Legal Issues in Jails - 1990

American Jail Association

9th Annual Training Conference

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Speakers:

William C. Collins, Moderator
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National Institute of Corrections
Jails Division

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Seminar Format

Each speaker, including the moderator, will make a formal presentation on the topics listed below. Following each presentation, there will be an opportunity for reactions from the other panelists and questions from the audience.

Following the formal presentations, the rest of the seminar will be devoted to responding to questions from the audience. Members of the audience are urged to write down questions on any legal topic of concern to them and pass such questions to the panel during breaks. Questions may be directed to individual panel members or to the panel generally. Questions will be taken from the floor, as well as in writing.

About the Presenters

William C. Collins

Bill Collins is the co-founder and co-editor of the Correctional Law Reporter, a legal issues journal written for correctional administrators. A consultant/lawyer in the field of correctional law, Mr. Collins has consulted and trained on legal issues for jurisdictions across the country. He is a former Senior Assistant Attorney General in the State of Washington and has worked in correctional law for nearly 20 years.

John Hagar

Mr. Hagar serves in an Of Counsel capacity with the ACLU Foundation of Southern California and has worked with prisoners' rights issues for the last eight years. He is the lead attorney for the plaintiffs in the Los Angeles County jail litigation, as well as in cases involving two other large California county jail systems. He has litigated a variety of inmate issues, including crowding, medical care, AIDS, pregnancy care, issues related to gay inmates, and several First Amendment cases.

Lynn Lund

Lynn Lund is Director of Loss Control for the Utah Local Trust in Salt Lake City. He is a former Inspector General for the Utah Department of Corrections. As a practicing attorney, Mr. Lund has represented, trained, and consulted for perhaps more correctional agencies across the country than any other attorney.

Howard Messing

Professor Messing has taught at the Nova Shepard Broad Law Center for the past 10 years. He serves as a Special Master in the Broward (Fort Lauderdale) and Monroe (Key West) County jail cases. During 1988-89, Professor Messing was a Visiting Fellow at the National Institute of Justice, studying the work of Masters in corrections. The results of his research will appear shortly. Professor Messing has been a Prosecutor and Defense Attorney and is currently active as a consultant in Criminal Justice System delay reduction.

Formal Presentations

(In alphabetical order)

Inmate Rights vs. Institutional Interests

William C. Collins

In a series of decisions between 1987 and early 1990, the Supreme Court created a new legal formula for court evaluation of lawsuits in which the issues involve a conflict between the claimed right of the inmate and a competing interest of the jail. This new "legitimate penological interest" test favors institution interests, when compared to tests used by lower courts prior to the Supreme Court cases. Jail administrators should understand the steps of the Court's test, since those steps can provide a useful guide to decision making in constitutionally sensitive areas of jail administration.

Judicial Remedies For Non-compliance With Court Orders

John Hagar

Obtaining a court order against a jail is one thing. Obtaining compliance with the order may be an entirely different problem. A great deal of court time in major corrections cases, including jail cases, is spent dealing with problems of non-compliance with earlier court orders.

This presentation will examine some of the post-judgment remedies ordered by courts when, for instance, jail population limits could not be maintained. The speaker will discuss general concepts of law concerning a court's power to enforce its relief orders, give examples of possible court responses to continued patterns of overcrowding which violates court orders, and look at specific case studies of overcrowding and the judicial/political responses to those situation.

Don't Take Candy From Strangers

Lynn Lund

Despite the attention on "inmate rights" issues, employee rights issues are an increasingly important -- and often overlooked -- source of legal concern which can create substantial liability for the jail administrator. This talk will review major personnel issues, including termination and termination hearing issues and questions of sexual harassment.

AIDS And The Law: Recent Developments

Howard Messing

AIDS continues to be a major legal and operational challenge to jail administrators. Case law in this area has been surprisingly slow to develop but now some apparent trends are emerging. This talk will look at these early trends, review potential future trouble spots, and discuss legal options and considerations for jail administrators.

GLICK v. HENDERSON - 1988 (855 F.2d 536)

Facts: Plaintiff alleges that Defendant's failure to test and segregate inmates w/AIDS placed Plaintiff in immediate danger of contracting AIDS because of the daily interactions which occur in prison. Plaintiff also wants prison officials tested and removal of those who test positive for AIDS.

Issue: Whether Plaintiff's complaint properly dismissed for failure to state a claim upon which relief could be granted.

Held: Yes (dismissed w/prejudice).

Reasons: 1. Complaint totally inadequate, not specific

2. Risk alleged grounded upon unsubstantiated fear and ignorance. The allegation Plaintiff states as putting him at risk have been proven as too remote for the transmission of AIDS (such as mosquito bites, sneezing, sweat, casual contact) - therefore, Plaintiff has not shown or even alleged deliberate indifference.

TESTING SHOULD BE REQUIRED

JARRETT v. FAULKNER - 1987 (662 F. Supp. 928)

Facts: Plaintiff's are 3 inmates who seek to represent a class of all present and future inmates. Allege violations of 8th and 14th Amendments for failure to screen inmates for AIDS.

Issue: Whether Plaintiff's state a claim under the 8th or 14th Amendment for which relief can be granted.

Held: No

Reasons: 1. Traditionally courts apply a hands off doctrine in matters of prison administration since prison problems not easily rectified by a court decree.

2. Plaintiff's complaint fails to show any risk of contracting AIDS which would infringe constitutional rights implicated.

FEAR OF AIDS

TRAUFLER V. THOMPSON - 1987 (662 F. Supp. 945)

Facts: 3 inmates charged 27 named defendants (a variety of state, federal and private individuals and agencies) with attempting to spread AIDS among prisoners, specifically to eliminate minorities in order to reduce welfare burden.

Issue: Whether inmates complaint is frivolous.

Held: Yes, complaint dismissed

Reasons: 1. Dismissal of a complaint justified if the allegations are beyond credulity.

2. Inmates allegations of conspiracy are unsupported and likely are the result of hysteria rather than reason.

HOLT v. MORRIS - 1989 (unpublished - F2d)

Facts: Plaintiff filed suit alleging his constitutional right had been violated due to the prisons failure to test for AIDS, failure to segregate AIDS victims, double-celling, and lack of sanitary precautions all of which place Plaintiff and non-infected inmates at risk of contracting AIDS.

Issue: Whether Plaintiff's complaint was properly dismissed

Held: Yes

Reason: 1. To maintain §1983 claim, Plaintiff must show that there exists a pervasive risk of harm to inmates of contracting the AIDS virus plus failure of prison officials to respond to the risk.

2. Plaintiff failed to demonstrate that the prison policy was not in accord w/medically established guidelines or that a pervasive risk of contracting AIDS was present.

TESTING/SEGREGATION

FEIGLEY v. FULCOMER - 1989 (720 F. Supp. 475)

Facts: Inmate alleges a violation of his 8th Amendment rights where prison policy regulations do not protect him adequately from contracting AIDS. Inmate alleges 4 prison practices which violate his 8th Amendment rights (1) incoming inmates not routinely tested for HIV, (2) inmates under control of correctional institution not routinely tested for HIV, (3) test not given to an inmate who requests such a test, and (4) no automatic segregation of inmates testing positive for HIV.

Issue: Whether the prison practices alleged by Plaintiff inmate violate his 8th Amendment right to be free from cruel and unusual punishment?

Held: No for (1), (2), (3), (4), allowed to submit brief on (3).

Reasons:

1. court refuses to apply "deliberate indifference" standard to a situation in which the "serious medical need" of a prisoner is only a possibility of contracting a fatal disease

2. No cases cited by Plaintiff which construe 8th Amendment to require prison officials to protect inmates from unreasonable risk of assault by other inmates

   - Defendant's submitted statement by Dr Brewer which pointed out that HIV testing protects neither inmates or employees because impossible to effectively separate infected from uninfected inmates since the test does not indicate presence of the virus, it indicates presence of antibody. Dr. suggests use of Universal Precautions rather than separation of prisoners.
   - Dr's report is sufficient to show Defendant's failure to test incoming inmates and inmates under institutions control does not = deliberate indifference. Plaintiff presented no evidence to rebut Dr's statement.

3. Refusal to automatically test Plaintiff at his request does not constitute deliberate indifference to Plaintiff's serious medical needs or to duty to protect Plaintiff from unreasonable risk of becoming infected. However, 8th Amendment also prohibits punishment of torture ... and ... unnecessary cruelty.
   - since Defendant's have not presented evidence that their refusal to automatically test Plaintiff at his request is not a punishment, Plaintiff is entitled to file a brief on this issue.

4. Failure to automatically segregate inmates testing positive is not a violation of Plaintiff's 8th Amendment rights where defendant presents evidence why segregation not mandated and Plaintiff does not submit evidence to the contrary.

TESTING/RELIGIOUS BELIEF

DUNN v. WHITE - 1989 (880 F.2d 1188)

Facts: Plaintiff alleged that prison officials threatened him with disciplinary segregation when Plaintiff refused to submit to a blood test for AIDS. Plaintiff argues that due to the threat he was in effect forced to submit to the test and that his religious beliefs forbade such testing. Plaintiff also argued that he was entitled to a due process hearing prior to the threat and blood test.

Issue:

1. Whether Plaintiff has a cause of action under the 4th Amendment based on his religious beliefs - No

2. Whether nonconsensual testing for AIDS violates the 4th Amendment rights of prisoners - No.

Reasons:

1. Accepted view that in order to preserve order and discipline limitations or retraction of constitutional rights of convicted prisoners may be required.
   - must balance the objective of the institutional restriction against the infringement of the constitutional right, in this case, balancing the intrusiveness of blood test against prisons need to administer test.

   - deference given to prison officials unless substantial evidence that officials have overstepped their boundaries

2. A prisoners expectation of privacy in his or her body is reduced due to incarceration.

   - the court concluded that the prisons substantial interest outweighs Plaintiff's expectation of privacy (interest = pursuing a program to treat AIDS prisoners and preventing further transmission)- court must now decide whether method of blood testing is reasonable, thus the court considers scope of the intrusion, manner in which it is conducted, justification for intrusion and place in which it is conducted (Plaintiff did not allege manner and place of test unreasonable)

3. Because Plaintiff did not set forth any details concerning his religion, the court does not address whether prisons interest overrides Plaintiff's religious interest.

