 (2nd Cir. 1992) (*per curiam*). At 99:

> *At least as early as 1975, it was established that prison officials must provide a prisoner with a diet that is consistent with his religious scruples....*Kahane *has never been overruled and remains the law....The principle it established was not placed in any reasonable doubt by intervening Supreme Court rulings in* [O'Lone *and* Turner], *that prison officials need meet less exacting standards when a prisoner's interest in marrying, or attending religious ceremonies, or maintaining the length of his hair is to be balanced against interests of rehabilitation and prison security.*

In Forma Pauperis

Moore v. Mabus, 976 F.2d 268 (5th Cir. 1992). The plaintiffs' claims concerning the inadequacy of medical treatment for HIV-positive inmates and unjustified denial of privileges to them should not have been dismissed as frivolous. The court observes in dictum: "*Wilson* [*v. Seiter*] does not require a 'smoking gun' in order to find deliberate indifference." (271)

One plaintiff's claims regarding loss of his privacy rights were appropriately dismissed based on the court's prior rejection of his motion for a preliminary injunction; his claim about segregation is rejected because "the identification and segregation of HIV-positive prisoners obviously serves a legitimate penological interest." (271, footnote omitted)

The district court should promptly appoint counsel because of the complexity, scope, and need for resources and expert testimony presented by this case.

Procedural Due Process—Disciplinary Proceedings

Hamilton v. O'Leary, 976 F.2d 341 (7th Cir. 1992). The plaintiff was found guilty of possessing contraband based on the finding of weapons in a vent to which a total of 32 prisoners had access. His three cellmates were also charged, but not inmates in an adjacent cell. The disposition stated that prisoners are "responsible for whatever is found in the cell."

At 345: "The ticket, together with constructive possession, is 'some evidence' of Hamilton's guilt." The court concedes that if 32 inmates had access to the vent, yielding a 3.1% chance the plaintiff was guilty, the "some evidence" rule would not be met. However, the plaintiff did not say that he heard the weapons being thrown in the vent by other inmates or that 32 inmates had access to the vent, and the court doubts that the disciplinary board members knew the engineering of the vents. Therefore, from the committee's point of view, considering the plaintiff and his cellmates, there was a 25% chance of his guilt, which meets the "some evidence" standard.

Judge Posner, dissenting, says it was absolutely clear that the plaintiff told the disciplinary committee that eight inmates had access to the vent, yielding a known probability of guilt of 12.5%. At 347: "That is not my idea of 'some evidence,'...unless purely collective guilt is deemed to satisfy due process —which in prison circumstances it might be,...but the defendants do not defend the disciplinary committee's action on that ground."

DISTRICT COURTS

Use of Force/Municipalities

Berry v. City of Phillipsburg, Kan., 796 F.Supp. 1400 (D.Kan. 1992). Evidence that the mayor had told the City Council that the police chief had a history of failure to supervise adequately and of personally using excessive force, and that the Council members told him they did not care, supported a claim of municipal liability for his misuse of force, as did evidence that the police chief himself was the city's "policymaker" with respect to arrests.

Pre-Trial Detainees/Modification of Judgments/Closing of Facilities/Mental Health

Inmates of Allegheny County Jail v. Wecht, 797 F.Supp. 425 (W.D.Pa. 1992). The agreed deadline for closing an antiquated and unconstitutional jail is extended to correspond to the schedule for completing a new jail.

The court increases the population cap to 10 less than the single-celled capacity of the 632-cell jail, based on improvements in conditions and services and a decrease in the number of "down cells," and contingent on the maintenance of the present level of staffing and the expansion of the counselling staff.

The court approves defendants' plan for an "intensive case management" program in the jail, i.e., a program of providing services to inmates in the general population, rather than their previous plan for construction of a separate mental health facility. The court "believe[s] that the deinstitutionalization philosophy in the mental health field constitutes a significant change in treatment prescribed for the mentally ill." This "significant change" entitles the defendants to consideration under the *Rufo* standard. Since no one disputes that the proposed program meets or exceeds constitutional minima, the modification is justified.

Defendants are to be permitted to use fine money accumulated for previous judgment violations to implement the new mental health program, with monitoring by the court's jail monitor.

The court states its belief that this 16-year-

old case is "progressing toward resolution." However, it keeps the monetary sanctions for violation of the new population cap in place.

Modification of Judgments/Judicial Disengagement

Patterson v. Newspaper and Mail Deliverers' Union, 797 F.Supp. 1174 (S.D.N.Y. 1992). At 1179: "Before exercising its power to modify or vacate a judicial decree, a court must be convinced by the party seeking relief that the purposes of the litigation as incorporated into the decree have been fully achieved." *Dowell* and *Rufo* are applied to a consent decree in a Title VII employment discrimination case. The exceeding of the goal of 25% minority representation for a period of seven months leads the court to conclude that the decree's purposes have been achieved and that the enforcement structure of the consent decree "is now an unnecessary and expensive relic, and ought to be retired." (1180) The court also cites language in the decree itself suggesting that it was intended to terminate at some point. After 18 years, the decree is vacated in its entirety.

The court declines to hold an evidentiary hearing on the plaintiffs' contentions that discriminatory actions have continued and will continue, and reiterates its prior holding that if the plaintiffs think that the consent decree was insufficient to end discrimination, they must bring a new lawsuit rather than seek modification of this judgment.

Civil Rights of Institutionalized Persons Act

United States v. State of Tennessee, 798 F.Supp. 483 (W.D.Tenn. 1992). There is no minimum number of affected residents required to support an action by the federal government under the Civil Rights of Institutionalized Persons Act. A claim under the Individuals with Disabilities Education Act is permitted to go forward under CRIPA.

The fact that the institution is certified as an Intermediate Care Facility for the Mentally Retarded under the Social Security Act does not establish a presumption of constitutional conditions. At 489:

> *Certification does not guarantee that constitutional minima exist.* See Lelsz v. Kavanagh, *673 F.Supp. 828, 841 (N.D.Tex. 1987) ("Surveyors examine whether policies and programs exist, not whether those policies or programs result in adequate care"). Additionally, facilities with serious deficiencies are allowed to provide a "plan of correction" and maintain their certification. Thus, certification is not equivalent to a legal presumption of constitutional conditions, although it may provide some evidence on that point.*

Heating and Ventilation/Clothing

Gordon v. Faber, 800 F.Supp. 793 (N.D.Iowa 1991), *remanded for additional findings*, 963 F.2d 187 (8th Cir. 1992), *on remand*, 800 F.Supp. 797 (N.D.Iowa), *aff'd*, 973 F.2d 686 (8th Cir. 1992). The plaintiffs were forced to exercise for several hours without hats or gloves in sub-freezing weather, even though some of them did not wish to go out and hats and gloves were readily available. They claimed no long-term injury.

