THE NATIONAL PRISON PROJECT

Supreme Court: No to Conditions, page 9

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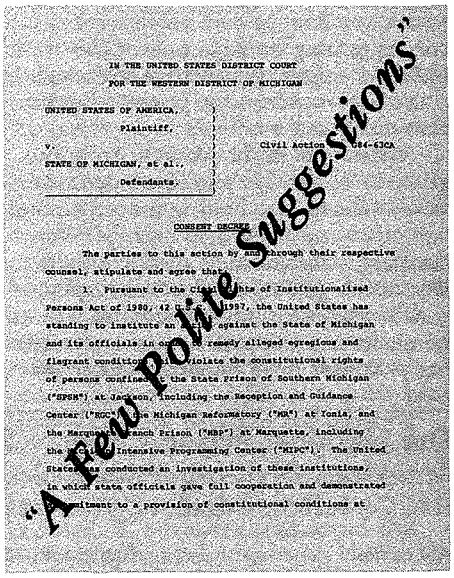
Justice Department Retreats: The Michigan Case

Elizabeth Alexander

The Rise and Fall of the Special Litigation Section

For over 25 years, this nation's commitment to civil rights for all its citizens has been symbolized by the existence of the Civil Rights Division of the Department of Justice. The Civil Rights Division was given official authority to enforce, on behalf of the government itself, civil rights laws ranging from those protecting voting to laws attempting to guarantee equal access to public accommodations, education and employment.

In 1974, a new unit was formed within the Civil Rights Division to address the civil rights of our most vulnerable citizens—prisoners, the mentally ill, the mentally retarded, and others confined in public institutions. Over time, the Special Litigation Section of the Civil Rights Division became known as an effective and formidable ally of advocacy groups seeking to bring the Bill of Rights inside prison and mental hospital gates. The lawyers assigned to the Unit developed a reputation for technical expertise and care in the development and presentation of their litigation, and a particular reputation for utilizing all the resources necessary to make the case. As litigation in the area became increasingly sophisticated, as in the development of the concept of "totality of conditions" litigation in prisons and jails, public interest groups increasingly relied on the ability of the Department of Justice to conduct the extensive discovery and to pay for the experts necessary to win the cases. Among a larger number of landmark cases in



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,
Plaintiff,
v. Civil Action
STATE OF MICHIGAN, et al.,
Defendants.

CONSENT DECREE

The parties to this action by and through their respective counsel, stipulate and agree that

1. Pursuant to the Civil Rights of Institutionalized Persons Act of 1980, 42 [illegible] 1997, the United States has standing to institute an action against the State of Michigan and its officials in order to remedy alleged egregious and flagrant conditions which violate the constitutional rights of persons confined in the State Prison of Southern Michigan ("SPSM") at Jackson, including the Reception and Guidance Center ("RGC"), the Michigan Reformatory ("MR") at Ionia, and the Marquette Branch Prison ("MBP") at Marquette, including the Michigan Intensive Programming Center ("MIPC"). The United States has conducted an investigation of these institutions, in which state officials gave full cooperation and demonstrated a commitment to a provision of constitutional conditions at

"A Few Polite Suggestions"

which the participation of the Special Litigation Section was crucial were *Wyatt v. Stickney,*[1] the first major case to address the rights of the mentally disabled which exposed appalling conditions in public hospitals in Alabama, and *Ruiz v. Estelle,*[2] which reformed the largest single prison system in the United States, since the state of Texas incarcerates more people than even the federal government.

—*continued on page 4.*

[1]344 F.Supp. 373 (M.D. Ala. 1971) *aff'd sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

[2]503 F.Supp. 1265 (S.D. Tex. 1980), *aff'd in part, modified in part, rev'd on other grounds,* 679 F.2d 1115 (5th Cir. 1982).

Jail Project Underway

In 1983 the National Prison Project announced the formation of a National Jail Project. The purpose of the Project is to provide technical assistance to private attorneys, legal agencies and others who are concerned about jail conditions in their locality. The Jail Project commenced with a grant of $125,000 from the Edna McConnell Clark Foundation of New York and has since received an additional two-year grant.

The Jail Project, unlike the National Prison Project, does not engage in any litigation itself. It will help to coordinate and organize efforts to focus on the problem of conditions in the nation's jails.

"The uncivilized conditions that we have helped begin to eliminate in our prisons," said Alvin J. Bronstein, Executive Director of the National Prison Project, "still exist in most of our jails, often in a grossly exaggerated manner." Bronstein oversees the activities of the new Jail Project, along with Edward I. Koren, Jail Project Director. Staff also includes Urvashi Vaid and Dan Manville.

"The present jail-by-jail or incident-by-incident approach is extremely costly to all concerned, and is relatively ineffective in dealing with systemic problems, and could, because of sheer numbers, go on endlessly," says Bronstein.

"Much of what we have learned in the twelve years of the National Prison Project can be successfully replicated in the jail area through the Jail Project."

The Jail Project began by surveying the current state of jail litigation in the country. Other priorities are to develop jail litigation strategies and to provide assistance to local agencies and attorneys in determining whether or not litigation is appropriate. Technical assistance is given to jail litigators, to people who are attempting to mediate jail problems, and to communities interested in developing alternatives to jail incarceration. The Project staff is available to provide on-site training sessions, advice and consultation concerning a locality's jail problems. The Project also monitors litigation and other developments nationally to prevent duplication and unnecessary, costly litigation and provides leadership in determining the most effective way to address jail problems.

—*continued on page 3.*

Opening Remarks

Alvin J. Bronstein

As we concluded our first 12 years of work, the staff of the National Prison Project decided that it was important to broaden the effort to share our views, concerns and expertise. Hence, this *JOURNAL*.

There have been a series of prisoners' rights newsletters published over the past dozen years, all addressed primarily to lawyers or persons using the courts, and none in existence for some time now. We visualize our public information mandate somewhat more broadly and hope to share our thoughts with a wider audience. The future development and recognition of the rights of prisoners and rational criminal sanctions depends as much on public education and political leadership as it does on the courts. Indeed, the Supreme Court itself in recent years has cast a pall over the entire movement.

As a natural outgrowth of the post-World War II civil rights and civil liberties movements, and aided by the public awareness that resulted from the explosion in Attica in 1971, judicial attitudes in the 1960's and 1970's began to move away drastically from the notion of *de facto* rightlessness that had been almost universally accepted for prisoners. Recognizing that there was no iron curtain drawn between the Constitution and the prisons of this country, for ten years the courts carefully examined what went on behind the curtain, and set limits on the government's curtailment of the rights and civil liberties of prisoners. However, beginning in the last half of the 1970's, the Burger-Rehnquist Court has moved us, though not yet full circle back to the slave-of-the-state era, at least half of the way back. In what is best characterized by Justice Rehnquist's callous comment in one case that "nobody promised them a rose garden", a majority of the Supreme Court has seen as its principal role the halting of the doctrinal expansion of prisoners' rights law.