4. Due process may require a hearing prior to disciplinary segregation. In the case at bar, however, Plaintiff was only threatened w/segregation and w/o more, there is no infringement on a prisoner's protected liberty interest.

TESTING/SEGREGATION/PRIVACY/8TH AMENDMENT

HARRIS v. THIGPEN - 1990 (727 F.Supp. 1564)

Facts: Alabama inmates challenge the constitutionality of a state statute which requires mandatory testing of all present and future inmates for HIV (upon arrival and release from prison), and the involuntary segregation and medical practices associated with HIV positive inmates. Complaint alleges involuntary testing = unlawful search and seize and violates privacy rights; public disclosure, failure to provide adequate medical care and totality of the circumstances = cruel and unusual punishment violative of the 8th Amendment; automatic segregation without hearing denies due process (14th Amendment); denial of certain activities denies equal protection; denial of legal access violated 1st and 14th Amendments; and treatment of HIV inmates discriminatory.

Issue: Whether Alabama statute unconstitutional and whether any of the prison regulations violate the 1st, 4th, 8th or 14th Amendments?

Held: Alabama statute constitutional and no violation of any prisoners rights.

Reasons: 1. Inmates have limited 4th Amendment rights against search and seizures as well as limited privacy rights. Government action must be supported by reasonableness to validate a search of prisoners.

- due to the seriousness of the introduction of a fatal disease into the prison population, the state's interest in guaranteeing safety is paramount.

2. Segregation is proper if necessary to protect both infected and uninfected inmates.

3. Inmates have very limited privacy rights because such inmates have "made their privacy a matter of public interest or have, in effect, made themselves public, have waived their right to privacy and have no such right.

- as a prisoner, one becomes the responsibility of the public and necessarily loses many rights of privacy.
- "an inmate's infection with AIDS is, therefore, not a private matter, but a matter of controlling state interest."

4. Equal protection clause not applicable because not similarly situated.

5. In considering AIDS policy in prison, must take into account the rights of non-infected inmates. Court held prison policy appropriate since spread of AIDS imposes a greater punishment on non-infected inmates.

6. No hearing necessary before segregated AIDS victims since the reason for confinement apparent (carrying a serious disease).

7. In determining reasonableness of prison regulation, courts should determine where there is 1) a valid, rational relation between the regulation and government interest, 2) an alternative means, 3) an overriding right of AIDS inmates as compared to the rights of guards and general prisoners.

8. Need for a particular search balanced against invasion of personal rights the reach entails - where potential spread of AIDS at issue, the need for a search is "overwhelming." Since AIDS is concealed within the body, prison officials should have reasonable access to that hiding place.
- possibility of testing errors is minimal.

9. Whether inadequate medical care = deliberate indifference always a question of fact. The constitution requires only reasonable care (therefore prison does not need to provide every possible care available)

10. AIDS inmates have right to access of a law library or assistance of legal aids.

11. State law creates no liberty interest in being entitled to work release program.

12. State has a duty to protect employees from known dangers and since AIDS is a contractible disease, the state has a legitimate interest in testing inmates and keeping records.

13. Plaintiff's not "otherwise qualified" as handicapped.

LEWIS v PRISON HEALTH SERVICES - 1988 (Not reported in F. Supp.)

Facts: Plaintiff diagnosed as HIV-positive prior to incarceration. Once at prison, Plaintiff subjected to administrative segregation and housed in the prison infirmary. Plaintiff alleges such segregation resulted in not being able to eat, exercise and attend religious ceremonies with rest of prison population and that Plaintiff not permitted use of TV, under constant surveillance and dressed and housed in a manner which exposed his condition to others.

Issue: Whether Defendant's violated any constitutional rights of Plaintiff.

Held: Dismissed all claims against Defendant except for claim of 8th Amendment - violation of serious medical needs.

Reasons:

1. No equal protection claim because AIDS inmates not similarly situated to general prison population.

2. Rational relation between the means and the ends
   - protect AIDS victims from possible threats and assaults
   - prevent spread of AIDS
   - control prison staff exposure to AIDS

3. Inmate retains only those 1st Amendment rights which "are not inconsistent with status as a prisoner or with legitimate phenological objectives of the correction system."
   - Plaintiff kept from religious group ceremonies not because of beliefs but because was AIDS carrier.

* * * 4. Eighth Amendment claim stands because Plaintiff alleges his disease was not monitored and requests for treatment were ignored. "A prisoner's health that is compromised because he was denied adequate exercise may constitute such a violation."
   - circumstances to be viewed in their totality to determine if a violation exists

SEGREGATION

CAMERON v. METCUZ - 1989 (705 F. Supp. 454)

Facts: Plaintiff was attacked and bitten on his finger down to the bone by another inmate known to have AIDS by prison officials. Plaintiff alleges that the attacker's act manifested intent and premeditation and should have been prevented by prison officials.

Issue: Whether Plaintiff states a claim under the 8th Amendment or due process clause of the 14th Amendment

Held: No.

Reasons:

1. Plaintiff must show that prison official's action was deliberate and reckless in a criminal sense; a claim of negligence is not sufficient under §1983 - officials breach their duty of providing security to prisoners when officials conduct intentionally exposes prisoners to a known risk at the hands of another
   - Plaintiff's claim against prison officials do not amount to deliberate indifference.

2. Plaintiff has no liberty interest arising from state law or the Constitution

   - "prisoner claiming a due process violation under the 14th Amendment must demonstrate ...deprived of a protected liberty ... by arbitrary government action."
   - the state statute at issue involves reporting and preventing spread of communicable diseases and includes AIDS; however the statute does not language mandating that the policies must be implemented - therefore no liberty interest arises from the statute.

MUHAMMAD v CARLSON - 1988 (845 F.2d 175)

Facts: Muhammad given blood tests due to his loss of coordination in his legs and right hand. Tests showed he developed antibodies to AIDS and was classified as PRE-ARC. Placed Muhammad in a restricted AIDS unit for 7 months of which time the prison regulations were changed to allow restricted prisoners back into the general prison population.

Issue: Whether Muhammad's segregation infringed a liberty interest protected by the Due Process Clause?

Held: No.

Reasons: 1. No liberty interest created by a regulation that gives prison officials unfettered discretion. The regulation in question here set forth specific criteria in testing for AIDS virus. However, the regulations only pertained to procedures for diagnosis, treatment and isolation of infected AIDS inmates.

2. Placing inmates in restricted quarters does not violate any due process rights where "the conditions or degree of confinement are within the purview of the sentence imposed and do not otherwise violate the constitution."

3. Legitimate purpose = diagnostic, treatment and security purposes.

4. Muhammad alleged no impermissible classification or injury resulting from his medical status. Thus, his claim fails.

SEGREGATION

CORDERO v. COUGHLIN - 1984 (607 F.Supp 9)

Facts: Action brought by prisoners in various NY state prisoners who suffer from AIDS. Prisoners allege that segregation from general inmate population violate the 1st, 8th and 14th Amendments.

Issue: Whether segregation of AIDS prisoners from the general inmate population is violative of the 1st, 8th or 14th Amendments.

Held: No.

Reasons: 1. The Equal Protection clause is inapplicable because AIDS victims are not similarly situated to others. AIDS victims are also not a suspect class, therefore if a legitimate government interest for segregating AIDS prisoners exists,

2. Gove exists, the means used must be rationally related government interest = protecting AIDS victims and other inmates from potential harm that may result from the tension and fear of allowing all inmates to live together. Doesn't matter whether fear is realistic or not. Until a better alternative is established, segregation allowable because it bears a rational relationship to the government's stated interest.

3. 8th Amendment in relation to prisoner rights pertains to "adequate food, clothing, shelter, sanitation, medical care and personal safety." Prisoners did not recite any facts entitling them to relief under the 8th.

4. 1st Amendment rights of prisoners are limited due to confinement and penal institutions needs. Cannot compel Defendant to provide AIDS prisoners same privileges as other prisoners.

SEGREGATION

BRICKUS v. FRAME - 1989 (not reported in F.Supp)

Facts: Plaintiff's were inmates at Chester County Prison and were carriers of the AIDS virus. Prison policy subjected AIDS-inflicted inmates to administrative segregation. This segregation was in a maximum security building and Plaintiff's allege that as a result of the segregation, they were not allowed to exercise, watch TV or attend religious ceremonies with general prison population, and thus were treated as maximum security prisoners. Defendant's assert efforts were made so that Plaintiff's would not feel like maximum security prisoners. Defendant's provided TV, telephones, walkman's and individual grooming sets, as well as exercise and visitation privileges to AIDS-infected inmates.

Issue: Whether Plaintiff's denied equal protection or due process.

Held: Granted summary judgment for Defendant's.

Reasons: 1. Equal protection clause not applicable to AIDS inmates because they are not similarly situated to the general prison population. Even if E.P.Clause applicable, AIDS inmates are not a suspect class.

2. Therefore, the government interests must be legitimate and the means employed must be rationally related to the ends in order for administrative segregation to be upheld.

3. Legitimate ends in this case are: 1) protect non-AIDS inmates from exposure, 2) limit AIDS victims' exposure to bacterial/viral agents which can be deadly to AIDS victims, 3) keep control and security of prison intact.

4. No fundamental right of a prisoner to reside in the general prison population.

PRIVACY/AIDS DIAGNOSIS

WOODS v. WHITE - 1988 (688 F.Supp. 874)

Facts: Plaintiff alleges that Defendant's (medical personnel) violated Plaintiff's constitutional right to privacy by disclosing that Plaintiff tested positive for AIDS to non-medical personal. Defendant's assert the defense of qualified immunity.

Issue: Whether Plaintiff has a constitutional right of privacy in his medical records.

Held: Yes.

Reasons: 1. Privacy interests fall into one of two categories: the "interest in independence in making certain ... decisions," or the interest "in avoiding disclosure of personal matters."

2. The extent of the right to privacy in personal information must be determined on a case-by-case basis, with an individual's right to confidentiality balanced against the government interest in limited disclosure.

- because contraction of AIDS is related to sexual activity or intravenous drug use, revealing such information is of a most personal nature, therefore an individual has an interest in the dissemination of such information.

