Jail Design and Operation

and

the Constitution

An Overview

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Foreword

With roots in the civil rights movement of the late 1960s and early 197Os, correctional law is a relatively new area of law, which focuses on the legal relations between inmates and those responsible for operating America's prisons and jails.

This document, while perhaps seeming very detailed to the lay reader, offers only an overview of correctional law. This material is not intended to make the reader an expert in correctional law, but should leave the reader with an appreciation of the complexity of operating a "legal" jail in the waning years of the 20th Century.

Any jurisdiction involved in reviewing and planning its jail and criminal justice system needs to recognize and take into account the requirements of jail design, construction, and operations imposed by the Constitution and enforced by the courts.

Morris Thigpen, Director NIC

Chapter I. Introduction

Courts respond to facts. Shocking facts in a case tend to produce startling, and often controversial, results. Much of the caselaw regarding jails that has developed over the years is based on the extraordinary, the exception, rather than the norm. Where those shocking, exceptional facts come before a court, the court is likely to find a violation of the Constitution. The court then announces a legal principle or precedent - an inmate right - to provide guidance in future cases for both courts and jail administrators. In addition to announcing the basic principle (such as, "inmates have a right to be free from temperatures in the jail which endanger their health"), the court may also enter an order directing the defendants to take specific steps to correct the problem and to prevent its recurrence ("defendants are hereby ordered to install a cooling system that will be sufficient to maintain temperatures within a normal, non-threatening range," e.g., install air conditioning).

When one looks just at a relief order, it may appear that the court is being "soft on criminals" and ordering the jail to create a "country club." When one looks at the facts behind the order, the end result may appear considerably more reasonable.

Poor Conditions and Practices Create Liability

Consider the case of Mr. Brock, a 62-year-old man jailed in Tennessee during a summer hot spell. On his arrival, he was in good health. He was not considered dangerous or violent. On his departure, Mr. Brock was unconscious and would soon die.

The jail had been criticized by state inspectors several times for its poor cooling and ventilation, among other problems. The sheriff had asked for funds to improve conditions, perhaps to install an air conditioning unit for the ducts already in place in the jail. But county commissioners denied the request for budget reasons.

Temperatures during the days reached 110 degrees. Night-time temperatures remained in the 103-to-104 degree range. Humidity was very high and was made worse by inmates running cold showers in attempts to cool the cell area. The sheriff ignored a nurse's recommendation that a fan be put in front of Mr. Brock's cell, even though the sheriff knew Mr. Brock was having trouble breathing.

One night Mr. Brock became delirious. The officer on duty was notified by inmates, but he said he could do nothing because he was the only officer on duty. At 5 a.m., Mr. Brock collapsed. He was eventually moved to a hallway, but nearly two hours passed before he was taken to a hospital, without ever having been given first aid by anyone in the jail. Diagnosed as suffering from heatstroke, Mr. Brock died several days later.

The court found that forcing a person to live in temperature conditions so extreme that they endangered his health was cruel and unusual punishment. The official "policy" of the county was one of deliberate indifference, as shown by the commissioners' decision to do nothing about the heat problem This supported a compensatory damage award of $100,000 against the sheriff and the county jointly. The court also made a $10,000 punitive damages award against the

sheriff because, despite knowing about the particular plight of Mr. Brock, the sheriff took no remedial measures (such as putting a fan in front of the cell), which would have cost very little. The court also gave the plaintiffs attorneys' fees of an unspecified amount, ***Brock v. Warren County,*** 713 F. Supp. 238 (E.D. Tenn., 1989).

The ***Brock*** case was not a class action* and did not ask for any sort of prospective injunctive relief However, had it been a class action seeking injunctive relief, the court would have had the power to require the county to cure the problem of excess heat in the jail in a way reasonably designed to prevent it from happening again. As air conditioning ducts already had been installed, it is possible that the court would have ordered the defendants to install air conditioning in the jail.

"Judge gives inmates air conditioning," the headlines would have read. More correctly, when the government incarcerates someone, the government has the obligation to hold the person in a setting that does not endanger the person's health' whether the danger comes from ***excessive*** temperatures, poor food, bad sanitation, or other reasons. Given the facts of the ***Brock*** case, installation of air conditioning could be a reasonable means of assuring temperatures did not rise to the point of threatening inmates' health.

The court also found that the commissioners and the sheriff had not given jail officers any training in dealing with medical emergencies and that this showed deliberate indifference to Mr. Brock's serious medical needs, in violation of the Eighth Amendment. An injunctive order, had one been entered, also could have addressed this deficiency in the jail's operation.

Brock provides a classic example of how very poor conditions and practices, known to government officials, can create the basis for liability and court intervention. Officials in ***Brock*** were warned about the general problem and also knew that the heat problem was threatening Mr. Brock, yet they did nothing. They also did nothing to tram officers about medical emergencies. Mr. Brock's death could have been avoided at minimal expense, but it wasn't. The result was litigation that cost the defendants close to $200,000 when all the bills were in and left them with a jail that still did not have an effective cooling system.

Brock also is an example of why a court may enter a remedial order that' seen in isolation' may seem extraordinary but when viewed in light of the facts of the case is reasonable. These sorts of remedial orders' issued in the face of serious facts, tend to grow into "rights" that affect all jails.

While sometimes a principle, stated in isolation, seems extraordinary when one considers the factual situation from which that principle came, the result may become more understandable.

Facility Design Can Contribute to Liability

In another case, several inmates sued as a result of being raped by other inmates. Various operational problems were cited by the court as contributing to liability. Physical factors in the

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. "Class **Action": A lawsuit brought on behalf of a large number of plaintiffs (a "class") with basically similar interests. In jail litigatiou, class actions are commonly brought on behalf of all the inmates who are, have been, or maybe in a jail. Class actions avoid a multiplicity ofindividual claims.**

prison's design also were noted and clearly made it more difficult for staff to monitor and detect sexual or other improper behavior. Officers stationed in central control bubbles monitored two-person cells in lOO-foot-long, two-story cell blocks. Apparently, officers were rarely present in the cell areas. Once the door of a cell was shut, the officers in the bubble could not see into the cell. Microphones were placed at 25-foot intervals along the tiers, but not in the cells. To be heard, an inmate in a cell had to shout. Despite the limitations the physical plant created, staff made little attempt to verify that inmates were in the proper cells.

So the physical plant of the institution' combined with an operational approach that did not try to compensate for the security problems created by the physical plant, led to a finding that institution officials were liable for the rapes that took place. Surprisingly, the jury awarded the inmates only nominal ***damages, Butler*** v. ***Dowd, 979*** F.2d 661 (8th Cir., 1992). The case did not seek any sort of injunctive or prospective relief intended to prevent future rapes from occurring. Had injunctive relief been awarded, the injunction would have addressed the problems leading to the rapes. Thus, the order could have potentially addressed:

- Lack of supervision in the cell blocks in light of the double-celling.
- The inability of an inmate in a cell to contact staff in an emergency.
- The design of the facility, which removed staff from direct contact with inmates.

Facility design can enhance or detract from jail safety, but facility design alone cannot assure a safe jail. Staff interactions with inmates are critical to maintaining a safe jail. Double-bunking a jail compromises the facility design and the jail's ability to provide for the basic human needs of the inmates in several areas, but especially with regard to safety. Where staff is not increased as the facility is double-bunked, safety is compromised even more. A staffing level intended to adequately supervise a population of 250 inmates cannot be expected to provide the same level of supervision for 450 inmates. When facility design physically removes staff from direct contact with inmates, the problems of overcrowding only become greater.

Scope of this Document

This paper reviews the history of correctional law and summarizes the results and effects of major court decisions. It begins with the recognition that the Constitution truly protects inmates in jails and prisons and proceeds to discuss the continuing challenge of deciding what those constitutional protections mean in practice and the struggle at the facility level to assure that inmate rights are met.

One of the largest areas of court involvement with corrections is in the area of conditions of confinement. "Conditions cases," which frequently have resulted in courts demanding the reduction of jail populations' can have a tremendous impact on facility design and operation and the cost of operating a jail. The changes they force can ripple through the jail and far into a county's entire criminal justice system. Several chapters in this document discuss conditions cases. Other chapters highlight legal issues whose impact is primarily operational.

Poor conditions and practices in jail which result in injury or serious risk of injury to inmates can lead to federal courts exercising their powers of oversight grants them under the Constitution.
These powers include the power to remedy poor conditions in ways intended to prevent their recurrence.

Chapter II. History of Court Involvement

Over 400 jails are under court orders relating to either crowding and/or conditions of confinement. In early 1995, only 3 states had not been sued over prison conditions and 39 states, the District of Columbia' Puerto Rico, and the Virgin Islands were under court order or consent decree for prison conditions and/or to limit population. These totals do not include jails or prisons whose operating policies reflect an order of a court (e.g., concerning arrestee strip searches, types of publications an inmate may receive, how an inmate may practice his/her religion, or inmate discipline, among many potential areas).

Why did federal courts become involved with state and local correctional facilities in the first place? How did the federal judges become so "enmeshed in the minutiae" of corrections, as Justice William Rehnquist once wrote?'

To some degree, court involvement with corrections was inevitable as the civil rights movement in general reinforced the principle that no agency of government can, or should, remain beyond the reach and control of the Constitution. Where it is recognized that the Constitution provides limits on the power of an agency, courts will exert some control over the agency since they enforce the Constitution.

But corrections virtually invited court intervention. "Power tends to corrupt, and absolute power corrupts absolutely" (Lord Acton) and "where laws end, tyranny begins" (William Pitt). Those cliches proved true in many prisons and jails across the country, leading to situations that cried out for intervention from someone. Those running prisons and jails had virtually absolute power over inmates. Many of those working in the field today can remember a time when corrections staff answered to virtually no one outside the institution and could do as they pleased. In many institutions, absolute power had corrupted, there was no law except the law of the warden and "con boss", and tyranny flourished.

Consider the following cases and it becomes easy to understand what led courts to . become involved with issues in corrections in the late 1960s.

- Inmates were intentionally segregated by race. ***Lee v. Washington, 390*** U.S. 333 (1968).
- Inmate trusties were given authority over other inmates, basic power to run the prison, and even deliver medical care, ***Halt v. Sawer, 309*** F. Supp. 361 (RD. Ark., 1970), Newman v. ***Alabama, 503*** F.2d 1320 (5th Cir., 1974).
- A bedsore-ridden quadriplegic, with wounds infested with maggots waited three weeks between the time the maggots were discovered and his wound was cleaned, Nauman.
- Inmates were held in solitary confinement in 6' x 9' cells, with little natural light, for years, being allowed out of their cells for only 15 minutes per day. ***Sinclair v. Henderson, 33*** 1 F. Supp. 1123 (D. La., 1971).

. *Bell v. Wolfish,* **441 U.S. 520,561 (1979).**

- Inmates seen as particularly incorrigible were housed in strip cells. Testimony showed they were placed in the cell without clothing and that the front of the cell was completely closed off from the corridor. The inmates were not given soap or any means of cleaning themselves between the showers they were supposed to receive once every five days. Cells were often very dirty. Only a hole in a raised platform (an "Oriental toilet") was available. The inmate could not flush the toilet, but had to depend on staff to do this. Inmates might spend weeks or even months in these cells. Medical attention was sporadic. ***Jordan v. Fitzharris, 257*** F. Supp. 674 (1966).
- Courts kept hands off correctional issues. Inmates were the "slaves of the state." ***Ruffin v. Commomwealth,*** 62 Vir.790 (Vir., 1871). There was little or nothing that courts would do to intervene in the case of prison or jail inmates.

The facts of these early cases' [illegible] if not demanded, that someone intervene to assure some level of humane treatment for inmates. No one is sent to jail to be raped or stabbed, beaten by officers, or kept in a medieval dungeon under conditions that seriously threaten the person's health or sanity. The cases described above came to court at what became the end of a time known as the hands-off era.

The Hands-Off Era -- Pre-1965-1970

Before the late 196Os, courts avoided deciding correctional cases in what has become known as the hands-off era. In one case decided in 1951, 40 inmates were housed in a single room 27 feet on a side in an old wood-frame jail with only 20 bunks. Each inmate had less than 19 square feet of floor space (about the size of a single bed). There was no recreational capacity. Youths as young as 16 were housed in the jail, as were mentally disturbed inmates. There was only one toilet (often clogged) and one shower. Heat came from an old-fashioned coal-burning stove, which was a major fire hazard. There was only one exit, and another exit could not have been added. The ventilation was very poor. The judge said the facility was not fit for human habitation' and quoted federal officials who called it a "fabulous obscenity."

But the judge felt he could do nothing about the poor conditions. Although he felt the conditions in the jail were "rightly to be deplored and condemned by all people with humane instincts," the conditions were still far better than those endured by soldiers fighting in "the mud and slush and snow and frost for hours or even days on end" in Korea. Besides, the only possible reliefthe judge could imagine was releasing the inmates, which he felt was not possible. The U.S. Marshals Service, responsible for operating the jail' had no money for its improvement, ***ExParte Pickens,*** 101 F. Supp. 285 (D. Alas., 1951).

However, as the civil rights movement grew in the 1960s some judges began to recognize that the Constitution was not a static document' but could evolve with the times. Cases were coming to court with facts that shocked the conscience of judges, convincing them that no one or no thing was holding jail and prison administrators accountable for the ways in which they ran their institutions. Beginning in the late 196Os, in light of many claims with appalling facts similar to the cases above and given the courts' increased concern over civil rights generally, the hands-off era ended and a period of hands-on involvement of the courts began. The courts

began to realize that there was no sound legal reason that the protections of the Constitution had to stop outside the jailhouse door. With that realization, the door to the courthouse began to open.

In 1970, a federal judge in Arkansas wrote what was to become an overriding theme for correctional facilities and the courts: If the government is going to operate a jail system, "it is going to have to be a system that is countenanced by the Constitution of the United States," ***Halt*** v. ***Sarver,*** 309 F. Supp., 362, 385 (E.D. Ark., 1970). In other words, the protections of the Constitution extended into prisons and jails, the only question being the extent of those protections.

The Hands-On Era - 1970-1980

Once the door to the courthouse opened for inmates, a stampede of cases battered the federal courts. The number of civil rights claims filed in federal court by state prisoners jumped from 2,030 in 1970 to 6,128 in 1975 and to nearly 12,400 by 1980.' Because correctional law was a completely new area of jurisprudence, there were few principles for evaluating cases. Defendants often had little but bristle and defiance to offer in defense of very bad practices. The result was a dramatic acceleration of rights and creation of new rights during the decade of the 1970s.

As an example of the growth of new rights, one district court judge ordered that inmates be given one green and one yellow vegetable every day. This decision was reversed on appeal, ***Smith v. Sullivan, 563*** F.2d 373 (5th Cir., 1977).

One Hand On, One Hand Off- 1980 to Date

The Supreme Court stemmed the tide of court involvement and judicial activism in 1979, with its first double-bunking decision, ***Bell*** v. ***Wolfish,*** 441 U.S. 520 (1979). In that decision, the Court strongly indicated that it felt lower courts had often gone too far in the name of inmate rights. Since that time, court involvement with correctional issues has retreated somewhat. This is due to several factors.

- Improved jail and prison operations.
- A conservative Supreme Court, which sent the clear message in several decisions that lower courts were going too far in defining and enforcing inmate rights.
- Increased professionalism among persons working in corrections.
- More staff, with better pay and more training.
- Better facilities.

Sourcebook of Criminal Justice Statistics, **1983, Bureau of Justice Statistics. By 1995, inmates were filing nearly 42,000 section 1983 cases every year against state and local officials, Corrections Digest, Vol. 32, No. 22, May 31, 1996.** To a **large extent, the rate of fling has kept pace with the overall in- in the number of inmates. It remains a very small percentage of the total number of inmates who file lawsuits.**

- Development and general acceptance of professional standards from groups such as the American Correctional Association and state agencies. Enforcement of state standards, where done, is also important.
- Improved funding, without which most of the above improvements could not have occurred.

But the ultimate motivator for the improvements, more than any other factor, was litigation or the threat of litigation: "If we don't (improve in some way), we'll get sued." The history of corrections in the last third of the 20th Century is, more than any other single thing, the history of court involvement.

Inmate Rights: What Are The Issues?

Major areas of constitutional rights for inmates come from four constitutional amendments. **First Amendment** To what extent may authorities restrict inmates' rights of religion, speech, press, and in general, the right to communicate with persons outside the jail?

Fourth Amendment What types of searches are reasonable or unreasonable for inmates, visitors, and staff? What privacy protections do persons retain when entering the jail?

Eighth Amendment What conduct, such as the use of force and conditions of confinement, amount to cruel and unusual punishment?

Fourteenth Amendment (due process and equal protection)

What types of procedural steps (notice, hearing, etc.) must accompany the decision to discipline an inmate to better assure the decision is made fairly?

- What other types of decisions require some form of due process, and what form must that process take?
- Due process also protects/regulates conditions of confinement for pretrial detainees, who are not protected by the cruel and unusual punishment clause of the Eighth Amendment. The requirements of the Eighth and Fourteenth Amendments in this context are essentially the same.
- What are the institution's affirmative obligations to assure inmates' access to the courts and assist them in preparing legal papers? This is a resource and physical plant issue, which **is often** overlooked at the jail level.
- Regarding equal protections: are there legitimate reasons for treating different groups of inmates differently? What justifies providing programs and facilities for female inmates that are typically of lesser quality and quantity than programs and facilities provided for men ("parity")? Some courts that have examined this question have found no adequate justification for such differences ***McCoy v. Nevada Department of Prisons,* 776** F. Supp. $21 (D. Nev., 1991). Others have reached the opposite conclusion, ***Klinger v. Dept. of Corrections,* 3** 1 F. 3d 727 (8th Cir. 1994).

Scope of Court Involvement: You Name It!

It is simple to summarize the constitutional amendments that affect the operation of a jail. The specific areas of jail operation touched by one or more of those amendments are

considerably more complicated. Few areas of jail operation have not been the subject of at least one (if not many) lawsuits over the years. Some of the issues that courts have addressed (with varying results) include:

- Inmate safety, classification;
- Quality of and access to medical care;
- Searches of inmates, visitors, and staff;
- Religious practices , clothing, hair and beards, wearing of medallions, attending services, access to religious literature, "what is a religion," sincerity of beliefs;
- Cross-gender staffing, observation and searches of one sex by the other;
- Diets, both medical and religious;
- Access to reading materials or limitations on what inmates can read;
- Access to the courts and legal materials;
- Basic facility sanitation;
- Personal hygiene, e.g., toilet paper, toothbrushes, hot water;
- Out-of-cell time and exercise;
- Disciplinary sanctions and due process;
- Administrative segregation procedures for entry and conditions in segregation units;
- Censorship of incoming and outgoing mail, handling of legal mail;
- Diet and nutrition;
- Clothing;
- Overall physical environment, including such things as lighting, heating, cooling, ventilation, noise levels;
- Protection against suicide;
- Use of force, when, how much;
- Smoking and smoke-free jails;
- Abortions;
- HIV, disclosure, treatment, segregation;
- Employee training and qualifications.