This treatment violated the Eighth Amendment. At 796: "Adequate clothing is one of the necessities of life of which prison officials cannot deprive an inmate....Prison officials violate the Constitution if they provide inmates with clothing that is 'patently insufficient to protect [them] from the cold in the winter months.'" The court does not believe testimony that this was done because of concerns for contraband, and even if this were true, the concerns would be unfounded in this situation.

Heating and Ventilation/Clothing/ Cruel and Unusual Punishment

Gordon v. Faber, 800 F.Supp. 797 (N.D.Iowa), *aff'd*, 973 F.2d 686 (8th Cir. 1992). The appeals court remanded for clarification of the district court's findings as to whether the objective component of the Eighth Amendment had been established by the plaintiffs.

The court concludes that the deprivation was "extreme" because of the length of time that the inmates were subjected to extreme weather conditions without minimal protection, the defendants' knowledge of the conditions (the officer on duty had thick gloves and a thick hat), and the plaintiffs' description of pain and numbness. The duration is characterized as "over one hour." (800)

The deprivation in this case was without legitimate penological justification, "which is relevant to the determination of whether the objective standard has been violated." (800)

Religion—Practices—Diet

Bass v. Coughlin, 800 F.Supp. 1066 (N.D.N.Y. 1991), *aff'd*, 976 F.2d 98 (2nd Cir. 1992). The plaintiff alleged that he was not provided with a kosher diet for about 15 months at Clinton Correctional Facility. (The prison provides a "Cold Alternative Diet" but only for prisoners previously enrolled in the kosher diet program at Green Haven.)

The defendants are not entitled to summary judgment despite their claim that the plaintiff could have bought his own food (which he said he couldn't afford) or eaten only the kosher items in the regular diet (which he said weren't marked). The right of observant Jews to a nutritionally adequate kosher diet has been established since *Kahane v. Carlson* (2nd Cir. 1975), which has not been overruled. The change in the governing constitutional standard in *Turner v. Safley* did not "dis-establish" this rule. At 1071: "When the Court of Appeals announces a principle of law for this circuit, it remains the law until the case is overruled or reversed. DOCS officials should not be entitled to speculate as to how the Court of Appeals would rule if faced with the question again."

Use of Force/Damages—Punitive

King v. Macri, 800 F.Supp. 1157 (S.D.N.Y. 1992). The court precluded plaintiff's counsel from inquiring into officers' prior disciplinary histories, but defendants' counsel's inquiries of two of the officers, who had not been disciplined, "opened the door" for plaintiff's counsel to argue to the jury that there was a reason the question was not asked of the third officer.

The failure to award compensatory damages is not dispositive of the question whether the plaintiff suffered a constitutional violation and does not preclude the award of punitive damages.

A compensatory award of $75,000 for two months' wrongful incarceration is not excessive. Awards of punitive damages of $75,000 for excessive force against one defendant and $75,000, $50,000 and $75,000 for excessive force, false arrest and malicious prosecution against the other were not excessive. Defendants' failure to introduce evidence of their earning power or resources precludes their argument that damages should be reduced as disproportionate to them.

The verdict need not be set aside even though it may have been affected by "passion and emotion" resulting from the Rodney King verdict and its sequelae because this verdict was supported by substantial evidence and the Los Angeles riots may legitimately have altered community perceptions in this area.

Staffing—Sex/Searches—Person—Prisoners

Canedy v. Boardman, 801 F.Supp. 254 (W.D.Wis. 1992). A strip search of a male prisoner supervised by a female officer did not violate the Fourth Amendment. This court rejects the numerous prior cases holding that the Fourth Amendment permits only inadvertent, infrequent or random observations of nude prisoners by opposite-sex staff on the ground that prisoners' privacy interests are outweighed by the equal employment rights of prison staff. Gender cannot be a bona fide occupational qualification under Title VII for this purpose.

For the Record

■ The treatment of seriously mentally ill prisoners in Arizona is "appalling," according to a March 19 decision by United States District Judge Carl Muecke in Phoenix.

Ruling in *Casey v. Lewis*, a class action lawsuit brought on behalf of all Arizona prisoners, Muecke found that numerous deficiencies in the prison mental health system "result in deliberate indifference to inmates' serious mental health needs such that the inmates' constitutional rights to be free from cruel and unusual punishment are violated." Attorneys from the National Prison Project of the American Civil Liberties Union in Washington, D.C. and attorneys with the Arizona Civil Liberties Union brought the case for the prisoners.

Muecke rejected prison officials' defense that these deficiencies were a result of budgetary constraints. "The fact that the lack of staff and programming is partially a result of lack of funding from the Legislature is not a defense to these constitutional violations," he wrote.

Arizona prison officials also discriminate unlawfully against female prisoners by failing to provide them mental health services comparable to those provided to men.

Muecke also found that the prison medical and dental care systems were unconstitutional at the time the lawsuit was filed. However, he found, the filing of the lawsuit caused prison officials to make numerous improvements, so that conditions were constitutional by the time of trial. But, noting that "this Court cannot be assured that defendants will continue to implement the new programs," Muecke ordered prison officials to submit periodic reports on the status of the medical and dental care systems.

"It's a victory for basic human decency," said NPP lawyer Stuart H. Adams, Jr. "A sentence to prison should not be a sentence to death or needless suffering because of a lack of medical or mental health care."

■ The Death Penalty Information Center has released a report on the costs of the death penalty. The report cites studies indicating that the cost of a single death penalty case often runs into millions of dollars, making capital punishment more expensive than life imprisonment without parole. The costs are incurred mostly at the trial level, and thus would not be cut deeply by the current trend toward limiting post-conviction habeas corpus actions. For more information, contact the Death Penalty Information Center, 1606 20th St., NW, Washington, D.C. 20009. 202/347-2531.

■ The National Prison Project announces three new publications. The 1993 *Prisoners' Assistance Directory* provides a state-by-state listing of organizations which offer services to prisoners and their families including legal assistance, ex-offender and family support, visitation, and advocacy. It also lists special interest groups focusing on the death penalty, religion, prisoners with AIDS, women, juveniles, gays and lesbians, and veterans. The 63-page *Directory* is available for $30, prepaid, from the National Prison Project, 1875 Connecticut Ave. N.W., Washington, D.C. 20009. (Note to prisoners: Keep your $30! Individual state lists from the Directory are available free upon request.)

AIDS and Prisons: The Facts for Inmates and Officers has been updated and expanded. The 48-page booklet answers common questions about AIDS in an easy-to-read question and answer format. It explains what AIDS is, how the virus is transmitted, and how to avoid infection. The new edition also includes a section on HIV and tuberculosis, an expanded list of organizations assisting prisoners with HIV/AIDS, and a comprehensive discussion of available medical treatment.

