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PRISON REFORM IN ANGLO-AMERICAN LAW: A COMPARATIVE DISCUSSION OF THE APPROACHES TAKEN BY NEW YORK STATE AND ENGLAND

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I. INTRODUCTION

"Prisoners are persons whom most of us would rather not think about."[1]

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country."[2]

This article discusses both contemporary problems and vehicles for reform in the New York State and English prison systems. The two systems provide particularly suitable subjects for a comparative study because of their similar histories, demographics, problems, and attempts at reformation. Such an analysis is useful to reveal valuable lessons in modern prison reform, not only for New York and English prisons, but for similar systems worldwide.

Part II of this article will examine the similarities and differences between the two prison systems. It will discuss the systems' populations, parole mechanisms, problems related to overcrowding, and prison disturbances. Part III will examine the legal mechanisms for change in the two systems. As a result of prisoners' minimal political influence, the

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1. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

2. 19 PARL. DEB., H.C. (5th ser.) 1354 (1910) (statement of Winston Churchill).

judiciary in these jurisdictions has often led the way in pressuring the system to be more humane in its treatment of prisoners.

Finally, in part IV, this article will address the increasingly serious problem that both jurisdictions have in providing for HIV-positive inmates. Neither jurisdiction has condoned either segregation or humiliation of HIV-positive prisoners. However, despite accomplishments in other areas, both the New York and English systems refuse to confront a basic prison reality that is potentially a grave problem both within and outside of the prison walls—HIV is spreading in prisons at an alarming rate through the sharing of needles and gay male sex.[3]

II. PRISON SYSTEMS IN NEW YORK STATE AND ENGLAND

The New York and English prison systems have many similarities. Both systems have an extremely high per capita prison rate. New York State prisons contain approximately 63,000 inmates, excluding juveniles, in about 67 facilities,[4] while English prisons contain approximately 44,000[5] inmates, including juveniles, in 124 prisons. In New York State, remand prisoners, along with inmates sentenced to less than one year, are incarcerated in local correctional facilities, the population of which totals over 30,000.[6] Approximately twenty-two percent of English inmates are remand prisoners, upwards of which twenty-five to forty percent will not be given prison sentences.[7]

The New York and English systems are at different stages of development with regard to remand prisoners and work programs. In April 1992, England established its first privately-run prison, the "Wolds," to house 300 remand prisoners. Prisoners are permitted to work for generous payments and spend approximately fifteen hours daily outside

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3. PRISON DISTURBANCES APRIL 1990: REPORT OF AN INQUIRY BY THE RT. HON. LORD JUSTICE WOOLF (PARTS I AND II) AND HIS HONOR JUDGE STEPHEN TUMIM (PART II)(1991)[hereinafter WOOLF REPORT].

4. Michael Hill, *Prisons, Like Crime, Increased*, BUFF. NEWS, Jan. 11, 1990, at A6.

5. On November 9, 1992, the prison population was 43,787 including 465 persons in police cells. 213 PARL. DEB., H.C. (6th ser.) 778 (1992) (statement of Peter Lloyd).

6. Telephone Interview with Charles Lavine, CFE, CCA, Senior Analyst, Office of Planning and Policy Analysis, N.Y. State Department of Correctional Services (Oct. 6, 1993).

7. WOOLF REPORT, *supra* note 3, ¶ 10.48-49. The number of remand prisoners has fallen about 13% between 1988 and 1990. GOVERNMENT STATISTICAL SERVICE, PRISON STATISTICS ENGLAND AND WALES 1990, 1992 Cmnd 1800, at 41 [hereinafter PRISON STATISTICS].

their cells.[8] New York State, unlike England, has developed a program where inmates must either work or attend school in order to obtain favorable parole treatment.[9] In England, there have been suggestions that would "make it possible for prisoners to do some useful form of work in prison . . . . [This] enables prisoners to pay off their debts to society by working hard and banking the money."[10] Although many agree that there are benefits to be gained by allowing prisoners to work, often their motives differ. For example, one commentator noted:

> It is necessary to turn our prisons into workplaces in which the inmates do not receive parole but can work their way out of prison by dedicated activity, which should be properly paid so that they can compensate those whom they have wronged and pay something back into the system. I am pleased that the idea that we should turn our prisons into workplaces is slowly beginning to take hold. The *Woolf Report* gave some articulation to it. Apart from anything else, if prisons were places where criminals had to work, fewer of them would want to go to prison.[11]

There are, of course, substantial differences between the two systems. Racial problems are serious in New York State, where approximately seventy-five percent of inmates are either African-American or Hispanic,[12] and many of the African-American prisoners are Muslims, requiring special dietary needs. In England, only about fifteen percent of the male prisoners are minorities and twenty-eight percent of the females are minorities.[13] Some racial discrimination exists in the English system, as

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8. Richard Evans, *Private Prison on Humberside Opens its Doors*, FIN. TIMES (London), Apr. 4, 1992, at 4. Penal "reformers" are generally hostile to the concept of privatization of prisons, which along with electronic "tagging" is viewed as a United States import. Tessa Blackstone, *Prisons and Penal Reform, in* COUNTERBLASTS No. 11, at 27 (1990). For a Parliamentary discussion on a bill that would extend privatization of prisons to sentenced prisoners, see 211 Parl. Deb., H.C. (6th ser.) 119-132 (1992). One Labour Member of Parliament stated that "the Association of Chief Police Officers is desperately worried about the increase in cowboy private security operators . . . ." *Id.* at 126 (remarks of Barry Sheerman).

9. Ronald Sullivan, *In New York, State Prisoners Work or Else*, N.Y. TIMES, Jan. 27, 1992, at B1, B2.

10. 200 PARL. DEB., H.C. (6th ser.) 180 (1991) (statement of Mrs. Teresa Gorman).

11. *Id.* (statement of Ivan Lawrence).

12. Elizabeth Kolbert, *Who Wants New Prisons? In New York, All of Upstate*, N.Y. TIMES, June 9, 1989, at B1, B2.

13. PRISON STATISTICS, *supra* note 7, at 14; Hugh Howard, *Racism and the Bench*,

evidenced by disparities in sentencing and the presence of only a few minority staff members. However, even a spokesperson for the British Labour Party has admitted that the government office responsible for prisons, the Home Office, "has gone a long way to establish anti-racist [prison] policies."[14] Notwithstanding the *Woolf Report's* general approval of prison racial relations, there is serious criticism of the erratic compliance with and lack of consistency in implementing race-related prison policies.[15]

Each prison system had one major riot that shook the entire rationale justifying the status quo. In New York, it was at Attica in September 1971, and in Manchester, England, it was at Strangeways in April 1990.

At Attica, 43 persons died, 29 of whom were inmates killed in an armed assault by state police.[16] Subsequent investigations concluded both that excessive force was used in the assault and that many existing prison conditions were intolerable. Although there were no fatalities in the Strangeways riot, 147 staff members and 47 prisoners were injured.[17]

Consequently, major reforms were enacted in New York. For example, Islam and Rastafarianism were recognized as religions, and grievance procedures and college classes were established for inmates. There developed a greater sensitivity to the needs of African-Americans and other minorities, and there became apparent the realization that overall living conditions within prisons must improve. One important long-range reform was the creation of an independent, three-member, full-time Commission of Correction which has regulatory and supervisory powers over the entire New York State corrections system. These powers included the closing of facilities and promulgation of rules establishing minimum standards for the care, supervision, and treatment of prisoners.

So deep were the Attica scars, that 1,281 plaintiffs sued four prison and government officials, or their estates, for approximately $2.8 billion in damages for intentional infliction of excessive force.[18] The trial began

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135 SOLIC. J. 472 (1991).

14. Blackstone, *supra* note 8, at 27.

15. WOOLF REPORT, *supra* note 3, ¶¶ 12.135, 12.140-142. On September 16, 1991, the government formally responded to the *Woolf Report*. HOME OFFICE, CUSTODY CARE AND JUSTICE: THE WAY AHEAD FOR THE PRISON SERVICE IN ENGLAND AND WALES, 1991, 1992 Cmnd 1647 (White Paper), which embodied most of the *Woolf Report* recommendations.