Thousands of court decision made over nearly three decades, touching nearly every aspect of the jail, continue to bolster sound jail management and operation. The quality of jails is typically far more advanced than 20 years ago, and the level of court intervention had declined somewhat in recent years. Nevertheless, court decisions and the threat of litigation continue to play a major role in the operation of a correctional facility.

Chapter III. Corrections and the Constitution as the Century Ends

Certain principles must be recognized about jails, the courts, and the Constitution. The Constitution protects inmates, and courts will hold jail administrators, county commissioners or supervisors, and even counties accountable for violation of inmates' rights. While these principles may stir heated argument among government officials as they are applied in particular ways, the reality of the principles is no longer a subject for debate.

The Constitution protects inmates. "Prison walls do not form a barrier separating prison (or jail) inmates from the protections of the Constitution" ***Turner v. safre,*** 107 S.Ct. 2254, 2259 (1987). "There is no iron curtain drawn between the Constitution and the prisons of this country" ***Wolff v. McDonnell,*** 418 U.S. 539 (1974). Though specific interpretations of the Constitution have ebbed and flowed over the last 25 years, the principle that the ***Constitution protects inmates*** has not changed.

Offcials are accountable. Federal courts will hold government officials and agencies accountable for knowing and meeting the obligations the Constitution imposes. Neither ignorance of the law nor lack of funds is going to be an acceptable excuse for violating the rights of someone in jail.

Government officials may balk when faced with a court order. An elected or appointed official who tells the federal court to "go to hell" and ignores the court's order may provoke great media coverage and short-term voter approval, but in the end the will of the court will prevail. Resistance to the order will simply add to the taxpayer's bill and, if anything, increase the level of court intervention.

Believing that "the federal judge has no business telling us how to run our jail and spend our money" may translate to "by fighting a lost cause, the size of the fee the county will have to pay to the inmates' lawyers will dramatically increase and the county will get nothing in return."

Correctional law then is a fact of life for governments operating jails and the people who run those jails. Remember the admonition from one of the earliest inmate rights cases: If the government is going to run a jail, "it is going to have to be a system that is countenanced by the Constitution of the United States." .

The Future of Corrections and the Courts

For the last several years, court intervention in corrections has been shrinking. It appears this trend will continue. The conservative Supreme Court, which has been checking the growth of inmate rights and in some cases reducing those rights for the better part of 20 years, re-emphasized that courts should take a limited role in corrections cases in a 1996 decision, ***Lewis*** v. ***Casey,*** 116 S.Ct. (1996). In 1996 Congress passed the Prison Litigation Reform Act' (discussed below), which is also intended to limit the power of the federal court in corrections cases.

. - **Holt v. Saner** supra, p. **8**

. - **Pub. L. No. 104-134,110 Stat. 1321.**

If the threat of court intervention continues to diminish, funding sources may feel more comfortable in reducing correctional budgets. Where funding is decreased, the trend of growing professionalism in corrections may be set back. Lack of funds may lead to more crowded jails, fewer staff, less training, decreased emphasis on self-evaluation and improvement, and the abandonment of state standards and their enforcement. The public's get tough on inmates attitude, reflected in such things as the movement to take away television, weights, and other things perceived as "perks," may contribute to a harsher attitude toward inmates from staff. If these things occur, serious problems in the operation of jails and prisons will inevitably reappear. These in turn may lead to a re-emergence of a hands-on era of increased court intervention.

Congress Becomes Involved in Inmate Rights

Since its beginning, the inmate rights movement has almost entirely been the result of courts interpreting and applying several amendments to the U.S. Constitution to the operation of jails and prisons. Legislative activity has played a very minor role. In the second half of the 199Os, this is changing as Congress has passed laws that directly affect inmates and their rights.

Prison Litigation Reform Act seeks to limit powers of courts. In the Spring of 1996, Congress acted in dramatic fashion to restrict the power of the federal courts over state and local corrections agencies in major conditions cases and to make it more difficult for inmates to file suits under section 1983. Highlights of the Prison Litigation Reform Act (PLM) follow.

- Court injunctions in virtually all types of "inmate rights" cases, and certainly in large conditions of confinement cases, will presumptively end after two years upon request of the defendants unless it can be shown constitutional violations continue. This provision includes consent decrees. This is intended to end court orders that seem to run forever and where haggling between the parties and the court continues over relatively minor items that may not, in and of themselves, be of constitutional importance.
- Sharp limitations are placed on the powers of Special Masters and on the fees they can be paid. PLRA also requires that a Master's fees be paid by the court appointing the Master, not by the defendants as has been the custom.
- Limitations are placed on circumstances under which inmates' lawyers may be paid attorneys fees and on the amount of fees that can be paid. Fee awards based on hourly rates of $250 to $300 per hour or more should become a thing of the past.
- The practice of completely waiving court filing fees for indigent inmates has been changed. While payment of fees may be postpone& inmates with almost any money on their institution books are required to pay the full amount of the fee over time and the jail is permitted to send money to the court as it may appear in the inmate's trust account. Fee waivers now, in essence, are more like loans than gifts.
- Inmates are required to exhaust any administrative remedies available to them prior to filing a section 1983 claim in federal court. Previously such a requirement could be imposed only if an institution grievance process was certified by either a jurisdiction's local federal court or by the U.S. Justice Department as meeting standards for grievance procedures set under the Civil Rights of Institutionalized Persons Act.

- Inmates who have had three previous cases dismissed as frivolous, malicious, or failing to state a claim for relief are barred from filing additional section 1983 actions unless they claim they are in imminent danger of bodily harm.

PLRA is intended to apply retroactively and may provide the basis for many jurisdictions currently operating a jail under the provisions of a consent decree to go back to court to have the decree terminated.

PRLA is a very controversial law and is certain to be attacked as being unconstitutional for various reasons. For instance, there is a very serious question whether the Separation of Powers Doctrine in the Constitution allows Congress to impose limits on the power of the court as PLRA purports to do, especially with regard to court orders in effect when the law was passed.

Much, if not most, of PLRA probably will survive constitutional attack, at least as the law applies prospectively. The law will substantially change the nature of litigation by and on behalf of inmates. Only time will determine what these changes will be and whether they are beneficial or not.

Americans with Disabilities Act protections extend to inmates. A relatively new area of legal involvement with both program and physical plant implications is the Americans with Disabilities Act (ADA) of 1990. This comprehensive and complex federal statute and accompanying regulations address government programs and services and the entire employment process and generally make it illegal to discriminate against someone on the basis of a disability, unless very good reasons exist to justify such discrimination. ADA's requirements go far beyond such things as building ramps and installing wheelchair lifts. The basic requirement of ADA is that persons with disabiities be reasonably accommodated so they can participate in employment or government services or programs.

ADA's protections extend throughout the employment process and also to participants or beneficiaries of government services and programs. Thus, for the first several years of ADA's existence, it has been generally assumed that ADA protects inmates and visitors to the jail, as well as employees and job applicants. Now at least one court has questioned this assumption ***Bryant v. Madigan,*** 84 F.3d 246 (7th Cir., 1996). Until this issue is resolved, jail administrators need to understand both the procedural and substantive requirements of ADA and be sensitive to inmate claims of discrimination on the basis of a disability.

The U.S. Constitution and courts of this country protect the rights of inmates. A jail cannot operate properly without recognizing this reality.
Congressional action in recent years has both expanded inmate rights and, with passage of the Prison Litigation Reform Act, reduced the power of the courts in this area.

Chapter IV. The Constitution and Physical Plant

Understanding and complying with constitutional requirements are of major importance in facility design. Following are some of the physical plant issues with potential constitutional significance that should be considered in either remodeling an existing facility or designing a new one.

- Crowding.
- Capacities of physical plant (HVAC, plumbing, kitchen, etc.).
- Safety - blind spots, staff access to inmates, staffing requirements dictated by the design.
- Exercise areas.
- Medical and mental health services - what is in the jail, what is not and how the jail will handle the increasing number of mentally disturbed inmates.
- Heating, cooling, and ventilation.
- Sanitation and hygiene toilets, showers, etc.
- Life Safety Code.
- Staff supervision of and contact with inmates. A direct-supervision jail improves contact and interaction between staff and inmates compared to earlier designs, which isolate staff from inmates.
- Privacy and cross-gender supervision.
- Library and law library.
- Access for the disabled (ABA).

Constitutional requirements are not precise and written down in one place, like the Building Code. It is very difficult to say with precision what the minimum physical plant requirements are for a jail because, when conditions of confinement are reviewed under the Constitution, the question is "what are the effects of the conditions on the inmates?" A specific physical plant characteristic, such as inmate exercise areas, is rarely analyzed in isolation. A court may order "outdoor exercise one hour a day, five days a week" because of a unique set of facts that does not exist in another facility. Should the second facility allow the same level of exercise? Likewise, crowding may or may not produce very serious problems, depending on a variety of other factors, such as the quality ofmanagement and number of staff. The result is no constitutionally mandated square footage requirements.

Another problem that can develop is a false sense of complacency due to a "we haven't been sued up to now, therefore we must be OK" philosophy. The risk is that the jail is not okay, but no one has filed a lawsuit. Ignoring problems and letting them get worse only invites larger lawsuits later. "Pay me now or pay me later." The potential for legal problems developing because of a "pay me now or pay me later" approach can be reduced through well- formulated programs of audits and inspections.

Prudence, if not legal mandate, says that physical plant issues that have caught the attention of courts in the past should be addressed both in prioritizing improvements for existing jails and in planning and designing new facilities.

Physical plant issues alone can sometimes be the focus of constitutional litigation. In other cases, physical plant and facility design issues can contribute to the operating success or failure of a jail.

Chapter V. Understanding Section 1983 Lawsuits

Inmates file most of their lawsuits in federal court under a law passed by Congress during post-Civil War Reconstruction. That law appears at Title 42 of the United States Code in section 1983. Some explanation of section 1983 actions may help foster an understanding of some of the important mechanics of civil rights litigation: who gets sued, why, and what the court has the power to do.

Section 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Little used until the middle of the 20th Century, section 1983 became the legal vehicle by which persons could sue state and local government officials for violations of constitutional rights. A section 1983 action then is simply the way one gets to court to raise a question of a constitutional violation.

Some of the key factors of section 1983 follow.

Person. Neither the state nor state agencies are "persons" and therefore cannot be directly sued under section 1983. But since 1978, "person" includes municipal corporations (i.e., cities, counties, ***etc.), Monell v. Department of Social Service, 98*** S.Ct. 2018 (1978). So a county may be sued directly in section 1983. This is particularly important when a lawsuit seeks damages, since a court may approve the award of damages directly against a county.

Color of State Law. Virtually anything that government officials do in the jail will be "under color of state law." The private contractor who may operate a jail or provide a component jail service (such as medical care) will typically also be seen as acting under color of state law. Therefore, contracting out all or part of a jail operation may change who an inmate sues for a civil rights violation, but it does not reduce the inmate's ability to use section 1983 to sue.

Causation. The plaintiff must prove the defendant(s) caused the violation of a constitutional right. Concepts of causation become very important when the suit names the county, the sheriff or chief jail administrator and they were not directly involved in the incident that the suit is about (such as improper use of force).

Violations can be caused by a policy, custom, or practice of the agency, and it is by showing this that the county can become liable. For example:

> The jail is seriously overcrowded and understaffed. Budget cuts have resulted in a reduction of staff even as the number of inmates has increased. As a result, violence levels are soaring. The sheriff asks the county commissioners for funds to increase staffing and/or to build a new jail, but is rebuffed: "We have no money, you will just have to make do."

The county's policy, then' is to run an overcrowded, excessively violent jail. A new, young inmate is raped and stabbed when housed with a predatory homosexual. The victim may be able to sue the county for damages, arguing that his injuries were caused by the policy of the county toward overcrowding the jail. ***Redman v. County of Sun Diego, 942*** F.2d 1435 (9th Cir., 1991), is a case with facts similar to this example.

Inadequate training or supervision can be the basis for suits against persons, even the county, not actually present when the act that violated the inmate's rights occurred, when the training or supervision is so bad as to reflect "deliberate indifference" to the constitutional interests of the inmate. Thus, where it is known to a "moral certainty" that officers will be dealing with the constitutional rights of inmates (such as in using force, inmate discipline, conducting searches, etc.) and the training is seriously inadequate, the county could be held liable for failure to train, ***City of Canton v. Harris,*** 109 S.Ct. 1197 (1989).

The Court Is Relief Powers

What can the court do when it finds a constitutional violation? Section 1983 gives the court a variety of relief powers. The most important are damages and injunctive relief.

Damages

Damages are of three sorts: **Nominal** damages are a token amount (such as $1) where the plaintiff shows a violation of his/her rights but **can** prove no actual damage. **Compensatory** damages are intended to make the plaintiff whole again and include out-of-pocket expenses, medical costs, and the more subjective concept of pain and suffering. **Punitive** damages are intended to punish the defendant and deter others from similar conduct. Punitive damages historically are reserved for only the most egregious conduct by defendants, but are theoretically available in any section 1983 case where "deliberate indifference" is part of the constitutional violation' ***Hill v. Marshall, 962*** F.2d 1209 (6th Cir., 1992).

The Qualified Immunity Defense

Damages may be awarded against individual defendants in a section 1983 action only if the right that was violated was "clearly established." This qualified immunity protects government officials from being monetarily liable for failing to predict the future course of constitutional law. However, the qualified immunity defense is not available to government entities, such as counties.

Lawyers and judges may spend large amounts of time arguing about whether a right is clearly established. Many inmate rights are clearly established but, in many other cases, the facts of the case are important in determining whether a general principle is clearly established as applied to those facts. For instance, there is a general right to exercise for inmates, but deprivation of access to exercise is permissible for limited periods of time. It is not clear how long this time may be.

How Serious Can Damages Be?

- In the aftermath of a riot, the court found that an officer pushed an inmate down a metal fire escape. The inmate was handcuffed and was offering no resistance. No damages were

awarded for lost earning capacity or medical expenses (which were paid by the Department of Corrections). However, the court did award $10,000 in compensatory damages for pain and suffering and an additional $25,000 in punitive damages. The punitive damages were intended to deter use of malicious force against inmates in the future and because the court felt the defendant maliciously intended to hurt the plaintiff An additional, unspecified amount of attorneys' fees was approved. ***Davis v. Moss,*** 841 F. Supp. 1193 (M.D. Ga, 1994).

- A mildly retarded, mildly mentally ill inmate received $65,000 in damages as a result of being held in jail improperly for almost four months because the jail failed to note the inmate had not been given his first court appearance. The inmate's lawyer was given $35,000 in attorneys' fees, ***Oviatt by and through Waugh v. Pearce, 954*** F.2d 1470 (9th Cir., 1992).
- $18,000 was awarded to an inmate found guilty of being involved in a riot and sanctioned to one year in Special Housing. Evidence showed that the inmate was present in the dining hall during the disturbance, but not that he had actually participated in the disturbance. ***Zuvuro v. Coughlin, 970*** F.2d 1148 (2d Cir., 1992).
- ***$1.1*** million ***was*** awarded ***in*** a suicide case, ***Simmons v. City of Philadelphia, 947*** F.2d 1042 (3rd Cir., 1992).
- A nurse who acquired the HIV virus in a fracas with an inmate, where officers refused to aid ***several*** nurses ***struggling with the*** inmate, received a ***$6.1*** million award. ***Doe v. State*** *of* New ***York, 595 NYS*** 2d 592 (1993). This was a tort suit, alleging negligence, not a section 1983 civil rights action.

The Prison Litigation Reform Act requires that prior to payment of any compensatory damages to an inmate, efforts must be made to notify any victims of crimes for which the inmate was convicted regarding the pending payment of damages to the inmate. This would allow such victims to file their own suits against the inmate. Damages awarded to the inmate must also be used to pay outstanding restitution orders.

-Injunctive Relief

Courts use the injunction to correct what are perceived as continuing problems. An injunction is the most common relief in class actions involving jails. Injunctions respond to past and present problems, but focus on the future: What must be done to correct this problem and prevent its reoccurrence. An injunction may either order that a practice be stopped or demand the defendants take affirmative steps.

The general rule has been that a court' having found a constitutional violation(s) AND having decided there is a continuing problem, could enter an order requiring the defendant to correct the problem by addressing its cause(s). For instance, consider the overcrowded, understaffed jail plagued with violence, described earlier. (p. 18)

Constitutional problem: Excess levels of violence.

Cause(s) of problem: Cross overcrowding, causing the breakdown of the classification system' and inadequate staffing, that was not increased as the inmate population increased past facility capacity staffing was actually decreased.

Cure: A population cap and population reduction order, plus an order to increase staffing levels.

Impact: Compliance with the population reduction order affects the entire criminal justice system, from police to prosecutors to courts to the jail, since all of these agencies help determine who goes to jail and how long they stay. Attempts to comply with the population reduction order trigger internal disputes between various stakeholders in the system (prosecutors, judges, jail, etc.) as none wants to change its practices in order to relieve jail crowding. The order to increase staffing affects the county budget generally, as money is taken from other agencies to meet the financial demands of the court's order.

Relief orders start at the least intrusive level needed to a bring facility up to constitutional levels. But if defendants do not comply with the relief order, more court orders are entered, which become ever more intrusive and demanding. The court ultimately has the power to order defendants to take actions that would violate state law, such as releasing inmates before their statutory release date. Such orders are permissible only as a last resort.

The principle to remember is that **the court has the power to require defendants to correct the problems.** The amount of power used grows in direct proportion to the court's view of the defendants' inability or reluctance to remedy the problems. This principle remains true even in light of limitations on the court's relief powers imposed by the Prison Litigation Reform Act. PLRA may delay the point at which the court may exercise some of its power, but in general the power remains.

Prison Litigation Reform Act curbs powers of the court. PLRA limits the court's powers somewhat and will change the sequence of events described above. All prospective relief court may order may extend no further than necessary to correct a violation of federal law. It must be narrowly drawn and be the least intrusive means necessary to correct the violation. Population caps may be entered only by a special three-judge court, and only after other remedies have failed to correct the violations. A court can no longer impose a population cap as a "first choice" form of relief. PLRA would not prevent the court from directing defendants to increase staffing levels to attempt to reduce violence levels.