* * * 3. Incarceration may limit certain constitutional rights of prisoners; however, inmates retain some privacy rights

- where information about an inmates' AIDS condition casually and unjustifiably revealed to non-medical personnel, Plaintiff may have a cause of action.

PRIVACY/ISOLATION

DOE v. COUGHLIN - 1988 (697 F.Supp 1234)

Facts: Class action on behalf of inmates confined in NY correctional facilities and such inmates have tested positive for HIV or AIDS and have been or will be selected by D.O.C. to be housed in separate dormitories. Action seeks injunctive relief based on right to privacy and nonconsensual nature of transfer to separate dormitories.

Issue: Whether segregation of AIDS prisoners due to involuntary transfer to a separate housing facilities violates these prisoners right to privacy.

Held: Injunctive relief granted until hearing on the merits.

Reasons: 1. Right to privacy has been defined as an individual's interest in avoiding disclosure of personal matters. Court believes that an AIDS diagnosis is extremely personal and persons should be able to exercise control over such information being revealed.

2. Prisoners subject to prisons separate housing facility must be afforded some protection against non-consensual disclosure of their diagnosis in light of the personal nature of such information and the likelihood that disclosure may result in harassment and psychological pressures.

3. The prisons objectives - improved and expedited medical care, budget reductions - are legitimate, however, these objectives are being carried out in a constitutionally impermissible manner since transfer to the separate housing will necessarily disclose a prisoners medical condition.

MEDICAL/ISOLATION

JUDD v. PACKARD - 1987 (669 F.Supp. 741)

Facts: Between July and October, 1985, Plaintiff suffered from various illnesses and weight loss. Between October, 1985 and January, 1986, Plaintiff was placed in medical isolation on 3 separate occasions for testing, diagnostic & treatment purposes. Plaintiff challenges his placement in the prison hospital isolation units on these 3 separate occasions.

Issue: Whether Plaintiff's isolation in the prison medical unit was an act of discrimination in violation of Plaintiff's civil rights.

Held: No

Reasons: 1. Discrimination against handicapped individuals is not invidious discrimination and thus the standard for review is rational basis.

2. The court took judicial notice of fact that AIDS poses a threat to public health. Therefore, in a closed community such as a penal institution where AIDS can be thread through homosexual activity and drug use, the need to identify and treat potential AIDS carriers is a legitimate government interest.

- and it is reasonable to isolate suspected carriers in medical units for diagnostic and treatment purposes.

8TH AMENDMENT - STANDARD OF MEDICAL CARE

MAYNARD v. NEW JERSEY - 1989 (719 F. Supp. 292)

Facts: Prisoner died of AIDS during incarceration. Parents of prisoners brought suit for failure to diagnose and refusal to treat prisoners AIDS.

Issue: Whether a cause of action exists under §1983 as protections of the 8th Amendment

Held: Yes as to prison's doctor and nurse, but dismissed as to NJ, East Jersey State Prison and NJ D.O.C.

Reasons: 1. A cause of action under the 8th Amendment is apparent where prison officials deliberate indifference to serious medical needs of prisoners occurs.

2. Two part standard must be met to successfully allege that prison officials' denial of medical treatment = a violation of §1983 and 8th Amendment
- allege acts or omissions sufficiently harmful
-to evidence deliberate indifference to serious medical need

3. Deliberate indifference has been interpreted as meaning denial of "reasonable requests for medical treatment ... and such denial exposes inmate to undue suffering or threat of tangible residual injury."

4. Where medical personnel prescribe "easier and less efficacious treatment," deliberate indifference may be found although medical malpractice alone does not rise to a cause of action under §1983.

5. Medical need determined serious when need diagnosed by physician as requiring treatment or is so obvious that a lay person would recognize need for treatment.

8th - MEDICAL CARE

HAWLEY v. EVANS - 1989 (716 F. Supp. 601)

Facts: Plaintiff's are 3 prisoners who tested positive for HIV and are requesting adequate and up-to-date treatment, or in the alternative, the right to a private physician. Plaintiff's allege deliberate indifference to their serious medical needs which violates the 8th Amendment.

Issue: Whether Plaintiff's complaint sets forth any genuine issues of fact?

Held: No

Reasons: 1. A constitutional claim for denial of medical treatment can stand only if Plaintiff's show deliberate indifference to their serious medical needs

- the DOC's medical policy substantially conforms to current acceptable medical practices and therefore passes constitutional muster.

- there is no constitutional requirement for states to have statutes allowing prisoners to have private physicians and since institutional security is a legitimate government interest which is reasonably related to restricting private physician visits, there is no constitutional infringement.

2. It is the exclusive prerogative of the state to permit (or not permit) private physicians or experimental drug use as long as the prison system is providing adequate medical care.

MEMORANDUM

FOR: AJA Legal Issues Seminar

FROM: John Hagar
P.O. Box 30287 TA
Los Angeles, CA 90030-0287

DATE: May 24, 1990

RE: Validity of Federal Court Orders
To Control Jail Overcrowding

LEGAL PRINCIPLES

1. A District Court Has Inherent and Broad Powers to Remedy Unconstitutional Conditions After Orders Are Issued.

"'Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."'" Hutto v. Finney 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978) [addressing the need to correct unconstitutional prison conditions].

2. A District Court May Exceed Prior Orders to Correct Unconstitutional Conditions.

As set forth by the Hutto Court: "...state and local authorities have primary responsibility for curing constitutional violations. "If, however, 'those authorities fail in their affirmative obligations...judicial authority may be evoked.'[citations omitted] .....the District Court [is] not remedying the present effects of a violation of the past. It [is] seeking to bring an ongoing violation to an immediate halt." Hutto v. Finney, supra, 437 U.S. at 687 fn 9. As the Supreme Court emphasized in Hutto, "In fashioning a remedy, the District Court [has] ample authority to go beyond its earlier orders." Id. at 687.

For Circuit Court decisions describing the more limited scope of a District Court's initial injunctive relief, see, Hoptowit v. Ray, 682 F.2d 1237, 1245 (9th Cir. 1982); Alberti v. Klevenhagen, 790 F.2d 1220, 1227 (5th Cir. 1986); Ruiz v. Estelle, 679 F.2d 1115, 1144-45 (5th Cir. 1982); Ramos v. Lamm, 639 F.2d 559, 586 (10th Cir. 1980). See also, Toussaint v. McCarthy, 597 F.Supp. 1388, 1419 (N.D. Cal. 1984).

3. Examples Of "Judicial Remedies" Applied To Overcrowded Jail After Defendants Failed To Comply With Prior Orders.

A. Jail Closure: Federal judges have ordered the closure of penal facilities when constitutional violations have been extreme and perpetual. See, e.g., Morales-Feliciano v. Parole Board of The Commonwealth of Puerto Rico, 887 F.2d 1 (1989); Ahrens v. Thomas, 434 F.Supp. 873, 899 (W.D. Mo. 1977); Inmates of Henry County Jail v. Parham, 430 F. Supp. 304 (N.D. Ga. 1976); Miller v. Carson, 401 F.Supp. 835 (M.D. Fla. 1975).

B. Population Limitations Ordered For Jails: Jail population caps or ceilings are a common remedy imposed by Federal District Courts. See, e.g., Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120, 128 (3rd. Cir. 1985); Badgley v. Varelas, 729 F.2d 894, 897 (2nd Cir. 1984); Duran v. Elrod, 713 F.2d 292, 293 (7th Cir. 1983), cert. denied 465 U.S. 1108 (1984); Reese v. Cragg, 650 F.Supp. 1297, 1311 (D.Kan. 1986); Monnouth City Correctional Institution Inmates v. Lanzano, 595 F.Supp. 1417, 1441 (D.N.J. 1984).

C. Orders Enjoining Jail Officials From Accepting New Prisoners: Some courts have enjoined jail or prison officials from accepting new inmates until reduced population objectives are achieved. See, e.g., Badgley v. Varelas, 729 F.2d 894 (2nd Cir. 1984); Twelve John Does v. District of Columbia, 668 F.Supp. 20, 25 (D.D.C. 1987).

D. Contempt: Federal judges have the inherent power to utilize contempt for noncompliance with prior orders. "Federal courts are not reduced to issuing injunctions against state officials and hoping for compliance. Many of the courts' most effective enforcement weapons involve financial penalties. A criminal contempt prosecution for "resistance to [the court's] lawful...order" may result in a jail term or fine..." Hutto v. Finney, supra, 437 U.S. at 690. Some District Court judges have made innovative use of fine income. For example, in Mobile County Jail Inmates v. Purvis, 581 F.Supp. 222, 225 (S.D. Ala. 1984) the court established a "relief fund" consisting of $150,000 of contempt fines to provide bail for low bond pre-trial detainees who could not afford bail, and thereby reduced the jail's population. See also, Palmigiano v. DiPrete, 710 F.Supp. 875, 879 (D.R.I. 1989).

4. Appellate Standard of Review Concerning Equity Decrees.

When "shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." Lemon v. Kurtzman, 411 U.S. 192, 200, 36 L.Ed.2d 151, 93 S.Ct. 1463 (1973). The issue on appeal is whether the District Court's choice of remedies was an abuse of discretion. Id. An abuse of discretion occurs, "when no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981), cert. denied 455 U.S. 993 (1982). Therefore, efforts by prosecutors and others to intervene and thereby contest a District Court order have largely been unsuccessful, even though the federal courts have recognized that orders limiting a jail's population may interfere with prosecutorial functions, and "in effect undo the bail determinations and sentences of state court judges." Harris v. Pernsley, 820 F.2d 592, 595 (3rd. Cir.1987); Cf., Graddick v. Newman, 453 U.S. 928, 69 L.Ed.2d 1025, 102 S.Ct. 4 (1981).

PRACTICAL CONSIDERATIONS

1. What is the real problem? Can the parties fashion their remedy accordingly?

2. Cooperative post trial litigation strategy?

3. Static or living orders - post trial conduct.

4. Dangers of Post Trail litigation for jail administrators: (A) Sanctions, including plaintiffs' attorney fees; (B) Special Masters; (C) Court Imposed Specific Remedy; (4) Jail administrators are forced by litigation to question the Court's authority.