While the Supreme Court has substantially increased the burden and cost of establishing constitutional violations in prison cases, there are fewer well-financed and well-staffed prisoners' rights offices. Reform litigation by offices funded through the Legal Services Corporation has been severely curtailed by the Reagan administration and the efforts of the Civil Rights Division of the United States Department of Justice have been reduced to the point where they are relatively meaningless. As the Michigan story appearing on page one of the *JOURNAL* illustrates, we have even had to use our resources to prevent Justice from doing evil.

What then might we look to in the future as our nation's prisons become human warehouses holding more persons than at any other time in history? We must devote even more of our efforts toward the goal of a uniform acceptance by all branches of government, as well as the media and the public, of the principle that prisoners must be afforded certain fundamental rights if we are to regard ourselves as a civilized society. Those rights must include: personal safety, decent care, personal dignity, work, self-improvement, the vote, and the right to a future. We should do no less if we believe that the Bill of Rights applies to all persons, and if we expect prisoners to return to society as lawful and productive citizens.

We would like this *JOURNAL* to broaden this discussion and promote these goals. ■

Seated: *Mary McClymont, Adjoa Aiyetoro, Al Bronstein, Urvashi Vaid, Claudia Wright;* Standing: *Elizabeth Alexander, Lynthia Simonette, Betsy Bernat, Heidi Reavis*, Dan Manville, Sharon Goretsky, Michelle Deitch*, Liz Rosenthal*, Linda Goldstein*, Maggie Wood Hassan*, Jan Elvin;* Not pictured: *Melvin Gibbons, Beryl Jones, Ed Koren, Steve Ney.* **Law students*

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

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

The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome. Deadline for next printing is October 31.

The National Prison Project *JOURNAL* is designed by James True.

Parties Move Toward Settlement in Arizona

Claudia Wright

After months of investigation and preparation for trial, National Prison Project lawyers representing plaintiffs in the administrative segregation unit of the Arizona State Prison are cautiously optimistic about possibilities for settlement of the case. Preliminary agreements have been reached which clear the way for a series of negotiation sessions in which all substantive issues will be discussed by the parties. In an unusual effort to facilitate resolution of the problems at ASU, the parties agreed to a review and evaluation by a panel of independent correctional experts which would make recommendations to be used as a framework for negotiations. The panel toured the institution in June, 1984 and presented its recommendations to the parties on July 23, 1984. Panel members are Allen Ault, former Director of Corrections in Georgia and Colorado, Allen Breed, former Director of the National Institute of Corrections, and Gordon Kamka, former Director of Public Safety in Maryland. Mr. Ault was selected as a panel member by the defendants, Mr. Kamka was selected by the plaintiffs, and Mr. Breed was jointly selected by both parties. The parties are now engaged in negotiations concerning the substantive issues of the case.

The case at ASU, styled *Black v. Ricketts,* involves a challenge to the conditions of confinement in the maximum security administration segregation unit, Cellblock 6, of the facility located at Florence, Arizona. The case in its present posture was filed by lawyers for the Arizona ACLU and the National Prison Project on behalf of the 160 prisoners now incarcerated in Cellblock 6.

The case was initially filed in Federal District Court in Phoenix, early in January 1984, as a *pro se* petition by prisoner Stephen Bishop. In his initial petition Bishop challenged the constitutionality of a recently implemented behavior modification program. The Management Adjustment Program, called MAP, is a complex system of levels in which a prisoner can be denied such basic necessities as food, exercise, visiting, and other forms of communication with the outside, in response to minor disciplinary infractions. MAP includes as a punishment the placement of a prisoner on a diet consisting only of "diet loaf", a gruel-like concoction, and water for indefinite periods of time.

The court in Phoenix, recognizing the serious nature of Bishop's complaints, appointed Alice Bendheim, a veteran ACLU litigator in Arizona, to represent Bishop and all others similarly situated. Bendheim's investigations revealed a number of other dangerous and abusive practices occurring in Cellblock 6. Bendheim found that many of the cells had been altered by the addition of steel plates, welded over interior and exterior openings, which cut off light and air. Prisoners were allowed out of these cells only three hours a week. The unit was in a dangerous state of disrepair and was chronically unsanitary. Many men had been housed in Cellblock 6 since the building was opened, over four years ago. No procedure presently exists for release into general population from Cellblock 6. Most shocking was the practice of routinely subjecting men to abusive rectal body cavity searches for purposes of punishment and control.

Early in March, 1984, Bendheim contacted the National Prison Project for assistance on the case. The Project responded, investigation intensified, and on May 7, 1984, an amended complaint was filed raising all the outstanding issues as an Eighth Amendment, totality of conditions lawsuit, Several preliminary rulings were obtained from the court which enjoined the defendants from prohibiting contact between the plaintiffs and their lawyers and experts. Extensive requests for documents were filed. Several state officials have been deposed. The lawyers discovered that videotapes had been made on March 22 and 23, 1984, of over a hundred men being subjected to rectal body cavity searches. Even considering the obvious security requirements of prisoners placed in administrative segregation, the plaintiffs' lawyers believe they will be able to prove that these searches go far beyond any notion of cruel and unusual punishment prohibited by the Eighth Amendment.

Upon the filing of the amended complaint, the court certified the case as a class action and set a trial date for October 2, 1984. On-site evaluations have been conducted by plaintiffs' experts which include a medical doctor, a psychiatrist, a sanitarian, a nutritionist, a psychologist, and corrections expert Kamka. During Kamka's visit, conversations between the lawyers for the parties and Mr. Kamka led to the proposal to allow an independent panel to review the situation and make suggestions. It is hoped that these suggestions, or recommendations, will provide the parties with specific, objective standards for the operation of Cellblock 6 which can be acceptable to all parties and form a basis for settlement of all the issues in the case. This unusual cooperative effort incorporates several key factors which should facilitate the success of a negotiated settlement. First, the use of a panel to make recommendations reflects the commitment of all parties to improve living conditions for the prisoners. Second, full participation by the parties in the selection of panel members assures confidence in the quality of the recommendations which result from the panel. Third, this joint effort will potentially result in agreements which will relieve the court of the burden it faces if a trial is required and court intervention is found to be necessary to remedy constitutional violations.

The conditions under which prisoners are living in Cellblock 6 in Arizona are serious and continuing, but are not intractable. The process to alleviate these unconstitutional conditions has begun. Lawyers for the plaintiffs are encouraged by the attitude of the defendants to move swiftly to the negotiating table. Perhaps if these attitudes of cooperation can be sustained, humane conditions of confinement can finally be realized for the prisoners of Cellblock 6. ■

Jail Project

—continued from page 1.

In March of 1984 the Jail Project published *A Primer for Jail Litigators,* a 178-page book which contains chapters addressing tactical and strategic questions in jail litigation as well as remedies, proper parties, planning and research, the use of experts, class actions, discovery, defenses, enforcement of court decrees, and attorneys' fees. See the publications list for information on how to obtain the *Primer.*

Bronstein summarizes his hopes for the Jail Project by saying, "Much of what we have learned in the 12 years of the National Prison Project can be successfully replicated in the jail area through the Jail Project: how to avoid litigation on certain kinds of problems and resolve them through mediation and negotiation, how to discourage unrealistic litigation, and most importantly, how to maximize the possibility of real and everlasting changes in our jails."

Please send in any relevant materials, legal or otherwise, to help keep our files current. ■

Justice Retreats

—continued from page 1.