16. Nicole Peradotto, *Attica Uprising Called Dark Day in State History*, BUFF. NEWS, Sept. 14, 1991, at C1.

17. WOOLF REPORT, *supra* note 3, ¶ 1.17.

18. Dan Herbeck, *Trial Will Turn Clock Back to Attica Uprising*, BUFF. NEWS, Oct.

on October 15, 1991, and ended in February of 1992, with the jury undecided as to two defendants while finding one liable and exonerating the fourth.[19] Because of the complexity of evidentiary and other matters, there is apprehension that this continuing litigation might create another Jarndyce and Jarndyce.[20]

The Strangeways riot, in the opinion of Professor Terence Morris of the London School of Economics, was "much closer to Attica than anything we've ever seen in this country."[21] Strangeways resulted in an inquiry culminating in the *Woolf Report*,[22] the first part of which examined the causes of Strangeways and of five other prison riots. Lord Justice Woolf, then her Majesty's Chief Inspector of Prisons, discussed and analyzed prison problems in part II of the report, making twelve formal recommendations and 204 specific proposals in over 600 pages.[23] Adam Sampson of the Prison Reform Trust described the *Woolf Report* as "the single most important and positive contribution to penal debate since the Second World War. If it is taken seriously, the prison system will be transformed."[24]

Currently, overcrowding is one of the most serious problems facing the prison systems in both England and New York State. However, the causes of overcrowding differ in each jurisdiction. In New York State, the increase is due primarily to more drug-related arrests, which "accounted for 45 percent of all new prison commitments being made last year . . . ."[25] This is largely due to the implementation of mandatory prison terms for anyone convicted of a second felony, including the sale of small amounts of crack.[26] In England, there has also been an increase

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13, 1991, at B1.

19. Andrew L. Yarrow, *Jury Renders Mixed Verdict in Attica Case*, N.Y. TIMES, Feb. 5, 1992, at B1, B5.

20. CHARLES DICKENS, BLEAK HOUSE 9 (Hovendon ed., 1853).

21. Glenn Frankel, *Violence in 19 Prisons Rocks Britain; Riots Draw Attention to Squalid Conditions at Crowded Facilities*, WASH. POST, Apr. 10, 1990, at A19.

22. WOOLF REPORT, *supra* note 3.

23. *Id.* part II.

24. *Genuine Prison Reform at Last?*, 141 NEW L.J. 262, 262 (1991). Lord Woolf has stressed that it was most important to have submitted a report that Parliament would accept rather than one that would address every conceivable political and controversial issue such as the closure of certain prisons and privatization. Interview with Lord Justice Woolf, in Cannes, France (Sept. 20, 1992).

25. Francis X. Clines, *For No. 83-A-6607, Added Years for .35 Ounces*, N.Y. TIMES, Mar. 23, 1993, at B1.

26. Sarah Lyall, *Without Money to Supply Prison Beds, Officials Consider Reducing*

in drug-related crimes. Drug offenders, who had accounted for three percent of the prison population in 1979, formed approximately nine percent of the inmate population in 1989.[27] The major factor, however, responsible for up to ninety percent of the English incarceration increase, is the rising number of remand prisoners.[28]

The central difference in the avenues of reform with respect to overcrowding and other prison problems is that political solutions are more viable in England, whereas only judicial resolution[29] seems feasible in New York State. Admittedly, in England "prison reform is not a vote catcher."[30] Yet, one is struck with the genuine interest in overcrowding, and in other problems with the English penal system, by public figures and politicians that is almost completely absent in New York State, which is commonly considered a politically "liberal" state. The typical English attitude toward prison reform is evidenced in the remarks of Judge Stephen Tumim, co-author of part II of the *Woolf Report*, who stated: "[I]f you look inside any prison, you can see at once that about a quarter of the inmates ought never to be let out, and about three-quarters ought to go home."[31]

In January 1990, the Labour Party published *A Safer Britain*,[32] outlining two penal objectives: (1) "to reduce the prison population" and (2) to improve the conditions and rights of the imprisoned.[33] The Tory

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Demand, N.Y. TIMES, Feb. 17, 1992, at B5.

27. GOVERNMENT STATISTICAL SERVICE, PRISON STATISTICS ENGLAND AND WALES 1989, 1990 Cmnd 1221, table 1.8 ("Population in Prison Service Establishments under sentence on 30 June by offence group and sex 1979-1989."). Between 1987 and 1990, the number had dropped from 3450 to 3150. PRISON STATISTICS, *supra* note 7, at 11.

28. PRISON REFORM TRUST, SUBMISSION TO PHASE 2 OF THE WOOLF INQUIRY INTO PRISON DISTURBANCES 6 (1990).

29. *See, e.g.*, Hale v. Arizona, 967 F.2d 1356 (9th Cir. 1992) (concluding that pursuant to the Fair Labor Standards Act 29 U.S.C. § 201, (1989) and 42 U.S.C. § 1983 (1989) prisoners must be paid a minimum wage). Arthur S. Hayes, *Prisoners Must Be Paid*, WALL ST. J., June 26, 1992, at B11. This decision was reversed *en banc* by the Ninth Circuit in *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993). Federal courts are split, however, on this issue. Senator Harry Reid has introduced a Senate bill (S.1115) whereby the Fair Labor Standards Act of 1938 would be amended to exclude inmates from being entitled to be paid a minimum wage.

30. *Remand Prisoners and the Courts*, 139 NEW L.J. 633, 633 (1989).

31. *Open Up*, ECONOMIST, Mar. 2, 1991, at 17.

32. LABOUR PARTY, A SAFER BRITAIN (1990). Barry Sheerman, *Labour's Plans for the Penal System, cited in* PRISON REPORT, Prison Reform Trust (London) Mar. 1990, at 6.

33. *Id.*

Government has agreed to accept 198 of the 204 *Woolf Report* recommendations[34] and believes its Criminal Justice Act of 1991[35] would allow imprisonment only for the most serious offenses.[36]

In the United States, if a political candidate publicly advocated the proposals in *A Safer Britain* he or she would, in effect, be committing political suicide. In fact, during the 1988 presidential election campaign, one major issue was to what extent the Governor of Massachusetts and Democratic candidate for president, Michael Dukakis, was responsible for atrocities committed by a released prisoner under his state's prison reform policies.[37]

In New York State, most penal experts would agree with the observation of Thomas A. Coughlin, III, Commissioner of the New York State Department of Correctional Services since 1979: "[I]nstead of putting a guy in prison for $25,000 a year, we should put him in drug treatment for $1,500."[38] Yet as Coughlin also explains, "[t]here is no constituency for prisons."[39]

New York State voters, however, have become so anti-crime that a political trade-off was necessary in order to obtain legislative approval for politically unpopular work release and early release programs.[40] In return for political support of powerful rural legislators for these programs, the trade-off required that five new prisons[41] be built in their respective legislative districts, which meant hundreds of recession-proof jobs. These prisons are so essential to a rural economy, that some democratic politicians have even suggested "[t]he opposition to the second-felony

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34. The Government has declined to follow the Woolf *Report* recommendation concerning overcrowding whereby only 13% overcrowding would be allowed for up to seven days within three months unless the Home Secretary informs Parliament through a detailed certificate. Quentin Cowdry, *Baker Maps the Route to Stamping Out Jail Unrest*, THE TIMES (London), Sept. 17, 1991, at A14.

35. The Act received Royal Assent on July 25, 1991.

36. *Teach Them a Lesson Behind Bars*, THE TIMES (London), Sept. 17, 1991, at 11.

37. Andrew Rosenthal, *Campaign Tactics Provoke New Charges*, N.Y. TIMES, Oct. 31, 1988, at B6.

38. Elizabeth Kolbert, *Criminal Justice: Hard Goal for Cuomo*, N.Y. TIMES, Oct. 2, 1990, at B1. Curiously, "it costs approximately the same to supervise someone on probation for a whole year as to keep them in a local program for three and one-half weeks." Blackstone, *supra* note 8, at 49.

39. David C. Anderson, *Jail Overcrowding Tests the Ingenuity of City and State*, N.Y. TIMES, Mar. 13, 1988, § 4, at 6.

40. "Rural towns scramble to land a new prison." Kolbert, *supra* note 12, at B1.

41. Anderson, *supra* note 39.

offender reform has to do with the fact that the law fills these prisons."[42] Further, Assemblyman Daniel L. Feldman, Chairman of the Assembly Correction Committee, also stressed:

> [W]hat's good for Plattsburgh or Oneonta isn't necessarily good for New York State. How can it make economic sense to have an ever-expanding pool of people who don't pay taxes, who are supported by the taxpayers, and who are guarded by people whose salaries are paid for by the taxpayers?[43]

New York State overcrowding of prisons has been further exacerbated by budgetary cutbacks that led to significant reductions of prison guards and support personnel. This combination of overcrowding and reduced staff resulted in the first-time installation of bunk beds in ten medium-security prisons increasing the number of inmates in a dormitory from fifty to ninety.[44] Commissioner Coughlin stated, "I've resisted this for 10 years . . . I just can't think of another way of doing it."[45] Penal authorities have concluded that overcrowding such as this "greatly increases the risk of a possible eruption at a prison,"[46] and that it would dramatically increase fights, sex abuse, and tension.[47] A prison guard predicted the results of such overcrowded dormitories: "You can put four or five officers in there with ninety inmates and it won't make any difference . . . you'll have bodies coming out."[48]

In New York City, the problems of overcrowding, exorbitant construction costs, and neighborhood dislike of vicinity jails have forced the New York City Corrections Department to resort to the use of jail barges. The first barge, "The Bibby Venture," which was equipped for 378 beds, was a reoutfitted British troop carrier used in the Falklands War.[49] Not since the American Revolution (1776-1783) had prisoners

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42. Sarah Lyall, *Without the Money to Supply Prison Beds Officials Consider Reducing Demand*, N.Y. TIMES, Feb. 17, 1992, at B5.