The notion of narrowly drawn relief which is the least intrusive necessary, is a flexible one. As defendants are unable or unwilling to meet a narrowly drawn' non-intrusive order, it becomes apparent that the order was not enough to correct the violation. So a somewhat broader, more intrusive order becomes permissible. And so on. As noted above, the Court has **the power to require defendants to correct the problems.**

PLRA also gives defendants more ability to challenge a court's injunctive order. However, fighting the order outside the context of an appeal, in the media' or at a political level will remain counterproductive, add costs to the case, invite more court intervention' prolong the case, and increase the attorneys' fees paid to the inmates' lawyers.

Attorneys' Fees

There is another important cost factor in section 1983 actions. A federal statute, 42 USC section 1997, allows the "prevailing party" in a civil rights case to be awarded attorneys' fees.'

. It is very difficult for defendants to "prevail" for attorneys' fees purposes - case must be "frivolous." So most attorneys' fees issues deal with whether the plain = "prevailed"). Since attorneys' fees are awarded

Prior to passage of the Prison Litigation Reform Act, fees were generally computed by multiplying the hours the lawyer spent on the case by the hourly rate for similarly qualified lawyers in the community. This resulted in hourly rates at times in excess of $300 per hour and fee awards of six, sometimes seven, figures. PLRA addresses attorneys' fees with the intent of limiting both the circumstances that will permit award of fees and the amount of fees a judge can award, as discussed below.

Fees Limited to Winning Claims. PLRA narrows the definition of "prevailing party." Prior to PLRA "prevail" included more than winning the lawsuit after a trial. Winning only a portion of the case supported a fee award. Settling the case through a consent decree supported a fee award, making the fee a proper question in settlement negotiations. Where the lawsuit was a catalyst for improvements, courts have awarded fees. Fees were even awarded for time spent on claims that the plaintiff did not win, but were related to winning claims.

PLRA says a fee may be awarded only for work "directly and reasonably incurred in proving an actual violation." Fees will no longer be awarded for losing claims related to winning ones or based on "catalyst " theories.

Computation of Fees. PLRA also changes the formula by which fees are computed. The traditional hours x rate in the legal community approach has been changed. Under PLRA, the hourly rate for fees is now limited to 150% of the rate paid to defense counsel appointed in criminal cases, a rate that varies across the country but is probably less than $100 an hour in most jurisdictions. Fees must be reasonably related to the relief ordered by the court, so many hours spent on a relatively small win should produce only a relatively small fee. The first 25% of any monetary judgment paid to the inmate must go toward a fee award. Even with the changes PLRA makes, however, attorneys' fees remain a potentially significant aspect of an inmate rights case.

Inmates who represent themselves in litigation are not entitled to attorneys' fee awards if they win.

One other point about attorneys' fees: They may not be covered by a county's insurance coverage! Where a county's coverage pays for "damages" from "errors and omissions," it does not ***cover*** attorneys' fees, ***Sullivan County, TN v. Home Indemnity Co., 925*** F.2d 152 (6th Cir., 1992).

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against the party (not the party's lawyer), fee awards against inmates would have little monetary value, since inmates seldom have any money.

Section 1983 is a very broad law, that gives the federal courts wide powers. While PLRA imposes some limitations, the court still retains a great deal of power to require defendants to cure violations of the Constitution. Liability under section 1983 can attach to both individuals and to local government entities, such as counties.

Chapter VI. How Courts Evaluate Claims -- The Balancing Test

Many rights enjoyed by persons in the community are restricted, and sometimes eliminated altogether, by incarceration. **A** fundamental question that courts must decide, then' is what reasons justify restricting or eliminating a constitutional right.

Many inmate rights claims require balancing what the inmate asks for ("the right to practice my religion by wearing religious medallions") against a competing interest of the institution' which is most commonly security ("medallions could be used as weapons or as gang identifiers, therefore, we do not allow medallions in the jail"). How courts pre-set the balance scale - what comparative weight they give constitutional rights in general versus the weight they give the jail's concerns about security or other "legitimate penological interests" - can often dictate the end result.

In past years, some courts pre-set the balance strongly in favor of any constitutionally protected right, especially First Amendment rights (religion' speech' press). To justify any restriction of such rights, the institution had to show a "compelling interest." This was a hard burden for the institution to meet.

In 1987, the Supreme Court eased the burden for corrections and required courts to give considerable deference to concerns of correctional administrators. "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," ***Turner*** v. ***Safley,*** 107 S.Ct. 2254 (1987). Legitimate penological interests include security, order, safety, rehabilitation (for convicted persons), and' in some circumstances, equal opportunity.

In ***Turner,*** the Court said that whether there is a reasonable relationship between a restriction and a legitimate penological interest is determined through a four-part test:

1. What is the connection between the restriction and the legitimate interest of the institution? Why does not allowing inmates to keep and wear religious medallions further the security and safety of the jail?

2. What other alternatives exist for the inmate to exercise the constitutional right at issue? If medallions are not allowed' can the inmate attend religious services, meet with religious leaders, have access to religious reading materials, etc.?

3. If the inmate's request is allowed' what would be the impact on staff, inmates, and institution resources?

4. Are there "ready alternatives" that would satisfy both the interests of the inmate and the concerns of the institution?

In general' the ***"Turner*** test" is not a difficult one to meet, but the jail administrator still must consider the following:

When does a restriction potentially impinge on a constitutionally protected area? An administrator must stay abreast of general developments in the law and how they may affect jail operations. Expert legal advice is very useful, but such advice is often not available to most jail administrators. Most county attorneys' offices are (a) too busy to give frequent advice, and

(b) not very knowledgeable about correctional law or jail operational issues because they do not have the time to become well versed in this important, but arcane, area of law. Administrators, then' need to educate themselves about correctional law, at least to the point where they know when to seek legal advice on a specific matter.

What in fact are the reasons behind a particular restriction, and do they really further a legitimate penological interest? For instance, restrictions on radical or pornographic publications are appropriate for some material' but sometimes the sheriff makes a decision based on moral or political philosophy rather than on a "legitimate penological interest." Just because someone would not have a particular publication in one's home does not mean it can be banned from a jail.

Likewise, it is easy to exaggerate a possible security threat. Several years ago, the standard practice in jails was to strip search every arrestee at the time of booking, regardless of who the arrestee was, what the arrest was for, or the behavior of the arrestee. The ostensible reason for this practice was to prevent the introduction into the jail of drugs or weapons that had not been discovered through routine pat searches. In a series of lawsuits around the country, no jail was able to convince a court that persons arrested for minor offenses, such as unpaid traffic tickets or other minor misdemeanors were likely enough to be carrying contraband around in a body cavity to constitutionally justify this type of search. These rulings have not resulted in major security problems in jails. For additional discussion of this issue, see Chapter IX.

While the ***Turner*** test applies to resolve a conflict between an inmate's constitutional right and a competing legitimate penological interest' Congress imposed a more rigid, demanding standard for evaluation of restrictions on religion with passage of the Religious Freedom Restoration Act in 1993. RFRA is reviewed in the next chapter.

With the *Turner* test, the Supreme Court gave jail administrators a comparatively clear roadmap for analyzing their actions and defending many of the claims inmates bring. However, unless the administrator is aware of when his/her actions intrude into an area protected by the Constitution and can articulate legitimate reasons for such actions, the potential benefits of the *Turner* decision may be lost.

Chapter VII. The First Amendment

> ***Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . .*** (U. S . Constitution' Amendment I).

Common issues under the Fist Amendment include religious questions and censorship or rejection of publications and correspondence (with special attention to "legal mail" from courts, lawyers, and government officials). To a lesser extent other issues around communications between inmates and free people arise, including telephone and visiting, but these have not been litigated often. Most First Amendment issues are "balancing test" questions that involve day-to-day operational issues.

Religion

Several different issues have arisen around religion.

Restrictions on religious practices. They include such restrictions as attendance at religious services (for instance, when temporarily segregated), wearing religious clothing or medallions, ability to keep long hair or beards, access to religious reading material (for instance, when jail staff feel the material is racist or otherwise likely to create unrest in the jail), participation in special ceremonies (Ramadan, sweat lodge), and religious diets, etc. Lawsuits over religious restrictions are the most common type of First Amendment religious claim.

Determination of what is a religion. A witchcraft sect? Satanism? Religious groups that ask one to send in $10 and receive a Doctor of Divinity degree in the return mail? Or other sects/cults that claim religious protections? This very complicated issue must be addressed at times. If a group claiming special privileges or accommodations because of religious status is not in fact a religion' the institution is under no obligation to make any accommodations.

Sincerity of belief If an inmate is not sincere in his/her religious beliefs, the institution has no duty to try to accommodate the inmate's special demands.

. Equality of opportunity to practice, especially for small religious groups.

. Expenditure of government funds, such as paying for chaplains.

Restrictions on religious practices are evaluated by courts under the ***"Turner*** test" described in the previous chapter. Examples of the sorts of restrictions which might be examined in this type of litigation include refusals to allow an inmate in segregation to attend group religious services, prohibitions on inmates wearing special religious clothing or jewelry, or refusals to provide special meals which complied with an inmate's religious dietary restrictions.

From 1993 to mid-1997, such religious claims were evaluated by courts under a more rigorous legal standard' one mandated by a statute passed by Congress known as the Religious Freedom Restoration Act. However, the Supreme Court struck down this law as exceeding the constitutional powers of Congress. ***City** of **Boeme v. Flares,*** 117 S.Ct. 2157 (1997).

Other First Amendment Issues

Correspondence When may incoming or outgoing mail be read and censored, or rejected? Must postage and writing materials be provided? How rapidly must mail be delivered? What special precautions must be taken for "legal mail" from lawyers, courts, or other government officials? What due process procedures must be followed when a letter is rejected?

Publications What type of content justifies not allowing a publication into a jail? Personal taste of the jail administrator is not an acceptable reason for not allowing a publication, which can sometimes create controversy regarding sexually oriented publications. A particularly difficult issue arises regarding publications that are religious but may also be racist.

Visiting What restrictions may be placed on visiting and visitors? Are contact or conjugal visits required? The answer is "no" to both. Neither are constitutionally required, but contact visits are very common and a small but increasing number of state institutions allow conjugal visits. Courts have been slow to intervene with regard to visiting.

Religious practice issues are probably the most common raised by inmates under the First Amendment. Essential to the jail defending decisions involving the first amendment is to have sound reasons behind the decisions. Snap decisions can be difficult to defend.

Chapter VIII. The Fourth Amendment

'The right** of **the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . "
(U.S. Constitution' Amendment IV)

The Fourth Amendment protects a person's reasonable expectations of privacy by prohibiting the government from conducting "unreasonable" searches and seizures. The reasonableness of a type of search varies, depending on its intrusiveness and the government's reasons for conducting the search. Jail, by definition' reduces the "expectation of privacy" of all entering, including inmates, visitors, and staff The question in many lawsuits is how much the expectation of privacy is lowered or, conversely, how intrusive a search may be in jail, given the government's heightened need for security.

Arrestee strip searches are a unique jail search issue. Federal appeals courts across the country have uniformly condemned the traditional practice of strip searching everyone booked into the jail, regardless of the reason for arrest or actual suspicion that the person might be carrying contraband.

In the strip search cases, the government could not show that any significant amount of contraband' undetectable in a pat search, entered the jail via persons arrested for minor offenses such as unpaid parking tickets. Without such a showing, jails could not justify the dramatic privacy intrusion that accompanies a strip search. Courts require that "reasonable suspicion" has to exist to justify strip searching an arrestee. Reasonable suspicion could be based on the reason for the arrest (drug offenses' felonies, or violent felonies), a person's current behavior, or perhaps his/her past arrest record, *Weber* v. Dell, 804 F.2d 796 (2d Cir., 1986). ***Weber*** lists many other circuit courts of appeal that have adopted a similar rule. Courts have not retreated from this rule since the ***Weber*** decision.

Other major search issues, past and present, include:

Cross-Gender Supervision. What privacy-related limitations exist with regard to one sex supervising, observing, or pat searching the opposite sex? This issue is unresolved. Some caselaw supports female officers pat searching male inmates and tolerates "casual, incidental" observation of male inmates showering using the toilet, or changing clothes. Probably very few posts or tasks exist in a male facility that women could not fill. There is not corresponding caselaw regarding male officers and female inmates. A 1993 decision said men pat searching women was cruel and unusual punishment, a violation of the Eighth Amendment, ***Jordan v. Gardner,*** 986 F.2d 1521(9th Cir., 1993). Judicial uncertainty about this issue reflects society's difficulties in reaching a consensus on the relations between the sexes in the workplace and society at large.

Cross-gender supervision and inmate privacy issues have obvious implications for facility design. By putting up various types of privacy screens around showers and toilets, the jail can eliminate many of the "invasion of privacy" complaints inmates may have.

Activities such as strip searches, which require close examination of inmates in states of undress, should only be done by staff members of the same sex, except in emergency situations.

Cross-gender supervision presents a three-sided conflict, instead of the typical two-sided dispute between the interests of the inmate and of the institution. Now inmate privacy and institutional security needs must be weighed with the equal opportunity rights of employees.

Some cross-gender search cases have raised claims under the Fist Amendment, with the inmate asserting that his or her religious beliefs prohibit being touched in relatively intimate ways by persons of the opposite sex (such as in a thorough pat search) or seen in states of undress by persons of the opposite sex.

Many jail administrators speak very highly about female correctional officers and use them virtually everywhere, for nearly every task, with few reservations. Except for tasks involving relatively direct observation of male inmates in the nude, it is doubtful a jail post today could be justified as "male only." It is not clear that the same could be said for male officers supervising female inmates because of a lack of court decisions addressing the issue of female inmates' privacy interests in terms being seen in states of undress by male officers.

Urine Testing. May inmates or staff subjected to random urine tests? "Yes" for inmates, and "probably yes" for staff, at least when they work in direct contact with inmates. This issue was litigated many times when urine testing first became common.

Cell Searches. Must the jail have specific justifications for conducting cell searches and do inmates have the right to be present during cell searches? The Supreme Court said that no "cause" was required for cell searches, and the inmate had no right to be present, ***Block v. Rutherford,*** 104 S.Ct. 3227 (1984).

Strip Searches. Could inmates be strip searched without particular cause after contact visits or trips outside the secure perimeter of the jail? Yes (Bell v. ***Wolfish, 441*** U.S. 520 [1979]. Questions remain as to whether inmates in the general population of a jail or prison may be strip searched without some level of cause, such as reasonable suspicion.

Body Cavity Searches. What level of cause must exist before an inmate may be required to submit to a body cavity probe search? (Reasonable suspicion, although many jurisdictions prefer to use the slightly more demanding standard of probable-cause.)

How Searches are Conducted. How staff conduct searches is often important. A generally reasonable type of search may violate the Fourth Amendment if done unreasonably, so as to unnecessarily humiliate or degrade the inmate.

Searches of Visitors and Staff. In general, each has more privacy protections than inmates, but less than they would have on the street.

Although issues concerning inmate privacy and cross-gender supervision remain unresolved, the fundamental constitutional requirements for most jail search issues are well established. One of the major continuing problems is assuring that these fundamental rules are followed on a day to day basis.

Chapter IX. The Eighth Amendment

"... *nor cruel and unusual punishments inflicted"* (U.S. Constitution, Amendment VIII)

Overview and Use of Force

Crue1 and unusual punishment is a vague, subjective concept now commonly defined in the jail context as the "wanton and unnecessary infliction of pain." Previous court attempts to define cruel and unusual punishment have included such vague, subjective phrases as "shock the conscience of the court" or "violate the evolving standards of decency of a maturing society."

While the Supreme Court has generally now settled on "wanton and unnecessary infliction of pain" as its definition of cruel and unusual punishment in the jail and prison context, it defines the phrase differently in different situations. In the medical context (and other situations involving the basic human needs of inmates), the phrase is defined in terms of "deliberate indifference" to the serious (medical, safety, sanitation, etc.) needs of the inmates. By contrast, if use of force is being evaluated, wanton and unnecessary infliction of pain is defined by whether force was used "maliciously and sadistically for the very purpose of causing harm."

The Eighth Amendment has had greater impact on jail operations than other amendments because conditions of confinement are subject to Eighth Amendment scrutiny.* It is through this amendment that courts enter sweeping orders, which have required such things as population caps, release of inmates, improvements to the jail's physical plant, and other costly and dramatic changes. As noted earlier, the power of federal courts to enter such orders has been recently limited to some degree by the Prison Litigation Reform Act.

Use of Force

Use of force, the most common subject of Eighth Amendment claims, does not involve sweeping institutional reform issues. (Use of force claims brought by pretrial detainees are analyzed under the Due Process Clause of the Fourteenth Amendment.) Most force issues involve one inmate and one or two officers.

Jail staff are permitted to use force in many circumstances, including protecting themselves or others, protecting property, enforcing orders, and maintaining jail safety and security. But force, ifexcessive enough, violates the Eighth Amendment. Force becomes cruel and unusual punishment when it involves "the wanton and unnecessary infliction of pain,"

. Technically, the Eighth Amendment does not apply to or protect pretrial detainees. However, the Due Process **Clause of the Fourteenth** Amendment **provides essentially equivalent protections for this group, which may make** up 50% or more **of a jail's** population. **For ease of reference, this document will group Eighth and Fourteenth** Amendment issues together **and refer to them only as Eighth Amendment, except where otherwise** noted.

Hudson v. McMillian, 112 S.Ct. 995 (1992). ***Hudson*** further defined this phrase as meaning force that is applied "maliciously and sadistically for the very purpose of causing harm," instead of being used "in a good faith effort to maintain or restore discipline," 112 S.Ct. at 998.

In deciding whether force meets this standard, the Supreme Court said lower courts should consider five factors:

1. The need for the use of any force,
2. The amount of force actually used,
3. The extent of any injuries sustained by the inmate,
4. The threat perceived by a reasonable correctional official,
5. Efforts made to temper the use of force.

It is not hard for a legitimate use of force (such as an officer responding to an attack by an inmate or a group of officers removing a recalcitrant inmate from a cell) to cross the line and become an impermissible form of punishment, especially when an officer loses his/her temper. Therefore, training and supervision are of great importance in avoiding excess force problems. Officers need to understand **WHEN** force is appropriate, **WHAT types** of force to use, **HOW TO** use force properly, and **HOW MUCH** force is enough. Courts will not second guess most uses of force too closely, but the officer who does not know "when to say when" may be a lawsuit waiting to happen.