Excerpts From The

CORRECTIONAL LAW *Reporter*

The material which follows is taken from the pages of the Correctional Law Reporter and should be of interest to those working in jails.

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CORRECTIONAL LAW Reporter

VOLUME I, NO. 1 MARCH 1989

MAIL, MARRIAGE AND MUSLIMS: THE SUPREME COURT'S NEW "REASONABLENESS"

A. *Turner* and *O'Lone* Analyzed

How a case is decided often is more important -- and often more lasting -- than what is decided. In mid 1987, the Supreme Court of the United States decided two of the most important cases of the decade involving prisoners, **Turner v. Safley**[1] and **O'Lone v. Estate of Shabazz**.[2] These decisions involved the specific issues of inmate-to-inmate correspondence, inmate marriage, and the right of inmates to attend a weekly Muslim Service known as Jumu'ah.

More importantly, the cases also tackled the larger issue of how courts should analyze prisoner cases where the issue involves a conflict between a right of the inmate and a legitimate interest of the institution.

So dramatic were the results in **Turner** and **O'Lone** that shortly after the two cases were announced it seemed clear that prisoners would have a much tougher time winning conflict cases and that prison officials could breath easier about a variety of prison rules. One year later, things are not so clear.

First, we will review and analyze the decisions and then turn to some more recent cases indicative of how lower courts are applying **Turner** and **O'Lone**.

Turner involved a challenge against two Missouri prison regulations; one essentially prohibiting inmate-to-inmate marriages, the other doing the same for inmate-to-inmate correspondence. **O'Lone** dealt with New Jersey prison policies which resulted in Muslim inmates' inability to attend a weekly congregational service known as Jumu'ah, a service viewed as central to the observance of the Muslim faith.

The correspondence issue in **Turner** and the religious service issues in **O'Lone** clearly involved the First Amendment. The Missouri marriage rule was characterized by the Court as a fundamental right which accompanies an inmate to prison. Since **Turner** applied the same analysis to inmate-inmate correspondence and marriage the Court apparently did not view any one of these rights as more important than any other.

The Court's decision in **Turner**, which upheld the inmate-

See TURNER, p. 2

1 - 107 S.Ct. 2254.
2 - 107 S.Ct. 2400.

Correctional Law Reporter: Filling A Gap

Welcome to the first edition of the Correctional Law Reporter. This periodical is dedicated to bringing useful and timely information about legal issues to the correctional professional.

CLR will offer more than just reviews of various cases. Each issue will offer several articles analyzing and discussing legal topics: trends and recent developments as well as more established areas where updating may be helpful. While CLR will include summaries of selected recent decisions, its emphasis will be on putting the larger legal issues in a practical, operational context for the practitioner.

While no journal can be a substitute for specific advice from counsel, the Correctional Law Reporter should become a unique resource from anyone working in corrections who is concerned about developments and changes in the law.

Subscribers will receive six regular issues of CLR per year. A seventh index and review issue will be published at year's end.

Other features. In addition to material written by the editors, Fred Cohen and Bill Collins, CLR will also feature occasional articles by guest contributors and a regular review of pertinent literature in the field by Elizabeth Walsh, a lawyer and editor of *the Journal of Research in Crime and Delinquency*.

Readers are invited to suggest topics for discussion.

See CLR, p. 16

In This Issue . . .

Turner, from p. 1

TURNER AND *O'LONE* CASES CREATE NEW TEST FOR RESOLVING CONFLICTS BETWEEN INMATE RIGHTS AND INSTITUTIONAL INTERESTS

to-inmate correspondence ban, set the tone for the other issues.

The most critical point in resolving any First Amendment claim is to decide first on the standard to be used in reaching a decision. In finding the Turner mail ban unconstitutional both lower federal courts applied what is known as the strict scrutiny standard. These courts read an earlier Supreme Court decision, **Procunier v. Martinez,**[3] for the proposition that the correspondence restriction could be justified only if it furthered an important or substantial governmental interest unrelated to suppression of expression and the limitation was no greater than necessary to protect that interest.

Justice O'Connor, writing for a slim five to four majority, rejected the lower courts' approach and stated, "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[4] This standard of review is known as the reasonableness test and it is obviously less demanding on government than the strict scrutiny test rejected by the Court. Justice O'Connor elaborated on how the reasonableness of a rule or practice should be decided:

1. **Is the restriction reasonably related to a legitimate penological interest? The judgment of prison officials becomes very important here.**
2. **Does the inmate have other alternative ways to exercise the right being restricted?**
3. **What would the impact be on inmates, officers, and the allocation of institution resources if the right were accommodated?**
4. **Are there any obvious, ready alternatives? (If there are, the restriction may well not be a reasonable one.)**

Two points are worth emphasizing: under the reasonableness test as adopted in Turner the governmental interest need only be legitimate (as opposed to important or substantial) and the regulation need only be reasonably related to that legitimate interest (as opposed to the least intrusive means available).[5]

> While this sounds like legal hair-splitting, what it means for correctional administrators is that restrictions imposed on inmate rights in the name of security should be easier to defend than in the past.

Turning to the actual decision in Turner, it is easy to see how these two tests dictate different outcomes on important prison questions. The inmates claimed -- and the lower courts accepted -- that the monitoring of inmate correspondence should be enough to satisfy the prison's unquestionably valid security interests. A majority of the Court, however, found that monitoring was an unduly burdensome alternative not required by the Constitution; that it would tax limited prison resources and still not be wholly effective. As a result, a total ban of all correspondences with a limited class of persons (other Missouri prisoners) was upheld as reasonable.

The Missouri marriage rule also at issue in Turner prohibited inmates from marrying other inmates or civilians unless the prison superintendent found "compelling reasons" for allowing the marriage. Generally, only pregnancy or the birth of a child were considered to be "compelling reasons."

After ruling marriage to be a fundamental constitutional right which inmates do not fully surrender, the Court next determined that the Missouri rule was too broad for rehabilitative purposes and was an exaggerated response to valid security objectives.

Although the Missouri marriage rule was found to be unconstitutional, the majority made it very clear that a narrower rule could be defended, so Turner doesn't totally rule out institution restrictions on inmate marriages. A moment's reflection reveals just how undemanding that would be especially in light of the Court's almost total deference to prison officials' conclusions about security interests.

> CAUTION: **Don't over-read the result in *Turner*. It applies only to correspondence between inmates, not inmate-free person mail, which remains governed by the stricter *Procunier v. Martinez* test, described above.**

In O'Lone, Muslim inmates in New Jersey challenged policies which resulted in their inability to attend a religious service every Friday afternoon. The service -- known as Jumu'ah -- was accepted by the Court as central to the faith and no question was raised as to the legitimacy of the religion or the sincerity of the inmates' beliefs.

See TURNER, p. 3

3 - 416 U.S. 396 (1974).
4 - 107 S.Ct. at 2261.

5 - Readers may use this explanation of the reasonableness test v. strict scrutiny test with satisfactory results in virtually any correctional law problem on point.

TURNER, from p. 2

Muslim inmates who were given a work assignment outside the prison's main buildings were required to spend all day outside and therefore could not attend the religious service. The inmates asked to be placed on inside work details or to be given substitute weekend tasks. These alternatives were rejected by prison officials who claimed that a scarcity of prison personnel made it difficult.

Prison officials also raised the question of security and the Court found a logical connection between security and the prohibition against return to the prison. The Court also found that the availability of a number of other avenues for religious observance created reasonable alternatives (note that none of these alternatives involved attending the Jumu'ah services).

Although much more could be written about **Turner** and **O'Lone**, for our purposes enough has been stated. The primary points may be summarized as follows: until **Turner** (and **O'Lone**) there was good reason to believe that even for prisoners some constitutional rights were considered to be more important than others, with First Amendment rights to expression ranking at or near the top. Therefore, when a prison rule or practice involved such a lofty right, courts were required to look very closely at the objective sought and to decide whether less drastic means were available to achieve that objective.

That way of thinking simply no longer applies. The Court has substituted the more easily met reasonableness test for strict scrutiny and seemingly constitutionalized a number of restrictive prison rules and practices.

The policy of deference to prison officials also seems to have received additional force.

O'Lone and **Turner** represent major victories for corrections. Prison and jail cases now will invariably look to those decisions for guidance when a federal constitutional claim is raised and officials claim some legitimate penological interest conflicts with the right. One area where these decisions is <u>not</u> likely to have a major impact involves an inmate's undoubted right to receive medical or psychiatric care, at least for serious illnesses. Where an inmate has a serious medical or psychiatric disorder then there appear to be no competing security claims and inmates have no access to needed care except that which government makes available.[6]

What remains problematic are the many other areas of inmate rights and institutional duties and the question of how these two cases will affect those areas, if at all.

B. *Turner* and *O'Lone*: A Second Look

Despite the initial reactions about the effect of **Turner** and **O'Lone** on prisoners' rights cases, a look at their effect some 18 months later shows the first evaluations may have been exaggerated.

1. Abortion

In **Monmouth County Correctional Institute v. Lanzaro**,[7] the Third Circuit Court of Appeals upheld a federal district court injunction striking down a New Jersey county's requirement that inmates seeking an elective abortion must first obtain a state court order. **Turner** and **O'Lone** figured prominently in the ruling.

Unless a jail doctor diagnosed a requested abortion as medically necessary, Monmouth County required female prisoners to secure court-ordered releases and provide their own financing in order to obtain abortions. Working against the county's position was the fact that women in New Jersey's State prisons and in federal prisons, 28 C.F.R. 551.23(d), would receive nontherapeutic abortions at government expense.

The Third Circuit turned immediately to **Turner** as a guide to decision, stating that a prison regulation is valid if it is reasonably related to legitimate penological interests. The court did not find any reason to alter this analysis depending on whether the facility was a prison or a jail.

The Third Circuit put the four factors from **Turner** for evaluating reasonableness to work:

1. *The rationality of the relationship between the regulation and the governmental interest put forward to justify it.* The only interest advanced by Monmouth County was unspecified administrative and financial burdens likely to result if it was required to provide nontherapeutic abortions.