43. *Id.*

44. Elizabeth Kolbert, *New York Plans to Double-Bunk Inmates in 10 of Its State Prisons*, N.Y. TIMES, Mar. 1, 1990, at A1.

45. Kevin Sack, *Correction Panel Approves Double-Bunking of Inmates in New York*, N.Y. TIMES, Mar. 6, 1990, at B3.

46. Kolbert, *supra* note 44, at B2.

47. *Id.*

48. Sack, *supra* note 45, at B3.

49. Russell W. Baker, *New York Seeks Floating Solution*, CHRISTIAN SCI. MONITOR,

been incarcerated in this manner within the United States.[50] In 1991, a $161 million, 800-men prison barge became the city's fifth floating jail.[51]

III. THE ROLE OF THE JUDICIARY AS A VEHICLE FOR REFORM

A. New York State

Since political resolution of such problems as overcrowding have proven ineffective in New York, the burden has fallen on the judiciary, especially the federal courts, to act as a catalyst for prison reform. An aggrieved prisoner, in either a state or county facility, may file suit in federal court for an alleged violation of one of the relevant Bill of Rights guarantees—made applicable to the states by the Fourteenth Amendment Due Process and Equal Protection Clause to the United States Constitution. Most often, prisoners will combine: First Amendment claims, such as the right of Muslims to religious services or a special diet, or an inmate's right to read nonobscene pornography; Eighth Amendment claims; and alleged violations of the inmate's right to privacy, implied in various parts of the Bill of Rights, including the Ninth Amendment.[52] Once federal jurisdiction is established, an inmate may plead state causes of action as long as they are transactionally related to the federally pleaded cause of action.[53]

In order to evade the Eleventh Amendment sovereign immunity defense by a state government, the "liberal" Warren Court permitted the reinvigoration of section 1983 of the Civil Rights Act of 1871,[54] which prohibits a state or local government official from violating an individual's constitutional rights under color of law. In *Cooper v. Pate*,[55] the Warren Court first held that prisoners had standing to sue under this statute.[56] A

Apr. 5, 1989, at 7.

50. *Id.*

51. Selwyn Raab, *Bronx Jail Barge to Open, Though the Cost Is Steep*, N.Y. TIMES, Jan. 27, 1992, at B3. The British are considering the use of "floating facilities" as an alternative to utilizing police cells. 203 PARL. DEB., H.C. (6th ser.) 103 (1992) (statement of Angela Rumbold).

52. Should a prison rule affect a suspect class, for example, race, religion, or involve a fundamental right such as marriage, then it would be subject to a standard of stricter scrutiny—rather than the standard that asks merely whether a prison rule is rationally related to a legitimate state objective.

53. Mine Workers v. Gibbs, 383 U.S. 715 (1966).

54. 42 U.S.C. § 1983 (1988) (the so-called anti-Ku Klux Klan law).

55. 378 U.S. 546 (1964).

56. *Id.* Under § 1983, the individual government official, for example, sheriff,

prisoner-plaintiff may bring a section 1983 action in either federal or state court. However, the vast majority of section 1983 claims are heard in federal forums for two reasons. First, federal judges, like their English counterparts, are appointed for life, and therefore, are not deemed susceptible to public pressure by the electorate. Second, there is often no cost incurred by a complainant prisoner.[57]

In *Nolley v. Erie County*,[58] a prisoner-plaintiff brought a section 1983 action alleging infliction of emotional distress and invasion of her right to privacy by prison officials. The HIV-positive inmate was segregated from other prisoners and given a "red dot" sticker on her paperwork, which in effect, publicly disclosed her HIV status. As a result of this treatment, she was awarded over $48,000 in damages and her attorney was also granted $82,527 in fees.[59]

Although section 1983 provides prisoners with an effective avenue to voice their grievances, there is some evidence that prisoners have abused this opportunity. In New York, one inmate filed 179 lawsuits in the past nine years against the Department of Correctional Services or its agents, mostly in federal court.[60] In fact, almost twenty percent of the federal suits in the Western District of New York between 1987 and 1991 involved inmate-instituted litigation.[61] Notably, the Chief Judge of the U.S. District Court for the Western District of New York declared that "[n]ine out of 10 cases have no merit whatsoever."[62]

Prisoners who receive court permission to file a *pro se* complaint *in forma pauperis* normally pay neither a filing fee nor service of process costs. The court ordinarily will allow the filing of the prisoner's

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prison officer, or commissioner of corrections, must be specifically named as a party defendant and not the particular state.

57. "More than 80 percent of the reported Federal cases [on AIDS] decided through January 1990 are § 1983 actions asserting violation of constitutionally protected rights of prisoners 'under color of state law.'" Daniel L. Skoler & Richard L. Dargan, *AIDS in Prisons—Administrator Policies, Inmate Protests, and Reactions from the Federal Bench*, FED. PROBATION, at 28 (June 1990).

58. 776 F. Supp. 715 (W.D.N.Y. 1991). A $20,000 punitive award against the superintendent of the jail was later set aside because on reconsideration he acted neither recklessly nor maliciously.

59. Nolley v. County of Erie, 802 F. Supp. 898 (W.D.N.Y. 1992).

60. Rose Ciotta, *Prison Plaintiffs Find Courts Suit Them Justly, But Others Claim Frivolous Complaints Clog Dockets*, BUFF. NEWS, Aug. 11, 1991, at B1.

61. *Id.*

62. *Id.*

complaint unless it is either frivolous or beyond credulity.[63] For example, in *Traufler v. Thompson*,[64] the court refused to allow three inmates to file a complaint alleging a widespread governmental conspiracy to spread the AIDS virus among black inmates in order to reduce welfare costs.

The Court found that, "The possibility that individuals as disparate as Illinois Department of Corrections Director . . . the Directors of the ACLU and NAACP, and United States Attorney General Edwin Meese are acting jointly to infect prisoners with a deadly disease is so remote as to be beyond reasonable consideration."[65]

Since the mid-1980s, Federal judicial involvement has become so extensive that many states are operating under the figurative gun of various federal court orders to remedy unconstitutional incarceration conditions.[66] For example, in 1983, a United States District Court Judge in New York City ordered 613 inmates to be released before completion of their sentences because the City failed to comply with his court order.[67] In 1991, the same judge ordered city officials to pay thirty-six inmates $150 each for failing to provide them with beds for more than twenty-four hours.[68]

Recent United States Supreme Court decisions indicate a mixed response to the issue of prisoners' constitutional rights. For example, the Supreme Court in *Wilson v. Seiter*[69] concluded that prisoners had no constitutional remedies for the overcrowding of prisons and other prison-related hardships unless they could prove that authorities acted with "deliberate indifference."[70] The four concurring judges stated that a prison could avoid section 1983 liability "simply by showing that the conditions are caused by insufficient [legislative] funding," rather than by

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63. Traufler v. Thompson, 662 F. Supp. 945 (N.D. Ill. 1987).

64. *Id.*

65. *Id.* at 946-47.

66. Samuel Jan Brakel, *Prison Reform Litigation: Has the Revolution Gone Too Far?*, CORRECTIONS TODAY, Aug. 1987, at 150. *See also* David C. Anderson, *Jail Overcrowding Tests the Ingenuity of City and State*, N.Y. TIMES, May 13, 1988, § 4, at 1.

67. John J. Goldman, *Judge Ordered to Open Court in N.Y. Jail as Soaring Drug Arrests Strain Facilities*, L.A. TIMES, Apr. 18, 1989, at 4.

68. Selwyn Raab, *Charges Filed in Crackdown at Corrections*, N.Y. TIMES, May 16, 1992, at A25 (reporting that the total amount of the fines was $5,400).