Avoiding Use of Force. Knowing how to accomplish a necessary goal (such as removing a disturbed and violent inmate from a ***cell) without*** using force is a vital skill for a correctional officer. Sometimes overlooked, interpersonal skills training helps officers defuse some potential force situations without resorting to force, can avoid potential litigation and, more importantly, can enhance the safety of both officers and inmates. Poor verbal and interpersonal skills can add to the natural antagonism between officers and inmates and thus provoke potentially physical confrontations.

In addition to training in the use of force, close supervisory review of uses of force is very important in assuring that force is used properly. .

Force cases usually involve only a few individuals and arise from a single incident. However, frequent use of force in a jail may be an indicator of larger problems. Administrators then need to evaluate individual incidents of force as well as watch trends in force usage.

Facility design and the operating philosophy dictated by that design can also affect staff-inmate relationships and have an impact on the number of force situation that arise in the jail.

Good training, good supervision, and well written reports can be useful in defending force claims. Many institutions now routinely videotape force incidents whenever feasible. Many say that the taping not only provides good evidence in court, but can deter inmates from provoking force incidents and staff from using excessive force.

Medical Care

The quality and quantity of medical care is also a common subject of Eighth Amendments lawsuits. As with most inmate litigation, the great majority of such suits are resolved in favor of the defendant institution administrators and medical staff However, many decisions over the

years, have favored inmates. These have had a significant effect on the nature of medical care provided in correctional facilities and have put a hefty price on inadequate medical care.

Some early medical cases involved the following situations.

- Medical care for an 1800-bed prison was provided by one doctor and several ***inmate*** assistants in a substandard hospital. ***Gates v. Collier,*** 501 F.2d 1291 (5th Cir., 1975).
- An inmate's ear was cut off in a fight. The inmate retrieved the ear, hastened to the prison hospital, and asked the doctor to sew the ear back on. Medical staff, it was alleged, looked at the inmate, told him "you don't need your ear," and tossed the ear in the trash, ***Williams v. Vincent, 508*** F.2d 541 (2d Cir., 1974).
- . Medical services were withheld by prison staff as punishment. Treatments, including minor surgery, were performed by unsupervised inmates. Supplies were inadequate and few trained medical staff were available in a prison the court termed "barbarous." Twenty days passed before any action was taken for a maggot-infested wound, festering from an unchanged dressing, Newman ***v. Alabama, 503*** F.2d 1320 (5th Cir., 1974).

The barbaric issues of the early cases rarely arise in medical cases in the 199Os, but some old issues repeat themselves and new issues continue to develop. AIDS presents many complex legal and operational issues. The dramatic upsurge in tuberculosis (TB), especially new drug-resistant strains of TB, creates problems of screening, testing, and protection for both staff and inmates, since TB bacteria are airborne.

Getting Medical Cases to Court. Issues concerning inadequate medical care can be presented to courts through two different legal vehicles: tort cases brought in state court, and civil rights actions brought under 42 USC section 1983, in either federal or state court.

Inmates, like any other recipient of medical services, can sue providers of care for malpractice in a tort suit. Such suits attempt to show that the provider was in some way negligent in providing the care, i.e., that the care failed to meet a reasonable standard of care as measured by prevailing medical practice in the community. Tort suits seek only damages as relief and typically focus on individual conduct. Relatively few inmates present their medical claims to the courts through tort actions.

By far the preferred means of suing over institutional medical care is to bring a civil rights suit under section 1983, even though the legal test a plaintiff must meet in a civil rights case is more difficult than in a tort case. Since the typical inmate medical lawsuit is a civil rights suit, the balance of this discussion focuses on constitutional issues and medical care.

The Constitution and Medical Care

The Supreme Court decided its first inmate medical case in 1976, announcing a test for evaluating the constitutional adequacy of medical care that remains in place today:

> "We therefore conclude that ***deliberate indifference to serious medical needs*** (emphasis added) of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment," ***Estelle v. Gamble,*** 429 U.S. 97, 105.

In reaching its conclusion, the Court emphasized that the inmate must rely on the government to treat his/her medical needs since the fact of incarceration prevents the inmate from obtaining his/her own treatment: "If the authorities fail (to treat medical needs), those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death" 420 U.S. at 103.

The test from ***Estelle*** is not ***an*** easy one for ***an*** inmate to meet. ***In Estelle,*** the Court made it clear that deliberate indifference requires more than a showing of simple negligence - medical malpractice does not violate the Constitution. In subsequent cases, the Court moved the definition of deliberate indifference to beyond even gross negligence. In very simple terms, an "oops" in medical care does not violate the Constitution (although it may be a tort). However, "who gives a damn" violates the Constitution.

What is "Deliberate Indifference?" Although the Supreme Court first used the phrase "deliberate indifference" in 1976, it did not try to define the phrase for nearly 20 years. Then, in ***Fanner v. Brennan,*** 114 S.Ct. 1970 (1994), the Court finally revisited "deliberate indifference." At issue in ***Fanner*** was the question of whether an institution official could be deliberately indifferent in a situation in which the official did not know of a problem (such as a serious threat to an inmate's safety or a serious medical need) but reasonably "should have known" about the problem. Various lower courts had said that under some circumstances, an official could be liable for what he/she should have known.

In ***Fanner,*** the Supreme ***Court*** disagreed, saying that ***an*** official must ***have actual*** knowledge of a problem before the official can be deliberately indifferent. ". . . a prison official cannot be found liable. . .for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety," 114 S.Ct. at 1979.

In saying that actual knowledge of a problem is part of the deliberate indifference test' the Court adopted the same subjective test as courts use to determine criminal recklessness. This is a difficult test for plaintiffs to meet and should reduce the overall liability exposure of correctional officials, especially supervisory officials. In cases that involve one inmate and only a single incident, it will be very difficult to show a supervisory official, such as a jail administrator, had actual knowledge of the inmate's problem. One negative aspect of the ruling may be that more suits are directed at line staff since they are more likely to have direct knowledge about a problem.

It is difficult to say whether ***Fanner*** will have an impact on medical ***systems cases*** or other large conditions cases, which are typically class actions. For example, while the jail administrator may have no knowledge of medical problems an individual inmate has encountered, the administrator is more likely to have knowledge of systemic deficiencies in the medical system that may be the result of serious crowding, underfunding' or poor administration. These systemic problems and their causes would be the focus of a conditions case.

Although decided before ***Former,*** a Ninth Circuit decision provides some guidance as to what deliberate ***indifference*** means ***in the*** medical context, ***McGuckin v. Smith, 974*** F.2d 1050

(9th Cir., 1992). The court said that a simple accident cannot be deliberate indifference. Delaying treatment does not show deliberate indifference, ***unless the delay is harmful.*** Harm, said the court, could be shown from continuing pain, not just that the condition worsened. Budget limitations may often create strong pressure to delay expensive treatment but, any time treatment is delayed, doctors should evaluate the medical consequences of that delay.

In ***McGuckin,*** over three years passed between an injury to the inmate's back and corrective surgery. Several months elapsed after the surgery was finally recommended and the plaintiff was in pain during the entire time. No one offered an explanation to justify the delay between diagnosis and treatment. To the court' the care the inmate received clearly violated the Eighth Amendment. However, the defendants won the case because the plaintiff sued the wrong people, none of the defendants was responsible for the inadequate care.

Individual Cases

The ear case mentioned above is an example of individual litigation -- the medical care given a single inmate. Other examples include an institution's refusal to change an inmate's job assignment after being advised the assignment aggravated the inmate's allergies, ***McDaniel v.*** Rhodes, 512 F.Supp. 117 (S.D. Ohio, 1981). Delay (or refusal) in providing prescribed medical treatment has been the subject of numerous cases. Often the underlying problem is a conflict between concerns of the institution's custody staff and the medical staff Custody staff may override a doctor's order for treatment out of fear that the treatment will threaten security. For instance, crutches given to an inmate could be used as weapons by the inmate or others in the cell block. In other instances, budgetary needs may cause the delayed treatment. Given that custody/medical conflicts are not uncommon, a facility needs a process by which such conflicts are resolved carefully.

Suicides Lawsuits and sometimes substantial liability commonly follow suicides. The issues in a suicide case often arise around (1) identification of possible suicidal inmates, (2) protecting and monitoring them once identified, and (3) responding to suicide attempts. Proactive efforts to prevent suicides in jails through such steps as improved screening at booking can be very successful and can be implemented with minimal cost.

Suicide cases may be brought as tort cases under state law, in which the claim is generally that officials were simply negligent, or as civil rights cases. In the latter situation, the claim will be that officials were deliberately indifferent to the medical or safety needs of the potentially suicidal inmate. The trend over the last several years has been for civil rights claims arising from suicides to be harder for plaintiff to win. Addition of the "actual knowledge" requirement from the ***Fanner*** case will continue this trend. However, even though such cases may be increasingly difficult for plaintiffs to win, lawsuits over suicides are likely to remain common.

Systems Cases

The fundamental questions in a medical systems case can be stated simply:

T I M E L Y...

Access May ***any*** inmate who feels he/she has a medical problem obtain timely access ("timely" varying with the nature of the medical problem) to . . .

Qualified Staff Are the staff providing medical care qualified to do so? Are they practicing within the scope and limitations of their licenses? And do these staff provide . . .

Diagnosis Is the medical staff equipped with adequate resources for diagnosis and treatment and, at least where a "serious medical need" exists ("serious" is also a relative term), does the inmate receive . . .

Treatment Generally appropriate care in a timely fashion.

It is one thing to develop a medical system of Access - Qualified Staff- Diagnosis - Treatment for readily treatable short-term medical problems, but it is something else again to meet treatment demands that may be very expensive and of indefinite duration. Although most inmates are in and out of the jail in a matter of days or weeks, some may remain well over a year. Many of these long-term inmates have serious medical problems, either of a chronic or acute nature. The costs oftreating these problems may be huge, yet delaying or denying treatment to save money places the jail at grave liability risk.

Many factors may be evaluated when the adequacy of an entire medical service delivery system is attacked. Here are some of the more common factors that courts have reviewed in this type of litigation:

- Adequate numbers of properly qualified medical staff (including dental and mental health staff);
- Medical records;
- Sanitation;
- Intake screening (particularly important in the jail setting, where a disproportionate number of suicide attempts occur within the first few hours after admission);
- Adequacy of the physical plant (this may include questions about what is available for both physical and mental illnesses);
- Special diets;
- Access to medical staff i.e., the sick call system;
- Emergency response systems;
- Overall policies and procedures;
- Training;
- Medications and medication delivery systems;

- Delayed or denied treatment (a very real problem with budget shortages).

In short, every part of a medical service delivery system is subject to review in a case that claims the medical system is deliberately indifferent to the medical needs of the inmates. Inquiries will begin with intake medical screening for new arrivals at the jail and will continue through the most elaborate medical procedures.

- ***Non-Medical Staff Is Important***

Medical litigation is not limited to acts or omissions of medical staff or the adequacy of the medical department. Issues often arise from the actions of custody staff

- The sick call system often depends on custody staff conveying written (or sometimes oral) requests for medical care to the medical department.
- Custody staff may be responsible for escorting inmates to the medical department and for treatment outside the confines of the institution.
- Custody staff can impede or facilitate access to medical staff in emergency situations, e.g., the inmate with an emergency during the night depends on custody staff to forward a request for help to medical personnel.
- Custody staff nay be in a position to impede or even prevent prescribed treatment from being delivered, such as ignoring a medical order for bed rest or light duty for an inmate and instead requiring the inmate to resume a strenuous workload.

Conflicts between competing interests and concerns of custody and medical departments are not uncommon in a prison or jail. It is essential that mechanisms exist that allow a thoughtful resolution of such disagreements quickly enough to prevent harm to the inmate from delayed or denied care or treatment.

Consider the following situation, which is a classic example of the medical/custody conflict: An inmate injures his arm in some way. A nurse at the jail sees the inmate, orders that he be taken to a local hospital for additional treatment, and directs that his arm be kept elevated during transport. The transportation lieutenant notes that institution policy requires all inmates being moved outside the facility be shackled. Following this policy to the letter, the lieutenant orders the inmate shackled, overruling the nurse's order to keep the inmate's arm elevated. If the arm injury is worsened as a result of not being elevated during the move, the inmate would have an excellent claim for deliberate indifference to his serious medical needs, The claim would name the lieutenant and might also name the facility head or even the county for being responsible for the policy the lieutenant followed.

Serious Medical Need. Unfortunately, court decisions do not provide a "bright line" between serious and non-serious medical needs. Determining whether a need is "serious" may involve consideration of various factors. Will a delay in treatment result in further significant injury or the 'wanton and unnecessary infliction of pain?" Is the injury one which "a reasonable doctor or patient would find important and worthy of comment or treatment?" Does the condition significantly affect the person's daily activities? Is there "chronic and substantial pain." ***McGuckin v. Smith, 974*** F.2d 1050, 1060 (9th Cir., 1992)?

While there are many examples of medical needs that are not serious and, therefore, a jail has no obligation to treat, many other conditions fall into a gray area where is it very difficult to decide with assurance that a particular need is not serious. An arbitrary policy stating certain medical conditions will be treated and others will not can be problematic. While attempts to draw lines between what will and will not be treated are legitimate, such lines should be drawn with care and should be flexible.

. *Medical Issues of the Late 1990s*

Perhaps the simplest way to predict what the main legal issues in correctional medicine will be in the next decade is to ask what the main medical problems will be, If an operational problem exists, it is safe to assume it may wind up in court. The following are some likely candidates for lawsuits.

Medical Co-Pay Plans. More and more jails have begun charging inmates a small fee ($5 - $10) for using the medical system. There is usually no charge for medical visits scheduled by the medical staff only for visits initiated by the inmate. There also may be a small charge for drugs. The goal of such co-pay plans is not to recoup the cost of providing medical service, but rather to discourage inmates from overusing medical services. Early, anecdotal reports from jails with such programs indicate they do result in a significant reduction of usage and hence, a reduction in cost.

A co-pay plan that is flexible and contains broad exceptions (e.g., no charges for emergency services, routine health assessments, follow-up treatments, etc.) was approved - indeed praised - by a ***court in Johnson v. Department of Public safety and Correctional Services,*** 885 F.Supp. 817 (ID. Md., 1995).

Co-pay plans must assure the inmate retains access to the system on demand, with payment concerns addressed independently from access issues. A "no-pay, no-care" policy would present major liability concerns. Furthermore, the inmate should have notice of the co-pay plan and some opportunity to challenge fees imposed. The normal inmate grievance system probably would suffice for this purpose. There is some question whether state law or local ordinances must specifically authorize charging for services.

Adequacy of Systems. As long as crowding remains the dominant problem in jails, suits over the adequacy of medical service delivery systems will continue. Increases in medical staff that match increases in the inmate population may reduce liability exposure. Unfortunately, such staffing increases often do not occur. Even when they do, population increases may outstrip the physical plant's capacity to meet the increased medical needs - there simply are not enough examination rooms, infirmary beds, etc.

Increases in population also increase the likelihood of individual claims as more inmates drop through the ever-widening cracks created by too many inmates and not enough money, staff, and resources. In addition to systems claims driven by overcrowding, systems claims will be brought on behalf of inmates with chronic medical and/or mental health problems.

Mental Health Care. Mental health needs of inmates are subject to the same "deliberate indifference to serious medical needs" test as are physical medical problems. The number of mentally ill inmates in jails continues to climb, increasing the demand on treatment resources.

Many jail administrators complain of the difficulty in obtaining mental health treatment for an inmate from the traditional mental health system. The mentally ill inmate can be a danger to him/herself, to staff, and to others, and in danger from others. Consistent with both the safety and treatment needs of this group, separate housing must often be provided. The result is the creation of small mental hospitals within the jail. This presents a physical plant issue for the jail as well as challenging staffing issues relating to both treatment and custody staff.

Mentally ill inmates, like other inmates, have the right to refuse treatment, but the jail has the power to override an inmate's refusal of care and involuntarily medicate the inmate. However, due process concerns must be addressed to assure that there is proper cause for involuntarily medicating the inmate and that proper procedures are followed in making the decision to medicate, ***Washington*** v. ***Harper,*** 110 S.Ct. 1028 (1990). Pretrial detainees also can be involuntarily medicated, although this decision may be complicated because of pending trials, ***Riggins v. Nevada,*** 112 S.Ct. 1810 (1992).

In general, to involuntarily medicate an inmate, the inmate must have a serious mental illness, must be a danger to self or others, and the treatment must be in the inmate's best medical interest.

AIDS. While there are many possible legal issues that can arise around AIDS, and while commentators expected a substantial amount of litigation and court concern over AIDS issues in correctional facilities, courts seem generally willing to leave choices on AIDS issues to correctional administrators.

Thus, courts neither require nor prevent segregation of inmates who are HIV positive, even though segregating HIV positive inmates has the effect of identifying them as such. Tokar ***v. Armontrout,*** 97 F.3d 1078 (8th Cir., 1996). ***Harris*** v. ***Thigpen,*** 941 F.2d 1495 (11th Cir. 199 1). Similarly, courts have neither prevented nor required mandatory testing of inmates, ***Harris, Doe v. Wigginton,*** 21 F.3d 733 (6th Cir., 1994) (inmate not meeting agency's criteria for testing had no right to be tested) ***Dunn v. White, 880*** F.2d 1188 (10th Cir., 1989).

Other courts looking at issues around disclosure have said that at least there is no clearly established constitutional right which prohibits disclosure of information regarding HIV status. ***Tokar, Anderson*** v. ***Romero,*** 72F.3d 518 (7th Cir., 1995). Where disclosure of HIV status has been upheld, it typically is recognized as coming as a result of the exercise of some legitimate concern of the institution, such as segregation. State statutes may also address HIV disclosure and confidentiality issues. Agencies still need carefully drawn policies on disclosure and should generally treat HIV status, as any other medical condition, as generally confidential.

Exclusion of HIV positive inmates from participating in programs may raise legal concerns under the Americans With Disabilities Act, ***Harris, Gates v. Rowland, 39*** F.3d 1439 (9th Cir., 1994). Although the ADA does not specifically recognize security concerns as a justification for discriminating against someone who is HIV positive, the Ninth Circuit in the ***Gates*** case said that security concerns could justify discrimination. In ***Gates,*** the court upheld a prison rule prohibiting HIV positive inmates from working in food services.

As a serious medical need, inmates with AIDS are entitled to medical treatment, although courts have yet to explore how such treatment is required. ***Hawley*** v. ***Evans,*** 716 F.Supp. 601 (N.D.Ga.,1989).

While AIDS litigation may not have developed to the expect anticipated when AIDS first began to emerge as a serious problem for correctional agencies, it continues to raise issues of potential legal concern under both the federal Constitution and under state law. Carefully drawn and enforced policies remain very important in this area.