TB and Prisons: The Facts for Inmates and Officers, discusses tuberculosis (TB) in a simple question-and-answer format. The 18-page booklet explains what tuberculosis is, how it is contracted, what its symptoms are, its treatment and medication, how HIV infection affects TB, and how multi-drug-resistant tuberculosis differs from ordinary TB.

Single copies of the AIDS and TB booklets are free from the NPP (see address above). Bulk copies are as follows: $25/100 copies; $100/500 copies; $150/1000 copies, prepayment requested.

In Forma Pauperis

Murphy v. Jones, 801 F.Supp. 283 (E.D.Mo. 1992). Pursuant to local rule, a plaintiff granted *in forma pauperis* was required to notify the court of any substantial change in his financial status. Dismissal is one of several possible sanctions for noncompliance, but given the ambiguity in the local rule and the plaintiff's eventual compliance, it is too harsh a penalty here. The court may revoke IFP status if the evidence shows that "plaintiff's economic situation is no longer a significant barrier to maintaining the action." (289) Several courts have found that revocation of IFP status is retroactive, requiring the litigant to pay the entire filing fee plus all other costs accrued. The court rejects this "pay or dismiss" view, at least as applied to a litigant whose financial situation improves after filing, since the IFP statute permits dismissal only if the affidavit of poverty is "untrue." The court also rejects other decisions' analogy to proceedings under the Criminal Justice Act. Finally, there is no reason to require retroactive payments in this case, since the previously paid partial filing fee of $13 served the purpose of deterring frivolous complaints.

Class Actions—Settlement of Actions/ Judicial Disengagement/Crowding

Diaz v. Romer, 801 F.Supp. 405 (D.Colo. 1992). Defendants were ordered to post notice of a class action settlement and a copy of the proposed agreement in every living unit and law library of each affected prison. The court makes factual findings concerning compliance and the adequacy of notice. The court also notes that class counsel met with class members, discussed the settlement at length, and obtained changes in the agreements to reflect concerns raised in these meetings (410).

At 407:

> *"...[T]he fact that the agreements reached do not address each and every issue raised in the Complaint or Motion for Contempt does not in and of itself give cause to question the fairness of the agreements or the process involved in reaching them."*

One of the agreements amounts to a final resolution of *Ramos v. Lamm*. At 408:

> *In return for the immediate dissolution of all previous orders of the Court in this action, and the withdrawal of plaintiffs' pending [contempt motion], defendants have agreed to make capital improvements and to undertake other steps, most notably staffing increases, at the affected prisons.... Except for the limited purpose*

of enforcing the terms of the settlement agreement, this case will be closed in its entirety and the Court's jurisdiction over the parties will end.

The agreements contain a "two-year period of compliance," which is not explained but presumably limits all the terms of the agreement.

Class members objected to the removal of population caps that would prohibit double-bunking and the failure to eliminate it where it exists, but the court finds that with the increase in staff, and given the adequacy of other conditions, it is not unconstitutional. The court also approves provisions involving medical and mental health care, sex offender treatment programs, and food service.

Procedural Due Process—Administrative Segregation/ Protective Custody

Banks v. Fauver, 801 F.Supp. 1422 (D.N.J. 1992). The plaintiff was placed in protective custody based on an anonymous tip that his life was in danger and that he was involved in drug trafficking as well as the charge that his wife had tried to smuggle money to him.

New Jersey regulations create a liberty interest in staying out of protective custody (1428-30). They define protective custody as confinement to a secure unit "in order to provide protection to the inmate from injury or harm actually threatened or reasonably believed to exist"; this phrase constitutes the regulation's substantive predicates. This definition, combined with language requiring the superintendent to review the reasons for PC placement "to determine whether... there is a reasonable basis to conclude that the inmate is in need of Protective Custody," and the requirement that the initial placement decision be supported by evidence and reasons related to the PC definition, constitutes mandatory language.

FEDERAL RULES

Use of Force/Discovery

Castle v. Jallah, 142 F.R.D. 618 (E.D.Va. 1982). At 620: "...[P]ro se litigants are entitled to the use of discovery procedures in civil cases on the same terms as litigants represented by counsel."

The plaintiff was entitled to discover factual material in prison reports of incidents; if they contain deliberative material, defendants may submit them for consideration of redaction within 20 days.■

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 have begun an "advice" column, a sort of "Dear Abby" for prisoners on legal questions. This issue's 'Dear Abby" is Joe Giarratano.

Dear Prison Project:

I am currently litigating a Section 1983 complaint in the federal court. In response to my complaint, the defendants argue that my claims should be dismissed because they are barred by the doctrine(s) of *res judicata* and/or *collateral estoppel*. I am confused because, from my understanding, these doctrines appear to be the same. What am I missing?

Confused

Dear Confused:

The legal doctrines of *res judicata* and *collateral estoppel* are not synonymous. Each has a distinct application. They appear to be the same because both doctrines are procedural mechanisms designed, and used, to preclude claims (bar review). Both serve the same underlying principle of issue preclusion: i.e., stop repeated litigation of issues by the same parties.

If the lawsuit you filed contains issues where there has already been a "judgment on the merits by a court of competent jurisdiction in a prior lawsuit involving the same parties or their agents," then *res judicata* may apply. The application of *res judicata* requires that certain defined conditions exit: (1) there must have been a prior judgment on the merits; (2) the judgment must come from a court with competent jurisdiction; (3) the suit must involve the same parties or agents; and (4) the suit must stem from the same cause of action. If any of these conditions do not exist then you should argue that *res judicata* does not apply to your case.

Collateral estoppel promotes a distinct aspect of the same underlying principle: you cannot re-litigate factual or legal issues that were actually litigated and decided in a prior suit involving you *irrespective* of whether the same cause of action was previously litigated. In other words, if the defendants claim that *res judicata* applies, and you show that your claims do not qualify as the "same cause of action," then *res judicata* should not apply to your case. *But,* your same claims may still be precluded under the doctrine of *collateral estoppel* if the defendants can show that your underlying factual or legal contentions are the same as those previously decided against you.

As with *res judicata,* certain conditions must be met before *collateral estoppel* can be applied to preclude your claims. *Collateral estoppel* should not apply unless the prior judgment was based on: (1) a "full and fair opportunity to litigate;" (2) an issue previously decided *but* the ruling on that issue was *not* necessary to the decision in the prior case; (3) and if it is impossible to determine what was litigated and decided in the prior action, then *collateral estoppel* should not apply. The burden of proof rests with the defendants to show what was or was not litigated and decided. It is important that you clearly show the court how your claims are not the same under the conditions outlined above.

Joseph Giarratano is a prisoner in Virginia. A respected jailhouse lawyer for many years, he is also on the advisory board for the Center for Teaching Peace in Washington, D.C., founder and president of the Alternatives to Violence project at Augusta Correctional Center, and a client advisor to the Virginia Coalition on Jails and Prisons.