69. 111 S.Ct. 2321 (1991)

70. *Id.*

prison officials' indifference.[71] Yet, in *Hudson v. McMillian*,[72] the Supreme Court upheld an $800 award for a prisoner who claimed he was beaten unnecessarily.[73]

Notwithstanding recent Supreme Court decisions, uncertainty remains as to how to comply with earlier Supreme Court holdings that necessitate gap-filling by lower federal courts, especially in the areas of sufficient access to the courts and the First Amendment right to freedom of expression. For example, in *Bounds v. Smith*,[74] the Supreme Court concluded that constitutional access to the courts required prison authorities to assist inmates in the preparation and filing of legal documents by providing either adequate law libraries or assistance from legally trained persons. Compliance with *Bounds*' standards has resulted in a judicial conclusion on the federal level that even an entire library might be insufficient.

> To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught."[75]

In New York, prison authorities concluded that *Bounds* required, *inter alia*, that inmates be permitted to correspond with legal counsel at the State's expense.[76] Rather than monitor outgoing mail, prison authorities decided it was more cost efficient to permit an inmate, upon request, to receive five twenty-nine cent stamps per week. "Hiring or reassigning personnel to monitor effectively stamp distribution would cost more than it saves,"[77] argued Daniel Feldman, a New York legislator.[78]

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71. *Id.* at 2330.

72. 112 S.Ct. 995 (1992).

73. *Id.*

74. 430 U.S. 817 (1977).

75. Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982).

76. Letter from Daniel L. Feldman, Assemblyman of State of New York, to Larry Weiss, President, New York State Correction Officers' Union (May 9, 1991) (on file with the *New York Law School Journal of International and Comparative Law*).

77. *Id.*

78. Ray Hill, *Only Felons Score Big in Cuomo's Budget*, BUFF. NEWS, May 9, 1991, at B1 (noting the statement of an irate tax payer: "Prisoners don't pay for postage stamps

In the absence of any violation of a federal constitutional right or statute, a prisoner may still litigate a dispute in a New York State court. In *V. v. State*,[79] an inmate was permitted to file a late claim against New York State for violation of "the HIV and AIDS Related Information" statute.[80] The plaintiff alleged that the correctional officers wrongfully disclosed his HIV status, and was, therefore, permitted to seek the statutory damages limit of $5,000 per occurrence.[81] The majority of suits brought against the state are based upon violations of state prison rules, since unlike a breach of English prison rules, a violation of New York mandatory rule provisions may result in an award of damages against the prison.[82]

New York rules are promulgated by the Commission of Corrections, supplemented by directives of the Department of Correctional Services, and details are filled-in by the superintendent of each facility. Typical of New York rules is a provision requiring that in a serious disciplinary hearing, the hearing officer must appoint an employee (a "McKenzie's friend") to assist the accused in investigation.[83] In addition, disciplinary penalties might be nullified if the authorities committed a procedural irregularity concerning the rules.[84] In *Davidson v. Smith*,[85] the court annulled a guilty finding because "at the time petitioners were charged, the inmate rules were not effective owing to the lack of filing" with the Secretary of State.[86] In *Gittens v. State*[87] the court permitted an inmate to sue successfully for nine days of wrongful excessive confinement because, "[t]he purported failure to have timely released claimant from keeplock, which might be termed ministerial neglect," was a violation of the rules of the Department of Correctional Services.[88] Although some plaintiff-prisoners have been successful in forcing prison authorities to abide by procedural rules, other decisions evince a mixed response by the courts.

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but the state pays for them. Annual cost is about $3 million.").

79. 566 N.Y.S.2d 987 (Ct. Cl. 1991).

80. *Id.*; N.Y. PUB. HEALTH LAW §§ 2780-87 (McKinney 1988).

81. 566 N.Y.S.2d 987, 990 (Ct. Cl. 1991).

82. Gittens v. State, 504 N.Y.S.2d 969, 974 (Ct. Cl. 1986).

83. Turner v. Coughlin, 557 N.Y.S.2d 692 (App. Div. 3d Dep't 1990); Wright v. Scully, 508 N.Y.S.2d 528 (App. Div. 2d Dep't 1986).

84. *Turner*, 557 N.Y.S.2d 692.

85. 504 N.E.2d 380 (Ct. App. N.Y. 1986).

86. *Id.* at 381.

87. 504 N.Y.S.2d 969, 974 (Ct. Cl. 1986).

88. *Id.*

For example, it is difficult to reconcile the judicial reasoning behind decisions based on the free exercise of religion which overturned a directive of the Department of Correctional Services that had required a Rastafarian inmate to cut his hair, but upheld the shaving requirement.[89] However, irrespective of such idiosyncracies, the judiciary, on the whole, has played a substantial role in the establishment of prisoners' rights within the state.

B. England

Notwithstanding Churchill's comment that "courts are the worst entities to run prisons except for all other entities,"[90] English courts have played a lesser role in shaping prison law than courts in the United States. It is indisputable that British courts have granted judicial relief to prisoners when the issue was access to courts.[91] Yet, even the *Woolf Report*, while advocating greater access by prisoners to courts, did not go so far as to recommend damage awards for breach of prison rules.

Similar to New York State, English rules cover many areas such as medical treatment, work requirements, and disciplinary measures.[92] The rules are supplemented by standing orders which help detail the translation of the rules into practice and fill gaps.[93] Circular instructions, which are unpublished administrative regulations, are often issued to amend standing orders or to amplify the use of prison rule discretion.[94]

As in New York State, most disciplinary measures in English prisons are handled by the prison governor. Unlike New York, serious violations were once dealt with by a Board of Visitors (approximately 115 boards with 1,603 members)[95] of whom forty percent are magistrates. The board operated both as a watchdog in investigating prison conditions and also as an adjudicatory body. The government has adopted the recommendation of the *Woolf Report* that the board cease its adjudicatory role.[96] Instead,

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89. Overton v. Coughlin, 520 N.Y.S.2d 32 (App. Div. 2d Dep't 1987).

90. Brakel, *supra* note 66, at 160, 167.

91. Una Pradel, *HIV, Prisons and Prisoners' Rights*, 12 LIVERPOOL L. REV. 55 (1990).

92. 15 PRISONS, HALSBURY'S STATUTORY INSTRUMENTS (1991) (Medical treatment (Rule 17); Work Regulations (Rule 28); Disciplinary Measures (Rule 47)).

93. *See generally* ACCOUNTABILITY AND PRISONS 7 (Mike Maguire et al. eds., 1985).

94. *Id.*

95. WOOLF REPORT, *supra* note 3, ¶ 12.174.

96. *Id.* ¶ 12.177.

serious criminal offenses committed while imprisoned would be adjudicated in the courts.[97]

Some of the unenlightened or absurd rules or practices have either been changed or are in the process of being changed as a result of either *Woolf Report* recommendations, litigation before the European Commission on Human Rights, or for other reasons. For example, the "uncivilized, unhygienic and degrading"[98] practice of "slopping-out" (the daily disposal of feces and urine) is scheduled to cease by December 1994, two years earlier than planned.[99] There is presently much greater freedom to utilize telephones,[100] to correspond with parties—especially concerning legal matters. Also, while incoming correspondence is examined, it is generally not read by the authorities.[101] In addition, the government abolished certain rules which formerly made it a disciplinary offense to file a "false" and "malicious" allegation against a prison officer, finding that it had a chilling effect upon the making of any complaint against an officer.[102]

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97. *Id.* ¶¶ 14.398-405, 14.402. Even some Tory members agreed that the adjudicatory role of the board of visitors should be abolished.

> I have always been deeply unhappy about adjudication proceedings in prisons. Unless one serves on a board of visitors, one has no experience of such proceedings, but the inmate is marched in—not quite at the double these days—to face three or more members of the board about three or four feet away in a small room. The inmate has an officer on either side of him, with their backs to the adjudication board, inches away from his face. I understand the need for security. No one wants the board of visitors, or the chairman, of whom I was one, being rushed at by an inmate who has been awarded a punishment with which he disagrees. But having two prison officers inches away from the prisoner's face, staring at him while he makes his case—such people are generally not trained advocates, although some are—is rather unfair.

200 PARL. DEB., H.C. (6th ser.) 191 (1991) (statement of Richard Alexander). On the need for implementing the *Woolf Report* recommendations, see Rod Morgan & Helen Jones, *Prison Discipline, The Case for Implementing Woolf*, 31 BRIT. J. OF CRIMINOLOGY 280 (1991).

98. WOOLF REPORT, *supra* note 3, ¶ 11.101.

99. 200 PARL. DEB., H.C. (6th ser.) 168 (1991) (statement of Kenneth Baker, Secretary of State for the Home Department).

100. On the use of cardphones in prisons, see 193 PARL. DEB., H.C. (6th ser.) 373-74 (1991) and 205 PAR. DEB., H.C. (6th ser.) 580 (1992) (statement of Angela Rumbold); WOOLF REPORT, *supra* note 3, ¶¶ 14.251-14.262. The *Woolf Report* was especially impressed with the availability of telephones in Rikers Island. *Id.* ¶ 14.251.