Tuberculosis. While TB does not present the life-threatening risk or the hysteria of HIV infection, the lifestyle of many people who end up in jail puts them at high risk of contracting TB. The resurgent threat of TB raises a major public health concern for all who live or work in a jail. With those public health threats comes the potential for litigation. What precautions must a jail take to detect TB and prevent its spread to avoid being deliberately indifferent to what is clearly a serious medical need?

Because TB is spread through the air, agencies need to be concerned about protecting staff as well as inmates. In this regard, state or federal laws relating to workplace safety must be considered.

The Aging Inmate Population. Due to a variety of factors, there is and will continue to be an increasing number of elderly inmates. Many other inmates are physically far older than their chronological age due to drug use, lack of health care, personal lifestyle, etc. While issues related to elderly inmates are generally more prevalent in prisons than in jails, they do appear at the jail level.

Treating the chronic needs of this population will put increasing demands on jail medical resources. Like AIDS inmates, providing medical care for elderly inmates will raise the question of "how much ***must*** we do for this population, when society may do less for them when they leave the jail?"

Abortion and Other Women's Issues. A court of appeals held in late 1987 that a New Jersey jail's policy of allowing female inmates to obtain elective abortions only pursuant to court order was unconstitutional. Moreover, the county had the affirmative duty to provide abortion services to all inmates requesting such services. The court did not require the county to assume the full cost of inmate abortions, but seemed to be saying that if the county could not find anyone else to pay for the abortion, the county would ***have*** to pay for it. ***Monmouth County Correctional Institution Inmates v. Lunzaro,*** 834 F.2d 326 (3rd Cir., 1987).

The court reasoned that the county's obligations arose from two sources. First was the Eighth Amendment duty to provide care for serious medical needs (elective abortions were seen as such and the county's policy of not assisting inmates in obtaining abortions was seen as deliberate indifference). Secondly, the county policy impermissibly interfered with the female inmate's fundamental constitutional right to obtain an abortion, guaranteed by previous Supreme Court decisions.

Aside from the abortion issue, increasing numbers of women entering jail bring a variety of unique medical problems, not the least of which relate to pregnancy.

Disabled Inmates. As noted earlier, the Americans with Disabilities Act probably protects inmates. Even if it does not, the Eighth Amendment certainly does and courts have found violations of the Eighth Amendment arising from treatment given to disabled inmates.

In one case, a paraplegic inmate confined in a wheelchair was forced to live for nearly eight months in conditions that made virtually no accommodations for the handicap. The court's

opinion described many problems the inmate encountered in using the toilet in his cell and in getting to a toilet from where he was assigned to work in the institution. ***LaFaut v. Smith, 834*** F.2d 389 (4th Cir., 1987). ***See also Bonner v. Arizona Department of Corrections,*** 714 F.Supp. 420 (D. Ariz., 1989), holding that the provisions of Sec. 504 of the Rehabilitation Act of 1973 (prohibiting discrimination against the handicapped) protected a prison inmate.

The lower court had also found the situation, which involved a federal institution, violated the Rehabilitation Act. This result was reversed as moot by the appellate court because the inmate had been transferred to another prison and later released altogether during the litigation.

Retrofitting an entire institution to accommodate the disabled could be tremendously expensive, but the ***LaFaut*** case shows that ignoring the needs of a paraplegic inmate can result in liability. Until prisons and jails are fully equipped for the disabled, extraordinary attention needs to be paid to the occasional handicapped inmate entering the institution.

The Eighth Amendment offers some protections for persons suffering from serious disabilities, and the Americans with Disabilities Act offers far more. The ultimate impact of the ADA on correctional operation is yet to be determined. At least one court has questioned the extent to which ADA applies to inmates. ***Bryant v. Madigan, 84*** F.3d 246 (7th Cir., 1996).

The adequacy of inmate medical care will remain a concern of the courts because inmates depend on their custodians as the soles source of medical assistance. Liability in this potentially volatile area is less likely to result from professional medical staff failing to properly perform than from the lack of adequate professional staff or other basic resources and/or from custody staff somehow preventing inmates from receiving appropriate care. Delaying necessary care for budgetary reasons, while tempting to the financially strapped county jail, can easily become the catalyst for difficult and embarrassing litigation. Medical co-pay plans, if carefully developed and implemented, may help reduce the demand for medical services without creating liability exposure.

Chapter X. Conditions Of Confinement

A conditions of confinement lawsuit, which claims that some or all of the living conditions in the jail are so bad that they violate the minimal requirements of the Constitution' may be one of the biggest lawsuits a local jurisdiction can face.

The lawsuit, from the service of the complaint through pretrial discovery, trial, and formal appeal, can demand large amounts of time and money. Literally thousands of hours of lawyer's time may be needed' as well as large amounts of time of those who run the jail. Experts will have to be hired to review conditions in the jail and testify at trial.

A county attorney's office may not have the time or legal expertise to adequately defend a major conditions case. If the case is lost, the county will be required to pay the plaintiffs' attorneys' fees, which can reach well into six figures even with the limitations imposed by the Prison Litigation Reform Act. Various factors, not the least of which is the potential cost of litigating a major conditions case, may create major pressures to settle the case. Many jurisdictions have learned the hard way however, that a hastily drawn settlement agreement (a "consent decree," see Ch. XII) can create almost never-ending problems. In some ways it becomes a greater burden on the county than if the case had been fought through trial and lost.

As significant as the time and financial consequences of the conditions lawsuit can be, they pale in comparison to the suit's potential operational consequences for the jail and the county's entire criminal justice system. Prior to passage of the Prison Litigation Reform Act in 1996, the relief phase of a conditions case could last for years. It could involve more court hearings' more attorney fees, a court-appointed Special Master, paid by the county, to oversee implementation of the decree, and more extraordinary demands on county staff's time. Continuing controversy could revolve around issues of compliance with the court order or consent decree, which' if seen in isolation, did not rise to the level of constitutional importance,

The Prison Litigation Reform Act is intended to reduce the scope of the court's power in the reliefphase of a major case. The PLRA does not attempt to change any of the substantive rights inmates have, but only the way a court may address violations of those rights. For instance, defendants may return to court every two years to ask that a decree be terminated. Unless it can be shown that constitutional violations continue, the court must terminate the decree. Population caps can be ordered only by a three-judge court after less intrusive forms of relief have been tried and failed. The powers of Special Masters are sharply limited and the fees and costs of a Master must be paid by the court, not by the defendants.

There are serious questions about the constitutionality of the PLRA, but, if most of the law withstands constitutional attack, it certainly will change the way courts approach ordering relief in major conditions cases. While the law is intended to curb the powers of the federal court in certain ways, the court still retains the ultimate power to require defendants to bring conditions in jails up to constitutional levels. How this will be done in light of PLRA remains to be seen.

The public may not be interested in what goes on in a jail and will give few accolades to government officials for running a good jail. But a poorly run jail, which ignores legal restrictions on how a jail must function, creates potentially huge monetary, legal, and operational consequences for the county.

What Are The Issues?

The issues in conditions cases have changed over the years. Conditions cases are sometimes referred to as overcrowding cases, although, technically, levels of crowding are no longer a direct measure of whether a jail meets constitutional requirements.

The ultimate question is whether the conditions in the jail amount to "cruel and unusual punishment." For pretrial detainees, who have not yet been convicted of a crime, the basic legal question is whether conditions amount to "punishment " in violation of the Due Process Clause of the Fourteenth Amendment. The distinction between the requirements of the Eighth and Fourteenth Amendments probably exists more in the minds of legal theoreticians and scholars than anywhere else. As a practical matter, there is no significant difference in conditions cases.

Since 199 1, cruel and unusual punishment occurs when conditions are so bad as to amount to the "wanton and unnecessary infliction of pain" and evidence shows the responsible officials (which typically include the county commissioners) are "deliberately indifferent" to those bad conditions, ***Wilson*** v. ***Seiter,*** 111 S.Ct. 2321 (1991). The requirement that officials be deliberately indifferent to poor conditions was not previously part of the legal equation used to evaluate jail conditions. Prior to ***the Wilson*** decision, the focus was exclusively on the objective question of "how bad were the conditions," not on a subjective inquiry into the state-of-mind of the defendant officials. It is too early to tell what the addition of a state of mind requirement means in conditions litigation. Particularly at the local government level (where the county itself can be sued), many experts doubt that adding the deliberate indifference requirement will have much effect, if any, on whether a court finds a particular facility unconstitutional.

Wilson also made another change from earlier caselaw. Most earlier decisions evaluated the quality of a jail under a "totality of conditions" approach, in which all poor conditions (or at least certain categories of conditions) would be considered together as a totality. ***In Wilson,*** the Supreme Court said this was improper: ***"Some*** conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets . . . Nothing so amorphous as overall conditions can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists," 115 L.Ed.2d 271,283 (emphasis in original).

So ***Wilson*** tossed the phrase "totality of conditions," so common to those working with conditions cases, on the legal trash heap. What then are the particular conditions a court will focus on? As ***Wilson*** indicates, the fundamental question in a conditions case is what the ***effects*** are on inmates from deficiencies in the jail's provision of basic human needs. Is the jail adequately providing for these needs, identified ***in Wilson*** and other cases as including:

- **Personal Safety** What are the levels of violence in the institution? This is one of the most common issues, especially in jails plagued with serious overcrowding, since maintaining adequate safety becomes increasingly difficult as the inmate population rises, the classification system breaks down tempers get shorter because of the lack of privacy, etc. While a jail can be double-bunked without becoming unconstitutional per se, double-bunking dramatically increases the potential for violence, especially when staffing levels are not increased along with the population.
- **Medical Care** Medical care is often the subject of a separate lawsuit, which attacks the health care delivery system alone. Medical suits are described in greater detail in Chapter X. As with personal safety, medical care can be compromised to a constitutionally significant extent when the population is allowed to increase without some corresponding increase in medical staff and resources.
- **Food** Do inmates receive a nutritionally adequate diet, prepared and served in a sanitary way? Some dietary issues are linked to medical services. Other dietary issues may raise First Amendment questions about religion (e.g., pork-free diets required by various religions), although these would not normally be part of a conditions case.
- **Shelter** This is a broad category, relating to the overall physical environment in the institution. Fire safety is an important issue here, given the tremendous threat to life that can be created when fire protections are inadequate. Other shelter issues can include such diverse areas as heating, cooling, ventilation, lighting, and noise levels.
- **Exercise** Identified specifically in ***Wilson,*** the effects of the lack of exercise vary directly with how long the inmate must live without it.
- **Sanitation** Do the sanitary conditions in the jail threaten the health of the inmates? Does the plumbing work adequately'? How clean is the facility, especially showers and bathrooms?
- Clothing Is the clothing adequate for the temperatures in which the inmates will be living, and does it provide adequate privacy? This is seldom an issue anymore.

While it is relatively easy to identify the areas of theoretical concern, it becomes very difficult to decide how bad problems must be in a given area before a court will intervene. That a condition does not comply with a given professional standard does not make it unconstitutional. However, the more a particular condition falls short of a professional standard (such as the fire code or recognized public health standards for sanitation), the more likely a court will find a constitutional violation.

The plaintiffs will attempt to show that (1) a bad condition exists, (2) inmates have actually suffered from the condition, and/or (3) harm to inmates is inevitable unless the condition is remedied. Defendants will, of course, try to contest all of these factors.

What About Crowding? Note that none of the factors relating to basic human needs speaks directly to crowding. In two cases, decided in 1979 and 198 1, the Supreme Court made it clear that there is no "one man - one cell principle lurking" in the Constitution. Bell v. ***Wolfish,*** 4412 U.S. 520 (1079), Rhodes v. ***C-man,*** 101 S.Ct. 2392 (1981). Instead of counting beds and bodies, a court must evaluate the ***effects of poor conditions*** on the inmates, said the Court in each of these cases.

Obviously, crowding can be the major factor behind unconstitutional conditions, such as excessively high levels of violence in a jail or a poor medical system. As more inmates are packed into a jail, adequately providing for their basic human needs becomes more difficult, especially if staffing levels are not increased along with the inmate population. For instance, the staff and physical plant of a medical service delivery system designed to treat 500 inmates may be incapable of treating 750 - there just is not enough time and space. A classification system, intended in part to assure inmate safety, may break down when crowding makes it impossible to relocate inmates in a jail. As crowding increases, tensions go up, leading to increased violence. One custody officer may be overwhelmed when expected to monitor twice the intended number of inmates jammed into a housing unit.

One can easily imagine how other key service delivery systems in a seriously overcrowded jail can break down when expected to serve populations perhaps twice as large as they were designed to serve. So, while crowding per se may not make a jail unconstitutional, it is often the reason a jail is found unconstitutional. Prior to passage of the Prison Litigation Reform Act, when a court decided that (a) conditions in a facility violate the Constitution and (b) crowding is the primary cause of the conditions, the court was free to address crowding issues in its relief order. PLRA demands that other forms of relief, presumably less dramatic and controversial, be attempted before a court may directly address crowding through such mechanisms as inmate release orders or population caps. However, while PLRA postpones the court's ability to address crowding directly, it does not remove the ability altogether. Facilities with major constitutional violations that are the product of overcrowding still will have to face the reality that the solution to the constitutional problems lies in reducing the number of inmates in the jail.

Other Factors of Concern. Various other factors, while not of direct constitutional importance, can work for or against a jail. An overcrowded jail is not necessarily unconstitutional, and factors such as the ones below can easily make the difference between a crowded jail that will withstand constitutional attack and one that will not.

- Quality **of Management.** Enlightened, innovative, creative, responsive jail management is very important. Not only can good managers often find solutions to problems, they can set a tone in the jail that can positively affect relations between staff and inmates. While a court rarely criticizes jail management directly, it is obvious that the quality of management is a major contributor to a good (or bad) jail.
- **Management philosophy. A** management philosophy that encourages rigid staff-inmate relations with limited direct interaction between staff and inmates can make dealing with other problems more difficult. Facility design can affect staff-inmate relations.
- **Activities and Out-of-Cell Time.** Even when a jail is very crowded, meaningful activities that occupy the inmates' time can mitigate the negative effects of crowding and idleness. The old adage that "idle hands are the devil's plaything" is true in a jail, and it is important that the jail keep inmates busy. Activities include exercise, classes, programs, library, etc.
- **Numbers of** Staff. Although the Supreme Court said that double celling in an institution is not necessarily unconstitutional, one should not read too much into that statement. Allowing a jail's population to increase far beyond its design capacity without increasing the custody

and other support staff-inmates problems that could be avoided or at least reduced if more staff is present.

- **Classification System. The** classification system must be able to separate predatory inmates from potential victims. This may be impossible in a very crowded jail.
- **Training and Supervision of Staff.** Crowding only increases the stresses on both inmates and staff A well trained and well supervised staff should be better able to handle this stress and help defuse its potentially negative effects.

Is Television a Constitutional Requirement? The trend that began in the mid-1990s to remove some of the amenities from jails, such as weights and other exercise equipment, TVs, and other recreational "perks," is not inherently unconstitutional -- there is no constitutional right to lift weights or to watch television. However, a policy of getting tougher on inmates may worsen operational problems if it leaves a crowded jail full of inmates with nothing to do. County policymakers who view stripping the jail of activities as getting tough on criminals and deterring crime by making jail as unattractive as possible may in turn make it more difficult for jail administrators and staff to control inmates and operate the jail at a constitutional level. An unintended consequence of running a "stripped-down" jail may be litigation and an increased likelihood of court intervention.

Relief - Where The Going Gets Tough

To understand the potential impact of a conditions case, recall the discussion in Chapter VI regarding the power of the federal court to order relief in a civil rights case once it finds a violation of the Constitution.

Public officials often decry what they believe is the improper and excessive intrusion of the federal court into matters that are "not the court's business". While there are examples of appellate courts reversing lower court relief orders for being too excessive, one must recognize and yield to the reality that the federal court has tremendous power to enter and enforce orders necessary to remedy constitutional violations, even in light of the Prison Litigation Reform Act.

As perhaps the ultimate example of this power, the Supreme Court has said that as a last resort a district court has the power to order local officials to raise taxes in order to comply with a court order, even though state law may prohibit such action, ***Missouri v. Jenkins,*** 110 S.Ct. 1651(1990). ***Jenkins*** was a school desegregation case and at issue was a consent decree local officials had voluntarily entered into. However, its rationale could be applied in a corrections case. For instance, at least one federal court endorsed the notion that a federal court could order local officials to violate state law, if necessary, to correct constitutional problems. In ***Stone v. City and County of San Francisco,*** 968 F.2d 865 (9th Cir., 1992), the district court ordered the sheriff to release inmates who had served half of their sentence in order to comply with population caps even though applicable state laws did not permit such releases. Although the court of appeals reversed this order under the circumstances of the case, it did 'not rule out the possibility that such action may be necessary in the future," 968 F.2d at 864. The court said that before an override order could be imposed in the case, the lower court should see if the threat of sanctions (i.e., fines for contempt of court) would result in compliance with the order.

Where a court finds cruel and unusual conditions in a jail, the court is empowered to issue an injunction that will require the offending conditions to be corrected by addressing their causes. Typically, a court finding a constitutional violation will order the defendants to develop and present a plan for its cure, leaving as much continuing power and control in the defendants' hands as is reasonably possible. As noted earlier, the Prison Litigation Reform Act delays the court's power to impose population controls and tries to assure that a relief order is the least intrusive remedy. Until PLRA has been applied by a number of courts and interpreted by courts of appeal, it is impossible to say what effect it will have on local jurisdictions trying to correct constitutional deficiencies in a jail.

An all-too-common problem in conditions cases is that defendants fail to comply with the court's initial order, which often simply incorporate the defendants' own plans for correcting problems. When this occurs, the court will begin to flex its relief powers. The court enters a more demanding order. The sequence of non-compliance followed by more intrusive, demanding orders can continue until the court is satisfied that defendants are complying with the mandates it issued. This sequence of events remains possible under PLEA.

A court generally will not accept lack of funds as an excuse for not complying with previously entered orders.

Whatever the effects of *Wilson V. Seiter* and the PLRA may be, conditions cases will continue to have a potentially tremendous impact on county jails and, indeed, entire county criminal justice systems. Jail administrators, other criminal justice officials, and county commissioners must not underestimate what is at risk when a conditions case is filed.

Conditions Litigation and the Jail: A Case Study

An example of a conditions case in which crowding was a major factor and the tests required by the Supreme Court in its *Wilson* decision were applied is ***Harris v. Angelina County,*** *3 1* F.3d 33 1 (Fifth Cir., 1994). While the stereotypical crowding/conditions comes from a prison or a very large jail, the Angelina County Jail was designed to hold 111 inmates, it housed between 13 5 and 159 inmate during the lawsuit.