Is Legal Punishment Right? The Answer is No.

BY LORRAINE BERZINS

The official and stated purpose of Canada's criminal justice system is to punish. In fact, Canada's most recent policy proposal clearly names "retribution" as the aim of our criminal law. Punishment is endorsed as "a requirement of justice" simply because it is seen as "a fitting response to wrongdoing."

No one questions whether it is "right" to retain legal punishment in the face of overwhelming evidence that our punishment-based criminal justice system has not only failed but has had a destructive effect. The 1987 Canadian Sentencing Commission reported 952 pages of such evidence, but still endorsed punishment. The Commissioners called it a solution "of despair, not of hope," but necessary so that criminals would get what they deserve. This way of thinking has become so formalized that it is referred to as the theory of "just deserts."[1]

Proponents of the theory claim that legal punishment can be justified if the purpose is censure and blame, and when this is what an offender "deserves." In this view, punishment is required because of its role in expressing disapproval of misconduct.

According to the theory of just deserts, punishment serves two intertwined purposes: deterrence and denunciation. It is in order to serve the dual purposes that the criminal sanction must have two essential features—the imposition of painful consequences and a message of condemnation.

Commonly Accepted Ethical Considerations and Constraints

Following is a checklist of some of the critical issues identified in the literature and Canadian official policy documents:

Proportionality: Punishment is supposed to comport with the seriousness of the crime, i.e., it must be deserved.

Parsimony or use of restraint: State-inflicted suffering should be kept to the minimum needed to achieve the purpose of intervention.

Preventive effect: The use of something so intrusive as the criminal law and legal punishment can only be "right" if its use can be justified by some preventive effect. Often referred to as "the Kantian injunction," this requires that no offender be made to suffer harsh punishment merely in order to alter the behaviour of others.

Censure: The punishment must express moral condemnation, disapproval, and blame.

The overall magnitude of the penalty scale must be just:

There should be limits to how disapproval may be expressed, particularly upper limits.

Seriously wrongful conduct: Law professor Andrew von Hirsch's whole justification for making legal punishment "right" takes for granted, he says, that it would only apply to serious violations of others' rights.

Economic conditions in society must be just: This is the biggest caveat of all. Just deserts in an unjust society may not be possible. Von Hirsch notes that all his assumptions—about wrongfulness of the criminal conduct and the culpability of the actors who engage in it—could be questioned "in situations of sufficient social and economic deprivation." A growing literature also draws attention to gender and race.

Collateral burden of punishment must not overwhelm: The burden must not be so large as to overcome the desert-based case that makes punishment "right."

These are the ethical considerations accepted today as criteria for ensuring that legal punishment is right. They also represent a scathing indictment of current sentencing practices in Canada and the U.S., and probably around the world. At the least, a radical downscaling of penalties is required even to pay lip service to the ethics of just deserts.

So much depends on what von Hirsch calls "one's moral assumptions, political ideology, and values about which reasonable people can disagree." The fatal flaw in the theory of just deserts is that it is an abstract construction.

The logic of punishment will inevitably breed injustice in an unjust society and, for this and several other reasons, punishment is *not* "right." Some of the purposes for which punishment has been used are important. I do not for a minute suggest that we should do nothing about crime. Of course, denunciation, protection and proportionality are important. What is in question here is the assumption that *punishment* is the only means of doing these things. It is not the best means, nor is it necessary. It is not right because it does so much harm.

If it can be shown that a system of punishment cannot deliver on the promises that have justified it, and is unable to conform to the ethical standards agreed upon as necessary constraints on actions by the state, then we can reasonably begin to consider that legal punishment may not be right.

We must reflect on how the theory behind punishment is based on an outdated understanding of the world; it is based on reasoning that just does not make sense. Finally, and this will ring true to anyone with any experience of the courts, the kind of adversarial procedures it has led us to gives no one a sense that what is done is either satisfying or right.

A Set of Outdated Assumptions

The *reality* of justice and our *beliefs* about justice are no longer the same in this society.

An overwhelming body of findings from the fields of social and modern physical sciences has shown that the imbalance of power and wealth in our society has led to inequities. These inequities have been rationalized by those who have the power to produce our ideological theories—theories that define what is "right."

Within existing social contexts, many people are left at the mercy of the social ethic of the dominant group—those with the power to define for everyone which interests are valuable, whose interests are valuable, and what rights are valuable. Degrees of "blameworthiness" become very difficult to judge given the imbalance of power and wealth. Assigning proportional ratings is not possible and the end result is the justification of the oppression of one group by another.

Those whom punishment might deter from acts defined as "criminal" do not share a common context of symbolic understanding with the dominant group. In fact, according to reviews of the most current communications research by world-class academics like Thomas Mathiesen, the preventive message of punishment lands in a context of interpretation such that "the signal is not effective, and the message not understood as the sender has meant it."[2] Those whom the message is intended to deter most often are already alienated from the dominant group. Mathiesen says, "The signal is not interpreted as a [threat of a] deterrent sanction or of an educational

message. Rather, it is for example interpreted as more oppression, more moralizing and more rejection."

On the other hand, those who share a common context of symbolic understanding with the dominant group sending out the deterrent message are already, for other reasons, safely placed on the "right" side of the line. "Put briefly and in bold relief," says Mathiesen, "general prevention functions in relation to those who do not 'need' it. In relation to those who do 'need' it, it does not function."

The power of the dominant group to assert that *their* perception justifies legal punishment can lead to scapegoating of those with whom there is not the relationship, bond or shared meaning that can otherwise be called upon to absorb conflicts of interest. Conflict with the order imposed (on the basis of *their* definitions) is no longer seen as the natural conflict of desires between equals, but as the "crime" or "sin" or "flaw" of the other. "I am afraid of you" becomes "you are dangerous." "I find it hard that you are different from me" becomes "there's something wrong with you; you must change or leave." "I don't understand why you are not trying to be the way I think you should be" becomes "you are unremorseful, unrepentant, uncooperative."

There is no doubt that crime cannot go ignored. But our criminal justice system is profoundly beside the point when it comes to dealing with crime. If our response is to truly help us build a *stronger* community—which is the goal espoused in "just deserts"—it cannot be based on a punishment strategy.

Is Punishment Right?

Proportionality

In light of contemporary knowledge, the very determination of proportionality is an obsolete notion. Tragically, however, within this "decontextualized" model, the labelling of a behaviour as "criminal offence" produces a kind of reification of it and triggers a process that then takes on a life of its own. Indeed, conduct labelled as "crime" includes, in von Hirsch's own estimation, behaviours that do not constitute violations serious enough to warrant the intervention of the State at all. With the label "criminal offence" applied, individual behaviour is no longer addressed with its idiosyncratic human features. Abstract categories of "crime" and "time" are compared without regard for context or content, in slavish adherence to the demands of proportionality. The principle of parsimony is never applied. The convention has been determined by the dominant group and is now cast in stone.