101. WOOLF REPORT, *supra* note 3, ¶ 14.263.

102. Graham Zellick, *Reforms in Prison Discipline*, 139 NEW L.J. 1295 (1989).

Other changes have eliminated Orwellian terminology for disciplinary offenses, such as a sanctioned prisoner receiving an "award" instead of calling it what it actually is—a punishment. This practice had been used in disciplinary matters so as to prevent prisoners from claiming defenses available in criminal charges. Yet, other rules remain that would be struck down in the United States as unconstitutionally vague. For example, Prison Rule 47(21) "Offenses Against Discipline" provides that: "A prison inmate is guilty of an offense against discipline if he . . . in any way offends against good order and discipline."[103] Regrettably, punishments under this charge are greater than any other offense.[104]

Although the English courts have not played as significant a role as the United States judiciary in the realm of prisoners' rights, they have moved in a somewhat progressive direction. In *R. v. Hull Prison Board of Visitors*,[105] the court first extended judicial review to Board of Visitor decisions in adjudicatory proceedings. Similarly, the House of Lords in *Leech v. Parkhurst Prison Deputy Governor*,[106] determined that judicial review was available to disciplinary punishment by a prison governor, without exhaustion of administrative remedies. Lord Bridge further remarked that "[t]he courts' infrequent interventions have improved the quality of justice administered by boards of visitors"[107] without simultaneously opening the floodgates of litigation.

The English courts have, however, reviewed and invalidated decisions by the Board of Visitors, when necessary to protect a prisoner's substantive or procedural rights. For example, in *R. v. Secretary of State for the Home Department*,[108] the court invalidated a standing order which required prisoners to initiate an internal complaint prior to consulting a lawyer about possible civil litigation based on the complaint.[109] In *R. v. Dartmoor Prison Board of Visitors*,[110] the court also rejected a Board of Visitor contention that it, *sua sponte*, could substitute a lesser offense than

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103. 15 PRISONS HALSBURY INSTRUMENTS (1991).

104. *See* GOVERNMENT STATISTICAL SERVICE, PRISON STATISTICS ENGLAND AND WALES 1986, table 9.7, 1987 Cmnd 210 (noting that over 26% of the offenses in 1986 were under rule 47 (21)).

105. 1 All E.R. 701 (C.A. 1979); R. v. Hull Prison Bd. of Visitors, 3 All E.R. 545 (Q.B. 1979).

106. 1 All E.R. 485 (H.L. 1988).

107. *Id.* at 493-94.

108. 1 All E.R. 920 (Q.B. 1984).

109. *Id.*

110. 2 All E.R. 651 (C.A. 1986).

that charged since "[n]o power to convict of a lesser included offence is conferred on the board of visitors by the [prison] rules." Furthermore, in *R. v. Secretary of State for the Home Department*,[111] the court concluded that there might be occasions when discretionary representation of a prisoner by a lawyer or friend might become mandatory, such as a charge of mutiny where "no board of visitors properly directing itself, could reasonably decide not to allow prisoner legal representation."[112]

It is interesting to note that in granting prisoners the right to seek redress in the courts, "quite a large percentage of applications for review"[113] never reach this phase, since the Board of Visitors is more likely to invalidate an improper decision. For example, in *Trevor Smith v. Long Lartin*,[114] the board chairman told the "prisoner's friend" that cross-examination of prison officers was unnecessary because "these officers didn't come here to tell lies." Understandably, when this was brought to the board's attention, it dismissed allegations against the prisoner.[115]

Other decisions have failed to expand the rights of prisoners. In *Hague v. Deputy Governor of Parkhurst Prison*,[116] the House of Lords unanimously denied a cause of action for false imprisonment by an inmate against the prison governor irrespective of his having been improperly restrained in "intolerable conditions."[117] Furthermore, the House of Lords reaffirmed that there was no cause of action which could be based on breaches of these types of prison rules which were merely regulatory, and not designed to give prisoners any cause of action. Perhaps similar to the United States requirement that a prisoner prove deliberate indifference by prison authorities, an English prisoner must prove more than medical negligence against the prison hospital.[118] In effect, an inmate must realize that "the law does not expect the same standard of care" as in nonprison

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111. 1 All E.R. 799 (Q.B. 1984).

112. *Id.* at 818. Given that the criminal standard of proof was required for any punishment, the Board of Visitors might have a duty to allow a prisoner to call certain witnesses. *See id.* at 816, 821.

113. Kate Akester, *Boards of Visitors and the Law, Prison Reform Trust*, 2 PRISON REP. 8 (1988). Occasionally inmates are offered *ex gratia* payments to discontinue litigation with occasional "no publicity clauses." 193 PARL. DEB., H.C. (6th ser.) 417 (1991) (statement of Angela Rumbold).

114. Akester, *supra* note 113, at 8.

115. *Id.*

116. 3 All E.R. 733 (H.L. 1991).

117. *Id.* at 746.

118. Knight v. Home Office, 3 All E.R. 237, 243 (Q.B. 1990).

hospitals.[119] Furthermore, in *R. v. Parole Board*,[120] the court upheld a parole board refusal to give reasons for denial of parole. Nor could a prisoner be compensated under negligence theory for having been isolated in a locked cell for twenty-three hours a day in order to protect him from being assaulted by fellow prisoners.[121] Consequently, compensation will only be granted where conditions are proven to be "intolerable" or if the inmate establishes "malice" on the part of a prison official.[122]

As an alternative to utilization of United Kingdom courts, a prisoner may make an application for relief before the European Commission on Human Rights. In fact, in the history of the convention, "the largest number of successful complaints brought against a single member nation have been against the United Kingdom."[123] According to the government, between 1979 and 1990 there were thirty-five complaints regarding prison procedures or conditions, eighteen of which were inadmissible, struck off or withdrawn, three resulted in settlements, and eight violations were found with six cases still pending.[124] As a condition precedent, the prisoner must show: (1) Exhaustion of a domestic remedy, (2) that he has clear evidence of having a *prima facie* case, and (3) a governmental breach of an article of the European Convention for the Protection of Fundamental Rights and Freedoms ("ECHR").[125] Should an applicant establish the above, he may then obtain a legal aid sum from the Council of Europe.[126]

Some of the complaints concerning postage and need for law books are similar to New York State prison litigation. For example, in *Boyle v.*

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119. *Id.*

120. 3 All E.R. 828 (Q.B. 1990).

121. H. v. Secretary of State for the Home Dept. *Law Report*, THE TIMES (London), May 7, 1992, at 20 (citing the case, which was decided by Court of Appeal).

122. *Id.*

123. James McManus, *Prisoners' Rights, in* IMPRISONMENT TODAY 104, 111 (Simon Backett et al. eds., 1988).

124. 180 PARL. DEB., H.C. (6th ser.) 36, 37 (1990).

125. Rod Morgan & Malcolm Evans, *Why Britain Cannot Ignore Jail Shame,* THE TIMES (London), Jan. 7, 1992, at 6. Violation of an ECHR might also result in moral pressure on the English government. For example, English prisons are inspected by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), which describes certain English prison conditions as "inhuman and degrading." *Id.*

126. APPLICATIONS OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS IN ACCOUNTABILITY AND PRISONS 63 (Mike Maguire et al. eds., 1985).

United Kingdom[127] the complainant argued unsuccessfully that article 13 of the convention was violated because prison rules and standing orders would only pay the postage of one letter per week and that other postage had to be paid solely from his £1.60 weekly prison earnings.[128] The complainant argued that he was unduly burdened by the rules, since eighty percent of his earnings went to pay the cost of oatmeal cakes and other parts of his vegetarian diet. The commission concluded that stopping the complainant's letter breached article 8 of the convention.[129] In *Ross v. United Kingdom*,[130] the commission found that article 6(3)(b) of the convention, requiring that an individual charged with a criminal offense must have adequate "facilities for the preparation of his defense," was not violated since prison officials did make an attempt to provide and did provide the applicant with some of the requested legal books.[131]

Although a commission decision is usually not binding on a government until final determination by the European Court of Human Rights or upon stipulation by the parties, very often prison officials remedy the rule or order in violation following a negative determination by the commission. For example, when the commission concluded that the Board of Visitors should publicize its decisions and that there should be publicly funded legal representation before the Commission on Human Rights, the English government made the necessary changes in order to comply with commission decisions.[132] The same deference towards Strasbourg, however, is not necessarily true of English Courts. For example, Lord Justice Kerr, in referring to a commission decision, *Campbell v. United Kingdom*,[133] stated "[i]t is clear . . . that this court cannot accept any argument based solely on this report, since we are bound by the settled jurisprudence of our law to which I have already referred."[134]

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127. 131 Eur. Ct. H.R. (ser. A) (1988).