Bad Conditions. In finding the conditions in the jail were bad enough to violate the objective component of ***Wilson,*** the court noted several things. The court looked at the physical configuration of the jail. The crowding adversely affected staffing, supervision, management, and classification. Inmates often had to sleep on the floor. Numerous problems were caused by or exacerbated by crowding, including abuse and intimidation of some inmates by others, inadequate care for inmates with special needs, improper sexual relations between inmates and even between inmates and staff, a homemade still, and fighting. Evidence suggested the reported instances of such problems reflected only the tip of the iceberg.

Officials' State of Mind. Turning to the subjective half of the ***Wilson*** test - whether officials were deliberately indifferent tot the problems - the evidence was clear that officials knew of the crowding and related problems. Officials argued they had done all they could to remedy problems, but the court felt the evidence showed there were other things officials could have done, including expanding the use of such alternatives to incarceration as increased probation, electronic monitoring, etc. Failure to take advantage of these other alternatives led the court to conclude that officials were deliberately indifferent.

Relief Addresses Crowding as the Cause of Problems. The district court found that crowding was the root cause of the constitutionally significant problems and therefore that controlling the population was an appropriate remedy. Accordingly, the court set a population cap on the facility of 111 inmates (the design capacity). The court left open the possibility of raising the cap if circumstances in the jail changes. The court of appeals felt this was a reasonable approach.

And After PLRA? ***Angelina*** was decided before passage of the PLRA. What if the case were decided today? PLRA would prevent the court from imposing the population cap, at least in its first remedial order. But what other relief short of a populations cap might the court order to address the problems? The court would try to address the causes of the problems, but would be hampered, since the most obvious cause, crowding, cannot be addressed until other forms of relief fail. Might the court order implementation of alternatives to incarceration? Additional staffing? Such other forms of relief might be even more intrusive than the population cap.

Chapter XI. The Fourteenth Amendment

> "... ***nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,*** " U.S. Constitution, Amendment XIV.

Due Process

The Fourteenth Amendment is the basis of several, quite different, obligations for jail administrators.

Substantive Due Process: Conditions of Confinement, Use of Force, and Pretrial Detainees. As discussed previously, the adequacy of conditions of confinement of pretrial detainees is judged through the Due Process Clause of the Fourteenth Amendment. Technically, the Eighth Amendment (cruel and unusual punishment) protects only sentenced offenders, so a court may not judge conditions for pretrial detainees under the Eighth Amendment. Instead, the Fourteenth Amendment is used, under the theory that the concept of Due Process prohibits the "punishment" of inmates and that in some circumstances bad conditions can amount to punishment. Fourteenth Amendment ***substantive*** due process (as the concept is called in this context) and Eighth Amendment cruel and unusual punishment are two legal routes to virtually the same destination.

Prior to ***Bell v. Wolfish*** some courts said the "presumption of innocence" required more for detainees than the Eighth Amendment demanded for convicted persons. But this distinction was laid to rest in ***Bell.***

Due process then may be used to evaluate major conditions cases, but due process also plays a very important role in the day-today operation of a jail. Excess force claims brought by pretrial detainees are also evaluated under the Fourteenth Amendment. Again, the difference between review of excess force under the Fourteenth Amendment and the Eighth Amendment is not significant.

Procedural Due Process: Inmate Discipline. Most due process claims are concerned with the process used in making certain decisions. Inmate discipline is the most obvious area affected by procedural due process. Since the Supreme Court's 1974 decision in ***Wolff v. McDonnell,*** 418 U.S. 539 (1974), inmates facing major disciplinary charges are entitled to a hearing with certain other minimal procedural protections as part of the disciplinary process. In a 1995 decision, the Court indicated that the procedural protections required by ***Wolff*** may apply only if the disciplinary hearing puts the inmate's release date at risk, but do not apply if the maximum sanction the inmate can receive is a term in segregation, ***Sandin v. Conner,*** 115 SCt. 2293 (1995).

Included in the rights that ***Wolff*** requires are a hearing, a limited right to call witnesses, assistance in certain situations (but no right to legal counsel), an impartial hearing officer or committee, and a written decision that indicates the evidence relied on and the reason for the sanction chosen. The Supreme Court said inmates have no right to comfort or cross-examine witnesses against them in disciplinary hearings. This allows for hearing decisions based on information from informants whose identity (and sometimes whose testimony) is not given to the

charged inmate. Courts have imposed various procedural protections around the use of informant information, intended to assure that the information is reliable.

Staff conducting the hearings must understand what the procedural rules are and how to apply them in a hearing. For instance, what circumstances justify denying an inmate's request that a certain witness be called to testify at a hearing and what sort of a record must be made of that and other decisions in the disciplinary hearing process that are of constitutional dimension.

Prior to ***Sandin,*** the assumption was that if a disciplinary infraction carried the possible sanction of either loss of good time or time in segregation, the full ***Wolff*** procedures were required. ***Sandin*** held that the ***Wolff*** procedures were not required when the maximum penalty the inmate could receive was only 30 days in segregation. Since ***Sandin,*** most courts have said that segregation sanctions considerably longer than 30 days are not governed by ***Wolff*** either, although some courts have said that if the disciplinary segregation lasts long enough, (perhaps more than a year), it is so serious that ***Wolff*** procedures still apply.

Sandin then does not impose any new requirements on jails, but gives jails the opportunity to limit their exposure to lawsuits and liability from civil rights suits dealing with inmate disciplinary hearings, although some restructuring of inmate disciplinary rules may be necessary to take advantage of this opportunity. As long as an infraction carries with it the possible loss of good time, ***Wolff*** will continue to apply.

While ***Sandin*** may offer jails an opportunity to reduce their liability exposure regarding inmate discipline and to revise their disciplinary rules, there is a yet undecided question as to whether the ***Sandin*** decision applies to pretrial detainees. One federal appeals court has held specifically that it does not, but that ***Wolff*** still governs disciplinary proceedings for this group of ***inmates, Mitchell v. Dupnik, 75*** F.3d 5 17 (9th Cir., 1996). Another suggested in dicta that ***San&n*** did not apply to pretrial detainees, ***Whitford v. Boglino,*** 63 F.3d 527 (7th Cir., 1995).

State-Created Liberty Interests. In some situations, an agency can create "liberty interests" protected by due process. Prior to the ***Sandin*** decision, the test for deciding if a liberty interest had been created focused on the language of the agency's rules. The more the rules imposed mandatory limits on the discretion of officials in making a particular type of decision, the more likely a court would find the rules created a liberty interest and that the inmate had some limited due process rights in regard to the decision. For example, rules that said an inmate would only be put in administrative segregation under certain specified circumstances were held to trigger limited due process protections, ***Hewitt v. Helms, 459*** U.S. 460 (1983).

In its Sandin decision in mid-1995, the Supreme Court abandoned its language-oriented "state-created liberty interest" test and replaced it with a test that focuses on the nature of the deprivation. Under the revised state-created liberty interest test, if an institutional decision imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," a liberty interest and limited due process protections are created. As this is written (nearly a year after the ***Sandin*** decision), it is still too early to tell what sorts of deprivations will meet this test.

The new test is welcome in one respect as it will end the federal courts scrutinizing the "shalls," 'Imusts," and "mays" of institution rules to determine if liberty interests had been created. However, the new rule will result in a period of uncertainty because the Supreme Court gave little guidance as to what an "atypical and significant hardship" might be.

Involuntary Medication. More and more mentally ill persons are entering America's jails. These increasing numbers present various management and legal problems for jail administrators. Deliberate indifference to serious mental health needs violates the Eighth Amendment, so the jail has constitutionally mandated treatment obligations. Many mentally ill individuals are reluctant to accept treatment, so the jail may face a dilemma. Treatment may be necessary and appropriate both in the inmate's interest and in the interest of operating the jail in a safe and humane way. However, it is the inmate's constitutional right to refuse treatment.

Compounding the treatment/refusal dilemma is a problem faced by many jails in accessing the traditional mental health treatment system. Many traditional sources of mental health treatment (including involuntary civil commitment) refuse, or are very reluctant, to accept referrals from the jail. This lack of coordination between the criminal justice and mental health systems puts pressure on jails to create their own internal mental health treatment system.

A key to such a system may be the ability to override an inmate's refusal to accept treatment. In 1990, the Supreme Court held that the Constitution permits a correctional institution to make a decision to treat an inmate without a court order. The Court indicated that due process requires an internal administrative hearing process to assure that proper grounds for involuntarily medicating ***an*** inmate ***exist, Washington v. Harper,*** 110 S.Ct. 1028 (1990). A 1992 Supreme Court decision indicates that the ***Harper*** case probably extends to and includes pretrial detainees, ***Riggans v. Nevada,*** 112 S.Ct. 1810 (1992). State law, however, may preclude the jail from implementing an involuntary medication program.

Access to the Courts. **In** a society and government such as ours, which recognizes various individual rights, the individual must have access to the agency or arm of government charged with enforcing those rights. It is one thing to say someone has the right to free speech or to practice a religion' but if the government can prevent someone from exercising those rights and the individual cannot obtain redress for that violation' then the right becomes an illusion. The body in our society charged with enforcing rights is the courts.

The Supreme Court over the years has recognized that while the Constitution does not speak specifically of a "right of access to the courts," that right must be an inherent part of the Constitution if that document is to guarantee any rights at all. For most persons, exercising the right of access to the courts is not difficult and the government does not impose insurmountable barriers between the individual and the court system. But when the person is in prison or jail, there is literally a physical barrier between the inmate and the courts.'

Over the years the Supreme Court decided several access to the courts cases involving inmates. The most important came in 1977, when the Court said that prison administrators have the affirmative duty to provide inmates with assistance or resources to allow them to meaningfully ***exercise their*** right of access to the ***courts, Bounds v. Smith, 430*** U.S. 8 17 (1977). Assistance could take the form of persons trained in the law (such as lawyers, paralegals, or law students), adequate law libraries' or some combination of these. A 1996 Supreme Court decision

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. While appointed **counsel provides a defendant access to the courts in a criminal case, lawyers are seldom** appointed to represent inmates in civil cases, since courts **do not have money to pay them. Once the criminal** case is over, the appointed counsel disappears and is never a potential resource for the sentenced offender. So the inmate **who wishes to bring a civil claim, such as asserting that he has been beaten or is not receiving proper medical care, is usually left to his own devices.**

dealing with access to the courts reaffirmed the core principle in ***Bounds,*** i.e., that the institution has an affirmative duty to provide some form of assistance (libraries or persons trained in the law) sufficient to give inmates the capability of filing nonfrivolous lawsuits challenging their sentence or the conditions of their confinement, ***Lewis*** v. Casey, 64 USLW 4587 (June 24, 1996).

The principle from ***Bounds*** (and now ***Lewis)*** has been extended to jails, although application of the principle may be slightly different in the jail context depending in part on how long inmates remain in the jail. The longer an inmate remains in a jail, the more the right of "access to the courts" places the same demands on the jail as it does on the prison.

Most jails have opted to provide some form of a law library rather than assistance from persons trained in the law. However, an "adequate" law library is quite extensive, expensive, and expansive. One or two shelves of state laws, court rules, and a few-out-of date legal texts donated by local attorneys is woefully insufficient, yet this describes the law library in many jails.

Many jails try to follow some sort of book paging/delivery system, relying on the county law library. In these systems, the inmate must request, or page, a particular item from the law library. If the item is available, it, or a copy, is delivered to the inmate. These book paging and delivery systems have almost always been found to be unconstitutional, ***(see Abdul-Akbar v. Watson,*** 775 F. Supp. 735 D-Del., 1991] and cases cited therein). The Supreme Court in the ***Lewis*** case said that an inmate complaining about inadequate access to the courts must show he/she has in fact been harmed in some way because of the lack of resources in an institution. This requirement may make it more difficult for inmates to successfully complain about paging and delivery systems.

Finding space for a complete law library in an existing jail can be difficult, given the amount of shelf space required for the hundreds, if not thousands, of books required. By the mid-199Os, many of the largest sets of law library materials were available on CD-ROM. In this form' the materials are somewhat less expensive to buy and collapse an entire wall of books into less than two feet of shelf space. Design of a new jail should address the access to the courts and law library issue.

Beyond the problems of providing an adequate law library, the Supreme Court's opinion in the ***Lewis*** case recognized that a law library alone would not necessarily be adequate for inmates incapable of using it. Prior to ***Lewis,*** at least one court said that a prison system must at a minimum provide inmates trained in the use of legal materials to assist other inmates, ***Knop v. Johnson,*** 977 F.2d 996 (6th Cir., 1992). Whether this is required after ***Lewis*** is uncertain. However, ***Lewis makes*** it clear that' in at least some circumstances, something more than a library will be necessary to assist inmates unable to use the library.

Inmates have not been shy about filing lawsuits since the courts abandoned the hands-off doctrine. Inmates in state and local correctional facilities filed nearly 38,000 civil rights cases in 1994, almost 14,000 more than they filed in 1990 and a nearly five-fold increase from 1977.' Well over 90% of these cases resulted in a judgment for the defendants without even a trial.'

. - *Sourcebook of Criminal Justice Statistics,* p. **499, Bureau of Justice Statistics, 1994.**

l - Hanson, Roger A. and Henry WK. Daley, ***Challenging the Conditions of Prisons and Jails, A Report on section 1983 Litigation,*** p. **19, Bureau of Justice Statistics, 1995.**

The Prison Litigation Reform Act contains provisions that may stem the rising tide of inmate lawsuits. Traditionally, courts have waived filing fees for indigent prisoners. PLEA allows courts to defer payment of these fees ($120), but sets a requirement that the fees be paid over time from moneys the inmate may accumulate while in custody. This cost burden may make some inmates think twice before filing a lawsuit.

If the newly imposed tiling fee requirements deter inmates generally from filing lawsuits, another section of the PLRA attempts to cut off the "frequent tiler," the inmate who continuously files suits. If the inmate has had three previous cases dismissed as frivolous, malicious, or failing to state a claim, the inmate is barred from filing additional suits unless he/she can show imminent danger of serious physical harm. One of the first courts to consider this section of the PLEA found it unconstitutional, ***Lyon v. VandeKrol, 940*** F. Supp. 1433 (S.D. Iowa' 1996).

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment demands that groups or individuals similar to one another be treated equally by the government, unless the government can demonstrate sufficient reason for discriminating against one group over another. Historically, the most common equal protection issue has been racial segregation. While racial segregation remains a concern, it is no longer the major equal protection issue confronting correctional institutions. Instead, the major issue deals with discrimination against female inmates. This discrimination is usually not intentional. It shows itself in the often major differences in the quality and quantity of programs, services, and facilities available to male inmates vs. those available to women. The cases that deal with this area are known as "parity" cases.

Parity. Parity is an issue with major implications for facility design. In general, parity cases have questioned, and often condemned, the differences in the quality and quantity of programs and facilities that commonly exist between men's and women's institutions. The name "parity" comes from the relief sought, which is not that programs or facilities must be identical, but that they be at a level of parity between men and women. Most courts that have addressed the question have agreed that treating men and women differently must be justified as "serving important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," ***McCoy v. Nevada Department*** *of* ***Prisons, 776*** F. Supp. 521 (D. Nev., 1991). The judge in this case noted differences in such areas as educational and vocational programs and in many privileges. For instance, women could not kiss visitors, men could; women could not get candy from visitors, men could; phone access was different; men had better recreation. The court said the defendants had the obligation of justifying those differences.

In the early parity cases' the government typically tailed to justify the differences between men's and women's programming. leading to a finding of an equal protection violation and a long period of ***court oversight, Glover v. Johnson,*** 478 F.Supp. 1075 (E.D.Mich., 1979). More recently, courts have said male and female inmates are not "similarly situated,: e.g., alike, for purposes of comparison under the Equal Protection Clause and even if they are, it is not proper to as exacting a comparison as was typical in the earlier cases such as ***Glover*** and ***McCoy.*** ***Klinger v. Department*** *of* ***Corrections 3*** 1 F.3d ***727*** (8th ***Cir.,*** 1994), ***Women Prisoners*** *of* ***the***

District of Columbia Department of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir., 1996). The result of these recent cases is that a legal theory that had the capacity to be the basis for challenging conditions and facilities provided for female inmates in many jurisdictions may be almost entirely blunted.

Despite the changing trends in caselaw in this area, the goal of equal programming and facilities for male and female inmates should remain a strong concern in facility planning and design as well as in the evaluation of existing jail programming.

While most Fourteenth Amendment questions are primarily operational (such as disciplinary hearings procedures), the issue of equal facilities for women is a major physical plant issue for both new and existing jails.

Chapter XII. Consent Decrees

The phrase "consent decree" has taken on a life greater than its literal meaning. To many trying to live with a consent decree that they (or, more typically, a predecessor) agreed to, it symbolizes all that is wrong with court intervention and corrections. Here again, the Prison Litigation Reform Act dramatically changes the rules of the game.

In simple terms, a consent decree is simply a means for settling a lawsuit short of a trial and the judge's decision on the merits. It reflects the parties' ***voluntary*** agreement as to their future course of conduct regarding issues raised in the lawsuit. In the typical jail consent decree, the defendant(s) agrees to implement various changes and improvements in the operation of the jail in return for the plaintiffs (the inmates) giving up various claims and not proceeding to trial. If the judge approves the proposed decree, he/she enters it as a court order resolving the litigation. At that point, the decree is both a contract between the parties and a court order, as binding as if it had been entered after a contested trial.

Once a consent decree is entered, it, not the Constitution, defines the continuing responsibilities of the defendants. A decree cannot reduce defendants' obligations under the Constitution, but it can impose additional demands. This fact became important in almost all consent decree cases because decrees in major cases typically included many requirements that, taken in isolation, exceeded constitutional minima.

Controversy about consent decrees is common. Causes of controversy vary, but include defendants not fully realizing what they were agreeing to under the decree or not understanding that the decree could impose very rigid, continuing requirements. Sometimes defendants seemed to think that once the decree was signed, the heat was off, leading to a flurry of compliance hearings. Decrees were signed without clear provision for termination, so they seemed to run forever with no means of ending them or changing their requirements. Decrees sometimes included very detailed requirements. Compliance with this minutiae could become a burden to a jail administrator.

PLRA changes this, in a way that may make federal court consent decrees virtually a thing of the past. Consent decrees, like orders entered following a trial, must be narrowly drawn and the least intrusive means of correcting the violation of a federal right. These restrictions probably mean the very comprehensive, detailed decree can no longer be entered, at least until less demanding decrees have been tried and found inadequate to bring about necessary improvement.