Punishment is the deliberate infliction of suffering; it is justified violence.

Time after time, rationales justify imposing greater punishment than the "mitigating individual circumstances" warrant. This is done to set an example and "send out a message" to people with so little status in the dominant group that they have neither the credibility nor the resources to challenge it. It also serves to make an example of the "non-disadvantaged" person who falls from grace through some deviant act and must be sacrificed to show that the principle of "just deserts" plays no favourites.

Contemporary societies are complex, impersonal, multicultural and non-communal. Legislators and judges administer justice within this context in a turbulent atmosphere of court backlogs and politics. They face a situation where, by legislative edict, every behaviour that can potentially be labelled "offence" also carries the potential for a prison sentence. In such a context, what Mathiesen calls the "action function" of imprisonment makes it the quickest, most observable sign that something is being done about crime.

The high collateral costs of this outcome, both financial and human, serve ultimately the interests of no one at all, save perhaps the industry that has grown up around it.

The inescapable conclusion: punishment cannot be proportional and therefore cannot be justified.

The Prevention Requirement

The evidence that deterrent effect cannot stand up to scrutiny is overwhelming. What all the literature boils down to is this: the premise that punishment has a preventive or deterrent effect is based on sheer assumption that fear of unpleasant consequences is a highly motivating factor in most walks of life. Empirical knowledge, says von Hirsch, about the actual deterrent impact of penalties is not conclusive, and Mathiesen's comprehensive review of the research corroborates this. Yet this unsubstantiated belief in punishment's preventive effect still prevails as its lingering justification. The burden of proof is placed on those who would cast doubt on it.

There are solid grounds for the claim that punishment, if it "works" at all, cannot be justified as either the primary means of preventing crime, the most important means, or the most effective means for doing so.

The Requirements of Logic

From whence comes, then, this strange belief in criminal law as a kind of penal magic, as if violence could produce nonviolence? Punishment is, by definition, the deliberate infliction of suffering; it is justified violence.

The logic of punishment cannot hold. To aim to punish and re-integrate offenders at the same time are contradictory objectives—as in to walk and stand still, to speak and remain silent. But this very logic of "just deserts" now forms the basis of Canada's most current policy proposals for the acceptable aim of its criminal law! Retribution or violence clings to our criminal law as an inevitable reply to an earlier violence. At best, it is prophylaxis. At worst, it is a crime like the rest.

Mathiesen points out that punishment's attempt to communicate a preventive message is rendered ineffectual by several distorting factors. The assumption of a preventive effect does not take into account how punishment is experienced by those on whom it is most likely to be imposed. Some social pressure or threat may make people conform but, beyond a certain point (and this point is well surpassed by contemporary criminal justice practice), the punishment is experienced as an injustice, a rejection, a scapegoating. Ultimately a counter-culture emerges, as opposed to conformance to the dominant culture, because it is not felt by those most often punished that successfully refraining from certain conduct is all that is required to successfully eliminate the risk of alienation from the dominant group.

Repercussions of an Adversarial System

The legal system spawned by the logic of punishment is, of necessity, adversarial and, as a result, is actually destructive of some of justice's most cherished objectives: the shared sense of what is right and wrong, the holding to account for wrongdoing, the affirming of the importance of the rights of the person injured, the sense of proportionality to the gravity of the misconduct, and the prevention of

further harm. Today, the legal industry turns the search for justice into a game of technicalities played between lawyers in court. The central focus is that a law has been broken. The message overrides the victim's priorities and considerations, as well as any other rational concern for protection, rehabilitation, and ultimate healing of the relationship with the victim or the community. The entire symbolic message of denunciation and moral condemnation must be carried by the length of prison sentence that is broadcast in headlines to the rest of the community.

Justice as Punishment: The Final Demise of a Paradigm

The hold that the punishment model maintains on our collective psyche is irrational. Fed by abstract stereotypes, it remains blissfully unchallenged.

There are other ways of looking at the kinds of problematic situations that get criminalized, as feminists[3] and other criminologists have begun to point out. Problematic situations can be handled in a wide variety of much more civilized ways than today—as aboriginal legal critics are rediscovering.[4]

Denunciation is, in fact, an important positive goal, as is the right to protection. But its inevitable association with punitiveness makes for unresolvable philosophical contradictions within a framework where one must mitigate against the consequences of a system whose intent is also to remove certain rights and liberties for the express purpose of inflicting pain as punishment.

When a way of thinking, based on unquestioned "common sense," begins to limit our ability to interpret and use new information and insights, it is usually a sign that a "paradigm" has been dominating our thinking and that a change in paradigm is probably close at hand. Since our paradigms can blind us to new possibilities, the ability to examine and challenge them to break the old and create the new becomes important to our human journey.

The ultimate contribution of Andrew von Hirsch, then, to the contemporary philosophic endeavour around justice theory, is to have finally broken the punishment paradigm of justice, by an analysis of its logic that unmasks its utter unworkability.

Creating a New Paradigm for Doing Justice

Today we can no longer ignore that the development of a just, peaceful, and safe society is a process that is forever ongoing. Justice cannot be built on exclusivism, absolutism, or intolerance. Neither can it be built on vague liberal slogans or pious programs, a soft humanism which does not want to recognize evil and face it. We can only remind ourselves of how we want to be living together and, guided by those values, within a framework of good and evil, understand what needs to be done, with all the truthtelling needed. We need a new "paradigm" for doing justice that can help us *build* community, not further destroy it.

Punishment... is not right because it does so much harm.

We must end the apparent logic of returning evil for evil, renounce the idea of retribution and those forms of conduct which have always appeared natural and legitimate. If we are to escape from violence, if we are to live together in peace, we must overcome the spirit of rancour and vengeance. To avoid punishment and blame, however, usually means to share in the suffering, finding the human capacity to bear pain and overcome it. Conflict, crime and evil will never be eliminated: it is how we deal with them that must be changed.

New perspectives will take shape if we have the courage to see that the emperor has no clothes. Skepticism towards the system must be honestly voiced as it emerges, by top level decision-makers, by personnel engaged in practice at the grass-roots, by professional associations and pressure groups outside the system, and by the community at large.

New measures could be introduced which can better satisfy aspirations and needs. "Pre-emptive deterrence" could be emphasized, rather than intervention by punishment after the event. Efforts could focus more closely on the *harm done to people*—rather than on the "law" that has been broken. Care for the victim could become central to the system, rather than concentrating services exclusively on blaming and fixing individual offenders. The peace-making function of the law could be developed, with procedures for solving more conflicts in the community.