128. *Id.*

129. Boyle & Rice v. United Kingdom, 10 Eur. H.R. Rep. 425, 464 (1988).

130. App. No. 11396/85 (1986), 50 COUNCIL OF EUROPE, DEC. & REP. 179 (Feb. 1987).

131. *Id.* at 183-84.

132. 65 PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: SERIES B: PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS: CASE OF CAMPBELL AND FELL 251, 253 (1988) (appendix to Resolution DH(86)7).

133. 5 Eur. Comm'n H.R. Dec. & Rep. 207 (1982).

134. R. v. Secretary of State for the Home Dep't, 1 All E.R. 799, 824 (Q.B. 1984).

Many prison applications result in "friendly settlements" whereby the government agrees to change the "wrongful" prison rule, standing order or circular instruction and pay legal fees beyond those advanced by the commission. Furthermore, in *McComb v. United Kingdom*,[135] a friendly settlement resulted in payment of the prisoner's reasonable legal fees and an agreement that the government would amend standing orders so that a prisoner's incoming legal correspondence would be opened in the prisoner's presence, and that outgoing legal correspondence would not be read by prison officials. In *Seale v. United Kingdom*,[136] a friendly settlement resulted in the government issuing a circular instruction and agreeing to take other measures to minimize the future risk of abortive visitations. The government also made a written apology to the prisoner's mother and paid the past travel expenses of the prisoner's family as well as a payment of £800 to the prisoner's mother "for inconvenience caused."[137]

Once admissibility of an application and failure to settle are determined, the commission then adjudicates the dispute. After the commission's decision, the matter may be referred to the Court of Human Rights within three months of the decision and the Court may examine the entire record concerning all issues. In *Campbell v. United Kingdom*,[138] the government appealed from various commission holdings. The court affirmed the commission decision that: (1) The nature of prison disciplinary offenses might amount to criminal proceedings, especially when there would be a significant loss of remission time and the prisoner had "a legitimate expectation that he will recover his liberty before the end of his term of imprisonment;"[139] (2) a person charged with a criminal offense "must be able to have recourse to legal assistance of his own choosing" before and during the Board of Visitor hearing;[140] and (3) the board must make its decision public.[141] The court rejected various commission findings such as the commission determination that the Board of Visitors lacked necessary independence from the government.[142]

In *Weeks v. United Kingdom*,[143] the government unsuccessfully

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135. 1986 Y.B. Eur. Conv. on H.R. 122.

136. 1986 Y.B. Eur. Conv. on H.R. 121.

137. *Id.*

138. 5 Eur. Comm'n H.R. Dec. & Rep. 207 (1982).

139. *Id.* ¶ 72.

140. *Id.* ¶ 99.

141. *Id.* ¶ 92, 102.

142. *Id.* ¶ 82.

143. 143 Eur. Ct. H.R. (ser. A) (1988). "In 1992 the European Court of Human

contested the commission findings of inadequacy concerning both parole board procedure and the judicial review of parole board decisions. A friendly settlement had resolved the matter of the prisoner's submitted legal fees and costs, minus £2,500 received in legal aid from the Council of Europe. When the government and applicant could not settle the damages claim, the European Court of Human Rights subsequently awarded the prisoner £8,000 of the £83,750/£103,750 requested damages.[144]

Furthermore, in *Thynne v. United Kingdom*,[145] the commission rejected the idea that the applicants could be sentenced to discretionary life terms without the legal necessity of having the lawfulness of their detention reviewed by a court at reasonable intervals and also at the moment of redetention.[146] The commission also has ruled that a prisoner may have a right to compensation for unlawful detention irrespective of the lack of such an enforceable claim before a United Kingdom court.[147]

IV. THE PROBLEM OF HIV INFECTION AMONG INMATES

Aside from overcrowding, prisoners infected with the Human Immunodeficiency Virus ("HIV") pose perhaps the most difficult and important policy questions in both jurisdictions.

England and New York State approach some HIV-related prison issues similarly. Neither jurisdiction allows mandatory testing of inmates.[148] Both New York State and England have undertaken extensive educational measures to try to alleviate the groundless fears of both guards and inmates as to the spread of HIV. Both jurisdictions have also prohibited the distribution of condoms and clean hypodermic needles. New York City, however, has allowed condom distribution to jail inmates who request them from the medical officer.

Rights awarded the applicant in *Campbell v. United Kingdom*, £9,257.69, for legal fees when the court concluded that Scottish prison authorities had interfered with his correspondence to a solicitor and correspondence with the European Commission on Human Rights." 13 HUM. RTS. L.J. 371-76.

144. *Weeks*, 145 Eur. Ct. H.R. (ser. A) at 34.

145. 13 Eur. Ct. H.R. (ser. A) 666 (1991).

146. *Id.*

147. *Id.*

148. This is so despite the fact that the United States federal prison system and approximately fourteen state penitentiary systems now require testing prisoners for HIV.

Although both jurisdictions have stated that able-bodied HIV prisoners should generally be treated no differently than everyone else,[149] they have either encouraged or permitted a *de facto* segregation of HIV inmates. At first blush, segregation might seem to promote the humane rationale, of providing better and more accessible medical care to inmates who are terminally ill. However, the stigma that accompanies *de facto* segregation has a chilling effect on any inmate who might be tempted to take an HIV test.[150]

Neither jurisdiction has been empathetic to the necessity for releasing terminally-ill AIDS patients. As of March 1992, Governor Cuomo only twice granted clemency to dying AIDS inmates.[151] Generally, New York courts have not viewed AIDS alone as an extraordinary circumstance for granting a reduction in sentence, notwithstanding a near certainty of death in prison.[152] Yet, a court might, as in the case of *People v. Camargo*,[153] grant a defendant's motion to dismiss all criminal charges when the evidence demonstrates that a terminally-ill "defendant is literally confined to his death bed."[154] Similarly, English courts, for instance, in *R. v. Stark*,[155] have refused to grant a noncustody option to an inmate who probably had one year to live.[156]

Statistics show that HIV is a grave problem in New York State prisons. Forty percent of all United States prisoners infected with HIV are located in New York State.[157] In New York State, HIV estimates range officially from fifteen percent to unofficial estimates which are much

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149. This progressive attitude toward AIDS in prison has met resistance within the Tory Party. For example, the Conservative Family Campaign considers it "outrageous" for Christian bishops to support HIV prisoners mingling with the non-infected and also in preparing food. Victoria MacDonald, *Tory Family Group Close to Splitting Up*, DAILY TELEGRAPH (London), Sept. 1, 1991, at 5.

150. WOOLF REPORT, *supra* note 3, at ¶ 12.360.

151. James Dao, *New York's Prisoners with AIDS Ask for Dignity During Last Days*, N.Y. TIMES, Mar. 22, 1992, § 1, at 1.

152. People v. Escobales, 551 N.Y.S.2d 757 (Sup. Ct. 1990); People v. Napolitano, 525 N.Y.S.2d 698 (App. Div. 2d Dep't 1988); People v. Howard, 559 N.Y.S.2d 572 (App. Div. 2d Dep't 1990); People v. Brandow, 527 N.Y.S.2d 120 (App. Div. 3d Dep't 1988).

153. 516 N.Y.S.2d 1004, 1007 (Sup. Ct. 1986).

154. *Id.*

155. *Law Report*, THE TIMES (London), Jan. 23, 1992, at 12.

156. Stephen Gilchrist, *Crime Reporter*, SOL. J., Feb. 14, 1992, at 132.

157. Bruce Lambert, *Law Suit Faults AIDS Care in N.Y. State Prisons*, N.Y. TIMES, Mar. 8, 1990, at B3.

higher.[158] The vast majority of prisoners with HIV are infected by sharing used hypodermic needles for drug injections. New York State Prison Commissioner Thomas A. Coughlin has concluded "[a]lmost 90 percent of inmate AIDS victims were infected by intravenous drug abuse, compared with 37 percent among victims statewide."[159] Significantly, about two-thirds of the state prison system's annual health budget of $100 million is spent on HIV treatment.[160] Furthermore, the average stay of a prisoner within the New York penal system is twenty-two months. Thus, the problems of HIV-infected prisoners are of great importance to the general public since prisoners undoubtedly create a bridgehead for the spread of HIV when released.