In place of the traditional consent decree, PI.RA encourages parties to enter into "private settlement agreements" that can be as detailed as the parties desire, but that cannot be enforced by the federal court, except to reinstate the lawsuit that was purportedly settled by the private agreement. Private settlement agreements can be enforceable under state law, if the parties so agree.

PLRA also permits agencies currently under a consent decree to have the decree terminated unless the plaintiffs can show continuing violations of federal rights.

Consent decrees, in their traditional form, will probably no longer play a major role in jail lawsuits. Many existing consent decrees are subject to termination under the provisions of the PLRA.

Despite the limitations of the PLRA, parties presumably will still want to settle at least some inmate lawsuits. It will be interesting to see what form such settlements take and whether private settlement agreements, enforceable in state court, replace the traditional consent decree.

Chapter XIII. Some Final Thoughts

Those who run jails (including the highest officials in county government) are accountable through the federal courts to the Constitution. In many areas, the specific demands of the Constitution are beyond argument. In other areas of jail operation, room for argument remains, depending on the facts of a case and/or the state of the law. The requirements of the Constitution are not static. A jail administrator needs to understand the basic principles, but also needs to have a way to keep track of changes in the law.

After reading this document, it should be clear that the evolving legal requirements that overlay operation of a jail only add to the complexity and difficulty of an already difficult task. Good management and adequate numbers of well trained staff are vital to operating a constitutional jail - they can save an otherwise poor or crowded jail. Conversely, poor management and staff can sink the best designed facility. For example, the direct-supervision jail, with a great deal of direct, face-to-face staff/inmate contact demands staff with strong "people" skills. These skills may not have been as important in older jails, where muscle and intimidation were perhaps of greater usefulness. Potential staff members who apply for work do not necessarily bring these skills with them to the jail - they need training. Failure to train staff to work in the unique environment of the direct-supervision jail will virtually assure the failure of the jail to operate as designed, and put both staff and inmates in danger.

Like every other aspect of government in American society in the waning years of the 20th Century, jail operation is far more complex than it was in years past. Recognition of this complexity, including the requirements of running a "legal" jail, is a necessity that cannot be ignored.

Glossary

Attorneys' Fees - Pursuant to **42** USC section 1997, the "prevailing party" in a civil rights suit is entitled to an award of attorneys' fees, in addition to whatever relief they obtain in the suit. Historically, fees have been computed generally by multiplying the hours the winning lawyer(s) spent on the suit by the typical hourly billing rate for similar lawyers in the community. This formula could produce fee awards many times higher than the value of the judgment won by the plaintiff. The Prison Litigation Reform Act attempts to reduce the size of fees awardable under section 1997 by capping the maximum hourly rate that can be paid and by defining the concept of "prevailing party" more narrowly than courts have defined the term. Even after the PLRA changes, fee awards will play an important part in inmate rights litigation.

Class Action - A lawsuit brought on behalf of a large number of plaintiffs (a "class") with basically similar interests. In jail litigation' class actions are commonly brought on behalf of all the inmates who are, have been' or may be in a jail. Class actions avoid a multiplicity of individual claims.

Conditions of Confinement - The phrase used to describe lawsuits that claim one or more conditions in a jail or prison amount to cruel and unusual punishment. Often used synonymously with "overcrowding suits," the phrase "conditions of confinement" is more accurate since the Supreme Court has said that the key question in this type of suit is not how crowded a facility is, but what effect the conditions in the institution have (or are likely to have) on the inmates. While crowding often is the major contributor to poor ***conditions, in*** deciding whether the Constitution has been violated, the court will examine the adequacy of the conditions. The conditions a court will focus on are those relating to the basic human needs of the inmates, including such things as personal safety, medical care, shelter, sanitation, food, exercise, and clothing. If the court finds that one or more conditions do violate the Constitution' the court then has the power to correct the problems that cause the poor conditions and, at that point, may address crowding. Leading Supreme Court conditions of confinement cases include ***Wilson v. Seiter,*** 111 S.Ct. 2321 (1991), ***Bell v. Wolfish,*** 441 U.S. 520 (1979), and ***Rhodes v. Chapman,*** 101 S.Ct. 2392 (1981).

Consent Decree - A form of settling a lawsuit in which the parties typically agree that the defendant will henceforth follow certain new courses of conduct and undertake various improvements (such as reducing jail populations). In return' plaintiffs may drop various claims altogether and reduce others. Once the parties agree, the tentative consent decree is presented to the court for approval. ***Once*** approved, the decree becomes an order of the court and is enforceable as any other court order, except where the provisions of the decree itselfmay define special enforcement mechanisms. Limitations placed on consent decrees by the Prison Litigation Reform Act of 1996 may effectively end the consent decree as it has developed in correctional litigation.

Cruel and Unusual Punishment - Conduct or conditions that are prohibited by the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive ***fines*** imposed, nor ***cruel and unusual punishments inflicted. " Courts*** over the years have used various phrases to try to further define the somewhat judgmental concept of "cruel and unusual punishment." Among the phrases they have used are "shock the conscience of the court," and "violate the evolving standards of decency of a civilized society." In the jail context, the courts now ask if the actions of jail officials show the "wanton and unnecessary infliction of pain." Areas of common concern in Eighth Amendment litigation include use of force, medical care, and overall conditions of confinement.

Deliberate Indifference - A "state of mind" requirement that must be proven in various types of inmate civil rights actions for the inmate to win the lawsuit. The phrase first appeared with regard to claims of inadequate medical care, where the Supreme Court said that in order to prove a violation of the Eighth Amendment, the plaintiff must show "deliberate indifference to a serious medical need," ***Estelle v. Gamble, 420*** U.S. 97 (1976). The concept has subsequently been applied to claims of inadequate training and to conditions of confinement, among other areas. The Supreme Court has said that to be deliberately indifferent, an official must have actual knowledge of a problem and fail to make some reasonable attempt to correct the problem. Fanner v. ***Brennan,*** 114 S.Ct. 1970 (1994).

Good Faith Defense - See qualified immunity.

Hands-Off Era - The name commonly given to the period prior to the late 196Os, when courts seldom, if ever, dealt with inmate claims about practices or conditions in prisons or jails.

Hands-On Era - Following the hands-off era' and beginning in about 1970, this period marked a time of dramatically increasing court involvement with correctional issues. It lasted until about 1980. The end of the hands-on era was probably marked primarily by the Supreme Court decision in ***Bell v. Wolfish,*** 441 U.S. 520 (1979).

One Hand Off, One Hand On Era - The period running from 1980 or so until the present, where court involvement with corrections has tapered off somewhat. This period, marked by the leadership of a generally conservative Supreme Court' has seen some rights from the hands-on era actually reduced and many other rights consolidated. The growth of new rights has slowed dramatically.

Parity -The name given to an equal protection case that argues that facilities and/or programs for female inmates are of lesser quality than those provided for male inmates and that no adequate reasons exist to justify those differences. The relief sought asks not for ***identical*** facilities or programs but that improvements be made to bring women's facilities and programs to a level of parity with those provided men.

Prison Litigation Reform Act (PLRA) - A statute passed by Congress in 1996, PLRA does not attempt to alter the substantive rights of inmates, but instead, limits the remedial powers of federal courts in the inmate rights area. The law, if constitutional, may allow many jurisdictions under old consent decrees to terminate or at least reduce the scope of those decrees. PLRA places limits on attorneys' fee awards. PLRA also creates a requirement that inmates pay court filing fees' instead of allowing such fees to be waived.

Payment can be made over time, on an "installment plan" basis. Inmates who have three cases dismissed as frivolous, malicious, or failing to state a claim are to be barred from filing additional cases unless they can show they are in imminent danger of serious physical injury.

Qualified Immunity - In section 1983 actions, no damages may be awarded to a plaintiff who establishes that his/her constitutional rights were violated if the rights violated were not "clearly established." The defendant must raise the "qualified immunity" defense, which is sometimes referred to as the "good faith defense," although the subjective good faith of the defendant asserting the defense has little, if any, effect on the success or failure of the defense. The qualified immunity defense is not available to municipal corporations nor does it prevent a court from entering an injunction requiring constitutional problems to be corrected.

Section 1983 - A shorthand reference to the statute, 42 USC section 1983, which is the legal vehicle by which inmates are able to bring civil rights claims in the federal courts. The law is also sometimes referred to as "the civil rights act," but this can be confusing since it is actually one of several federal civil rights laws

Turner* Test** - A means for evaluating whether a jail or prison has validly imposed a restriction on an inmate's exercise of a constitutionally protected right, such as the First Amendment right to correspond with persons outside the jail. The reference is to the Supreme Court decision in ***Turner v. ***Safley,*** 107 S.Ct. 2254 (1987), in which the Court said that restrictions are valid if they are "reasonably related to a legitimate penological interest." In applying the test, courts consider four factors:

1. The relationship between the restriction and a legitimate penological interest, which is most commonly security (although other interests, such as rehabilitation, have also been seen as legitimate).

2. Alternative ways the inmate may have for exercising the general right in question. For instance, if the inmate is not permitted to attend a religions service, is the inmate able to practice his/her religion in other ways?

3. The impact on staff/ inmates, and institution resources if the inmate's request is accommodated.

4. Are there other, obvious ways ("ready alternatives") of accommodating both the inmate's request and the needs of the institution?

The ***Turner*** test is not a difficult one for jail administrators to meet. However, they must recognize when their actions impinge on a constitutionally protected area and carefully evaluate their justifications for those actions.

Selected Cases

Significant court decisions in correctional law are summarized in this section. They represent only a tiny fraction of the total number of major cases the courts have decided over the years that affect the operation of a correctional institution. The Supreme Court has decided well over two dozen cases dealing with correctional issues since 1970.

Bell v. Wolfish

441 U.S. 520 (1979)

One of the most significant cases the Supreme Court has decided in corrections, ***Bell*** dealt with overcrowding and double-celling as well as various operational issues. The Court rejected the idea that putting two inmates in a cell designed for one (double-celling) was a per se violation of the Constitution. Instead, the Court indicated the focal point in conditions cases must be the effect of the conditions on inmates: "While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause. . . . "99 S.Ct. at 1876.

The Court also rejected standards adopted by various professional associations, as being a proper measure of what the Constitution requires. This reversed a trend among some lower courts to rely on standards (particularly regarding square footage standards) from groups such as the American Correctional Association.

Other issues were established in Bell including:

. The publisher-only rule, which allows inmates to receive hardback books only from a publisher, book club, or bookstore, did not violate the First Amendment rights of inmates, given the smuggling problems that could be created if books could enter the institution from any source.
- Strict limits on the numbers of packages inmates could receive were approved. Here, the Court sharply criticized the District Court judge for improperly substituting his judgment for that of corrections officials as to what would or would not create a security threat.
- There is no constitutional requirement that inmates be present while correctional officers search their cells.
- A policy of strip searching inmates after returning from contact visits was reasonable and did not violate the Fourth Amendment.

Beyond its immediate results, ***Bell*** set a new tone and approach for federal court oversight of corrections, which increased the importance of courts deferring to the legitimate concerns of corrections officials. "But ***many*** of these courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations," 99 S.Ct. at 1886. If the 1970s saw a rising tide of court intervention in corrections, Bell marked the high water mark of that tide and the beginning of a more moderate era of court oversight.

Block v. Rutherford

104 S.Ct. 3227 (1984)

Pretrial detainees have no constitutional right to contact visits. The Court also reversed the lower court's order allowing inmates to observe searches of their cells. The lower court attempted to justify its ruling, which was in conflict with part of ***Bell v. Wolfish,*** by resting its decision on a different amendment to the Constitution. The Supreme Court rejected this reasoning' and reaffirmed its result from ***Bell*** - inmates have no constitutional right to be present during cell searches.

Brock v. Warren County

713 F. Supp. 238 (E.D. Term., 1989)

This case demonstrates the potential risks that ignoring dangerous conditions in a jail can pose for both a sheriff and the county. A 62-year-old man was placed in a Tennessee jail during a summer hot streak. Temperatures in the jail were running between 103 and 110 degrees. Humidity was very high' in part because inmates would run cold showers to try to reduce the heat. The nurse recommended that the man be moved to a cooler place, but the sheriff did not respond to this recommendation or take any steps to cool the jail. Despite previous warnings about excessive heat in the jail and requests from the sheriff for funds to remedy the problem' the county commissioners had refused to authorize expenditure of funds to hook up an air conditioning system' even though ductwork was already in place.

The man began hallucinating one night and eventually collapsed. When notified by other inmates, the single officer on duty felt he could do nothing because he had no assistance. After collapsing' the man was eventually moved to a cooler area and, after nearly two hours, was taken to a hospital. He had received no first aid at the jail. Suffering from heatstroke, he died in a couple of days.

Evidence showed jail staff had not been given training in emergency medical care or response. Both the county and the sheriff were found to have been deliberately indifferent to the inmate's serious health needs as shown by such things as the county ignoring the general warnings about the excess heat, the sheriff ignoring the specific recommendations from the nurse, and both the county and sheriff failing to provide staff with training on responding to medical emergencies.

The court awarded $100,000 compensatory damages against the sheriff and county jointly and an additional $10,000 in punitive damages against the sheriff (punitive damages may not be awarded against a municipal corporation). An additional unspecified attorneys' fee award was approved.

Bounds v. Smith

430 U.S. 817 (1977)

Inmates have a right of access to the courts. Part of this right includes a duty on the part of institutions to provide assistance to inmates in the form of law libraries or persons trained in the law to assure that inmates may obtain "meaningful" access to the courts. Because most institutions across the country opted to meet the requirements of Bounds by providing some form of law library, instead of assistance from persons such as lawyers, law students, or paralegals became known informally as the "law library case." See ***Lewis v. Casey,*** 116 S.Ct. 2 174 (1996), later in this case summary list.

Butler v. Dowd

979 F.2d 661 (8th Cir., 1992)

Several inmates successfully sued a prison warden for a failure to protect them from homosexual rape. Several operational issues combined to support a conclusion that the defendants were deliberately indifferent to conditions in the cell block that resulted in the plaintiff being raped several times. While the court did not specifically cite the institution's basic physical structure as contributing to the deliberate indifference finding, certain physical attributes of the prison at least made it easier for the rapes to occur.

Inmates were double-celled in two-story, lOO-foot-long wings. Each wing was controlled from a central bubble where officers could monitor activity in the hallways, but could not see into the cells. Officers did not routinely patrol the wings. Inmates in the cells could communicate with officers in the control area only by shouting to make themselves heard in one of four microphones placed at intervals in the ceiling of each wing. Inmates were allowed to move freely in the wing at various times. During times when inmates were locked in their cells, officers were expected only to verify that two inmates were in a cell, not that the inmates in a cell were the ones assigned to it. The physical structure of the prison' combined with the operating policies, made it easier for rapes to occur.

City of Canton v. Harris

489 U.S. 378 (1989)

This case recognizes that a constitutional claim can be based on a "failure to train" theory. In other words, when a failure to train staff is so severe as to show deliberate indifference to the constitutionally protected interests of the inmates and the inmate can show that the failure to train caused a violation of his/her rights' the inmate can bring a successful claim under ***42*** USC section 1983 against the agency based on a "failure to train" theory. Such a claim might arise where the agency chose to provide little or no training regarding the use of force and an inmate was injured by a staff member's use of excessive force. The argument made on behalf of the inmate would be that "but for" the failure to properly train the officer in the use of force, the inmate would not have been injured.

"Failure to supervise" claims are also brought at times under the same general theory as failure to train cases: that a supervisor's very serious failures to supervise staff in key areas (again such as use of force) were the causative factor in violating an inmate's rights.

Both of these theories provide theories by which lawyers for inmates can attempt to extend liability from line staff to supervisors or even the agency, neither of which was directly and immediately involved in the liability-creating incident.

Farmer v. Brennan

114 S.Ct. 1970 (1994)

In a "failure to protect" case brought by a transsexual inmate who was allegedly raped in a federal prison, the Supreme Court defined the term "deliberate indifference," which it first used in a medical care case, ***Estelle v. Gamble,*** 429 U.S. 97 (1976) but which it had never defined. The prisoner claimed that the actions of the defendants in placing him in a housing unit where he was sexually assaulted showed deliberate indifference on the part of officials to his personal safety needs, in violation of the Eighth Amendment.

The Court held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a ***substantial risk of serious harm exists,*** and he must also draw the inference." 114 S.Ct. at 1979 (emphasis added).

In including an "actual knowledge" requirement in the Eighth Amendment test for deliberate indifference' the Court rejected the plaintiffs argument' one accepted by various lower courts, that what an official "should have known" could be the basis of a finding of deliberate indifference.

Gates v. Collier

501 F.2d 1291 (5th Cir., 1975)

In one of the earliest cases involving prison conditions and operations to reach a federal appeals court, defendants in this case admitted the Mississippi State Penitentiary at Parchman violated the Constitution. On appeal, they argued they did not have the money to meet the timetable for relief set by the court. This claim was rejected by the Court of Appeals.

Housing was described as "unfit for human habitation under any modem concept of decency." Grossly inadequate medical and hygiene conditions threatened the health of inmates.

Inmates were subject to physical punishments, such as being forced to take milk of magnesia, being handcuffed to fences for long periods, and being shot at to keep moving or remain standing. Beatings were common.

Most of the internal security was provided by gun-carrying inmate trusties who were untrained and largely selected based on favoritism' not merit. These trusties were involved in loan sharking, extortion, and beatings. They often shot other inmates.

There was no classification system (other than racial segregation) and literally no staff control over dormitory living units during the night.

Helling v. McKinney

113 S.Ct. 2475 (1993)

Exposure to second-hand cigarette smoke, may be cruel and unusual punishment if the facts of the case show the facility staff was deliberately indifferent to the potential health problems caused by the smoke and the exposure is so high as to create an unreasonable risk of damage to the future health of the inmate.

This case did not hold that inmates have a constitutional right to a smoke free environment, but only that under certain circumstances, exposure to second-hand cigarette smoke ***could*** violate the Eighth Amendment.

The case may prove to be more important for its holding that creating risks of future harm to inmates' health can violate the Eighth Amendment than for its specifics about smoking. ***Helling*** makes it clear that an inmate does not necessarily have to claim he is currently in need of medical care to state an Eighth Amendment claim. ***Helling*** would appear to be particularly relevant in light of the increasing dangers associated with tuberculosis in jails.