2. *The existence of alternative means to exercise the right.* On this factor the Third Circuit found that a woman's right to an abortion is clear and independently protected by the Constitution, at least since **Roe v. Wade**. The right obviously must be exercised relatively early in the pregnancy and in requiring court-ordered release -- to say nothing of self-financing -- the rule in question could easily destroy the women's right of free choice. Neither short-term nor long-term inmates, then, have reasonable alternative means to exercise the right.

3. *The impact on prison resources of accommodating the asserted right.* This criteria from **Turner** may yet have a far-reaching effect because it allows questions of budget to enter into the decision process. However, here the court found that providing women with transportation to a medical facility and the necessary funding for the procedure would not burden the facility's limited resources. Indeed, the court found no more burdens involved in the decision to abort than the county's accepted responsibility to provide all pregnant inmates with proper pre- and post-natal care. The costs involved in the abortion actually may be <u>less</u> than where the option to bear the child is exercised.

See TURNER, p. 4

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6 - Co-editor's comment: It appears to me that some psychiatric problems could raise security concerns if the illness creates a risk of the inmate harming himself or others. BC.

7 - 834 F.2d 326 (3rd Cir., 1987), cert denied, 108 S.Ct. 1731 (1988).

TURNER, from p. 3

4. *The existence of ready alternatives to accommodate the asserted claim at nominal cost to valid penological objectives.* These inmates seek access to all medical services related to their pregnancies whether they opt for abortion or birth. The court saw no significant disruption of valid penological services and this represents what Turner called an exaggerated response to asserted financial and administrative concerns. There was no logical connection between the county's regulations and any valid penological objectives. The financing issue was left up in the air. The court found it too early to decide whether the county might opt for a means-based test.

Thus, in a groundbreaking decision -- and despite **Turner** and **O'Lone** -- the Third Circuit gave women in New Jersey jails what women in New Jersey state and federal prisons and in the community receive: the right of reasonable access to elective abortions. In so doing, the court also applied **Turner** and **O'Lone** to a non-First Amendment Right.[8]

2. Hair - and There

How a person -- including inmates -- wears their hair can be seen merely as a personal expression or more importantly as part of a religious mandate. Courts have not been favorably disposed to inmate claims that hair length or styling "is the essential me" but some courts are protective of hair length as an expression of religious faith.

For example, the highest court in New York upheld the right of a Rastafarian inmate to retain the long dreadlocks he had worn for over twenty years.[9] The inmate's religious claims under the First Amendment prevailed over the prison's claim that health and security required an initial haircut for proper prison photographs.

This decision was rendered shortly before **Turner** and **O'Lone** and one might wonder what would be decided in a similar case applying the less demanding reasonableness test.

After the **Turner** and **O'Lone** decisions, an Indiana state prisoner sued over a hair length regulation arguing that it violated his religious liberty as a Rastafarian and that he was denied equal protection because hair length rules were not enforced against American Indians, **Reed v. Faulkner.**[10] Judge Posner, writing for the Seventh Circuit, used the **Turner** reasonableness test and stated that if the inmate was insincere or if the regulation struck a reasonable balance between security and religious freedom it would stand.

If the exception granted to the American Indian prisoners was shown not to be arbitrary then the Rastafarian also loses. Judge Posner (often mentioned for a Supreme Court seat) while reversing, found the record on security needs quite weak while the evidence on the religious infringement was strong. The case was remanded for additional factfinding, so the issue of Rastarian hair length in the Seventh Circuit isn't over yet.

An Orthodox Jew confined in a New York prison recently won the right to wear his beard much longer than the one inch limit prescribed by prison regulation, **Fromer v. Scully.**[11] What makes this decision particularly interesting is that Fromer originally won his case prior to the **Turner** and **O'Lone** decisions. New York appealed to the Supreme Court which granted the request for review but then returned the case to the federal district court for reconsideration in light of Turner and **O'Lone.**[12]

In a particularly thoughtful opinion, Judge Stewart again sustained Fromer's religious claim to wearing a beard longer than the New York rules permitted. The judge used the four-prong analysis from **Turner** and decided:

1. While New York's interest in effective identification is important and substantial, the difference between a one inch beard and one several inches longer was so slight that the rule is unreasonable on this objective.

2. Concerning the detection of contraband, no evidence was produced that beards were used to conceal contraband and on this record that objective is not sustained.

3. On safety and hygiene, long beards are indistinguishable from long hair, which was permitted, and any risks around machinery or food service can easily and inexpensively be eliminated.

4. Finally, this court found that there are no alternatives to exercising this claim. That is, you either have a religiously acceptable long beard or you do not. It was no answer to Judge Stewart that the inmate had other ways to observe his religion (silent prayer, e.g.). The question for him was whether this part of one's religion was wholly eliminated by a prison rule and finding that it was, the regulation was found constitutionally unreasonable.

On this last point, Judge Stewart's reasoning does seem to be at odds with Chief Justice Rehnquist's reasoning in O'Lone. In **O'Lone** the Muslim inmates were wholly precluded from observing Jumu'ah but not from other aspects of their Muslim faith.

We must emphasize that these decisions on hair length and beards relate exclusively to valid religious/First Amendment claims. Prohibitions on beards and long hair which do not conflict with

See TURNER, p. 5

8 - The Ninth Circuit found the Turner factors "instructive" in non-First Amendment cases and applied them in a Fourth Amendment strip search case. The court upheld a policy of strip searching all inmates leaving and returning from the Nevada State Prisons's maximum custody unit, Michenfelder v. Sumner, 860 F.2d 328, 331, fn. 1 (9th Cir., 1988).

9 - People v. Lewis, 502 N.E.2d 988 (N.Y. Ct. of Appeals, 1986).

10 - 842 F.2d 960 (7th Cir. 1988).

11 - 84 Civ. 5612 (S.D.N.Y., Sept. 16, 1988).

12 - See 108 S.Ct. 254 (1987).

TURNER, from p. 4

inmates' First Amendment claims generally are valid.

An immediate reaction after Turner and O'Lone was that hair and beard cases probably were almost sure winners from now on. The cases reviewed above show this is not necessarily the case and emphasize the importance of officials not only articulating clear security needs to justify hair or beard rules but also being sure the rule they are enforcing is consistent with other security restrictions.

3. AIDS

Courts have consistently upheld the segregation of inmates who have tested positive for exposure to the HIV virus.[13] But in Doe v. Coughlin'[14] AIDS-positive inmates argued successfully that they had a right to privacy which protected them from being involuntarily housed in a prison dormitory used only for AIDS victims.

Some fifty inmates from around the state were to be housed in a special dorm in a prison a short distance from a hospital used for their treatment. The move was to improve and expedite care and also save some money by eliminating some transportation costs. The court, naturally, found these objectives permissible but in a unique ruling found that the inmates' right of privacy was so much stronger that the proposed housing plan -- with its unavoidable labelling and stigmatizing of the residents -- was unreasonable under a Turner analysis.

These inmates were all programmable and were to mix in the general population. Therefore, the prison could not easily claim it was acting to protect staff or other inmates. What is surprising here is that New York's motives were unimpeachable and that this court relied on an inmate's right to privacy when the Supreme Court has repeatedly found no such inmate right.

While prison and jail officials certainly should be concerned with confidentiality and privacy in dealing with AIDS victims, segregation of those who have succumbed to one of the opportunistic diseases seems clearly legal. Segregation of those who are known only to have tested positive is more dubious.

Some Closing Observations

What do these decisions tell us about the reasonableness test? First, those who thought that the courts would simply validate any rule short of branding and mutilation were wrong.

Second, prison and jail officials now have a blueprint showing how courts will analyze many inmate rights questions and which also shows how the institution's position should be presented in court and how rules which impinge on inmates' expression and religious practices (as well as other constitutionally protected rights) should be evaluated as they are put in place.

Finally, it is still much too early to be certain where reasonableness is headed but it does seem as though courts are being reasonable with the reasonableness test and not simply endorsing anything put before them. FC

CLR will continue to monitor how lower courts, are applying *Turner* and *O'Lone* and report significant cases in future issues.

13 - See e.g. Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984). Prior cases involved claims under the First, Eighth, and Fourteenth Amendments.
14 - 88-Civ.-964 (N.D.N.Y., October 14, 1988).

AND IN THE NEXT CLR

...The first installment in a series of reviews of AIDS issues in corrections: AIDS and Disclosure

...Discussion of new Supreme Court decisions

...And more . . .

MORE From The Literature . . .
(see p. 6)

MAIL CENSORSHIP

Knight, M. **Censorship of Inmate Mail and the First Amendment: The Way of the Circuits.** 19 Tex. Tech L. Rev. 1057-1090 (1988).

An interesting review of the history of prison mail censorship which discusses first the general rights of prisoners under the "hands-off" approach, followed by the development of prisoners' rights to the use of the mail under the First Amendment and in light of the critical Turner decision (discussed in the text of the CLR). Although not an all-encompassing look at the law as applied in each circuit, but more of a glance, attorneys and administrators alike should find this useful as a general overview when examining the law in their circuit as it applies to censorship of inmates' mail.

RESTORATION OF CIVIL RIGHTS

Burton, V. S., F.T. Cullen and L.F. Travis III, **The Collateral Consequences of a Felony Conviction: A National Study of State Statutes,** Federal Probation, 52-60 (September 1987).

Many people discuss offenders having their civil rights restored, but do you know what rights they lost? Somebody has taken the time to find out. This nationwide empirical study presents a systematic review and analysis of civil rights and privileges lost to those convicted of a felony: voting, parenting, divorce, public employment, jury duty, holding public office, firearm ownership, criminal registration and civil death. The authors conclude the current trend is that states generally are less punitive in depriving felons of civil rights, perhaps due to the influence of the due process movement and a willingness on the courts' part to be sensitive to the rights of ex-offenders.

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Supreme Court Decision

Administrative, Not Judicial, Hearing Necessary To Involuntarily Medicate Inmates

Washington v. Harper
110 S.Ct. 1028 (1990)

Due Process does not require a judicial hearing before a mentally ill inmate may be given psychotropic drugs against his will, the Supreme Court said in a February 27 decision. In reaching this conclusion, the Court overruled a unanimous decision by the Washington State Supreme Court. (CLR had previewed the **Harper** case at 1 CLR 25 and 65.) **Harper** may be the most significant corrections case of the current Supreme Court term.