The notion of "punishment" could be replaced by "liability" of an offender for a given offence. The least onerous measures should be chosen in accordance with the "response-ability" of the offender.

Some separation from society may be needed, but not for the purpose of punishment. Some non-violent alternative form of "moral expression" may be needed—rituals, for example—to express denunciation and release in healthy ways the vengeful feelings and retributive emotion—but without feeding the cycle of violence. Ultimately, some strictly coercive measures bordering on punishment may have to be invoked—but only as a last resort.

This by no means implies that society should not protect itself or censure wrongdoing. Denunciation and disapproval are important human responses to wrongdoing. But it is a fallacy to believe that the response must be punitive.

The concept of "deserved punishment" is deeply entrenched, reaching back into biblical tradition. It was originally intended as a limiting principle (no *more* than an eye for an eye), restricting what could be done to tangibly acknowledge the harm done. What has now grown up around it is the infliction of pain and the satisfaction of revenge. In light of contemporary knowledge and scientific evidence, this cannot be an acceptable foundation for any government's criminal justice policy. ■

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[1] The writings of law professor Andrew von Hirsch have been particularly influential in narrowing down and spelling out this theory as a credible reason for allowing punishment by the state. See particularly his article, "Proportionality in Philosophy of Punishment: From 'Why Punish?' to 'How Much?'" *Criminal Law Forum, and International Journal*, Vol.I, No.2 (1990).

[2] Mathiesen, *Prison on Trial: A Critical Assessment*, London, (1990).

[3] Ed. note see M. Kay Harris, "Exploring the Connections Between Feminism and Justice," *NPP JOURNAL*, No.13, Fall 1987.

[4] Von Hirsch mentions the analogy of penance rituals. Penance rituals could provide alternatives for the "moral discourse" needed, the communication of judgment and feeling, the need for reflection on the moral quality of certain behaviour, the recognition of the seriousness of the harm done, and the valuing of certain rights.

(con't. from page 2)

The authorities had tried to restrict our prison visits to foreigners only. We insisted that the Russians be allowed in, too. The relationship between the ministry officials and small penal reform groups who are Russia's only independent watchdogs is inevitably ambivalent. The activists' work in publicizing abuses is embarrassing to officials. On the other hand, their knowledge about penal issues has had a role to play in framing legislation. At least one advocacy group, the Prison Centre in Moscow, became involved last year in peace-making inside the penal colonies, when a spate of strikes and riots threatened widespread bloodshed. The Centre's founder, Valery Fedorovich Abramkin, a former prisoner and unremitting evangelist for reform, is a particularly tenacious thorn in the side of the authorities. The Ministry has banned him from making further visits to the camps, but without total success.

Abramkin and his practical right-hand man, Petrov (who met us at the airport), have in recent years travelled outside Russia, and seen prisons in the West. They are well aware that prosperous capitalist states do not necessarily treat their prisoners well. But they are the exception. Most of the participants at the Moscow conference have not travelled abroad. Without direct experience of the West, there persists a widespread belief that capitalism can get prisons right. The visiting Westerners had little success persuading either the Russians or the many other ex-Soviet nationalities of the fundamental fact that locking people up is a negative and damaging act, and that imprisonment in any country perpetuates crime.

Comparisons with U.S.

In one key respect, the former Soviet Union compares favorably with the United States. In the ex-USSR, widespread amnesties for political and non-violent prisoners in 1987-88 reduced the prison population by more than a third. The result is that the U.S. proportionate rate of imprisonment, 455 per 100,000, is much higher than the rate in the former USSR, 350 per 100,000 according to official figures. (Both sets are for 1990-91.)

But the numbers in prison in the former Soviet Union are rising again. As everywhere, the penal problem starts and finishes in the world outside. Sharply rising crime is leading to public demand for tougher and tougher penalties. The pattern is all too familiar. The law—its content and its application—is what remains fundamentally different in the states which for three generations were under Soviet communist rule.

The Russian criminal code, though amended, has yet to receive the root-and-branch overhaul that would bring it in line with western norms. Little meaningful distinction is made between minor delinquency and dangerous crime. The key difference in sentencing is between first offenders—first time caught—and all the rest. Sentences for relatively minor offenses remain remarkably long. The pretrial investigation by a public prosecutor follows the inquisitorial system used in Western Europe, which is unfamiliar to Anglo-Saxon countries with an adversarial system. But it is not accompanied by any effective legal protection for the detainee; no provision for bail, no limit imposed on the length of time a prisoner awaits trial. Juries have yet to be introduced into the courtroom. And after conviction, legal redress for inhumane treatment in custody

"Some people have to sleep while others stand," recalls Bronstein.

During the conference, Al Bronstein was part of a group that visited the remand prison (jail) in Moscow. Here are his recollections:

"The facility was built in the 1870s and is literally a Victorian dungeon. Designed for 1,000, it held 5,200 on the day of our visit. This included men, women (10% of the population) and juveniles, all kept in separate parts of the prison. There is apparently no limit on the time of detention; you can be held three to four years pre-trial, that is, after you are charged, but only six to eight months if you're just being held for investigation. In other words, you can be held for investigation before any formal charges are filed. The director (warden) mentioned that the place is so crowded that prisoners have to sleep in turns. Some people have to sleep while others stand. He was going to show us 70 men in a 40-man cell. When we went there, the 40-man cell (which looked more like a 12-man cell to me) held 70 prisoners. The bunks are right up against one another; there is not even one inch of space between them. It looks like two large sleeping platforms, one row of bunks and then another row of bunks on top of them, with the prisoners shuffling around between the bunks and the wall.

"The director gave us the prison schedule and then mentioned that it was not followed at all because of the crowding. With a population of over 5,000, he said they had arts and crafts workshops that would accommodate 100. The outdoor recreation is on the roof in a bunch of cages. They are supposed to get one hour each day in the fresh air, but given the crowding, it was apparent that prisoners rarely get to the roof because it takes so long to get there and there are just too many of them.

"Only the prosecutor, or the investigator, can arrange permission for visits from family of pre-trial prisoners. After sentencing, they can get visits. Lawyers, prior to sentencing, can only visit with the permission of the investigator.

"The director is allotted 57 rubles a day to feed each prisoner; at the exchange rate then, that was about 13 cents. We saw a feeding as we were walking around the prison, and a man was spooning out some very thick, greasy potato soup from a huge dirty pot into bowls and then handing them into cells.