Congress recognized this new role for the Civil Rights Division in 1980 when it passed the Civil Rights of Institutionalized Persons Act (CRIPA), clarifying the legal duties of the Department of Justice to protect the constitutional rights of those in public institutions. At the time of CRIPA's enactment, the Department of Justice told Congress it expected that the number of lawsuits filed under CRIPA would be no more than seven to ten per year.[3]

In fact, since the effective date of CRIPA in May, 1980, there have not even been seven actions filed. The reasons for the failure of the Civil Rights Division to enforce CRIPA in a meaningful way were effectively summarized in Congressional testimony by a former lawyer from the Special Litigation Section:

> The passage of the Act should have been a clarion call for the Justice Department to renew and reinforce its advocacy for the rights of the institutionalized. Unfortunately, there was another event that interposed itself and negated this positive development. That event was the appointment of William Bradford Reynolds as Assistant Attorney General for the Civil Rights Division.
>
> From his confirmation hearing, it was clear that Mr. Reynolds would change Justice Department positions on several highly public civil rights issues where the Reagan Administration had already stated its views, such as busing as a remedy for the segregation of school children and the use of so-called quotas to remedy racial discrimination in employment.[4]

The first major impact of Mr. Reynolds' appointment on the Special Litigation Section was the change of position of the Department of Justice in many of its existing lawsuits involving prisons and mental hospitals. In case after case, the Special Litigation Section stopped advocating reform and joined forces with its supposed opponents, the state and local defendants. For example, in the Mississippi case, one of Justice's most important prison cases, the federal judge dismissed the Department as a party as to certain issues because of the Department's switch in positions and because the court found Justice's interests to be no longer "common to the interests of the plaintiff class."[5] The Department has adopted new positions bitterly opposed by representatives of the inmate plaintiffs in a number of other important cases as well.[6]

Reynolds objected, in a handwritten memorandum, to the "detailed proposals" which he thought should be monitored by state agencies even though the state itself had produced the unconstitutional conditions.

Developing the reputation as the anti-Civil Rights Division inevitably took its toll in morale, particularly in the Special Litigation section. One result was the departure from the Section of dedicated and experienced lawyers. Sixteen of eighteen staff lawyers in the Section have left since January, 1981, as have five of their replacements.[7]

By January of 1984, the Department of Justice finally got around to filing what was only its second lawsuit under CRIPA.[8] (The first lawsuit, against the Hawaiian prison system, was thrown out of court on procedural grounds.[9]) The lawsuit, filed simultaneously with a proposed consent decree in January, 1984, illustrates the lengths to which the Justice Department, under Bradford Reynolds, will go to implement anti-civil rights policies under the guise of enforcing CRIPA.

Michigan: Test Case for States' Right Under CRIPA

On October 9, 1981, the Department of Justice sent a formal letter informing the state of Michigan that pursuant to CRIPA an investigation of conditions of confinement would be undertaken at the State Prison of Southern Michigan in Jackson, Michigan; the Michigan Reformatory at Ionia; and the State House of Corrections and Branch Prison at Marquette.

On October 29, 1982, Reynolds submitted a "notice of findings" regarding these facilities to the state of Michigan. The investigation by the Justice Department, the letter states, had "discovered . . . a pattern or practice of egregious or flagrant conditions that are subjecting the prisoners incarcerated in each facility to grievous harm in violation of their Eighth Amendment rights." Among the Justice findings were stark conclusions that the prisons consisted of physical plants that had become antiquated and unsanitary. There was a critical lack of provision for fire safety. Inmates were inadequately protected against physical and sexual assault, other violence, and extortion. Overcrowding had strained support facilities, physical plants, equipment, and sanitation. Mental health care was inadequate at each of the facilities.

Between December, 1982, and the first of October, 1983, the attorneys for the state of Michigan and the Department met on numerous occasions. Experts hired by the Department of Justice also attended the negotiation sessions that related to their specific areas of expertise.

In the first part of October, 1983, the state of Michigan and two attorneys from Justice had negotiated a comprehensive, mandatory 54-page consent decree. All of the necessary parties from the state of Michigan had approved the decree as of the middle of October. The lawyer representing the state of Michigan likened the state's position to "a bridegroom waiting at the altar for the bride to show up." Accordingly, the two lawyers from Justice's Special Litigation Section headed back to Washington to try to sell the decree to Reynolds.

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[3]Senate Report No. 96-416, p. 33, n. 88 (November 15, 1979).

[4]Testimony of Stephen A. Whinston, Hearing, House of Representatives Subcommittee on Courts, Civil Liberties and the Administration of Justice and Subcommittee on Civil and Constitutional Rights (2/8/84).

[5]*Gates v. Collier,* No. GC 71-6-K (N.D. Miss. 8/6/83), earlier opinions at 423 F.Supp. 732 (N.D. Miss. 1976), *aff'd and remanded,* 548 F.2d 1241 (5th Cir. 1977).

[6]See, e.g., *Wyatt v. Ireland,* C.A. No. 3195-N (M.D. Ala., Feb. 1, 1983), see later opinion at 515 F.Supp. 888 (M.D. Ala. 1983) (after more than a decade of helping the plaintiffs representing a class of mental patients the Justice Department joined the defendants in proposing a settlement which the plaintiffs have opposed) (this is a later stage of the *Wyatt v. Stickney* litigation, *supra* n. 1.; *Gary W. v. State of Louisiana,* C.A. No. 74-2412 "C" (E.D. La.), earlier opinion at 622 F.2d 804 (5th Cir. 1980) ("[I]f DOJ persists in its new posture as guardian of the federal executive branch's or defendants' interests, then the plaintiff-class will have no choice but to move for DOJ's dismissal from this case." Plaintiff's Supplemental Memorandum in Support of Motion to Approve Placement Procedure Order, November 15, 1983, p.4); *Battle v. Anderson,* No. Civ. 72-95 (E.D. Okla.) (Private plaintiffs' counsel for class of prisoners asked the court to remove the Department of Justice, charging that "[a]ttorneys for the United States have abdicated their lawful role in this litigation." Application filed November 21, 1983, and see 708 F.2d 1523 (10th Cir. 1983)). For a full account of Mr. Reynolds' sabotaging of civil rights in all areas of his responsibilities, see Spence, "In Contempt of Congress and the Courts: The Reagan Civil Rights Record" (1984), available from ACLU, Suite 301, 600 Pennsylvania Avenue, SE, Washington, D.C. 20003.

[7]*The New York Times,* 6/22/84.

[8]It is interesting to note that, since January, 1981, the National Prison Project, with seven lawyers, has filed fifteen major new lawsuits. To date, our best information is that there have been four CRIPA actions filed.

[9]*United States v. Hawaii,* Civil No. 83-0248 (complaint filed 3/4/83).

Despite Michigan's approval of the proposed decree, Reynolds refused to move from his position that "states' rights" principles required the Department of Justice to refrain from placing specific obligations on the states. Reynolds objected, in a handwritten memorandum, to the "detailed proposals" which he thought should be monitored by state agencies even though the state itself had produced the unconstitutional conditions.[10] Reynolds added that "[f]ederal supervision of such planned improvement goes well beyond our proposed complaint and our CRIPA authority."