The Court held that Fourteenth Amendment Due Process protections *do* apply to the decision to involuntarily medicate an inmate, both as to the substantive basis for the decision and as to what procedures must be followed in making that decision. However, the inmate's right to refuse medication (which Due Process protects) may be overcome by the state with somewhat less effort and showing than the state court felt was necessary.

The Court approved procedures followed by the Washington State DOC, but, frustratingly, did not specifically say which of those was constitutionally mandated.

When May Involuntary Medications Be Used?

The Court requires three be shown to justify medicating someone over their refusal:

1. The inmate must have a "serious mental illness."
2. The inmate must be dangerous to himself or others.
3. The treatment must be in the inmate's medical interest. Slip opinion, p. 15.

In discussing the State's interests involuntarily medicating an inmate, the Court noted that the state's *interest* in institution safety (which

See HARPER, p. 2

AIDS

Court Approves AIDS Testing, Segregation Policies

Harris v. Thigpen
727 F.Supp. 1564 (M.D. Ala., 1990)

HIV-positive inmates in Alabama, subject to mandatory testing and segregation requirements suffered virtually a complete defeat in a sweeping lawsuit attacking policies and practices of the Alabama Department of Corrections.

Plaintiffs raised almost every issue commonly discussed about AIDS in prison. And lost every one. Included were the following questions, which raised issues under the First, Fourth, Eighth, and Fourteenth Amendments to the Constitution and under §504 of the Rehabilitation Act of 1973 (handicapped discrimination). The court's decision

See AIDS, p. 3

In This Issue . . .

HARPER, from p. 1

would be furthered by treating a dangerous, mentally ill inmate) overlapped with the State's *duty* to protect the inmate from himself.

The treatment basis behind the decision to medicate was very important to the Court. The decision clearly does not approve using drugs simply to control an inmate's behavior, without accompanying treatment benefits. While security concerns played a major part in the Court's decision, treatment remains the fundamental justification for medicating the inmate. (Fred Cohen will address this question in detail in the next CLR.)

What Procedures Must Be Followed?

Although a judicial hearing is not required, the Court held a formal administrative review, including certain procedural protections was necessary. The treating psychiatrist alone *may not* approve involuntary medications.

Washington officials were following a carefully developed process, which the Court specifically approved. The process worked as follows:

1. The treating psychiatrist must determine the necessity of treatment with psychotropic drugs as a result of a mental disorder and that the inmate was dangerous to himself or others or property or was "gravely disabled." (The definitions of dangerousness and gravely disabled were taken from the state's civil commitment laws.)

2. The refusing inmate was then entitled to a hearing before a special committee.

3. The committee included a psychiatrist, psychologist, and an Associate Superintendent, none of whom could be involved in the inmate's immediate diagnosis or treatment. While the composition of this group isn't necessarily fixed by Due Process, Harper insists the hearing panel (or perhaps single hearing officer) be independent of the original diagnosis and not show any institutional biases. The decision strongly approves the final involuntary treatment decision being made by mental health clinicians rather than by judges.

4. The inmate was given at least 24 hours notice of the hearing. The notice included the tentative diagnosis, its factual basis, and why staff feels medication is necessary.

5. The inmate had the right to attend the hearing, present evidence and witnesses, and to cross-examine staff witnesses, although some limitations could be imposed on the right to cross-examine.

6. The inmate also had the right to assistance of a "lay advisor who has not been involved in the case and who understands the psychiatric issues involved," slip opinion, p. 4. The Court specifically stated that a lawyer was not required. The Court did not say if some less demanding form of assistance would be acceptable. But at this juncture, it would not appear wise to test this

See HARPER, p. 3

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HARPER, from p. 2

question by, for instance, allowing lay assistants who did not understand the psychiatric issues involved.

The Court also rejected contentions that the hearing had to be conducted according to formal rules of evidence or that a "clear, cogent and convincing" standard of proof was necessary.

Another factor noted by the Court in approving Washington's procedure was that judicial review of the final decision was available in state court and that the record produced in the administrative review/hearing was sufficient to allow such review.

Comment: While this decision reflects the generally conservative approach the Supreme Court has taken to corrections cases, the procedures approved by the Court are not simple ones, especially for a jail or prison which does not have a major mental health component. (*Harper* arose out of a 144 bed prison devoted almost entirely to mental ill inmates.)

The decision to involuntarily treat may remain in the hands of medical professionals, but the person making the initial diagnosis and treatment decision may not be part of the *independent* panel which ultimately must approve that initial decision. A hearing bearing certain procedural similarities to an inmate disciplinary hearing must take place, but the inmate should have assistance in every case and the person providing the assistance needs some expertise in psychiatric issues.

CLR will review the implications of *Harper* and what it may promise for mentally ill offenders in greater depth in our next issue.

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AIDS, from p. 1

is briefly summarized after each issue.

ISSUE: Do mandatory AIDS tests, given shortly after admission to prison and shortly before release violate inmate rights?

No. Blood test "searches" were reasonable means of reducing the possible spread of AIDS and thereby protecting the interests of other inmates. Introducing AIDS into prison was, to the court's mind, more serious than the introduction of contraband.

ISSUE: Did the conditions of segregation in which HIV positive inmates were required to live constitute cruel and unusual punishment?

No. The opinion did not provide much detail as to what these conditions were like.

ISSUE: Does placing HIV positive inmates in segregation without a hearing violate Due Process?

No. When the testing process followed by Alabama showed an inmate to be positive, "the reason for confinement is apparent, and there is no occasion for a hearing,, 727 F.Supp. at ____ . (A positive ELISA test was followed by a second ELISA test which, if positive, was followed by a Western Blot. If it was positive, then the inmate was treated as HIV positive.)

The court generally bolstered its conclusions by applying the four-part test from **Turner v. Safley**, 107 S.Ct. 2254 (1987) to decide the restrictions imposed by the state were reasonably related to legitimate penological interests ("penal confinement, security, and safety").

ISSUE: Did defendants show deliberate indifference to the serious medical needs of the AIDS infected inmates by not providing AZT treatment to the extent they might have?

No. In part because Alabama is a poor state and in part because it doesn't have the numbers of AIDS-infected inmates as do states such as California or New York, less stringent standards of treatment were applicable in Alabama prisons, said the court.

The financial cost of treatment alternatives was, to the court, an important factor in determining the reasonableness of what treatment was provided. The court also expressed concern that if very expensive treatments were mandated for the prison system, AIDS patients would commit crimes solely to be able to have access to such treatment.

(The court's reliance on financial considerations as a justification for not providing a treatment recognized as prolonging the life of the AIDS patient is perhaps the most startling aspect of this case. CLR does not recall ever seeing a "we're a poor state" rationale used to to define what levels of medical care should be in a prison or jail setting..

ISSUE: Did restrictions on HIV positive inmates' access to work release or other conditional release programs and to programs which might better prepare the inmate for release violate Equal Protection?

No. Decisions about planning for "placing unfortunate inmates with terminal diseases in free-world employment" are best left to prison authorities, 727 F.Supp. at ____.

ISSUE: Did the de facto disclosure of who was HIV positive (by segregation) violate any inmate rights?

See AIDS, p. 4

AIDS, from p. 3

No. The state's interest in protecting employees and other inmates from a communicable disease justified testing, segregation, and the keeping of records regarding HIV status. It may also be important for the state to know who did and didn't have AIDS as a means of protecting itself from possible liability claims from former inmates claiming they acquired AIDS while in prison, presumably through some fault of the prison authorities.

ISSUE: Did the discrimination practiced against HIV positive inmates violate §504 of the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified" handicapped persons by any program receiving federal assistance?

No. The court decided no accommodation which could be made would eliminate a significant risk of transmission. Therefore, the inmates could not be seen as "otherwise qualified."

ISSUE: Did the totality of conditions (including medical, dental, and mental health care available) under which the HIV positive inmates lived violate the Eighth Amendment?

No. The opinion does not detail the conditions under which the inmates lived, but simply concludes that they were constitutional.

ISSUE: Were non-HIV infected inmates entitled to have a mandatory testing and segregation program to protect them from HIV positive inmates?

No. In a somewhat unique twist, about 400 inmates intervened in the case *on behalf of* the defendant state officials and in opposition to the HIV positive inmates who were plaintiffs. While the court upheld the policies of the defendants regarding testing and segregation, the court refused to go so far as to say such policies were constitutionally *mandated* in order to protect the rights of other inmates. So segregation and testing questions are policy, not legal, issues as far as the **Harris** court was concerned.

ISSUE: Did law library access totalling about nine hours per week deny inmates sufficient access to the courts?

Yes, but. . . The court said nine hours per week of access was not enough but later implied some unspecified increase in the quality or quantity of access was sufficient. So no relief was granted.

COMMENT: Wow! This was a major, well-litigated attack on a wide range of restrictive policies and practices regarding AIDS in prison and the inmates got absolutely no relief. But a notice of appeal has been filed and we will hear more from Alabama and AIDS in the future.

CLR will take a longer look at *Harris* and AIDS in our next issue.

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Religious "Business" Mail Not Exempt From Warden's Inquiry

Requiring an inmate to provide the warden with certain information regarding a proposed business venture by the inmate as a condition to allowing the inmate to send business mail did not violate the rights of the inmate, even where the business arguably was religious in nature.

The regulation asked for the type of business, the service or product to be delivered, the anticipated mail volume, the date the business would begin, and whether the service or product would be delivered to other inmates or state employees. The inmate claimed the regulation violated his First amendment rights because what he wanted to do was part of his activities as a member of the Universal Life Church. The defendants claimed the ULC was not a religion, relying in part on an IRS refusal to grant a tax exempt status to ULC. The court decided the regulation was validly applied regardless of ULC's religious status.

Other courts have ruled the Universal Life Church is not a religion. One court said whatever the definition of a "religion" was, the ULC failed to meet it, **Jones v. Bradley**, 590 F.2d 294 (9th Cir., 1979). A group loosely affiliated with the ULC, the "United Church of St. Dennis," (?) also was found not to be a religion, **Jacques v. Hilton**, 569 F.Supp. 730 (D. N.J., 1983).