"It was interesting that the prison officials allowed us—a group of about 25 or 30—including ex-prisoners, the families of current prisoners, activists, as well as foreign guests—to tour the prison. There was no checking backgrounds of the visitors; no searches; we were able to go anywhere except punishment cells (though we were allowed to see one segregation cell that held a very young girl). It was a kind of openness you would rarely see in an American prison. There was no movement of prisoners throughout the prison. Almost all of them were locked in their cells, which are really small dormitories, all the time. The place was dirty and damp, and hot, with exposed wires all around, and leaking toilets and faucets. The prison director indicated he had no money for cleaning supplies or paint. It was as bad as anything I had ever seen. Prisoners, because of the heat and dampness, were shirtless, in shorts and flipflops. They were crowded into these horrendous dormitories. On the other hand, most of the prison staff did appear to be pretty friendly, not hostile-looking but bored. There did not appear to be much tension. The entire series of buildings had the damp, sweaty smell of a prison."

does not exist. This is a system inherited by the now independent republics.

There appears to be no systematic method of reversing wrongful conviction. We heard of men and women convicted for offenses, such as doing private business, which were crimes against the State under communism. They are no longer crimes, but, according to accounts at the conference, people serving long sentences for such activities remain in the camps. With the outbreak of ethnic wars in several republics, the "crime" of being a conscientious objector has also reappeared, resulting in imprisonment for those refusing to join up.

The law operates against a backdrop of economic collapse, vertiginous inflation, and top-level political combat between reformers and old guard. It operates with many of the judges from the old days still in office, trained to protect the state, not the individual. It operates, above all, in a moral vacuum. Corruption at every level is rife. We heard of examples at the conference, and even witnessed one when a policeman stopped a driver taking us into Moscow and accused him of a number of infractions until he handed over 800 rubles. On this occasion, the presence of foreigners made no difference.

Death Penalty

With the rule of law seen to be absent, public faith in harsh punishment is well-nigh unshakable. A poll quoted at the conference indicates that 75% of Russians are in favor of capital punishment, and 30% want it expanded. One speaker at the conference felt that research into the effects of capital punishment needed to be undertaken—to which Alvin J. Bronstein [executive director] of the NPP replied this would be "like researching whether Buchenwald was a success."

The death penalty is not applied as frequently as it was under the old regime, but recorded executions in the former Soviet Union have been about 90 annually in recent years (compared to 30 annually in the U.S.). A bizarre debate took place about the method of execution, and speakers asked a senior ministry official why the body could not be returned to the family. They received the chilling non-answer that the prison custom was cremation, "so there might be excesses because of different cultural ways [among the population] of disposing of the body."

The debate ended with a suggestion from Alvin Bronstein, which received support, that there should be a resolution against the death penalty. The chairman, an eminent Russian writer, said he couldn't be sure how to frame such a resolution. The discussion resumed. By the end of the day, no one seemed clear whether such a resolution did or did not exist. (Throughout the conference, commitment was rivalled only by chaos.)

The Future of Reform

Given the nightmarish problems faced by the ex-USSR, is there anything that can be done by outsiders to further the unpopular cause of penal reform? In relation to the scale of the task, not much. It was clear at the conference that Russia and her neighbors are not going to leap-frog the mistakes we in the West have made over the past century. The problem is not primarily one of money; it is a question of mentality. What Westerners can offer—and what the reformers in Russia want—is know-how: organizational, technical, and, if precisely targeted, material.

But most of all, vigilance. The Russian authorities pay far more heed to foreign opinion than they do to their own citizens. Former political prisoners have taken up the cause of everyday prisoners, and of everyday people, in their fight to make the system more humane. There may no longer be political prisoners in Russia (though no one could swear to that), but the need for constant reminders to those in power that people in the West are watching has not diminished. As Valery Abramkin told us: "We need your support just as much now as when we ourselves were in prison." ■

Jennifer Monahan is a British freelance journalist and member of Penal Reform International.

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Deprivation of Liberty," 11 *Canadian Psychiatric Association Journal* 470-484 (1966); Scott, G., & Gendreau, P. "Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison," 12 *Canadian Psychiatric Association Journal* 337-341 (1969); Cohen, S., & Taylor, L., *Psychological Survival*, Harnondsworth: Penguin (1972); Grassian, S., "Psychopathological Effects of Solitary Confinement," 140 *American Journal of Psychiatry* 1450-1454 (1983); Jackson, M. *Prisoners of Isolation: Solitary Confinement in Canada*, Toronto: University of Toronto Press (1983); Grassian, S. & Friedman, N., "Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement," 8 *International Journal of Law and Psychiatry* 49-65 (1986); Slater, R. "Psychiatric Intervention in an Atmosphere of Terror," 7 *American Journal of Forensic Psychiatry* 6-12 (1986); Brodsky, S. & Scogin, F., "Inmates in Protective Custody: First Data on Emotional Effects," 1 *Forensic Reports* 267-280 (1988); and Cooke, D. "Containing Violent Prisoners: An Analysis of the Barlinnie Special Unit," 29 *British Journal of Criminology* 129-143 (1989).

[6] This description of cell extraction practices is corroborated not only by numerous prisoner accounts of the process but also by explicit Department of Corrections procedures. Once a decision has been made to "extract" a prisoner from his cell, this is how the five-man cell extraction team proceeds: the first member of the team is to enter the cell carrying a large shield, which is used to push the prisoner back into a corner of the cell; the second member follows closely, wielding a special cell extraction baton, which is used to strike the inmate on the upper part of his body so that he will raise his arms in self-protection; thus unsteadied, the inmate is pulled off balance by another member of the team whose job is to place leg irons around his ankles; once downed, a fourth member of the team places him in handcuffs; the fifth member stands ready to fire a taser gun or rifle that shoots wooden or rubber bullets at the resistant inmate.

[7] One of the basic principles of any unit premised on domination and punitive control—as the Pelican Bay Security Housing Unit is—is that a worse, more punitive and degrading place always must be created in order to punish those prisoners who still commit rule infractions. At Pelican Bay, that place is termed the "Violence Control Unit" (which the prisoners refer to as "Bedrock"). From my observations and interviews, some of the most psychiatrically disturbed prisoners are kept in the VCU. Prisoners in this unit are not permitted televisions or radios, and they are the only ones chained and escorted to the door of the outside exercise cage (despite the fact that no prisoner is more than four cells away from this door). In addition, there are plexiglas coverings on the entire outside facing of the VCU cells, which results in a significant distortion of vision into and out of the cell itself. Indeed, because of the bright light reflected off this Plexiglas covering, I found it difficult to see clearly into any of the upper-level VCU cells I observed, or even to look clearly into the faces of prisoners who were standing right in front of me on the other side of this plexiglas shield. Inside, the perception of confinement is intensified because of this added barrier placed on the front of each cell.

[8] In the first several years of its operation, Pelican Bay State Prison had *one* fulltime mental health staff member, and not a single Ph.D. psychologist or psychiatrist, to administer to the needs of the entire prison population, which included over 1,000 SHU prisoners, as well as over 2,000 prisoners in the general population of the prison. Although the size of the mental health staff has been increased somewhat in recent years, it is still the case that no advance screening is done by mental health staff on prisoners admitted to the SHUs to determine pre-existing psychiatric disorders or suicide risk, and no regular monitoring is performed by mental health staff to assess the negative psychological consequences of exposure to this toxic environment.