But Reynolds was ready with a solution. Indeed, cutting out the staff lawyers that had put together the case, he had already made direct contact with the state officials. Reynolds reported that the state officials agreed to his proposal to change the consent decree into a "plan", primarily monitored by the state itself.

By January, 1984, Michigan signed off on the new consent decree that called for "minimally adequate" sanitation, medical care, fire safety, and protection from harm. The consent decree gave no explanation as to the meaning of "minimally adequate" standards, but noted that the state had prepared a plan. However, the consent decree blandly stated, the state's failure to comply with the plan (the original consent decree) was not, by itself, a violation of the consent decree. In plain language, Michigan signed a statement that it would obey the Constitution but undertook no binding obligations to take any single step to end the violations in the prison. Since Michigan was always required to obey the Constitution, the proposed "consent decree" was legally a meaningless act. Both lawyers who had negotiated the original proposed decree refused to sign Reynolds' decree; in a matter of months both left the Special Litigation Section.

The Department of Justice then filed its proposed consent decree, along with a final complaint, against the state of Michigan, in federal court in Kalamazoo, Michigan. The National Prison Project, along with the Michigan affiliate of the ACLU, asked Judge Richard Enslen for permission to argue against the new decree. Private lawyers representing the class of all inmates in the Central Complex of the Jackson prison also petitioned to appear to oppose the consent decree. Despite the press release of the Department of Justice describing the Reynolds' decree as a model for future litigation, there was widespread criticism of the decree. Indeed, Kenneth Schoen, the corrections expert employed by the Department of Justice to investigate the Michigan prisons, filed an affidavit with the court attacking the new decree as ineffective and no more than "a set of polite suggestions" to Michigan.

But the Justice Department's campaigning will also continue across the country to replace enforceable decrees with paper travesties.

On March 23, 1984, Judge Enslen heard argument on whether the decree should be approved by the court. He began by allowing the National Prison Project to appear as an *amicus curiae* (friend of the court) and allowing the private lawyers to intervene to challenge the decree insofar as it applied to the Central Complex at Jackson.

Judge Enslen continued by criticizing the decree in blunt language:

> I realize that I have only been in the profession 26 years, but I have never seen a . . . five page [consent decree] like this five-page document. I couldn't read it.
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> * * *
>
> The point is that in its present form it seems to me that I do nothing by signing the five-page consent decree. I don't know what it means, and if I don't know what it means, I don't see how anybody else does.[11]

After rejecting the consent decree, Judge Enslen ordered the state of Michigan and the Department of Justice to negotiate a new decree.

For a period, the Department of Justice refused to schedule further negotiations with the state of Michigan. On its own, Michigan prepared a new consent decree that, like the original argument, made the entire "plan" enforceable in court. But when the Michigan representatives were finally allowed to meet with Justice, Justice gave them a new eight-page consent decree.

Again, the eight-page consent decree incorporated the critical provision that violations of the state's plan (the original consent decree) were not violations of this consent decree unless Justice proved that they violated the Constitution. Judge Enslen, after receipt of the new consent decree, held a private conference with the lawyers and again asked for new negotiations for a decree that he could accept. He pointedly ordered Michigan's attorneys to go to Washington, D.C., for the negotiations, since it was apparent that all the decisions were being made in Washington by Reynolds.

By this time, the National Prison Project had had an opportunity to learn more about the Michigan system. The Project realized that even if the Michigan "plan" were fully implemented, serious constitutional problems would remain. Accordingly, the National Prison Project, again with the Michigan ACLU affiliate, filed a new lawsuit to redress the remaining constitutional problems in Michigan prisons, including racial segregation and discrimination in jobs and programs.[12]

Despite the judge's cajoling, however, Michigan and the Department of Justice submitted the same eight-page unenforceable decree to the court at the public hearing on June 12. Acceptance of the consent decree had become so important to Justice's plans for states' rights that Reynolds took the highly unusual step of appearing personally to argue for the acceptance of the decree. After negotiations Judge Enslen ultimately told Reynolds that he must accept changes in the consent decree or have the decree rejected once and for all.

In essence, the judge's new language changed the decree in three important ways. First, the state could not change anything in the "plan" without the approval of Judge Enslen. For practical purposes, that made the plan little different from a traditional enforceable consent decree since the parties to a traditional court decree can also seek court permission to modify the decree. Second, Judge Enslen set a hearing for June, 1985, at which time he would determine if the consent decree is in fact working effectively to cure the constitutional violations in the Michigan prisons. If it is not working, he would then order further changes. Third, the National Prison Project, the Michigan ACLU and the private lawyers representing the Jackson Central Complex inmates would have a role in monitoring enforcement of the consent decree, including participation in the 1985 hearing.

—continued on next page.

[10]Reynolds claimed the reason for objecting to the plan was that several parts of the proposed consent decree borrowed standards set by state law of general affiliation, such as plumbing codes or public health codes. But use of such state set standards to remedy constitutional standards is commonplace. See, e.g., *Williams v. Edwards,* 547 F.2d 1206, 1214 (5th Cir. 1977); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980); *Battle v. Anderson,* 457 F.Supp. 719 (E.D. Okla. 1978); *Palmigiano v. Garrahy,* 443 F.Supp. 956 (D. R.I. 1977).

[11]*U.S. v. Michigan,* No. G84-63 (W.D. Mich.) transcript of hearing 155-156 (3/23/84).

[12]*Knop v. Johnson,* G84-651-CA5 (W.D. Mich., filed 6/84).

—continued from preceding page.

The Struggle Continues

In short, the outcome in Michigan was a fairly complete victory for prisoners' rights advocates. But it was a victory in one battle, not the war. Indeed, even as to Michigan prisoners themselves, how much impact the Project's efforts have had will not be measurable until after the June, 1985 hearing. Because the Department of Justice fought bitterly against an enforceable decree, no one can expect that Justice will voluntarily pursue vigorous enforcement of the decree. Obviously, the longer fight is just beginning in Michigan.

But the Justice Department's campaigning will also continue across the country to replace enforceable decrees with paper travesties. Ironically, during the very months that the Prison Project and the Department of Justice were contesting the Michigan decree, the Department of Justice successfully signed a comparable consent decree involving two mental hospitals in Indiana, attracting almost none of the media attention that had surrounded the Michigan case.[13] There is absolutely no reason to believe that Mr. Reynolds has changed his position that his proposed Michigan decree is the appropriate model in prison and other institutional litigation, and we can expect the battle between states' rights and human rights to continue in the courtrooms across the land. ■

[13] *United States v. Indiana,* IP 84-411C (Consent decree) S.D. Ind. 4/6/84).

Private Firms Cash In On Crime

Jan Elvin

Anyone keeping up with the corrections field knows that the most talked-about trend is the potential movement toward privatization of prisons, jails, juvenile institutions, and Immigration and Naturalization Service (INS) detention centers. The idea has stimulated lively debate as the feasibility of privately managed and operated prisons and jails is being explored.