There has been a significant amount of litigation in New York based on alleged violations of HIV-infected prisoner's rights, with similar factual scenarios producing divergent results largely due to the lawyer's choice of legal theory. In *Cordero v. Coughlin*,[161] for example, the court allowed the segregation of inmate "AIDS sufferers" since "AIDS victims are not a 'suspect class' . . . and the means used are rationally related to [a legitimate government] end."[162] By contrast, in *Doe v. Coughlin*,[163] the court granted injunctive relief to a class of HIV-positive inmates thereby preventing the state from transferring them to a separate "AIDS Dorm" irrespective of the commendability and desirability of improved medical care.[164] In *Doe*, unlike *Cordero*, the plaintiffs based their allegations on a "constitutionally protected right to privacy."[165] Irrespective of assurances from officials that AIDS units would provide better care, there is apprehension among prison experts that "[s]egregated units will act as dumping grounds for infected inmates" and that "[o]nce segregated, despite prior assurances, HIV-infected inmates will be deprived of programs, education, and jobs."[166]

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158. Francis X. Clines, *Freeing Inmate with AIDS in Time to Die*, N.Y. TIMES, Jan. 5, 1993, at 1.

159. Thomas A. Coughlin, *How New York Prisons Deal with AIDS Inside Their Walls*, N.Y. TIMES, Oct. 11, 1989, at A30.

160. More inmates in New York prisons die from AIDS-related diseases than all other causes combined. Clines, *supra* note 158, at A1.

161. 607 F. Supp. 9 (S.D.N.Y. 1984).

162. *Id.* at 10.

163. 697 F. Supp. 1234 (N.D.N.Y. 1988).

164. *Id.*

165. *Id.* at 1236.

166. Nancy Neveloff Dubler et al., *Management of HIV Infection in New York State*

Another difficult issue is whether an HIV-infected inmate should be allowed to participate in conjugal visits. In 1991, the New York State Department of Correctional Services, "in a major policy reversal intended to encourage thousands of prisoners to have themselves tested for AIDS,"[167] allowed HIV-positive inmates to participate in programs permitting conjugal visits with spouses on the condition that the parties have received safe-sex counseling and the spouse is aware of the inmates HIV-positive status.[168]

This policy reversal was remarkable because it was taken after years of bitterly contested litigation. In *Doe v. Coughlin*,[169] an HIV-infected inmate alleged a wrongful denial of conjugal visitation rights. The lower court and intermediate appellate court[170] denied relief concluding, *inter alia*, that a conjugal visit is a privilege not a right, and that there is no proof either that HIV could not be casually transmitted or that HIV transmission could be "entirely eliminated" through safe-sex practices.[171] The New York Court of Appeals,[172] in a plurality decision (3-1-3), concluded that irrespective of "the most personal aspects of the marriage commitment," conjugal visits do not stem from constitutional right to privacy.[173] The court did not base its decision on the lower court's "casual transmission" argument, yet noted that the state abandoned its earlier position that there might be a "risk of transmission to those prison employees responsible for cleaning the trailer facilities."[174] In essence, therefore, New York's highest court deferred to the expertise of prison management and significantly, five of the seven judges believed the classification prohibiting conjugal visits necessitated more than the traditional rational relationship test.

New York prisons still prohibit the distribution of condoms and hypodermic syringes as a matter of official policy. One inmate, who uses intravenous drugs, explained why he was more likely to share needles

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Prisons, 21 COLUM. HUM. RTS. L. REV. 363, 380-81 (1990).

167. Philip Hilts, *Dying Member of Panel on AIDS Wants Her Illness to Lift Stigma*, N.Y. TIMES, Aug. 4, 1991, at A1.

168. Sam Verhovek, *Spouse Visits For Inmates with HIV*, N.Y. TIMES, Aug. 5, 1991, at B1.

169. 505 N.Y.S.2d 534 (Sup. Ct. 1986).

170. Doe v. Coughlin, 509 N.Y.S.2d 209 (App. Div. 3d Dep't 1986).

171. *Id.* at 212.

172. Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987).

173. *Id.* at 545.

174. *Id.* at 551 n.2.

within prison, "[y]ou shoot up in the yard where you can easily exchange needles. On the outside there were very few times that I ever shared a needle, because for two bucks you can get new works [hypodermic syringes]."[175] A New York State AIDS panel has concluded that prison refusal to distribute condoms "amounts to a death sentence."[176] Presently, there is a class action suit brought by HIV-infected inmates in federal court alleging numerous causes of action.[177] One allegation in the suit asserts that:

> [A]lthough medical and public health authorities agree that the best way to prevent transmission of HIV is by providing extensive education on safe sex and safe needle use, defendants have no such program. Inmates are simply told not to engage in sexual activities and not to use drugs or engage in tattooing. Defendants refuse on policy grounds to provide inmates with condoms, although they know that sexual activities occur in their prisons and that condoms are effective in preventing transmission of HIV.[178]

In England, HIV-infected prisoners have not been litigating the issues peculiar to their status.[179] One reason for the lack of litigation might be England's relatively small number of HIV-positive inmates. While it is uncertain how many prisoners are HIV positive, estimates range from 350 to 1,000.[180]

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175. Celia Torres, *Health: Authorities Contribute to AIDS Deaths in N.Y. Prisons*, Inter Press Service, May 16, 1988, *available in* LEXIS, Nexis Library, INPRES file.

176. Bruce Lambert, *Albany AIDS Panel Assails Ban on Condoms to Inmates*, N.Y. TIMES, Sept. 16, 1989, § 1, at 30.

177. Inmates of New York State with HIV v. Cuomo, No. 90 Civ. 252 (N.D.N.Y. Mar. 6, 1990).

178. *Id.*

179. *See* Pradel, *supra* note 91, at 61. One prisoner contacted the National Council for Civil Liberties to handle his case based on breach of confidence in transmitting information of his HIV status. The case, however, collapsed for reasons other than its merits.

180. Victoria MacDonald, *Jail Talks Reveal an AIDS Iceberg*, DAILY TELEGRAPH (London), Mar. 31, 1991, at 11. HIV statistical data in English prisons is "difficult to interpret," while it is estimated that in the Canton of Berne, Switzerland, approximately 11 percent of prisoners are HIV positive and in Spain approximately 25 percent of male inmates are seropositive. Timothy Harding, *HIV Infection and AIDS in the Prison Environment: A Test Case for the Respect of Human Rights*, *in* AIDS AND DRUG MISUSE, THE CHALLENGE FOR POLICY AND PRACTICE IN THE 1990S, at 200 (John Strang & Gerry

The British government's policy on HIV in prisons has been described as "still one of incoherence and confusion."[181] There is a significant discrepancy between what the government says is its policy and the reality of HIV in prison. The government has insisted it is dealing with HIV in prison: it cites its policy of "properly" training prison officers to deal with HIV-infected prisoners, and the policy that HIV-infected inmates may mingle with the noninfected and are encouraged "to participate as fully as possible in normal prison life."[182] The government has distributed leaflets and a video as part of a resource package titled "AIDS Inside And Out."[183] Notwithstanding demands by the Prison Officers Association for compulsory prisoner testing, the government has insisted that all HIV testing be voluntary. Typical of the government's objection to mandatory testing is the remarks of Earl Ferrers, who has said that prison "blood tests taken without consent could be an assault. Tests for HIV without the consent of the patient could be unethical."[184]

In practice, the government record on the HIV crisis is mixed. The Home Office still does not seem "ready to press the issue" of eliminating the segregation of HIV prisoners.[185] Furthermore, instead of educating prison guards in using universal precautions against HIV infection, the government has distributed "protective clothing (such as a paper face mask and plastic eye goggles) to all prison establishments for the use of officers dealing with patients suffering from AIDS."[186] As explained in 1987 by the House of Commons Social Services Committee, the government policy "runs counter to all apparently recommended procedures . . . and we believe it is likely to encourage . . . alarm and misunderstanding among officers . . . ."[187] In 1989, the committee again criticized the government because its practices were still not following its stated policy.[188]

V. Stimpson eds., 1990).

181. PRISON REFORM TRUST, HIV, AIDS AND PRISONS: UPDATE, PRISON REFORM TRUST 8 (1991).

182. 149 PARL. DEB., H.C. (6th ser.) 295 (1989) (statement of Douglas Hogg).

183. 200 PARL. DEB., H.C. (6th ser.) 214 (1991) (statement of Angela Rumbold).

184. 498 PARL. DEB., H.L. (5th ser.) 600 (1988) (statement of Earl Ferrers); *Aids Lessons for Prisoners*, THE TIMES (London), Feb. 6, 1990, at 10.