[9] Cf. Toch, H., "The Disturbed Disruptive Inmate: Where Does the Bus Stop?" 10 *Journal of Psychiatry and Law* 327-350, (1982).

[10] Dickens, C., *American Notes for General Circulation*. London: Chapman and Hall (1842); Beaumont, G., & de Tocqueville, A., *On the Penitentiary System in the United States and Its Application in France*, Montclair, N.J., (1833; 1976).

THE NATIONAL PRISON PROJECT

AIDS Update

"Teaching other inmates about HIV/AIDS is not an easy task."

—Dee Farmer, FCI, Springfield

BY JACKIE WALKER

David Spinks

Mike Flashner, a peer educator at the Pondville (MA) Correctional Center, would like to see a national peer education organization.

Peer educators have often been the only source of education and advocacy in prison around HIV/AIDS issues. Three peer educators tell, in their own words, about their struggles and accomplishments:

Dee Farmer-FCI Springfield, Missouri

There is little literature evaluating the effectiveness of HIV/AIDS peer educators. But many believe inmates are best qualified to educate other inmates about HIV/AIDS. Most prison officials are perceived as judgmental in their AIDS education programs. Instead many inmates, like myself, have filled in and sometimes taken over the prison AIDS education program.

Teaching other inmates about HIV/AIDS is not an easy task. In educating fellow inmates we are asking them to change the way they engage in sexual activity and drug use; or with the absence of condoms and clean needles, to abandon these activities completely. It is not easy to ask inmates to do this, because sexual activity and drug use can be a comfort in the lonely and isolated prison environment.

Our message has to be that though giving up these activities may be emotionally difficult now, not to do so can be a lot worse in the long run. Beyond AIDS education we must begin to network. I do my part by mailing AIDS literature to inmates throughout the country and writing articles for AIDS magazines and prison publications.

Here, at the Federal Prison Medical Center my mission is to show inmates how to live positively with AIDS. When HIV/AIDS inmates arrive here they are lonely and scared. On the terminally ill ward I witness AIDS patients being fed intravenously, unable to walk, barely breathing, and just hanging on to a thread of life. No matter how often I visit the ward I am always overwhelmed with a deep sense of sadness. I feel compelled to tell everyone that AIDS can be a killer. Protect and take care of yourself, because a prison hospital is one of the worst places to be.

Cruz Salgado-Wallkill Correctional Facility, New York

It hasn't been easy, trudging through this struggle, but after the death of a good friend five years ago, I decided to pick up the banner of peer support. You see, my friend died of pneumocystis carinii pneumonia (PCP). Since then, I've coordinated support groups, taught AIDS prevention education, conducted seminars, chaired the Prisoners for AIDS Counseling & Education group, and I am now a certified peer (AIDS) counselor. In the process, I've also seen how the AIDS crisis in prison has affected fellow prisoners. Although there has been some improvement, the overall quality of treatment for prisoners with HIV/AIDS continues to crawl at a snail's pace.

Hopes that things will improve in '93 seem bleak. Out of the quagmire three issues emerge that need action: 1) the slow process for release under the Medical Parole Law; 2) the need for discharge planning to include housing and support services for parolees; and 3) developing conduits for providing food and clothing to prisoners with HIV/AIDS. Anyone with insights is urged to contact the AIDS in Prison Project at (212) 254-5700.

In the meantime, I invite all prisoners to unite against AIDS and help calm the echoing scream of frustration, despair and fear of our fellow prisoners with AIDS.

Mike Flashner-Pondville Correctional Center, Massachusetts

The AIDS Education Awareness Program at NCCI Gardner wants to start a nationwide Peer AIDS Education Organization and encourages all peer AIDS educators to participate in forming a network for better medical care for HIV/AIDS and terminally ill prisoners.

The time is long overdue for peer educators to be heard nationwide. This organization would give every peer run education program a voice in Congress and the White House. The United States Supreme Court has ruled that prisoners have the right to adequate health care in prison. As peer educators, we know government action must be taken to meet these standards.

We all must take exception to statements from prison officials who say "they're going to pass away in prison anyway." We say 95% of HIV/AIDS-infected prisoners did not get sentenced to death and we must look at alternatives to see this doesn't become a common practice in our nation's prisons. ■

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.

QTY. COST

Fill out and send with check payable to:

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

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THE NATIONAL PRISON PROJECT

Highlights

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

Casey v. Lewis, filed on behalf of Arizona state prisoners, challenges legal access, health care and practices surrounding assignments to segregation. On March 19, the district court declared the mental health care system unconstitutional, rejecting the state's claim that budget constraints made deficiencies unavoidable. The court found that medical and dental care had been unconstitutional at the time of filing. Due to improvements made since the filing of the case, the court found that medical and dental care were currently constitutional, but ordered the state to submit periodic status reports on these areas. On April 6, the court ruled that the state's failure to make facilities accessible to mobility impaired prisoners violated the Constitution.

Duran v. King challenges crowding and conditions in New Mexico's prisons. On January 29, the district court released from federal court supervision three state prisons that had achieved compliance with court-ordered reforms. However, serious problems remain at the state penitentiary.

Hadix v. Johnson—The National Prison Project appears in the medical and mental health care portion of this case which concerns conditions of confinement at the State Prison of Southern Michigan in Jackson. Following evidentiary hearings in March, the court ordered relief in several areas, including staffing and tuberculosis control.

Hamilton v. Morial challenges overcrowding and conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans. The judge recently ordered defendants to discontinue their policy of charging prisoners for over-the-counter medications. In addition, plaintiffs' attorneys convinced defendants to drop their policy of charging prisoners a copayment for sick call.

Palmigiano v. Sundlun challenges overcrowding and conditions in the Rhode Island prisons. In February, the Governor's new Commission to Avoid Future Prison Overcrowding proposed legislation to hold the prisoner population at certain agreed-to limits. The package calls for use of alternatives such as intensive supervision, halfway houses and drug treatment programs, night and weekend court to expedite arraignments, and the creation of a committee to supervise population levels.

Roe v. Meachum—This case was filed on February 24, 1993 by the National Prison Project and the Connecticut Civil Liberties Union on behalf of all prisoners housed in the Bridgeport (CT) Community Correctional Center. Plaintiffs claim that deficiencies in the mental health care system amount to a violation of prisoners' constitutional and statutory rights.

U.S. v. Michigan/Knop v. Johnson—This is a state-wide Michigan prison conditions case. In *Knop*, the Supreme Court denied plaintiffs' petition for *certiorari* on a racial slurs issue on March 8. On March 4, the trial court ordered the defendants to submit a compliance plan for legal access by June, 1993.

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