There is a long history of contractual arrangements between corrections and private organizations for certain services, such as health care, and for secondary community corrections placements (halfway houses, drug rehabilitation programs, etc.). The actual number of privately financed or operated jails and prisons remains small, however, and a recent National Institute of Corrections survey shows that the trend towards contracting out *complete* operation of a prison or jail is still viewed with skepticism by corrections administrators. Complete takeover by private companies would represent great loss of control to the corrections community, and they are nervous about liability and responsibility issues. Of governmental agencies responding to the NIC study, only 22% would favor contracting for management of an entire facility; 75% would not consider it and over 4% were unsure. However, faced with rising prison populations, higher costs, and public reluctance to finance more prisons and jails, corrections administrators are taking a good look at the privatization packages that are being marketed around the country. Some involve only financing of capital costs while others also include private operation of the facility. Companies like E.F. Hutton and Dean Witter Reynolds are entering the business to finance construction costs only. Governments have traditionally financed prison and jail construction with money at hand and "general obligation bonds." General obligation bonds, however, are subject to voter approval, and, as the E.F. Hutton brochure, "Innovative Alternatives to Traditional Jail Financing" points out, "Detention facilities have not enjoyed popular support at the polls."

Private financing, therefore, will effectively sidestep statutory constraints on public debt and allow construction of more prisons and jails without voter approval. Private industry stands to make a profit off the fact that we as a nation jam nearly 3/4 of a million men, women and children into our jails and prisons. In spite of the decline in the crime rate in most areas, we are still putting more and more people away behind bars: prisons are operating at 110% capacity. The involvement of profit-making firms may well mean that more effective and more humane methods of punishment will be ignored, and citizen participation in formulating correctional policy will be drastically reduced. Although community service and restitution programs have proved successful, companies like E.F. Hutton turn a deaf ear since they do not fit into their profit-making goals.

The entrepreneurial operation of a jail or prison raises additional concerns. When the private company wants to show, or increase, profits, it is prisoners

who will suffer. Prisoners who already endure outmoded environmental conditions, inadequate medical and psychiatric care, paltry programs and grossly overcrowded living space will be asked to pay even further for the cost-cutting measures. Should constitutional conditions of confinement be sacrificed for the profit motives of private business?

Private companies such as the Corrections Corporation of America claim to be able to build and operate prisons and jails at a lower cost without loss in operating efficiency. How will these companies pay property taxes (they have no tax-exempt status), higher interest rates, liability insurance, *and* earn a profit? The Rutherford County Commission in Tennessee found that a proposal by the Corrections Corporation of America to build and manage a new county jail would result in increased costs. Some Commissioners want a study done to seek alternatives with less impact on the property tax rate. Commissioner Gannon said, "We should question whether this is what we can truly afford. Common sense would dictate that there are alternatives."

A number of recent studies have recommended that jail and prison space be considered a scarce resource, like energy or water, and should therefore be used parsimoniously. If a private company is getting paid a certain number of dollars per occupied bed, the tendency will be to increase occupancy. The company will have a vested interest in keeping the head count high inside prison, not in exploring alternatives to incarceration. The current prison population boom is already a reflection of our shortsighted, narrowminded judicial and public policy. Add to that a profit motive, and the possibility of meaningful reform in the way of implementing alternatives to incarceration becomes an even more remote dream than it is now.

Making money as a result of imprisoning people raises a number of legal and ethical questions. Who will monitor performance of the private company? Who will monitor and enforce regulations and standards? Of course all these items can be written into the contract between the state or locality and the provider, but who can guarantee that they will be? And who will say that the conditions of the contract are satisfactory to those of us who are more concerned about prison conditions and the reduction of unnecessary confinement than in profits made on the backs of prisoners? Do administrators of privately run facilities have the authority to handle inmate disciplinary actions including use of deadly force? Should this important issue be delegated to a money-making venture?

"Private industry stands to make a profit off the fact that we as a nation jam nearly 3/4 of a million men, women and children into our jails and prisons."

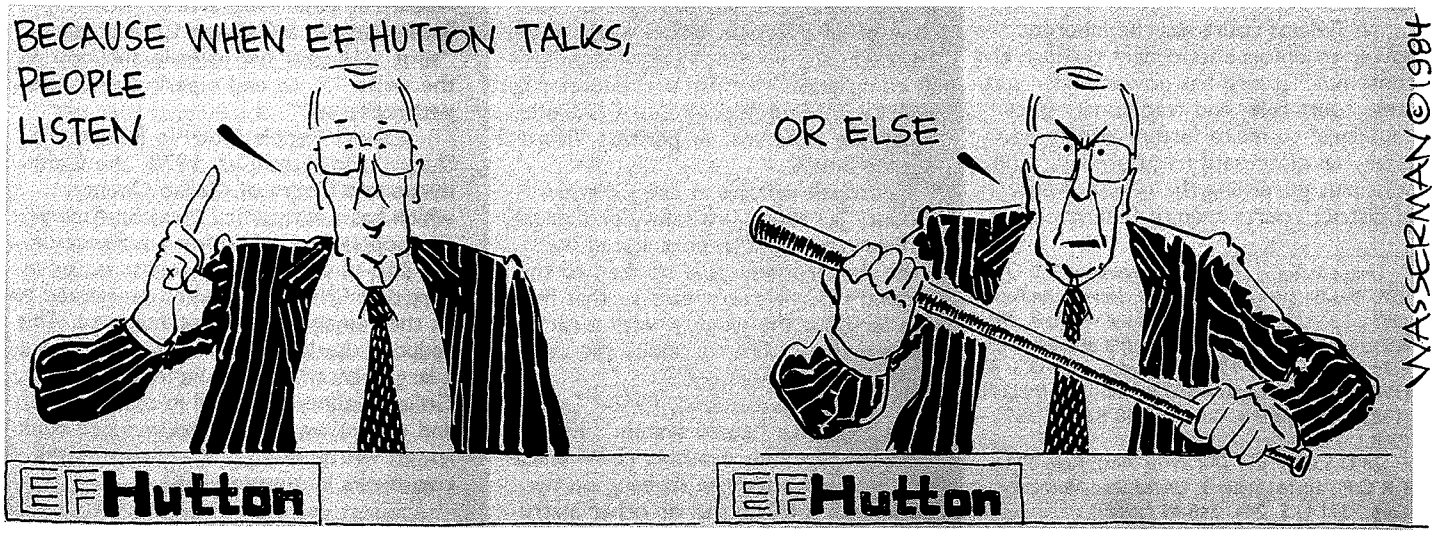
So far the most active new market has emerged in efforts to confine more illegal aliens. Holding camps are appearing all along the Southern border. The Corrections Corporation of America has built a $4 million, 300-bed INS detention center in Houston. CCA is the first corporation that was formed solely to "offer complete management and operational services of correctional facilities . . ."

With the exception of the INS facilities, at the present time there is no adult prison under private management. The closest thing to it is a minimum security work-study release facility in Wisconsin totally managed and operated for the past 5 years by Wisconsin Correctional Services, a non-profit corporation. The Division of Corrections retains only the responsibility for inmate discipline.

Nearly 20 states are negotiating to go private with some jails. One reason jail contracting may appeal to local governments is because it would permit the cost of jail construction and management to be shared across jurisdictional lines. The companies who market private financing are concentrating their efforts on states and localities which are under court order because of overcrowding. It's no wonder: 31 states and 17% of the counties are under court order to relieve unconstitutional conditions, including overcrowding.