Caution: Don't Rely Too Much On District Court AIDS Decision

It is risky to place too much reliance on a single federal district court decision. It binds on only the parties. It may be reversed on appeal. Other courts may decide the same issues in opposite ways. But occasionally a district court decision warrants special attention. **Harris** is such a case.

Because it is the most serious attack to date on a state's AIDS policies, **Harris** at the moment must be seen as the "leading case" in this area. But beware: the case is already on appeal, so it may not last long in its present form. But unless and until changed on appeal or until other "big" cases are decided, **Harris** remains an important statement in the still developing law about AIDS and inmates.

CLR will discuss the implications of **Harris** in depth in our next issue.

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Washington v. Harper

A Closer Look At Mentally Disordered Inmates And Forcible Medication

In our last issue, we reviewed the specifics of the Supreme Court's holding in **Washington v. Harper**, the involuntary medication case. In the following article, Fred Cohen takes a longer, more studied look at the case and its implications.

By Fred Cohen

Co-Editor Bill Collins was in attendance at the United States Supreme Court on October 11, 1989 when **Washington v. Harper**, 110 S.Ct. 1028 (1990) was argued. Estimating the result by the questions asked of counsel by the various Justices, Bill was certain that the State's position would prevail. When the decision was announced on February 27, 1990, it was clear that Bill could not have been more correct. The State prevailed on every major point.

The central question in **Harper** was whether a judicial hearing was required before the State could treat a mentally ill prisoner with antipsychotic drugs against his will. The unequivocal answer was: no judicial hearing is required.

That being said, the decision actually goes far beyond the central question in terms of issues raised and decided and issues

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AIDS Caselaw Slowly Developing In Favor Of Institution, But Cases Still Surprisingly Few

By Gina Caruso and Howard Messing

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The presence of a substantial number of prisoners with AIDS or AIDS Related Complex (ARC) in America's jails and prisons presents an enormous challenge and threat to the safe and fair functioning of America's correctional institutions. The constantly growing body of medical knowledge means that, for the time being at least, no professional correctional administrator can be legally certain what the best procedure is for dealing with inmates who test positive for the human immunodeficiency virus (HIV) or suffer from AIDS.

AIDS is a plague of international proportion. In some African countries as many as one in fourteen persons are infected with AIDS. In some urban areas in the United States as many as one out of five babies born test positive for HIV. The most recent data compiled by the Center for Disease Control (CDC) estimates that there are approximately 120,000 active AIDS cases in the United States at the present time. Of these the greatest number of cases involve male homosexual contact (58%) with by far the second largest group a result of intravenous drug users (18%).

By most estimates, however, these numbers severely underestimate those with HIV, the precursor of AIDS, and may significantly underestimate the number of AIDS cases as well. A recent study by the federal government General Accounting Office estimated that by the end of 1991 almost 500,000 Americans will have been diagnosed with AIDS. In addition to this uncertainty, knowledge about AIDS is constantly being updated and reevaluated as more is learned about the disease. Recent Center for Disease Control policies and

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medical studies clearly have established the value of early treatment with AZT, the only drug known to significantly delay the onset and reduce the symptoms of AIDS.

It is not surprising that courts have been reluctant to force correctional administrators to act in this area, due to the enormous expense involved for treatment of AIDS ($80,000 to $100,000 a year per prisoner is a conservative estimate) and the lack of certain medical knowledge. However, the advancing state of medicine, including more extensive information on appropriate treatment, may lead to courts in the future to develop a more focused view about the responsibility of correctional managers.

To date, prisoners with AIDS, affected jail and prison personnel, and non-AIDS prisoners who fear contact with AIDS prisoners have almost uniformly been unsuccessful in litigation. Prisoners have sued detention and correctional institutions: in opposition to (and in favor of!) mass screening for AIDS; segregation of AIDS patients; loss of privileges such as: jail or prison employment, exercise, work release, visitation, and good time credits; and failure to fully protect non-AIDS infected prisoners from contracting AIDS.

Legal grounds for AIDS related suits have included denial of equal protection; the right to due process prior to segregation; privacy rights; Eighth Amendment issues about medical care (an area which may become central to this type of litigation as the state of AIDS medical knowledge increases); cruel and unusual punishment through segregation; violation of religious beliefs (forced testing of inmates as violative of religious beliefs); and unlawful search and seizure.

In almost every case to date, the courts have held for the professional corrections administrator and against the prisoners.

Equal Protection Claims

In response to equal protection claims brought in the cases of **Bricius v. Frame, Cordero v. Coughlin,** and **Powell v. Department of Corrections** (citations to cases cited appear at the end of the article), the courts held that (1) the equal protection clause is not applicable to AIDS inmates because these inmates are not similarly situated to the general prison population; (2) even if the equal protection clause was held applicable, AIDS inmates are not a suspect class, (3) segregation of AIDS inmates was permissible as the segregation is rationally related to legitimate governmental interests, which include protecting non-AIDS inmates from exposure to the AIDS virus, preventing the spread of AIDS, limiting AIDS victims exposure to bacterial agents which could be deadly to the AIDS victim, and maintaining

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Loose Lips Sink Ships Dept.

Improper Disclosure Plus AIDS Hysteria Brings Liability

Rumors about AIDS spread far more rapidly than the virus.

A probationer had been arrested. The probation officer started to do a body search. The probationer interrupted and said "Be careful. I have AIDS and I have some weeping lesions on my body which you probably don't want to touch."

Later that day the PO searched the probationer's home. During his visit, he spoke briefly to one of the neighbors. Fearing the probationer or his wife may have had physical contact with the neighbors, Smith told the neighbor, Mrs. Babble, "The probationer has AIDS and his wife might. If you have had contact with them, you should wash thoroughly with disinfectant."

The smell of disinfectant still clinging to her thoroughly scrubbed hands, Mrs. Babble contacted the school her children and the probationer's four children attended. She also contacted other parents and the media. The next day 19 children were withdrawn from the school, the media were at the school, and the story appeared in the local papers and on TV. At least one story mentioned the family by name.

Sound farfetched? Substitute "police" for "probation officers," change the facts only slightly, and you have the case of **Doe v. Borough of Barrington**, 729 F.Supp. 376 (D. N.J., 1990).

Holding: Summary judgment for the probationer's and her children against the police officer who told the neighbors *and* against the Borough employing the officer for its failure to provide training about AIDS prevention or control.

The disclosure to Mrs. Babble violated the constitutional right of privacy of plaintiff and her children, even though her husband volunteered the information in the first place. Regardless of how government may obtain otherwise confidential information, it has the obligation to avoid further, unnecessary disclosure, said the court, citing Woods v. White, 689 F.Supp. 874 (W.D. Wisc., 1988), discussed in the main article.

COMMENT: The precise line between the ability to disclose AIDS information and the duty not to disclose is still shrouded in legal mist But some disclosure problems are obvious. AIDS information is presumptively private. Disclosure by correctional staff without good reason will violate the right of privacy. Here there was no good reason to disclose the AIDS information, since the neighbor was in no danger of acquiring the disease from casual exposure.

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control and security in the prison (that is preventing the potential for assault of AIDS inmates if left to reside in the general prison population) and finally, (4) a prisoner has no fundamental right to reside in the general prison population, and in fact, confinement in jail or prison limits many rights and privileges.

The legal defense to equal protection claims most likely to protect administrators in similar future lawsuits is that prisoner segregation is necessary for a legitimate government interest and well within the scope of authority of professional corrections administrators.

Due Process Rights

In prisoner suits claiming a denial of due process rights, courts have held that placing inmates in restricted quarters does not violate due process rights where "the conditions or degree of confinement are within the purview of the sentence imposed and do not otherwise violate the Constitution," especially when the legitimate purpose for segregating inmates is for diagnosis, treatment, or security. (**Muhammad v. Carlson**) Furthermore, a recent sweeping decision held that a due process hearing is not required prior to segregation of AIDS inmates from assault and protection of non-AIDS inmates from contacting the virus (**Harris v. Thigpen**).

Right Of Privacy

In the area of right to privacy claims, prisoners have had some rather ephemeral successes. Courts have held that since an AIDS diagnosis is extremely personal in nature, a person should be able to exercise control over who has access to such information (**Doe v. Coughlin**). However, the court in Woods v. White held that the privacy issue should be decided on a case-by-case basis with an individual's right to confidentiality balanced against the government's interest in limited disclosure. The court went on to say that although incarceration may limit certain constitutional rights of inmates, inmates nonetheless retain some privacy rights.

Therefore, where information of an inmate's AIDS condition may limit certain constitutional rights of inmates, inmates nonetheless retain some privacy rights. Therefore, where information of an inmate's AIDS condition was revealed to non-medical personnel, the plaintiff may have a cause of action.

However, the most recent case in this area, **Harris v. Thigpen**, held that inmates have very limited privacy rights because inmates "have made privacy a matter of public interest."

Eighth Amendment Claims

The Eighth Amendment arguments, which to date have been unsuccessful, offer the greatest possibility of court reevaluation in the future. In **Maynard v. New Jersey**, the court found that a prisoner's claim of deliberate indifference must meet the two-part standard announced in **Estelle v. Gamble**: alleged acts or omissions which are sufficiently harmful and evidence of deliberate indifference to serious medical needs. Deliberate indifference to serious medical needs has been defined as the denial of a "reasonable request for medical treatment and such denial exposes the inmate to undue suffering or the threat of tangible residual injury," **Monmouth v. Lanzaro**, 834 F2d 326 (3rd 1987) at 346. Prescription of easier or less effective treatment may lead to a deliberate indifference finding, although medical malpractice by itself will not give rise to an action under §1983.

In **Hawley v. Evans**, a court found that states have no constitutional requirement to implement statutes allowing prisoners private physicians or to provide experimental drugs for AIDS treatment in prisons. However, in the case of **Lewis v. Prison Health Services**, an Eighth Amendment claim alleging the prison failed to monitor the physical condition of a prisoner suffering with AIDS and ignored a prisoner's requests for treatment successfully withstood a motion to dismiss.