Hudson v. McMillian

112 s.ct. 995 (1992)

An inmate claiming to have been beaten by officers need not plead and prove a "significant injury" as an absolute condition to stating a claim for an Eighth Amendment violation. While the extent of an injury from a beating is relevant in deciding whether the inmate was subjected to cruel and unusual punishment, it was error for the court of appeals to overturn a judgment of $800 in favor of the inmate because the inmate's injuries were not "significant."

Facts showed an inmate being moved from one part of the institution to another was held by one officer while being punched and kicked by another. A supervisor observed the incident, but did not attempt to intervene.

In a case alleging an Eighth Amendment violation based on excess force, the plaintiff must show he/she was subjected to "wanton and unnecessary infliction of pain." In deciding this, the Supreme Court said lower courts should consider five factors:

1. The need for force to be used.
2. The amount of force actually used.
3. The extent of the injuries.
4. The threat perceived by reasonable corrections officials.
5. Efforts made by officials to temper the use of force.

Jordan v. Fittharris

257 F. Supp. 674 (1966)

Conditions in the strip cells at a California prison at Soledad were found to violate the Eighth Amendment. The plaintiff was locked in a strip cell for nearly two weeks. The cell had no interior light and was almost completely dark for all but 15 minutes per day. At best, the inmate was given one shower every five days. The cell had an "Oriental" toilet, flushed twice a day by staff from the outside. No other running water was available and the inmate had no ability to clean himself A prison doctor suggested he could clean himself with toilet paper and part of the drinking water he was given. The cell walls were covered with waste from prior inmates.

The inmate had no clothes for seven days of his stay. There was no mattress or blanket, only a stiff canvas mat.

The cells were used to house incorrigible inmates, whom the prison authorities felt they could not control in any other way. This was the first major prison case to come before this district court. In finding the conditions unconstitutional, the judge wrote "the responsible prison authorities.. . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature," 257 F. Supp. at 680.

Jordan v. Gardner

986 F.2d 1521(9th Cii., 1993), en banc

This was the first federal appeals court decision to evaluate the practice of male correctional officers pat searching female inmates. Overturning a 2-1 decision of a panel of the court, the Ninth Circuit held ***en banc*** that the practice was cruel and unusual punishment and violated the Eighth Amendment rights of the female inmates. Surprisingly, the court simply refused to discuss whether the searches also violated the fourth Amendment.

The court based its conclusion on expert testimony which said that many of the inmates, previously abused and victimized by men sexually and/or physically prior to coming to prison, would be psychologically traumatized by being subjected to intensive pat searches that involve touching the breasts and genital areas.

Interestingly, the Ninth Circuit and other courts have approved female officers pat ***searching male inmates, Grummett v. Rushen,*** 779 F.2d 491(9th ***Cu.,*** 1985), ***Smith v. Fairman,*** 678 F.2d 52 (7th Cir., 1982), ***Madyun v. Franzen,,' 704*** F.2d 954 (7th Cir., 1983). The result of these and other cases that address and generally approve female officers supervising male inmates on one hand and the ***Jordan*** decision on the other apparently is to create different legal requirements' based on different factual underpinnings, for men supervising women and women supervising men.

Lewis v. Casey

116 S.Ct. 2174 (1996)

In Lewis, the Supreme Court reaffirmed the access to the courts principle from ***Bounds v. Smith, 430*** U.S. 817 (1977) summarized earlier in this list. the Court re-emphasized that the right of access to the courts includes an affirmative duty for the prison or jail to provide assistance to the inmate. In other ways, ***Lewis*** restricted the scope of the duty to provide assistance somewhat, limiting it to assistance for challenges to the criminal conviction or to conditions of confinement. Other aspects of ***Lewis*** may make it more difficult for inmates to win access to the courts claims.

Monell v. Department of Social Service

98 S.Ct. 2018 (1978)

Reversing earlier decisions, the Supreme Court held that municipal corporations (cities, counties, etc.) were "persons" and therefore could be sued under 42 USC section 1983 for both compensatory damages and injunctive relief A state or state agency is not a "person" and cannot be sued directly in section 1983. Prior to ***Monell,*** this protection also existed for local governments. Later decisions have held that local governments cannot invoke the "qualified immunity" defense available to individual government officials. This means that any time the government itself (such as the County) violates the constitutional rights of an individual, the government may be held liable for damages, even if the right violated was not "clearly established" when the violation occurred. Municipal corporations cannot be held liable for punitive damages.

Newman v. Alabama

503 F.2d 1320 (5th Cir., 1974)

Medical conditions in the Alabama prison system were successfully attacked in this case, which was one of a series of decisions that ultimately embraced all conditions throughout the entire state prison system. As a result of these cases, the prison system remained under close supervision of the federal court for years.

There were gross staff shortages in the system, e.g., one prison with nearly 900 inmates received its medical care from one medical technical assistant and inmate assistants. Unsupervised inmates were providing medical care throughout the system' including doing such things as taking X-rays, giving injections, suturing, and performing minor surgery.

Patients were commonly left unattended for long periods. One inmate was noted as having a wound infested with maggots. Twenty days passed before the wound was cleaned. Another incontinent, geriatric stroke victim was forced to sit on a wooden bench all day so he would not get his bed dirty. He eventually fell off the bench, and injured his leg, which was later amputated. He died the day after the amputation.

Pembroke v. Wood County

981 F.2d 225 (5th Cir., 1983)

A small Texas jail was sued in 1985 over a variety of poor conditions. Between 1985 and 1988, when the case was tried, most of the problems were corrected. Many of the improvements occurred because of the construction of a new jail, which was planned before the suit was filed. Other improvements were due to a new jail administrator, hired in 1987. A judgment for defendants, both as to damages and injunctive relief was given by the district court. This case shows that correcting problems even after a suit is filed can help reduce liability and court intervention.

Redman v. County of San Diego

942 F.2d 1435 (9th Cir., 1991)

This case demonstrates how a "policy" of overcrowding can create liability for the County.

The jail was seriously overcrowded. A series of circumstances led to a young detainee who had never been in jail before being placed in the same cell with an aggressive homosexual offender awaiting parole revocation. The young inmate was raped several times.

Although the suit could have focused exclusively on the specific decisions that led to the inmates being placed in the same cell, its primary focus turned to the sheriff's "policies" of crowding the jail and de facto policies concerning the housing of homosexuals. Because of the crowding, homosexuals could not be housed by themselves.

Even though the sheriff knew nothing of the specific incidents that led to the suit, the court felt that a jury could find that the sheriff was deliberately indifferent to the victim-plaintiffs right to personal safety by knowing of the overcrowding and the deficient classification procedures. Thus, the sheriff was found liable. The County also shared liability because the Sheriff was the policymaker for the County insofar as jail operations were concerned.

Rhodes v. Chapman

101 S.Ct. 2392 (1981)

Reiterating its result in ***Bell,*** the Supreme Court held that double-celling sentenced offenders in a maximum custody prison does not necessarily violate the Eighth Amendment. Opinions of experts as to desirable prison conditions do not mark the boundaries of the Constitution. Conditions must amount to the "unnecessary and wanton infliction of pain" to violate the Eighth Amendment. The prison in question, which the district court found unconstitutional, was 38% over its rated capacity. The Supreme Court reversed the lower court, holding that the double-celling when viewed in light of generally adequate services and programs in the institution, did not violate the Constitution.

With Rhodes, it became absolutely clear that crowding per se was not a measure of the constitutional adequacy of a prison or jail.

Sandin v. Conner

115 SCt. 2293 (1995)

This very important decision marks a retreat by the Court in the area of inmate discipline and in due process protections for inmates generally. The Court held that there are no due process protections in an inmate disciplinary proceeding in which the maximum penalty is only 30 days in segregation. Subsequent lower court decisions consistently read the opinion as including considerably longer segregation sanctions from the protections of due process. Previously, the due process protections mandated for inmate disciplinary proceedings by the Court in its 1974 opinion in ***Wolff v. McDonnell, 4*** 18 U.S. 539 (1974) included proceedings where segregation was the penalty. Now ***Wolff*** protections are clearly required only for infractions where the inmate faces a loss of good time. (Some courts still hold all ***Wolff*** protections apply to pretrial detainees, see p. 51.)

The second portion of ***Sandin*** addresses how a government agency might create "liberty interests" protected by the Due Process Clause. Under the previous test the Court used, liberty interests could be created by statutes, rules, or policies that limit the discretion of officials through the use of mandatory language. ***Sandin*** abandons this test, which looked only at the language of a rule, not at the actual loss a particular decision might impose on an inmate. In its place, the Court said that only when a decision imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" must it be accompanied by some level of procedural due process protections. ***Sandin*** offers the potential of reducing agency litigation and liability exposure.

Sinclair v. Henderson

33 1 F. Supp. 1123 (ED. La., 1971)

Sinclair is one of the very earliest cases in which exercise was an issue. Inmates on death row at the Louisiana State Penitentiary in Angola lived in 6' x 9' cells. Sunlight seldom reached the cells. Inmates remained in the cells 23 hours, 45 minutes per day. During the 15 minutes they were out of the cells, they could go down a closed corridor for a shower, to wash their clothes, and to get whatever exercise they could. Inmates remained in these conditions for many years.

Based on these facts, the court held that the lack of any exercise violated the Eighth Amendment and ordered that the inmates receive at least some outdoor exercise. From the flagrant facts of ***Sinclair,*** other courts evolved a more general right to exercise for almost all inmates.

Stone v. San Francisco

968 F.2d 850 (9th Cir., 1992)

This case indicates how far a court may go in ordering relief in a conditions case. San Francisco City and County officials had entered into a consent decree limiting the population of the jail system. Unanticipated population increases made it impossible for the officials to keep the jails within the population limits. After less dramatic measures had failed, the district court ordered the sheriff to release inmates upon serving only 50% of their sentence, even though this violated state law.

On appeal, the court said the lower court judge had acted prematurely and that, before ordering the sheriff to take actions in violation of state law, the court should have imposed increasingly large fines for contempt of court as a means of compelling local officials to comply with the consent decree. However, the court of appeals flatly stated that should the contempt fines remedy fail to produce compliance with the order, the lower court could return to ordering the sheriff to release inmates early, even though this was in violation of state law.

Turner v. Safley

107 S.Ct. 2254 (1987)

Resolving a conflict among the various circuit courts of appeal, the Supreme Court in ***Turner*** set out the basic ground rules which courts should apply in evaluating claims that involve a conflict between the inmate's assertion of a particular right and a competing interest of the institution.

The Court said that where an institutional restriction on an inmate's constitutional rights is rationally related to "legitimate penological interests," the restriction is valid. The ***"Turner*** test," reiterated in the companion case of ***O'Lone v. Estate of Shabazz,*** 107 S.Ct. 2400 (1987), provides the basis of analyzing many prison cases. The approach embodied in the ***Turner*** test is more sympathetic to institutional interests than approaches used by many lower courts prior to ***Turner,*** which required a greater showing of institutional need to justify restricting an inmate's rights. See Glossary, ***"Turner*** Test."

Washington v. Harper

110 S.Ct. 1028 (1990)

Mentally ill inmates who present a danger to themselves or others may be involuntarily medicated without the need of a judicial hearing, according to this 1990 interpretation of the Due Process Clause of the Fourteenth Amendment. The Court approved the due process hearing procedure that the State of Washington Department of Corrections was following in making the decision to involuntarily medicate inmates. The procedure resembles an inmate disciplinary hearing, although it is somewhat more complicated.

Wolff v. McDonnell

418 U.S. 539 (1974)

This decision remains the primary source of procedural due process requirements for inmate disciplinary hearings. As interpreted and applied by courts since, ***Wolff*** imposes the following requirements when inmates are charged with infractions that carry penalties which could directly affect an inmate's release date. Prior to ***Sandin v. Conner,*** 115 S.Ct. 2293 (1995), ***Wolff*** was interpreted as applying also whenever an inmate could be put in disciplinary segregation. ***Sandin*** limits ***Wolff*** in this respect, at least for sentenced inmates. (see Chapter XI)

1. A hearing at which the inmate has a right to be present.
2. An impartial hearing officer.
3. Notice of the charges, given to the inmate at least 24 hours before the hearings.
4. A right to call witnesses, unless calling a particular witness would be "unduly hazardous to institutional safety or correctional goals."
5. A right to assistance in the hearing where the inmate is illiterate or the issues are particularly complex and it appears the inmate is not capable of collecting and presenting evidence for an adequate comprehension of the case.
6. A written decision that states the evidence relied upon and the reasons for the decision. The Court specifically said that inmates in disciplinary hearings do not have the right to assistance by legal counsel nor do they have the right to confront or cross-examine witnesses.

Over the years other Supreme Court decisions and many lower court decisions have elaborated on the principles set out in ***Wolff*** and filled in many of the blanks left in ***Wolff. Wolff*** also addressed issues concerning correspondence between attorneys and inmates.

Resources in Correctional Law

This section provides a list of publications that may assist jail administrators in staying abreast of developments in the area of correctional law. No publication can substitute for advice from an attorney knowledgeable about the law and the specific facts that may lead to seeking legal advice. Subscription prices are omitted because they are subject to change. Prices for the publications listed below range from free to about $150 per year.

Correctional Issues

A Practical Guide To Inmate Discipline, 2nd ed, Collins, (1997). A 55 page monograph that reviews the basic constitutional requirements for inmate disciplinary hearings and discusses how those requirements can be successfully applied by hearing officers to produce readily defensible hearing results. Published by Civic Research Institute, P.O. Box 585, Kingston, NJ 08528. (609) 683-4011.

Correctional Law for the Correctional Officer, Collins (1990). A 135 page monograph that reviews basic correctional law. Written for the corrections officer or other corrections practitioner. Useful training tool or general background resource. Price is less than $20. Published by the American Correctional Association, 4380 Forbes Boulevard, Lanham, MD 20706 **(301) 918-1800.**

Correctional Law Reporter - Discusses issues and trends in correctional law as well as reporting on individual cases. Published six times per year by Civic Research Institute, Inc., P.O. Box 585 Kingston, NJ 08528. (609) 583-4011.

Detention and Corrections Caselaw Catalog, A huge collection of summaries of case holdings, broken into 50 major categories. Updated annually. Probably the most comprehensive collection of case holdings in corrections available. May be a greater use to a lawyer than a lay person. CRS Publications, P.O. Box 1180, Washington Grove, **MD 20880, (301) 527-1962.**

Jail and Prison Law Bulletin - Contains summaries of recent decisions from both federal and state courts. Published monthly by Americans for Effective Law Enforcement, 55 19 N. Cumberland, #1008, Chicago, IL 60656-1498. (3 12) 763-2800.

Jail Suicide/Mental Health Update - Excellent collection of case holdings plus valuable operations information (model policies, etc.) dealing with suicides in jails. Free. Published quarterly by National Center on Institutions and Alternatives, 40 Lantern Lane, Mansfield, MA 02048. (508) 337-8806.

National Prison Project Journal - Thoughtful reviews of both specific cases and general issues from the American Civil Liberties Union. Published quarterly by the National Prison Project of the American Civil Liberties Union Foundation, 1875 Connecticut Ave., NW, Washington, D.C. 20009. (202) 234-4830.

Prisoners' Self-Help Litigation Manual, Boston and Manville, 1995. A very comprehensive review of inmate rights and procedures to follow in filing and litigating a civil rights case in federal court. This volume should be part of any jail law library. Published by Oceana Publications (9 14) 693-8 100.

Recommended Collections For Prison and Other Institution Law Libraries (1990), Jackson Boulevard, Recommendations for jail and prison law libraries in this work will normally be followed by courts in law library cases. Published by American Association of Law Libraries, 53 West Chicago, IL 60604. (3 12) 939-4764.

Other general materials on corrections administration, which often include material on legal issues, **are** available from such **sources as the American Jail Association,** 1000 Day Road, Suite 100, Hagerstown, **MD 21740;** the **American Correctional Association, 4380** Forbes Boulevard, Lanham, **MD, 20706,** and the **National Commission on Correctional Health Care,** 2105 N. Southport, Suite 200, Chicago, IL 60614 (3 12) 528-08 18. Another excellent **general source** of **material** and referral is the **NIC Information Center, 1860** Industrial Circle, Suite A, Longmont, Colorado, 80501 800-877-1461

Staff Issues

Legal issues involving staff are increasing in number and complexity. The jail administrator should try to become knowledgeable about issues concerning the Fair Labor Standards Act (which regulates issues such as employee overtime), the Americans with Disabilities Act of 1990, the Family and Medical Leave Act, state and federal laws relating to sexual and racial discrimination and harassment, as well as local civil service rules and requirements from local labor agreements. Some publications dealing with staff issues include:

Fire and Police Personnel Reporter - Format is ***similar*** to ***Jail and Prison Law Bulletin,*** except focus is on personnel-related issues. Published monthly by the Public Safety Personnel Research Institute, 5519 N. Cumberland, #1008, Chicago, IL 60656-1498. (312) 7634259.

Rights of Law Enforcement Officers (Aitchison, 1990), **The Americans With Disabilities** Act,(Snyder,"l991), **The FLSA, A User's Manual** (Aitchison, 1991). These three **books** (250 - 450 pages) are published by Labor Relations Information System, P.O. Box 83068, Portland, OR, 97203 (503) 621-9720.

For areas of law baaed on federal statute and **regulation,** the appropriate federal regulatory agency is a source of regulations, interpretations, and other guideline materials. Areas of law included in this category would be the Fair Labor Standards **Act (U.S.** Department of Labor), the Americans with Disabilities Act (Equal Employment Opportunities Commission and the U.S. Department of Justice), and Title VII (sexual, racial harassment and discrimination, EEOC). There are also various looseleafpublications that focus on each of these areas. A major law library should have at least some of these.

About the Author

William C. Collins is generally recognized as one of the country's most experienced and knowledgeable attorneys in the field of correctional law. With over 20 years experience in the area, Mr. Collins has worked closely with legal issues in all phases of corrections, from jails and prisons through probation and parole.

Mr. Collins has published extensively in the field, including two small books of essays on legal issues in corrections as well as articles in various professional journals. He is co-founder and editor of the Correctional Law Reporter, a journal of legal issues written for the correctional administrator.

In recent years, Mr. Collins' work has involved consulting with various correctional agencies across the country, training for state and national organizations on legal issues in corrections, and writing extensively in the area.

Prior to entering private practice in 1985, Mr. Collins worked with the Washington State Attorney General's Office, serving as the first head of that agency's Corrections Division and as de facto chief counsel to virtually every corrections agency in Washington State at one time or another.

While serving as counsel to and later as a member of the Washington State Corrections Standards Board, Mr. Collins assisted in the development of state jail standards and advisory state prison standards in Washington.

Mr. Collins is a graduate of the University of Washington School of Law and also received his Bachelor's degree from the University of Washington.

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