In spite of the publicity around the INS contracts which may have the public expecting a stampede towards prisons for profit, a study done by the National Institute of Justice, "Corrections and the Private Sector," found little change in the contracting practices of state adult correctional agencies. It is really too soon to tell whether or not this will become a major trend and will lead to contracts for management of "secure" facilities. Some observers are saying that things can't get much worse than they are now, and we should give business a try. On the other hand, there is no reason to suspect miracles since the private corporations will only reflect the policies of the governments they represent.

In the next issue of the *JOURNAL,* we will discuss the legal implications for all concerned in the prisons for profit movement. ■



Prison Litigation: Making Reform a Reality

Mary E. McClymont

Once the substantial hurdle of establishing liability for unconstitutional conditions has been overcome in prison litigation, as with all major complex civil rights and institutional reform litigation, lawyers are faced with the equally important and difficult tasks of arguing for and ensuring compliance with effective and meaningful remedies. In this article, we highlight several of the major methods available to a district court to enforce the remedial orders it has framed to cure constitutional violations.

The power of a district court to fashion an effective remedy once a constitutional violation has been established is beyond question. A court possesses the full range of equitable powers. The Supreme Court, in *Hutto v. Finney,* 437 U.S. 678 (1978), upholding the district court's remedy providing for a 30-day limitation on confinement to punitive isolation, reiterated this principle, citing several other Supreme Court cases:

> As we explained in *Milliken v. Bradley* [citations omitted], state and local authorities have primary responsibility for curing constitutional violations. "If, however, '[those] authorities fail in their affirmative obligations . . . judicial authority may be invoked." *Swann v. Charlotte-Mecklenburg Board of Education* [citations omitted]. Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Ibid.* 437 U.S. at 687 n.9.

The Court in *Hutto* further explained that the district court "was seeking to bring an ongoing violation to an immediate halt."

A federal court has the inherent power to enforce its orders through civil contempt.[1] It also has power under statutes, court rule, and traditional equity doctrines[2] to make further orders necessary to effectuate its judgments. The principles governing the remedial powers of district courts require federal courts to focus upon three factors. First, the nature of the remedy is to be determined by the nature and scope of the constitutional violation, and the remedy must, therefore, be related to the condition alleged to offend the Constitution. Second, the decree must be remedial in nature and designed as nearly as possible to restore victims to the position they would have occupied in the absence of a constitutional violation. Third, the federal courts in formulating a remedy must take into account the interests of state and local authorities in managing their own affairs consistent with the Constitution. Furthermore, while state and local authorities have primary responsibility for managing their own affairs, if those "'authorities fail in their affirmative obligations . . . judicial authority may be invoked.'" *Milliken v. Bradley,* 433 U.S. 267, 281 (1977) (Milliken II), quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1 (1971).

Much has been written in recent years about the complex and time-consuming problems encountered in the remedial stages of institutional reform litigation.[3] There are a variety of possible remedial steps to employ in institutional litigation. Some of those steps, generally in the order of escalating intrusiveness, include the following:

1. a declaratory judgment with or without guidelines for compliance;
2. time for good faith compliance;
3. a compliance hearing;
4. plaintiffs' request for supplemental relief;
5. an order for defendants to submit detailed remedial plans;
6. hearings on court-ordered plans;
7. more time for good faith compliance;[4]
8. appointment of a master or oversight committee with power to gather data and review

[1] *United States v. United Mine Workers,* 330 U.S. 258, 303-04 (1947); *McComb v. Jacksonville Paper Corp.,* 336 U.S. 187 (1949); *Powell v. Ward,* 487 F.Supp. 917 (S.D.N.Y. 1980), *aff'd as mod.,* 643 F.2d 924 (2nd Cir. 1981), *cert. den.,* 454 U.S. 832 (1982); *Miller v. Carson,* 550 F.Supp. 543 (M.D.Fla. (1982); *Palmigiano v. Garrahy,* 448 F.Supp. 659 (D.R.I. 1978).

[2] 28 U.S.C. §1651 (All Writs Act); Rule 60(b), F.R.C.P.; *United States v. United Shoe Machinery Corp.,* 391 U.S. 244, 248-49 (1968).

[3] *See, e.g.,* Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv.L.Rev. 1281 (1976); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court,* 13 Harv. C.R.-C.L.L.Rev. 1 (1978); Note, *Implementation Problems in Institutional Reform Litigation,* 91 Harv.L.Rev. 428 (1977); Note, *Monitors: A New Equitable Remedy,* 70 Yale L.J. 103 (1960); Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 Colum.L.Rev. 784 (1978); Nathan, *The Use of Masters in Institutional Reform Litigation,* 10 Toledo L.Rev. 419 (1979).

[4] In order to enhance compliance efforts, a court may require new inspections, record keeping or reporting requirements. *See, e.g., Powell v. Ward, supra; Todaro v. Ward,* 74 Civ. 4581 (RJW), (S.D.N.Y., November 21, 1979) (Order).

How Some Folks Do It In The Lone Star State

Betsy Bernat

Bush v. Viterna, the National Prison Project case which challenges conditions in the Texas jails, has brought to light a slew of jail practices which we have yet to see in any published set of standards. A compilation of these procedures might well be entitled *Making Do: A Guide to Innovative Violations,* or perhaps, *Reinventing the Bastille.*

Just ask officials at the Coleman County Jail about fire safety procedures. A February, 1978 report stated that "the sheriff has a cable hooked to the second story window bars so that he can jerk out the window with a car in the event of a fire to unlock the cells and let the inmates out."

Not to be outdone, Crane County once rigged an "audio system" whereby "at night the only available communication was for a trustee to bang on the floor with a frying pan or other instrument to awake the sheriff downstairs."

Getting an Excedrin headache? According to a 1980 article in the Big Spring *Herald,* a Callahan County jailer "shot a 16-year old juvenile abductor in the wrist . . . to end a period of tension within the jail."

"Short People Got No Reason To Sleep." On March 30, 1979, the Commissioners Court of Goliad County, which has a substantial Mexican-American population, asked for a variance on the size of bunks. The request stated in part that "the bunk had to be resized to fit the remaining space as indicated. This reduced the bunk lengths to 5'9". Since a large percentage of the inmates in Goliad County are small in stature (5'6" and under) we believe this reduced bunk length will be entirely adequate for the two bunks in question." ■

and guide decree implementation.[5]

Several of the most commonly used enforcement options, of an even more intrusive nature than those above, include:

1. contempt;
2. an order for population caps/reduction;
3. appointment of a receiver;
4. closing of institutions; and
5. the release of prisoners.

It goes without saying that the particular option employed will be dependent on a number of factors. The remedy must fit the particular violation in question (e.g., population reduction would be used to cure overcrowding perhaps more readily than a contempt finding, whereas a contempt finding would be used as a first step, perhaps, in relieving unconstitutional medical care). It will also depend upon the particular juncture in the history of the compliance process as to which remedy is best suited. Finally, the relevant political considerations and local public attitudes, not to mention the cooperation and competence of the particular defendant officials, will factor into the decision as to which remedy is most appropriate. A combination of remedies might also be ordered. See, e.g., *Jones v. Wittenberg,* 440 F. Supp. 600 (N.D.Ohio 1977) (where, *inter alia,* the court ordered a population cap and gave the master authority to seek contempt against defendant officials).