185. PRISON REFORM TRUST, *supra* note 181, at 2.

186. HOUSE OF COMMONS, SOCIAL SERVICES COMMITTEE, THIRD REPORT, 1987, at xxxv (1987) [hereinafter THIRD REPORT].

187. *Id.*

188. HOUSE OF COMMONS, SOCIAL SERVICES COMMITTEE, SEVENTH REPORT, 1989, at xviii (1989).

Prison guard ignorance of HIV infections has serious implications for the protection of inmate's rights. A few officers, for example, with the approval of the Prison Medical Officer, explained that they shaved the head of an inmate "[b]ecause you've got HIV bugs and they jump around."[189] Another example of an overreaction due to misinformation is the former policy at Brixton where HIV prisoners had been required to use different colored plastic plates instead of eating on regular plateware.[190] Recently, an HIV-infected prisoner at Stafford complained that he was "paraded through the hospital like an animal on a leash" and his meals were served on paper plates "with his name and a sticker saying 'AIDS.'"[191] In Wandsworth, "high risk" categories of prisoners were segregated in one AIDS unit with the approval of the Governor.[192] A prison guard spokesman said that while "[t]he Home Office [has] said that it contradicts their policy . . . they are content to let it continue because I think they agree with us that there are benefits."[193] Prisoners at Wandsworth remain segregated until blood tests indicate that they are not HIV positive. Should a prisoner test positive for the virus, the prison medical service often marks him with Viral Infectivity Restrictions (VIR) which were originally developed to protect against the hepatitis B virus infection.[194] Authorities agree that marking HIV prisoners with VIR status has neither medical nor penal benefit.[195] Should the government continue to permit the segregation of HIV prisoners, it may face charges of

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189. Kirsty Milne, *Life Sentence: Prisoners With AIDS*, NEW STATESMAN & SOCIETY, Oct. 7, 1988, at 22.

190. PRISON REFORM TRUST, HIV, AIDS AND PRISONS 16 (1988).

191. *Prisoners with AIDS "Led on Chains,"* THE TIMES (London), Sept. 27, 1991, at 4; *HIV Infected Prison Inmates "Chained" for Hospital Trips*, Agence France Presse, Sept. 27, 1991, *available in* LEXIS, Nexis Library, AFP File; Stephen Guy, *AIDS Prisoners "Led by Chain to Hospital,"* Press Ass'n Newsfile, *available in* LEXIS, Nexis Library, PANEWS File.

192. Will Bennett, *Prison Officers Demand AIDS Tests for Inmates*, THE INDEPENDENT (London), May 25, 1990, at 6.

193. *Id.* The HIV wing for VIR prisoners "has now all but closed," ADAM SAMPSON, PRISON REPORT 13 (Spring 1992).

194. WOOLF REPORT, *supra* note 3, ¶ 12.354.

195. The *Woolf Report*, which considered the Wandsworth policy concerning AIDS conditions to be "a travesty of justice," Paragraph 12.360 of the *Woolf Report* criticized utilizing VIR markings and stated that fear of VIR certainly discourages individuals from voluntarily taking HIV tests. *Id.* ¶ 12.367. *See also* Alison Young & Jean V. McHale, *The Dilemmas of the HIV Positive Prisoner*, 31 HOW. J. CRIM JUST. (U.K.) 89 (1992).

"inhuman or degrading treatment" before the European Court of Human Rights.[196]

Sir Donald Acheson, former Chief Medical Officer, along with his New York counterparts have expressed a similar fear that HIV prisoners will act as a bridgehead for the spread of AIDS when they leave prison.[197] Considering that in 1987 the average Crown Court sentence was about nineteen months, this fear rises above mere speculation.[198]

As in New York, British officials distribute neither condoms nor hypodermic syringes to inmates.[199] This is particularly troublesome since an estimated twenty-five percent to thirty percent of English long-term prisoners are involved in gay relationships.[200] Evidence also indicates that the ample supply of illegal drugs and lack of access to syringes leads to needle sharing among prisoners.[201] The government has been criticized for complacency in: trying to minimize the number of HIV prisoners, the

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196. *See* PAUL SIEGHART, AIDS AND HUMAN RIGHTS 65-67 (1989). "[F]or treatment to violate the prohibition against inhuman or degrading treatment, it must reach a certain level of severity. While the compulsory segregation or isolation of prisoners with AIDS or HIV infection would probably not, on that test, constitute 'inhuman' treatment, it might well, depending on the circumstances, amount to 'degrading' treatment—especially bearing in mind that public health experts have said they see no need for it." *Id.*

197. Una Padel, *HIV Prisons & Prisoners Rights*, 12 LIVERPOOL L. REV. 55 (1990).

198. Blackstone, *supra* note 8, at 35. Most prisoners are incarcerated for "a relatively short time" lasting between three and six months. 200 PARL. DEB., H.C. (6th ser.) 198 (1991). *Cruel and All Too Usual*, ECONOMIST, Aug. 4, 1990, at 15 (stating the average sentence is 19 months); Christine Aziz, *Health: Ignorance That Locks Prisoners in Separate Cells; Inmates with HIV are Supposed to be Treated Like Other Offenders in British Jails, But Fear Means Many Have to Endure Isolation*, THE INDEPENDENT (London), Oct. 16, 1990, at 15 (reporting that a recent study has shown that of the 183 injecting drug users interviewed, 139 had spent time in prison, 17 said they were HIV positive and 24 said they shared needles, with an average of 11 partners each; 9 persons reported having sex with a total of 42 partners but did not disclose what type of sexual activity).

199. Mrs. Rumbold dismissed needle exchange systems as "quite unacceptable" and that allowing condoms would encourage anal intercourse. Peter Archer, *Prison Needle Exchange Schemes Unacceptable*, Press Ass'n Newsfile, May 29, 1991, *available in* LEXIS, Nexis Library, PANEWS File. *See also* Alison Young & Jean V. McHale, *The Dilemmas of the HIV Positive Prisoner*, 31 HOW. J. CRIM JUST. (U.K.) 89 (1992).

200. PRISON REFORM TRUST, *supra* note 181, at 5.

201. Kate A. Dolan et al., *Drug Injecting and Syringe Sharing in Custody and in the Community: An Exploratory Survey of HIV Risk Behaviour*, 29 HOW. J. CRIM. JUST. (U.K.) 177, 184 (1990).

breadth of homosexual activity, and the use of drugs within prisons.[202] While the government has argued that distributing condoms might encourage high-risk behavior, experts such as Una Padell have argued that while "[c]ondoms are not a panacea . . . if they reduce risk by even 50 percent in anal sex, then why not make them available?"[203] Certainly, the very least that should be done is to follow Judge Tumim's recommendation for an academic study of prison sex and drug use so as to obtain reliable information.

What is necessary today in New York is a fair grievance procedure and not more ineffectual litigation. The Department of Correctional Services has submitted for federal approval an in-prison grievance procedure which would hopefully resolve the majority of legal complaints dealing with a multiplicity of issues like: cold coffee, lack of writing paper, untimely delivery of law books and magazines, and slow mail delivery.

In September 1990, a new grievance procedure became effective in England which established a two-tiered process for almost all grievances except parole. At the first stage, should an informal resolution be infeasible, prisoners may apply to the landing officer and be heard that day. Should the matter remain unresolved, the aggrieved inmate's complaint would be heard by a senior staff member of the Governor within two days.[204]

The next step would be the use of an official form (or plain paper if the form is unavailable) for making a complaint. The inmate then receives a response within seven days of returning the form. The government has agreed that governors shall conduct all disciplinary cases within their power, that prisons may appeal to an area manager any disciplinary decisions of the governor, and that there should be an avenue of appeal to an independent body.[205] Once a complaints adjudicator is appointed to decide prison appeals and inmate discipline or grievances, there will be fewer cases brought before the European Court of Human Rights.

V. CONCLUSION

Both jurisdictions recognize that overcrowding will result in serious riots and disturbances but realize that massive additional funding is

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202. THIRD REPORT, *supra* note 186, at ¶ 94.

203. Aziz, *supra* note 198, at 15.

204. Stephen Shaw, *Two Cheers for New Grievance Procedure, in* PRISON REFORM TRUST, HIV, AIDS AND PRISONS 12 (1990).

205. *Id.*

necessary for prison reform. The English government's acceptance of the vast majority of the *Woolf Report* recommendations should eliminate most of the factors that resulted in the Strangeways riot. Modernizing prisons should also minimize litigation. Unfortunately, within New York State, there has not been the equivalent of a *Woolf Report*; and even if there was, it is very doubtful that Albany would accept the basic recommendations. Unlike England, New York prisons are heavily interwoven with local politics, and New York legislators for the most part do not take prisoner rights seriously.

As far as HIV-related issues are concerned, the respective prison systems must institute policies which recognize that drugs and gay sex do take place in prison. Admittedly, it may be offensive to some to provide syringes and condoms to inmates, but there must be a greater fear that prisoners, who after twenty-two months in a New York prison and less than nineteen months in an English prison, will come back into society and very likely serve as a bridgehead for the spread of HIV.