This area has the greatest potential for liability for corrections administrators in the future, as more effective AIDS treatments become available. The recent Center for Disease Control policy regarding AIDS suggests that jails and prisons may suddenly become liable for very expensive treatment with the drug AZT (which costs an average of $20.00 per day). This is now recognized as the one medicine proven effective in preventing or significantly delaying the development of AIDS. Denying AZT to a prisoner may be found to be a denial of Eighth Amendment rights by deliberate indifference to the medical needs of these prisoners. Conversely, it is not difficult to imagine individuals getting arrested simply to obtain this treatment due to its considerable expense in the world outside jails and prisons. But **Harris** rejected the AZT claim. **Harris** is probably not the last word on this question (see box, p. 24).

Freedom of Religion

Although AIDS related infringement of religion claims have been limited, the court in **Dunn v. White** held that this area was related to privacy demands with the balance required of the needs of the institution (in this case the administering of an AIDS test) against the infringement of prisoners constitutional rights. The court held that the prison's substantial interest in pursuing a program to treat and prevent AIDS outweighed the inmate's expectation of privacy and right to religious practice. Very recent related Supreme Court case law suggests that religious rights, in any event, are far from absolute.

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Search and Seizure

Prisoners also have sued claiming unlawful search and seizure by the mass screening of inmates. However, in **Harris v. Thigpen**, the court held that incarceration limits inmates Fourth Amendment rights as well as privacy rights and that governmental action need only be reasonable in order to validate this "search" of inmates. The court further stated that the seriousness of the disease and its potential for introduction to the general prison population required mass screening despite the potential invasion of personal rights. Of course the real problem for corrections officers in this area is that mass screening is both expensive and not absolutely reliable with many "false positives" resulting from first and even second AIDS tests. If any action is taken after a positive test, such as segregating the inmate, it probably will effectively label the inmate as "having AIDS." Even if later tests showed the first to have been a false positive, it may be very hard for the inmate to shake the label.

Non AIDS Infected Prisoner Suits

An interesting related area of litigation involves actions by non-AIDS infected inmates alleging violation of their right to by protected from AIDS inmates. To date, court decisions have relied upon in large part a lack of knowledge by society about the transmission of AIDS and the unreasonable fear of prisoners. For example, in **Glick v. Henderson**, a non-infected inmate's action was dismissed on grounds that the prisoner's fear of contracting AIDS was due to ignorance. In **Cameron v. Cruz**, the court dismissed an inmate's suit since the inmate was unable to show that the action of prison officials amounted to deliberate indifference by allowing an AIDS inmate to remain in the general prison population. Surprisingly, even the fact that the AIDS inmate bit another inmate's finger to the bone did not result in a cause of action. And in **Holton v. Norris**, the court held that an inmate had failed to show sufficient harm of contracting the AIDS virus where the prison policies were in accord with medically established guidelines.

It is interesting to contrast this holding with a recent spate of charges against prisoners testing positive for AIDS who have attacked and bitten or spat at police and correctional officers. These inmates have been charged and convicted of offenses ranging up to attempted murder although few courts to date have fully adjudicated these matters. See 1 CLR 87 (Jan 1990) for references to some of these cases.

Summary

Although prisoner lawsuits regarding AIDS to date have been noticeably unsuccessful, no definitive court guidance exists for correctional administrators. The growing body of medical knowledge will undoubtedly lead to a sweeping reevaluation by the courts of the needs and rights of AIDS and non-AIDS prisoners in correctional settings.

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Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988), aff'd ___ F.2d ____ (6th Cir., 1990).

AZT: Closer To A Right?

The inmate was HIV positive but not acutely ill. He had not yet been diagnosed as even having ARC (AIDS Related Complex) in an acute form. During the time covered by the complaint, January through August, 1989, the court noted the medical community was divided as to the efficacy of AZT treatment for someone like the plaintiff. Since the medical community itself was split, the court said the defendant doctor was entitled to qualified immunity (no "clearly established right" to AZT existed *at that time*).

This opinion clearly *does not* suggest the doctor would have been exonerated had the plaintiff's medical condition been such that AZT would have been a recommended treatment. Wilson v. Franceschi, 730 F.Supp. 420 (M.D. Fla., 1990).

O'DELL V. J.R. SIMPLOT CO.
736 P.2d 1324, 112 Idaho 870, 1987

Mr. O'Dell, Personnel Director at the Land and Livestock Division of J.R. Simplot Company, filed suit against the president of this division in a retaliatory discharge action.

Mr. O'Dell's assistant complained to him of sexual harassing behavior from the company's president. As a part of his duties, as personnel manager, Mr. O'Dell was required to investigate the allegations and provide support and assistance to the victim.

During this 18 month investigation the victim was isolated, her job responsibilities were taken away, and an environment of hostility and retaliation was evident.

O'Dell went to bat for the assistant, questioning the behavior and subsequent actions of the president of the company. The president fired O'Dell.

As a result of a court trial, the jury found for Mr. O'Dell on the basis of three claims under both common law and Idaho's Human Rights Act:

1. Retaliatory discharge under the human rights act;
2. breach of contract based on the company's personnel policies; and
3. intentional infliction of emotional distress.

The jury awarded $1.4 million to Mr. O'Dell.

MERITOR SAVINGS BANK V. VINSON
106 S.Ct. 2399 (1986)

In September of 1974, Michelle Vinson asked Sidney Taylor, a male vice-president at what is now Meritor Savings Bank, for a position at the bank. Meritor Savings Bank promptly hired Vinson as a teller-trainee and, eventually, promoted her to bank teller, head teller and assistant branch manager under Taylor's supervision. It was not disputed that these promotions were achieved based "solely on her merits as an employee" at Meritor Savings.

In September 1978, four years after being hired, Vinson took indefinite sick leave and filed a Title VII suit against Taylor and Meritor Savings Bank. The Bank fired her two months later, ostensibly, for excessive sick leave.

In her lawsuit against Taylor and the Bank, Ms. Vinson claimed that Taylor had illegally sexually harassed her for two years while she was employed by the Bank. Ms. Vinson testified that before 1975 Taylor did not demand sexual favors from her; he was a helpful "father figure" who assisted her with rent payments. This all changed in May of 1975. Ms. Vinson claims that at that time Taylor took her out to dinner and suggested that they go to a motel later to begin a sexual relationship.

At first Ms. Vinson alleges that she declined Taylor's invitations, but when Taylor told her that she "owed him since he obtained the job for her," she relented out of fear of losing her job. Ms. Vinson claimed that Taylor continued his demands for sexual favors and forced her to engage in sexual intercourse with him forty to fifty times between May 1975 and 1977.

Ms. Vinson also claimed that Taylor harassed her in other ways including fondling her breasts and buttocks on the job, sometimes in the presence of co-worker's, and by exposing himself to her in the women's restroom. Vinson testified that Taylor did not single her out for this harassment; he also touched and fondled other women employees. Taylor stopped making sexual demands on her in 1977 when she embarked on a steady relationship with another man.

Taylor denied Ms. Vinson's allegations. He said that he had never engaged in sexual intercourse with her, and never fondled her. At the trial, Taylor attempted to charge that Ms. Vinson had brought these very serious charges "to get even with him" for a business-related dispute about whom Vinson, then assistant branch manager, would train as head teller. The Bank also denied all of Ms. Vinson's claims, but stated that if Taylor had in fact sexually harassed Vinson, he acted without the Bank's consent or approval.

The district court held for Taylor and Meritor Savings Bank,

stating that Ms. Vinson was not the victim of sexual harassment or discrimination, that she had not been required to grant Taylor sexual favors "as a condition of either her employment or in order to obtain promotion," and that even if she had been, Meritor Savings could not be held liable because it was without notice of Taylor's actions. The Bank's claim that voluntary conduct without complaint does not fall within the parameters of sexual harassment was accepted by the district court.

The court of appeals reversed and remanded the case. It held that Vinson stated a claim under Title VII and that "any discriminatory activity by Taylor is attributable to the Bank."

The Supreme Court unanimously affirmed the court of appeals' decision, holding hostile work environment sexual harassment actionable under Title VII.

Issues:

1. What conduct constitutes sexual harassment?;
2. strict liability;
3. guilty acquiescence;
4. failure to complain;
5. voluntary participation;
6. damages for hostile work environment; and
7. victim's conduct.

PRICE WATERHOUSE V HOPKINS
57LW 1165 (U.S. Supreme Court, May 1, 1989)

FACTS: Ann Hopkins was a senior manager with the Price Waterhouse Accounting Firm for five years. It was the practice of Price Waterhouse to have existing partners recommend whether or not senior managers should be made future partners in the firm. This process was done on an annual basis. There were no fixed guidelines by which the firm's admission committee decided which candidates were accepted, which were rejected, and which were held over for another year. Ann was first held over to the next year and then rejected, although she had played a key role in obtaining a twenty five million dollar contract for the firm with the Department of State. Ann Hopkins was the only woman of eighty eight candidates proposed for partnership.

Hopkins' performance ratings had been outstanding and those who worked closest with her viewed her as "a highly competent project leader who worked long hours, ... to meet deadlines ..." However, some partners, both supporters and detractors, felt that she was sometimes "overly aggressive, unduly harsh, difficult to work with and impatient with staff."

The lower court ruled that although some complaints against Hopkins were legitimate, there were also clear indications that some of the partners reacted negatively to Hopkins because she was a woman. For example, one partner suggested she take "a course at charm school." Another suggested that women should not use profanity. Another said that women were not capable of functioning as partners - or even as senior managers.

Thomas Beyer, the person selected by the Policy Board Selection Committee to notify Hopkins why she was placed "on hold" until the next year, advised Hopkins that she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Hopkins resigned after Price Waterhouse did nothing to disavow any of these impermissible remarks.

ISSUE: What is the proper burden of proof required of plaintiffs and defendants in "mixed motive" cases such as this?

HELD: Once a plaintiff has shown by direct evidence that an impermissible consideration such as sex was the "substantial" or "motivating factor" (prima facie) in the "employment decision, then employers are obligated

to prove by a "preponderance of the evidence" that they would have reached the same decision even if they had not allowed gender to play such a role.

The Court quoted a previous case to emphasize the importance of these kind of cases: "It is abundantly clear that Title VII tolerates no...(sexual) discrimination, subtle or otherwise. (emphasis added)