In the next issue of the *JOURNAL,* we will discuss in greater depth the five enforcement options mentioned above.

[5] The district court in *Reed v. Rhodes,* 500 F.Supp. 363, 397 (N.D.Ohio 1980), *aff'd in part and reversed in part on other grounds,* 635 F.2d 556 (6th Cir. 1980), *modified,* 642 F.2d 186 (6th Cir. 1981), discussed the common use of masters upon a finding of liability in institutional reform litigation to "assist in conducting and overseeing actual implementation of the remedies":

> These officials have been given various names: masters, special masters, examiners, experts, monitors, referees, commissioners, administrators, observers, committees, panel, etc. See *Special Project: The Remedial Process in Institutional Reform Litigation,* 78 Colum.L.Rev. 784, 826-27 (1978). Because these officials inevitably and necessarily displace certain functions and responsibilities that otherwise would rest with those who control the institution, they have been classified as a group as "neoreceivers" (footnote omitted). Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change,* Wis.L.Rev. 1161 (1976).

Court Says Hands Off on Contact Visits and Cell Privacy

Alvin J. Bronstein

On July 3, 1984, the Supreme Court took one of the largest steps in its march to halt the doctrinal expansion of prisoners' rights law (see "Opening Remarks"). Indeed, according to the dissenting opinion in one of the cases, written by Justice Stevens for four Justices, "By adopting [the majority opinion], the Court takes the 'hands off' approach to prison administration that I thought it had abandoned forever . . . ."

The first case, *Block v. Rutherford,* ___ U.S. ___, 52 LW 5067 (July 3, 1984), involved pre-trial detainees at the large Los Angeles County Jail. The Federal District Court and the Court of Appeals had held that low risk detainees incarcerated for more than a month be allowed contact visits with their families and loved ones and that detainees be allowed to observe from a distance if a search of their cells is to take place when they are in the area. A Supreme Court majority, in an opinion written by Chief Justice Burger, held that the Constitution does not require that detainees be allowed contact visits when responsible experienced administrators have determined, in their discretion, that such visits will jeopardize the security of the facility. The Court further held that the cell search rules violated neither the Fourth Amendment nor the due process rights of prisoners because "proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgements which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees."

Although he concurred in the majority decision, Justice Blackmun warned that "the Court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting" could "run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a 'hands off' approach."

Justice Marshall, in a dissenting opinion for himself and two other Justices, pointed out that the majority ignored two important issues in upholding the ban on contact visits. They ignored the findings of the trial court that to deprive a long term, low risk detainee of the opportunity to embrace his loved ones constituted punishment and any punishment of a detainee, whether intended or not, was prohibited by Supreme Court precedent. In addition, the Court ignored the fact that certain fundamental rights—the freedom to engage in and prevent the deterioration of family relationships—were involved and therefore the jail officials should have been required to justify interfering with those fundamental rights by showing it materially advanced a substantial state interest, a showing they could not make on the record in this case. The dissent also found that the jail's cell search procedure violated the Due Process Clause.

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Photo by Anthony Cross—Lorton Photography Workshop

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*Hudson v. Palmer,*____ U.S. ____, 52 LW 5052 (July 3, 1984), involved a Virginia prisoner who had sued an officer at his prison claiming that the officer had conducted a malicious and unreasonable search of his cell and intentionally destroyed the prisoner's noncontraband personal property. The Supreme Court, again in an opinion written by the Chief Justice, ruled that because in their view it would otherwise be impossible to accomplish asserted prison objectives of preventing the introduction of contraband into the premises, a prisoner has no reasonable expectation of privacy in his cell; therefore the Fourth Amendment's protection against unreasonable searches and seizures did not apply. The Court went on to say that even if the officer had intentionally destroyed the prisoner's property during the search, the destruction did not violate the Due Process Clause of the Fourteenth Amendment since the prisoner had an adequate post-destructive remedy, a suit for damages in state court. Thus, in one opinion the Court gave license to a malicious correctional officer who wanted to ravage a prisoner's cell and his prized, personal possessions, and then closed the doors to the federal court for any redress.

Justice Stevens, in his dissent, pointed out that even the "trivial residuum" of privacy and the possessions that a prisoner keeps in his cell may mark the difference between slavery and humanity. He pointed out that the majority opinion was fundamentally wrong for at least two reasons. First, the property was entirely legitimate as a matter of state law and therefore the prisoner had a legitimate claim of entitlement to that property and the State could not arbitrarily deprive him of his legitimate interest in the property. Second, the prisoner's interests were protected by the Eighth Amendment's prohibition against cruel and unusual punishment because "to hold that a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure or destruction would not, in my judgement, comport with any civilized standard of decency." Finally, the dissent warned that the courts have a special obligation to protect the rights of prisoners because they are the disenfranchised outcasts of society, shut away from public view. The majority opinion, continued the dissent, was "a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency."

Both decisions were on relatively narrow, though important, issues and even the majority opinions of Chief Justice Burger did repeat that "prisons are not beyond the reach of the Constitution" and that prison officials cannot "ride roughshod over inmates' property rights with impunity." What remains to be seen is how the lower federal courts reconcile the difference between those general caveats and the repeated lecturing by a majority of the Court about how those courts should pay deference to decisions of the prison administrator. The task for us is to meet the increased burden of proof and clearly establish the severity of the constitutional injury in our prisoners' rights litigation. ■

BOOKLIST

The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. It lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 5th edition, published December 1982. Paperback, $15 prepaid from NPP.

Offender Rights Litigation: Historical and Future Developments. We have reprinted a book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). The chapter traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (includes many case citations). 24 pages, $2.50 prepaid from NPP.

ACLU Handbook, The Rights of Prisoners. A guide to the legal rights of prisoners, pre-trial detainees, in question-and-answer format with case citations. Bantam Books, April 1983. Paperback, $3.95 from ACLU, 132 West 43rd St., New York, N.Y. 10036. Free to prisoners.

Prisoners' Rights 1979. These are course handbooks prepared for the Prisoners' Rights National Training Programs held January-March 1979. They include articles, legal analyses, and litigation forms. The books, prepared by the staff of the National Prison Project, are available in paperback. $35 per set, from the Practicing Law Institute, 810 Seventh Ave., New York, N.Y. 10019. 2 Vols., 1163 pages. This set, plus Representing Prisoners (below), can be purchased for $40.

Representing Prisoners. This is the course handbook prepared for the Prisoners' Rights National Training Programs held in June and July 1981. It includes articles, legal analyses, and litigation forms. Prepared by the staff of the National Prison Project. Available in paperback from the Practising Law Institute, 810 Seventh Ave., New York, N.Y. 10019. 1 volume, 980 pages. $35.

The National Prison Project Status Report lists each state which is presently under court order, or is dealing with pending litigation in the entire state prison system or the major institutions in the state which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia). Periodically updated. $3 prepaid from NPP.

Bibliography of Women in Prison Issues. This is a bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $5 prepaid from NPP.

A Primer For Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. It also lists relevant case citations and correctional standards. 1st edition, February 1984. 180 pages, paperback $15 prepaid from NPP.

—continued from page 12.

"Fiscal conservatives in the legislature said 'it's time for prison reform'," Turner said. "The reason was to contain costs."

He does not think that the Blue Ribbon Commission was a necessary first step to the legislation. "*Ruiz* hangs over the state's head like a Sword of Damocles. Nobody needed the Blue Ribbon Commission to tell the legislature what to do."

Turner acknowledges the initial success of the measures. "The bills are a useful first step to control the prison population," he noted, "but they are not sufficient." He says that Texas prisons were designed for a smaller capacity. "Our view is that they are at 150% of capacity," he said. *Ruiz* attorneys have a motion pending in federal court concerning the prisons' true capacity. Nevertheless, Turner feels the good time amendment is behind the recent prison population reduction. Others agree.

"The good time law has effectively reduced prison population," observed TDC Board Director Harry Whittington.

Charles Sullivan, executive director of Citizens United for the Rehabilitation of Errants (CURE), a prison watchdog and lobbyist group, also cites liberalized good time as the most effective anti-crowding measure. The removal of the governor from the parole process has been beneficial, too, Sullivan says, explaining that the measure "caused a considerable reduction in delay of parole grants."

However, both he and Whittington feel that local resistance has jeopardized the success of the more progressive measures in the package: work release and restitution centers.

"I think we're at the point where we may have to use a carrot-stick approach," Sullivan said.

Particularly troublesome to some, however, is a so called anti-crime measure, passed seven years ago as an amendment to the Mandatory Supervision Law.

The amendment provides that a person convicted of an aggravated form of kidnapping, rape or sexual assault, or who is found by the court to have used or revealed a firearm in the commission of or immediate flight from a felony must serve one-third of his sentence in prison after which he is to be released under mandatory supervision for the remainder of his sentence. Good time applies to the mandatory supervision period only.

Under the old law, according to Turner, a prisoner sentenced to life could be released in seven years on parole when his good time went toward completion of one-third of his sentence. With the change in law, this will be the year that the 1977 law begins to take its toll on prison crowding. According to TDC figures, there are 7,266 inmates currently doing "flat time" under the Mandatory Supervision Law.

TDC General Counsel Steve Martin said that the earlier law will "ultimately undermine" the 1983 legislative package's goal of prison population reduction.

Meanwhile, John Byrd, executive director of the Texas Board of Pardons and Paroles, does not see much cause for concern, although "If not for the Mandatory Supervision law, inmates would have gotten longer sentences," he said.

CURE's Charles Sullivan maintains that the threat posed by the law to overcrowding was foreseeable in 1977. "They predicted then that it would cause overcrowding," said Sullivan.

There is a lesson here for other states which are attempting to grapple with the problem of prison overcrowding. New legislation designed to reduce prison population must take into account all existing laws which have a population impact to avoid the apparent catch-22 situation facing Texas. ■

Elizabeth Rosenthal is a third-year law student from Rutgers-Camden School of Law who did an internship at the Prison Project this summer.

Too Much Time for the Crime I Done

I done too much time, buddy, whoa man, for the crime I've done,
Well if I had a knowed it, oh, I'd a broke and run,
Well, I just had a knowed it, oh boy, I'd broke and run,
I got way too long, buddy, for the crime I done.

"What you do, buddy, get your great long time?"
Whoa, man, they accuse me a robbin', poor boy, with a fire iron . . .

Well, wasn't I lucky, please 'sider me lucky, now when I got my time,
I got it cut from one hundred, oh boy, down to ninety-nine . . .

by J.B. Smith, a Texas prisoner who was serving a 45-year sentence for murder, recorded by Bruce Jackson in *Wake Up Dead Man: Afro-American Worksongs from Texas Prisons*, Harvard University Press, Cambridge, Mass., 1972.

> *"Ruiz hangs over the state's head like a Sword of Damocles. Nobody needed the Blue Ribbon Commission to tell the legislature what to do."*
>
> **—William Bennett Turner**

LEGISLATIVE NEWS

Texas Reform Package Caught in Catch-22

Elizabeth Rosenthal

Population reduction initiatives passed in 1983 by the Texas legislature have been hailed by many people as the most progressive package of legislation the prison reform movement has ever offered. However, much of the impact of this legislation may be frustrated by a 1977 law that was designed to keep certain inmates in prison for longer periods of time.

The 1983 lesiglative package was comprised of 14 bills and one state constitutional amendment, all of which became law, with the exception of one bill that was vetoed by Governor Mark White. The new laws came on the heels of a December, 1982, report by the Blue Ribbon Commission for the Comprehensive Review of the Criminal Justice Corrections system. The Commission was formed by then Governor William Clements in response to the overcrowded conditions in Texas prisons declared unconstitutional in *Ruiz v. Estelle.*

The laws embody a range of methods designed to reduce overreliance on incarceration. Here are the most notable:

- A state constitutional amendment removes the politically sensitive governor from the parole process and a bill enables the Texas Board of Pardons and Paroles to exercise full authority over parole grants and revocations.
- The Texas Prison Management Act provides for emergency awards of good time and accelerated parole that the Department of Corrections must implement when the prison population reaches 95% of capacity (no more than one inmate per forty square feet, according to the 1982 Fifth Circuit Court of Appeals modification of the District Court's order in *Ruiz.*)
- Trustees are eligible for an additional ten to 25 days of good time. Good time also is made available to Texas Department of Corrections (TDC) inmates serving time in jail, and to those inmates participating in educational or vocational programs.
- Community work-release programs for third-degree felons, restitution centers for nonviolent offenders and pre-parole halfway houses for low-risk offenders are in place as alternatives to incarceration.
- The Habitual Offender Law is amended to give juries the option of sentencing third-time felons to an indeterminate sentence of 25 years to life rather than life only.
- A person convicted of a property crime is classified as a felon where the pecuniary loss is at least $750, which is up from the old law's $200.

Texas Department of Corrections' statistics show that the prison population has been reduced from approximately 37,000 to 35,000 in one year.

Conflicting forces contributed to the introduction, passage and success of this legislation. Its main political orchestrator was State Senator Ray Farabee, chairperson of the Senate State Affairs Committee and member of the Blue Ribbon Commission.

"I thought we had to reevaluate where we were going from a corrections point of view and a fiscal point of view," said Senator Farabee, who introduced and steered through the Senate much of the legislation, including the bill that removes the governor from the parole process, and the Texas Prison Management Act. "I can't say I was ever part of a prison reform movement," he said.

Farabee attributed the package's success to the cooperation of conservative and liberal forces in the state legislature.

Mark Burk, who until recently was staff director of Senator Farabee's senate committee, and before that was a committee manager on the Blue Ribbon Commission, called the legislation an amazing feat for such a conservative state.

William Bennett Turner, counsel to the plaintiffs in *Ruiz,* said that the legislature, faced with the specter of exorbitantly expensive prison construction, simply chose cheaper measures.

—continued on page 11.

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